CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

5, 6, 7, 8, HOWARD,

BOOK 12,

LAWYERS' EDITION,

CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

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GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

CASES REPORTED IN VOL. V.

[Figures refer to Marginal Figures in respective vols.]

CASES REPORTED IN VOL. VI.

CASES REPORTED IN VOL. VII.

CASES REPORTED IN VOL. VIII.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1847.

BY BENJAMIN C. HOWARD,

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

VOL V.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN MCLEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN MCKINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. LEVI WOODBURY, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*

NATHAN CLIFFORD, Esq., *Attorney-General.*

WILLIAM THOMAS CARROLL, Esq., *Clerk.*

BENJAMIN C. HOWARD. Esq., *Reporter.*

ALEXANDER HUNTER, Esq., *Marshal.*

ORDER OF COURT.

For the 1st Circuit, HON. LEVI WOODBURY.
For the 2d Circuit, HON. SAMUEL NELSON.
For the 3rd Circuit, HON. ROBERT C. GRIER.
For the 4th Circuit, HON. ROGER B. TANEY, *Ch. J.*
For the 5th Circuit, HON. JOHN MCKINLEY.
For the 6th Circuit, HON. JAMES M. WAYNE.
For the 7th Circuit, HON. JOHN MCLEAN.
For the 8th Circuit, HON. JOHN CATRON.
For the 9th Circuit, HON. PETER V. DANIEL.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

January Term, 1847,

AND REPORTED HEREIN,

VOL. 46.

AS HAVE ALSO BEEN REPORTED IN

5 HOWARD AND IN 16 CURTIS'S DECISIONS.

5 How.	Title.	16 Curt.	Here in.
1-2	Wood v. Underhill	281	23
2-5	" "		24
5-6	" "		25
6-7	Sewall v. Chamberlain	284	25
7	" "		26
7-9	Dick v. Runnels	285	26
9-10	" "		27
10-11	United States v. Lawton	286	27
11-13	" "		28
13-15	" "		29
15-18	" "		30
18-20	" "		31
20-22	" "		32
22-24	" "		33
24-27	" "		34
27-29	" "		35
29	" "		36
29-31	United States v. Boyd	290	36
31-33	" "		37
33-35	" "		38
35-38	" "		39
38-40	" "		40
40-42	" "		41
42-44	" "		42
44-46	" "		43
46-48	" "		44
48-51	" "		45
51	" "		46
51-52	Pepper v. Dunlap	299	46
53	McAfee v. Doremus	300	46
53-55	" "		47
55-57	" "		48
57-59	" "		49
59-62	" "		50
62-64	" "		51
64	" "		52
64-66	Walker v. Taylor ("Walker v. Tailor")	302	52
66-68	" "		53
68-69	" "		54
69-71	Hildeburn v. Turner	304	54
71-72	" "		55
72-73	Miller v. Herbert	306	55
73-75	" "		56
75-77	" "		57
77-79	Miller v. Herbert	306	58
79-82	" "		59
82	" "		60
83-84	Alexandria Canal Co. v. Swann	315	60
84-86	" "		61
86-88	" "		62
88-90	" "		63
90-91	" "		64
91-93	Bridges v. Armour	320	64
93-95	" "		65
95-96	" "		66
96-97	Hall v. Smith	323	66
97-98	" "		67
98-100	" "		68
100-102	" "		69
102-103	" "		70
103-104	Barry v. Mercein	327	70
104-107	" "		71
107-109	" "		72
109-111	" "		73
111-113	" "		74
113-115	" "		75
115-118	" "		76
118-120	" "		77
120-121	" "		78
121-122	Mayberry v. Thompson	330	78
122-124	" "		79
124-126	" "		80
126	" "		81
127-128	Nelson v. Hill	331	81
128-130	" "		82
130-132	" "		83
132-134	" "		84
134-136	Rowan v. Runnels	336	85
136-138	" "		86
138-140	" "		87
140-141	" "		88
141-143	Truly v. Wanzer	339	88
143	" "		89
143-145	Ford v. Douglas	341	89
145-147	" "		90
147-149	" "		91
149-151	" "		92
151-153	" "		93

5 How.	Title.	16 Curt.	Here in.
153–156	Ford v. Douglas	341	94
156–158	" "		95
158–160	" "		96
160–162	" "		97
162–164	" "		98
164–167	" "		99
167–168	" "		100
168–169	Gear v. Parish	347	100
169–171	" "		101
171–173	" "		102
173–175	" "		103
175–176	" "		104
176–177	Metzger, Re	348	104
177–180	" "		105
180–182	" "		106
182–184	" "		107
184–186	" "		108
186–188	" "		109
188–191	" "		110
191–192	" "		111
192–193	Creath v. Sims	353	111
193–194	" "		112
194–196	" "		113
196–198	" "		114
198–200	" "		115
200–203	" "		116
203–205	" "		117
205–207	" "		118
207–208	" "		119
208–209	United States v. Briggs	360	119
209–210	" "		120
210–211	Sheppard v. Wilson	362	120
211–213	" "		121
213	Miners' Bank v. United States ex rel. Grant	364	121
213–215	" "		122
215	Jones v. Van Zandt	366	122
215–218	" "		123
218–220	" "		124
220–222	" "		125
222–225	" "		126
225–227	" "		127
227–229	" "		128
229–231	" "		129
231–232	" "		130
233	Taylor v. Benham Benham v. Taylor	377	130
233–234	" "		131
234–236	" "		132
236–238	" "		133
238–240	" "		134
240–243	" "		135
243–245	" "		136
245–247	" "		137
247–249	" "		138
249–252	" "		139
252–254	" "		140
254–256	" "		141
256–258	" "		142
258–260	" "		143
260–263	" "		144
263–265	" "		145
265–267	" "		146
267–269	" "		147
269–271	" "		148
271–274	" "		149
274–276	" "		150
276–278	" "		151
278	" "		152
278–280	Phillips v. Preston	396	152

5 How.	Title.	16 Curt.	Here in.
280–282	Phillips v. Preston	396	153
282–284	" "		154
284–287	" "		155
287–289	" "		156
289–291	" "		157
291–293	" "		158
293–294	" "		159
295	Innerarity v. Byrne	404	159
295	Cook v. Moffat	405	159
295–297	" "		160
297–300	" "		161
300–302	" "		162
302–304	" "		163
304–306	" "		164
306–308	" "		165
308–311	" "		166
311–313	" "		167
313–315	" "		168
315–316	" "		169
317	Commercial Bank v. Buckingham	416	169
317–319	" "		170
319–321	" "		171
321–323	" "		172
323–326	" "		173
326–328	" "		174
328–330	" "		175
330–332	" "		176
332–334	" "		177
334–337	" "		178
337–339	" "		179
339–341	" "		180
341–343	" "		181
343	Scott v. Jones	420	181
343–345	" "		182
345–347	" "		183
348–350	" "		184
350–352	" "		185
352–354	" "		186
354–356	" "		187
356–358	" "		188
358–361	" "		189
361–363	" "		190
363–365	" "		191
365–367	" "		192
367–369	" "		193
369–372	" "		194
372–374	" "		195
374–376	" "		196
376–378	" "		197
378–380	" "		198
380–382	" "		199
382	United States v. Bank of the United States	429	199
382–384	" "		200
384–386	" "		201
386–388	" "		202
388–390	" "		203
390–392	" "		204
392–395	" "		205
395–397	" "		206
397–399	" "		207
399–401	" "		208
401–404	" "		209
404–406	" "		210
406–408	" "		211
408–410	" "		212
410	" "		213
410–412	Fox v. Ohio	447	213
412–414	" "		214

5 How.	Title.	16 Curt.	Here in.
414–417	Fox v. Ohio	447	215
417–419	" "		216
419–421	" "		217
421–423	" "		218
423–425	" "		219
425–428	" "		220
428–430	" "		221
430–432	" "		222
432–434	" "		223
434–436	" "		224
436–438	" "		225
438–440	" "		226
441	Waring v. Clarke	456	226
441–443	" "		227
443–445	" "		228
445–447	" "		229
447–449	" "		230
449–452	" "		231
452–454	" "		232
454–456	" "		233
456–458	" "		234
458–460	" "		235
460–462	" "		236
462–465	" "		237
465–467	" "		238
467–469	" "		239
469–471	" "		240
471–473	" "		241
473–475	" "		242
475–477	" "		243
478–480	" "		244
480–482	" "		245
482–484	" "		246
484–486	" "		247
486–488	" "		248
488–491	" "		249
491–493	" "		250
493–495	" "		251
495–497	" "		252
497–499	" "		253
499–501	" "		254
501–504	" "		255
504	" "		256
504–505	Thurlow v. Massachusetts Fletcher v. Rhode Island Peirce v. New Hampshire	513	256
505–508	" "		257
508–510	" "		258
510–512	" "		259
512–514	" "		260
514–517	" "		261
517–519	" "		262
519–521	" "		263
521–523	" "		264
523–525	Thurlow v. Massachusetts Fletcher v. Rhode Island Peirce v. New Hampshire	513	265
525–528	" "		266
528–530	" "		267
530–532	" "		268
532–534	" "		269
534–536	" "		270
536–539	" "		271
539	" "		272
540–541	Fletcher v. Rhode Island	513	272
541–543	" "		273
543–545	" "		274
545–548	" "		275
548–550	" "		276
550–552	" "		277
552–554	" "		278
554–556	Peirce v. New Hampshire	513	279
556–559	" "		280
559–561	" "		281
561–563	" "		282
563–565	" "		283
565–567	" "		284
567–570	" "		285
570–572	" "		286
572–574	" "		287
574–576	" "		288
576–578	" "		289
578–580	" "		290
580–583	" "		291
583–585	" "		292
585–587	" "		293
587–589	" "		294
589–591	" "		295
591–594	" "		296
594–596	" "		297
596–598	" "		298
598–600	" "		299
600–602	" "		300
602–605	" "		301
605–607	" "		302
607–609	" "		303
609–611	" "		304
611–613	" "		305
613–615	" "		306
615–618	" "		307
618–620	" "		308
620–622	" "		309
622–624	" "		310
624–626	" "		311
626–628	" "		312
628–631	" "		313
631–633	" "		314
633	" "		315

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1847.

1*] *JAMES WOOD, Plaintiff in Error,
v.
WILLIAM A. UNDERHILL and Aschel H. Gerow, Defendants.

Patent would be void where letters on their face not explicit enough to enable one skilled in similar art to make composition patented without experiment—statement of general rule and exceptions.

In order to obtain a patent, the specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention, without making any experiments of his own.

If the patent be for a new composition of matter and no relative proportions of the ingredients are given, or they are stated so ambiguously and vaguely that no one could use the invention without first ascertaining, by experiment, the exact proportion required to produce the result, it would be the duty of the court to declare the patent void.

But the sufficiency of the description in patents for machines, or for a new composition of matter, where any of the ingredients do not always possess exactly the same properties in the same degree, is, generally, a question of fact to be determined by the jury.

Where a patent was obtained for a new improvement in the mode of making brick, tile, and other clay ware, and the process described in the specification was, to mix pulverized anthracite coal with the clay before moulding it, in the proportion of three fourths of a bushel of coal dust to one thousand brick, some clay requiring one eighth more, and some not exceeding half a bushel, this degree of vagueness and uncertainty was not sufficient to justify the court below in declaring the patent void.

The court should have left it to the jury to say, from the evidence of persons skilled in the art, whether the description was clear and exact enough to enable such persons to compound and use the invention.

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

It appeared that, in the year 1836, Wood took out amended letters patent for "a new and useful improvement in the mode of making brick, tile, and other clay ware," and filed the following specification of his invention:

"Be it known that I, the said James Wood, have invented a new and useful improvement in the art of manufacturing bricks and tiles. The process is as follows: Take of common anthracite coal, unburnt, *such quantity [*2 as will best suit the kind of clay to be made into brick or tile, and mix the same, when well pulverized, with the clay before [it] is molded; that clay which requires the most burning will require the greatest proportion of coal dust; the exact proportion, therefore, cannot be specified; but, in general, three fourths of a bushel of coal dust to one thousand brick will be correct. Some clay may require one eighth more, and some not exceeding a half bushel. The benefits resulting from this composition are the saving of fuel, and the more general diffusion of heat through the kiln, by which the whole contents are more equally burned. If the heat is raised to high, the brick will swell, and be injured in their form. If the heat is too moderate, the coal dust will be consumed before the desired effect is produced. Extremes are therefore to be avoided. I claim as my invention the using of fine anthracite coal, or coal dust, with clay, for the purpose of making brick and tile as aforesaid, and for that only claim letters patent from the United States.

"James Wood.

"Dated 9th November, 1836."

In July, 1842, he brought a suit against the defendants in error, for a violation of this patent.

And at the trial the defendant objected to the sufficiency of the specification, "because no certain proportion for the mixture is pointed out, but only that such quantity of coal must be taken as will best suit the kind of clay to be made into brick or tile; but that clay which requires most burning will require the greatest quantity of coal dust; the exact proportion cannot, therefore, be specified; but, in general, three fourths of a bushel of coal dust to one thousand brick will be correct. Some clay may require one eighth more, and some not exceeding half a bushel; so that there is no fixed rule by which the manufacturer can make the mixture, but that must be ascertained by experiments upon the clay; and the claiming clause in the specification is only for the abstract general principle of mixing anthracite coal dust with clay, for the purpose of making brick, without any practical rule as to the proportions, which is too vague and uncertain to sustain a patent;" which objection was sustained by the

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NOTE.—As to patent law; for what patents will be granted, and when declared void, see notes to 4 L. ed. U. S. 433; 14 L. ed. U. S. 683; 37 L. ed. U. S. 353; 38 L. ed. U. S. 136; 39 L. ed. U. S. 238; 40 L. ed. U. S. 1025.

12 L. ed.

court. The plaintiff excepted; and the verdict and judgment being against him, the case was brought here upon this exception.

The cause was argued by Mr. Silliman for the plaintiff in error, and Mr. Rowley for the defendants.

Mr. Silliman, for the plaintiff in error, made the following points:

The plaintiff insists—

1. That he has in his specification given a 3*] general rule by which *every kind of clay may be much better burned than by any previous process. And that the general proportions specified are, with some exceptions, the very best that can be used.

That a patent may properly be granted for a beneficial general rule, although there might be some exceptions to it not provided for.

2. That if it is necessary to entitle the plaintiff to a patent for a most beneficial invention for burning clay of the qualities usually found, that he should also discover the means of burning, to best advantage, clays of qualities not usually found; that his patent should not, therefore, be deemed void on its face, but he should be permitted to prove by persons conversant with the business, that they could instantly determine, on inspection of clays of uncommon qualities, whether they required much more or less, than the usual burning, and how much more or less, so as to regulate the variation of proportions in such manner as to burn to the best advantage.

3. The plaintiff should have been permitted to show, under his specification, by experts, that any kind of clay of which bricks can be made, however varied the qualities, can be better burnt under his general rule than by any previous process; and if such is the fact, the plaintiff should be entitled to a patent for the discovery, if he had given the general rule only, and had taken no notice of those exceptions, in which some uncommon kinds of clay can be best burned with a greater or less proportion of coal than that specified in the general rule.

4. The judge in his decision adopts all the errors of the defendants objection, which states that there is no fixed rule by which the manufacturer can make the mixture, but that must be ascertained by experiments upon the clay. Suppose this to be so, and that the inventor has only furnished a guide by which such experiments can be successfully made, and that the subject, on account of the variable qualities of the materials, does not admit of greater certainty, and that by the simplest and cheapest experiments the manufacturer, in consequence of the plaintiff's invention, will be able to burn his bricks much better in less than half the time, and at less than half the cost of burning, by any other process, is not the inventor entitled to a patent for an invention practically so useful?

The fact that not a single brick has for some years past been burned, except according to the plaintiff's specification, is pretty good evidence that the manufacturers have been able to discover some thing from plaintiff's specification.

5. The objection, as adopted by the court, declares that the claiming clause in the specification is only for the abstract general principle of mixing anthracite coal dust with clay, for the purpose of making bricks and tiles, without any practical rule as to the proportions, which is too vague and uncertain to sustain a patent. Suppose this objection true in point of fact, and that no information had *been [*4 intentionally suppressed, and that the qualities of clay varied so much that the proportions most useful could only be ascertained by an experiment on each bed of clay, it might, nevertheless, be a very useful invention, for which the inventor should be, in some measure, compensated by a patent. But this part of the objection is not true in fact, for the claiming clause is of the invention of using fine anthracite coal, or coal dust, with clay, for the purpose of making brick and tile "as aforesaid." These words "as aforesaid" refer to the general rule of three fourths of a bushel of coal for a thousand bricks, with the exceptions or variations previously expressed.

6. The judgment should be reversed with costs, including the costs in the Circuit Court.

Mr. Rowley, for the defendant in error:

The patentee's specification is uncertain and insufficient. It furnishes no rule for making bricks, without the manufacturer's first making a series of experiments. The most it does is to prescribe in about what manner the trials are to be conducted; which is not enough to sustain his patent. The King v. Arkwright, Dav. Pat. Cases, 106, per Buller, J.; Turner v. Winter, 1 Term R. 606, per Ashurst, J.; Boulton v. Bull, 2 H. Bl. 484, Buller J.; Harmer v. Playne, 11 East, 101, Lord Ellenborough; The King v. Wheeler, 2 Barn. & Ald. 345, Abbott, Ch. J.; Godson on Patents, 85; Lowell v. Lewis, 1 Mason's R. 182, Story, J.; Langdon v. DeGroot, 1 Paine's R. 203; Phillips on Patents, 83, 207, 268, 283, 284, 289.

Mr. Chief Justice Taney delivered the opinion of the court:

The question presented in this case is a narrow one, and may be disposed of in a few words.

The plaintiff claims that he has invented a new and useful improvement in the art of manufacturing bricks and tiles; and states his invention to consist in using fine anthracite coal or coal dust, with clay, for the purpose of making brick or tile; and for that only he claims a patent. And the only question presented by the record is, whether his description of the relative proportions of coal dust and clay, as given in his specification, is upon the face of it too vague and uncertain to support a patent.

The degree of certainty which the law requires is set forth in the act of Congress. The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without making any experiments of his own. In patents for machines the sufficiency of the description must, in general, be a question of fact to be determined by the jury. And this must also be the case in compositions of matter, where any of *the in- [*5 gredients mentioned in the specification do not always possess exactly the same properties in the same degree.

But when the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent to be void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining by experiment the exact proportion of the different ingredients required to produce the result intended to be obtained. And if the specification before us was liable to either of these objections the patent would be void, and the instruction given by the Circuit Court undoubtedly right.

But we do not think this degree of vagueness and uncertainty exists. The patentee gives a certain proportion as a general rule; that is, three fourths of a bushel of coal dust to one thousand bricks. It is true he also states that clay which requires the most burning will require the greatest proportion of coal dust, and that some clay may require one eighth more than the proportions given, and some not more than half a bushel instead of three fourths. The two last mentioned proportions may, however, be justly considered as exceptions to the rule he has stated; and as applicable to those cases only where the clay has some peculiarity, and differs in quality from that ordinarily employed in making bricks. Indeed, in most compositions of matter, some small difference in the proportions must occasionally be required, since the ingredients proposed to be compounded must sometimes be in some degree superior or inferior to those most commonly used. In this case, however, the general rule is given with entire exactness in its terms; and the notice of the variations, mentioned in the specification, would seem to be designed to guard the brick maker against mistakes, into which he might fall if his clay was more or less hard to burn than the kind ordinarily employed in the manufacture.

It may be, indeed, that the qualities of clay generally differ so widely that the specification of the proportions stated in this case is of no value; and that the improvement cannot be used with advantage in any case, or with any clay, without first ascertaining by experiment the proportion to be employed. If that be the case, then the invention is not patentable. Because, by the terms of the Act of Congress, the inventor is not entitled to a patent unless his description is so full, clear, and exact as to enable anyone skilled in the art to compound and use it. And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent. But this does not appear to be the case on the face of this specification. And whether the fact is so 6*] or not is a question to be decided *by a jury, upon the evidence of persons skilled in the art to which the patent appertains.

The Circuit Court, therefore, erred in instructing the jury that the specification was too vague and uncertain to support the patent, and its judgment must be reversed.

12 L. ed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

STEPHEN SEWALL, Appellant,
v.
HENRY V. CHAMBERLAIN.

Appeal—dismissal—amount in dispute.

Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the sum of two thousand dollars, the appeal to this court will be dismissed, on motion, for want of jurisdiction.

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

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

Mr. Dargan moved to dismiss the appeal for want of jurisdiction.

Mr. Justice Wayne delivered the opinion of the court:

This cause having been regularly docketed, the appellee now moves the court to dismiss the appeal, on the ground that the amount in controversy is not large enough to bring the case within the appellate jurisdiction of the Supreme Court.

We have examined the record and find it to be so. By the averments in the complainant's bill, it seems that the subject matter in controversy between himself and the defendant relates to the foreclosure of a mortgage given to the complainant by one Stephen Chandler, upon a lot of land in the city of Mobile, to secure the payment of a promissory note made by Chandler in his favor, bearing date 6th August, 1824, for $485, payable on the first of March thereafter, which was not paid at maturity, for the collection of which the complainant made the defendant his attorney and agent; also to the purchase of the premises, under a decree for *its sale, by the defend- [*7
ant, for one hundred and fifty dollars. The decree of foreclosure was for the sum of six hundred and twenty dollars ninety-one cents, and the complainant avers that the lot was a valid and sufficient security for the payment of his debt.

After setting out all the circumstances of his case, and specially interrogating the defendant, the complainant's prayer is, that the matter

NOTE.—As to jurisdiction of Supreme Court of United States, dependent on amount, see note to 7 L. ed. U. S. 592.

may be "referred to a master, to compute and report the amount found due your orator by the foreclosure decree, with the interest thereon, and also to compute the report the value of the mortgaged lot, and its value at the time it was sold and conveyed by the defendant to one Samuel P. Bullard (who is admitted by the complainant to be a bona fide purchaser of the lot from the defendant, without any notice of the complainant's equity), and that the defendant may be decreed to pay, either the amount of the said decree of foreclosure, and interest on the value of said lot of land, or the amount received by the defendant from the sale to Bullard, if the same were sold for its fair and full value, with all the profits and increase since made by the use of the money, or legal interest thereon, without any deduction of commissions for agency."

From this prayer, the complainant's demand is susceptible of definite computation, and as his recovery could not be extended to an amount above his first or alternative prayer, if the recovery in either case must be below the sum of two thousand dollars, as it would have to be upon his own showing, this court cannot have appellate jurisdiction of the cause.

We shall direct the dismission of the appeal.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, and it appearing to the court here that the matter in dispute does not exceed the sum or value of two thousand dollars, exclusive of costs, it is, therefore, now here ordered and decreed by this court, that this appeal be, and the same is hereby dismissed for the want of jurisdiction.

N. and J. DICK AND COMPANY v. HARDIN D. RUNNELS.

Sufficiency of certificate of reason for want of service of notice.

By the 30th section of the Judiciary Act of 1789, (1 Statutes at Large, 88) depositions may be taken in certain cases and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken.

A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred [*8] miles of such place, and *that, therefore, no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good.

If either of the two facts, viz., that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void.

THIS case came up from the Circuit Court of the United States for the District of Mississippi, on a certificate of division in opinion between the judges thereof.

The only question involved was the construction of a part of the 30th section of the Judiciary Act of 1789, 1 Statutes at Large, 88, which part is as follows. After providing for taking the testimony of persons "who shall live at a greater distance from the place of trial than one hundred miles," the section proceeds thus: "Provided, that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel."

On the trial of the cause, in June, 1838, the plaintiff's counsel offered in evidence a deposition, attached to which was a certificate in these words, viz.:

"And I, the said Paul Bertus, recorder of the first municipality, and acting mayor of the city of New Orleans aforesaid, do certify that the deposition of the said William Christy was taken as aforesaid, because he, the witness, lives at New Orleans aforesaid, a greater distance than one hundred miles from Jackson, the place of trial of the suit or matter of controversy aforesaid, and I caused no notification of the time and place of the taking of said deposition to be made out and served upon Hardin D. Runnels, the adverse party, or his counsel, to be present at the taking of said deposition, and to put interrogatories, if he or they thought proper, because neither the said Hardin D. Runnels nor his counsel live within one hundred miles of the place of caption to this deposition, being the place where the same is taken; and I do further certify, that the deposition was taken down by the witness, and signed by him in my presence, after being duly sworn; and I do further certify, that I am not of counsel or attorney to either of the parties aforesaid, or interested in the event of the cause or controversy aforesaid.

"In testimony whereof I have hereunto set my hand and seal, the day and year first before written.

[Seal.] (Signed) "Paul Bertus,
"Recorder No. 1, Mayor pro tem."

*And thereupon a motion was made by [*9 the defendant's counsel to exclude the deposition, on the ground "that the commissioner taking said deposition did not certify that neither the said defendant or his attorney was within one hundred miles of New Orleans, the place of taking the deposition, at the time of taking the same."

Upon which question the judges were opposed in opinion, which is ordered to be certified to the Supreme Court of the United States; which is done accordingly.

Mr. Bibb, counsel for the defendant, submitted the case to the court.

Mr. Justice McLean delivered the opinion of the court:

The only point raised in this case is, whether

the certificate of the officer who took the deposition objected to is sufficient. He states that he did not give the defendant Runnels, nor his counsel, notice, as neither lived within one hundred miles of the place where the deposition was taken. This may be true, it is alleged, and yet one or both of them might have been in New Orleans, or near to it, at the date of the certificate.

The law requires that a "notice shall be made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption," etc. The officer taking the deposition is presumed to know the residence of the party entitled to notice, as the person at whose instance the deposition is taken is bound to communicate that fact to him. But beyond this, he cannot be presumed to know or required to certify. If, in the words of the act, he certifies "that the adverse party or his attorney is not within one hundred miles," he is presumed so to state from the known fact that the residence of neither is within the distance specified. If the party or his counsel live within the hundred miles, a notice left at his residence would be good.

Where the party entitled to a notice lives more than one hundred miles from the place where the deposition is taken, and the officer so certifies, it would be sufficient, although it might be proved that such party was within the distance specified at the time, if the fact were unknown to the officer and the person in whose behalf the deposition was taken. The certificate may be controverted by parol proof, especially in regard to the facts stated, of which the magistrate is not supposed to have official knowledge. And if it were made to appear that the person entitled to notice did not live one hundred miles from the place of the caption of the deposition, or if he were known to the magistrate or the party to be temporarily within that distance, where a notice might be served on him, though his residence might be more than one hundred miles distant, without a notice, the proceeding would be irregular and the deposition inadmissible.

10*] *Upon the whole, we think the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled. Whereupon, it is now here ordered and adjudged, that it be so certified to the said Circuit Court.

12 L. ed.

THE UNITED STATES, Appellants,
v.
JOSEPH LAWTON, Executor of Charles Lawton, Martha Pollard, Hannah Maria Kershaw, Wife of James Kershaw, et al.

Spanish grant void for uncertainty.

A Spanish grant of land in Florida, for six miles square, "at the place called Dunn's Lake, upon the river St. John's," is too vague to be confirmed even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water power.

The river St. John's meanders so much that it is near Dunn's Lake for thirty miles. The survey might therefore commence at any point of this distance with as much propriety as at any other point.

This concession cannot be distinguished from various others which have been brought before this court. The land granted was not severed from the king's domain. It remained a floating grant, not recognised by the government of Spain before the cession, nor by this government since as conferring an individual title to any specific parcel of land.

Nor is the grant in this case aided by two surveys, one purporting to have been made in December, 1817, and the other in the spring of 1818. The first must have been fictitious, not actually made upon the ground, but merely upon paper; and the second was too imperfect to be effectual.

Previous to the Act of May 26, 1824, Congress alone could act upon these incipient titles. By that act power was given to the court to pass a decree for the land, provided its locality, extent, and boundaries could be found. But, in the present case, this cannot be done.

THIS was an appeal from the Superior Court of East Florida, under the following circumstances:

On the 10th of November, 1817, James Darley presented the following petition to Governor Coppinger:

"To his Excellency the Governor:

"Don James Darley, a native of Great Britain, with the respect due to your excellency, says, that with the view of settling himself in *this province under the protection of [*11 His Catholic Majesty, knowing the very great advantages that would result to the commerce of it from the article of lumber, if machinery for sawing is erected, for sawing for the consumption of the province, as well as for exportation; and wishing to dedicate his attention and funds to this object, whenever he may be in possession of the necessary right, he asks and supplicates your excellency will be pleased to grant to him from this time, in absolute property, six miles square of land, at the place called Dunn's Lake, upon the river St. John's, for the purpose aforesaid of establishing said machinery; which favor he hopes to merit from the justice of your excellency. St. Augustine, Florida, 10th of November, 1817."

To which the following response was given:

Decree.

"St. Augustine, 10th of November, 1817.

"Taking into consideration the benefit and utility which ought to result to the improve-

NOTE.—As to errors in surveys and in descriptions in patents for land, see note to 5 L. ed. U. S. 423.

ment of this province by what the petitioner proposes, there are granted to him in absolute property, the six miles square of land which he solicits for said water saw-mill, and that it may be effected, let there be issued to him, from the secretary's office, a certified copy of this petition and decree, which will serve him as title in form. Coppinger."

On the 21st of December, 1817, George Clarke, the Surveyor-General, gave the following certificate of survey, accompanied by a plat:

"I, Don George Clarke, captain of the Northern District of East Florida, and by the government thereof appointed Surveyor-General of said province, do certify that I have surveyed and delineated for Santiago Darley a square of six miles of land, equal to twenty-three thousand and four acres, on the west part of Dunn's Lake, contiguous to the waters thereof, in its upper part, which lands were granted to him by the government on the 10th of November of the present year. Said tract is conformable to the following plat, and to the copy thereof, which I keep. Northern District, 21st December, 1817."

On the 22d of May, 1819, the grantee filed his petition to the Superior Court of Florida, praying confirmation.

On the 12th of September, 1829, the District Attorney of the United States, Thomas Douglas, answered the above petition, denied generally the matters and things stated in it, of which he required proof, averred that the grant, if made, was in violation of the laws of Spain, and that the governor had no power to make it; and that if made at all, it was made 12*] after the 24th of January, 1818, *and antedated; that grants for speculation were contrary to the policy of Spain, and void; that the grant, if made, was upon the condition that Darley would build a saw-mill, which he had not done; that the grant conferred no right to the soil, but only a right to cut pine trees for the use of the mill, and averred that Darley was not a subject of the King of Spain at the date of the supposed grant, which circumstance, of itself, rendered the grant null and void.

On the 26th of May, 1830, Congress passed an act, the fourth section of which enacted as follows:

"That all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the Act of Congress approved 23d May, 1828."

On the 4th of January, 1834, the will of Darley was admitted to probate (he having died at some prior time which the record does not state), and letters testamentary were granted to Charles Lawton as executor.

On the 23d of July, 1834, the claimant's death was suggested, and the cause ordered to proceed in the name of Charles Lawton, executor.

On the 29th of July, 1834, Charles Lawton filed a bill of revivor on behalf of himself and the unknown heirs and devisees of the deceased.

On the 26th of August, 1834, the attorney of

88

the United States answered the bill of revivor, denying the right of Lawton to revive the suit, either for himself as executor, or on behalf of the unknown heirs and devisees.

On the 16th of June, 1841, a bill of revivor was filed on behalf of Joseph Lawton, executor of Martha Pollard, the widow of Jonathan Pollard, late of England, deceased; of James Kershaw and Hannah Maria Pollard, his wife; of Robert Mutrie and Sarah Pollard, his wife; of William Pollard and James Pollard, all of England, children of Martha Pollard, and heirs and legatees of James Darley, deceased.

On the 10th of July, 1841, the District Attorney of the United States filed his answer in the nature of a general replication, and on the 17th of July the cause came up for hearing.

On the 13th of September, 1841, the court pronounced a decree, from which the following is an extract:

"Without recapitulating the other proofs in the cause, it is sufficient for the present to say, that the claimants have made out a case, which entitles them to a confirmation of the title of the land granted, provided the identity of the land specified in the grant is such as to warrant a decree of confirmation; or, in other words, if *the description of the land, as contained [*13 in the grant, is such that the land intended can be identified, located, and laid down by actual survey, according to the calls and manifest intention of the grant.

"The claimants have put in evidence a survey of a tract of land, made by George J. F. Clarke (formerly the Spanish Surveyor-General of East Florida), bearing date the twenty-first day of December, 1817, and which, with the plat accompanying it, purports to be a survey and plat of the land in question. But there are objections to this survey of such a nature as to make it improper that an absolute decree should be made for the land therein described.

"First, it does not follow the calls of the grant, even if they can be followed at all; the grant is for the place called Dunn's Lake, 'on the river St. John's.' There is as yet no proof that there is such a place 'on the river St. John's;' but taking it for granted that there is such a place, which may be found, this survey does not appear to be at that place; it is not 'on the river St. John's' at all.

"The location, it is true, appears to be on the west side of Dunn's Lake, and 'contiguous to the waters thereof in its upper part.' In the absence of any proof as to the geography of the country, if it should be said that the court should take notice of the maps of the surveyed part of the territory, as published from the land office, it will be remarked that the maps of the country show that a lake, called Dunn's Lake, does connect itself with the St. John's; but it will also appear that a square of six miles, bounded on the east by the upper end of the lake, will not extend to the river St. John's; and if it was the intention of the grant that the lands should lie 'upon the river St. John's,' such a location as is set forth in the plat and survey must of course be rejected.

"Whether the point of junction between the lake and the river is 'the place' alluded to in the grant, it is not necessary now to determine (nor in fact can that point be determined without further proof); but if it is there, clearly

the survey offered is not a survey or plat of the land granted.

"Second. The survey and plat are materially defective in other particulars. There is no well defined corner, or permanent monument, mark, or boundary, which is known and established, or which can be found as a starting point. The plat shows that the first corner is a stake in the swamp, near the margin of the lake, but whereabouts in the swamp, or how far from the head or the foot of the lake, does not appear; and all the other corners are represented to be stakes, but without marks, and their location entirely undefined; and the survey does not purport that the lines were ever run or marked; and even if it was conceded that stakes were set at the four corners of a tract six miles square, in that part of the country, in 1817, it could hardly be supposed that at this time 14*] *they would furnish any aid to the person who should attempt to find the tract; but the court cannot disregard the suggestion which has been repeatedly made in these land cases, with reference to Clarke's surveys, viz: that they were not made in fact upon the land, but merely delineated on paper, particularly where that suggestion is strengthened by the internal evidence afforded by the survey itself. This plat and survey bill might easily have been made by Mr. Clarke without his ever seeing the land, and in the absence of any proof to show that any one corner, line, or mark, or boundary of this tract is now extant, or can be found, it would be very improper to confirm this survey.

"It must not be overlooked in the decision of these land cases, that although the equity and justice of the claim, or the validity of the grant alleged, is of primary importance, and the first thing to be ascertained, yet the exact location and boundaries of the tract in question are equally important, not only to the United States, but to the claimant; and it was one of the principal objects that the government had in view, in confiding the adjustment of these claims to this court, by the Act of 1828 and 1830, that the extent, location, and boundaries of such grants as were found to be valid might be clearly ascertained, and fully and finally adjusted between the claimants and the government, so that the grants found to be valid might, with precision and accuracy, be severed from the remainder of the public domain, and that the proper officers of the government might know what lands belonged to the United States, and what might and could safely be sold by them.

"This was all important to the correct operations of the land office, and of deep concern to the claimants, and by the act of Congress the decree of this court is made final and conclusive upon the parties, unless appealed from. To make a decree, therefore, which merely settles the right of the claimant to a certain quantity of land in a certain neighborhood, or section of the country, without clearly defining the locality, extent, and boundaries of such land, by proper and known or permanent landmarks and monuments, would seem to be a very incomplete fulfillment of the provisions of the statute, and to fail far short of the objects of the law. The surveys of these grants *should be accurate, and defined by permanent* corners, and the intersection of the lines of the tract with the lines of the government surveys should be clearly and accurately shown; or where this is not entirely practicable, some one or more of the corners of the tract or grant should be clearly defined by a permanent landmark or monument, and its course and distance from some corner of the public surveys accurately given, so that the lines of the tract may be seen therefrom without any difficulty.

"In this case, it may be that the survey was actually made, and that further proofs may show that the lines and corners are now to *be found, and that it is clearly within [*15 the calls of the grant; but if, on the other hand, it should appear that no survey was made, or that no corners or boundaries can be found, or, being found, that they are not within the calls of the grant, then it is a proper case for a survey before final decree, and one should be made; provided, upon proofs to be made respecting the region of country in which the grant is claimed, 'the place' designated in the grant can be found and identified; but if, on the contrary, it should appear that the place mentioned in the grant cannot be found, and that the description is too indefinite for a survey to be made, that the description lacks identity, or ascertainable locality, then of course the grant must be declared void for want of identity, and the claimants take nothing by their concession. Forbes's case, 15 Peters, 184, 185; Arredondo's case, 6 Peters, 691; Bucyk's case, 15 Peters, 223.

"With a view, therefore, of enabling the claimants to produce further proofs on these points, and to identify and locate the land claimed by actual survey, or otherwise, the decree must be suspended or postponed, and the cause continued.

"J. H. Bronson, Judge."

On the 13th of November, 1841, the evidence of Mauricio Sanchez, Joseph S. Sanchez, and John M. Fontane was filed, in addition to that of Antonio Alvarez, all of which is as follows:

Testimony of Antonio Alvarez, a witness produced, sworn, and examined on the part of the claimants.

Witness says, I am keeper of the public archives of East Florida; a certificate, with the name of Thomas de Aguilar signed to it, being shown to witness, he says, "this document was transferred to my office by the land commissioners. It is in the handwriting of Thomas de Aguilar, and is signed by him. The certified copy here produced and filed in this cause (by me certified) is a true copy of this paper. This certificate of Aguilar came into my office in 1829, or early in 1830. This claim of Darley was filed before the board of land commissioners, 29th November, 1823. The plat and survey, it appears, were filed with the commissioners on that day. I was in the secretary's office here in 1817. The paper which we used was from Havana; we usually got our paper there; never got American paper that I remember. The inhabitants here were in the habit of using American, or English, or Spanish paper. Paper imported from the United States was common in those days."

Being cross-examined, witness says the paper on which the Aguilar certificate is written is Spanish paper. The survey is on American

paper. Clarke did not do his business in the secretary's office.

Testimony of Mauricio Sanchez, Joseph S. 16*] Sanchez, and John *M. Fontane, witnesses produced, sworn, and examined on the part of the claimants.

Mauricio Sanchez, sworn, says, "I know the lake called Dunn's Lake; have known it about fourteen years. It is on the east side of the St. John's River, and about fifty miles southwest of St. Augustine. I know of no other lake of that name; it empties into the St. John's. The lake is about fifteen miles long, and about three or four miles wide. I lived on the lake with my uncle, Ramon Sanchez, above six or eight years. This is Dunn's Lake on the St. John's."

Cross-examined by United States Attorney:

Witness says: "From the river St. John's you go about ten miles through a deep creek to the lake. It is about five miles to Lake George. The St. John's River makes a bend west of this lake, and leaves a deep strip between it and the river St. John's. This strip of land is sometimes called Cowsneck, and sometimes Dunn's Lake neck. There is a swamp on the west side of the lake, continuing eight or nine miles up from the mouth of the outlet. The spots of hard land, and some swamps and sawgrass," etc.

By the Court:

"If I had a grant on Dunn's Lake, I think I should have it lying on Dunn's Lake. The strip, or Cowsneck, is from six to ten miles wide, perhaps more. The outlet of the lake, by the meanders, is about ten miles; in a straight line, perhaps six miles. This outlet is a narrow creek, very deep, sometimes an hundred yards wide, sometimes narrower."

Joseph S. Sanchez, being duly sworn, says:

"I have known Dunn's Lake for fifteen years. I have resided there, and know it well. It empties into the St. John's by a creek called Dunn's creek. The lake is east of the St. John's; it is about five or six miles from the St. John's. The widest part of the strip of land is near the beginning of the creek."

Cross-examined by counsel for the United States:

"I know of no place on the St. John's River called Dunn's Lake, except this. The mouth of the outlet in the St. John's is about seven miles above Palatka. From Hambly's store on the St. John's it is about seven or eight miles across to the lake; above there it is perhaps four or five. Dunn's creek is about twenty or thirty feet wide, and in going up into the lake, you go in a southeasterly direction, about ten miles by the meanders of the creek, and about seven miles in a straight line. The lake is above fifteen miles long, and about three miles wide on an average, and lies nearly north and south. A swamp extends up the lake about half way on the west side. Then there is some swamp some hammock, and some hard land.

"The average width of the strip of land lying between the lake and river St. John's is about five miles. In some places more. The 17*] *widest part of the strip is at the north end of the lake. From the middle of the west side of the lake, I should think it would be *about five and a half miles to the St. John's, and above that the average width is about* 60

five miles between the Lake and river St. John's.

"By Dunn's Lake on the river St. John's, I understand, a Dunn's Lake on the St. John's. But I know nothing about Dunn's Lake."

John M. Fontane, being duly sworn, says:

"I have seen a survey made for James Darley, by Geo. J. F. Clarke. I received fifty dollars from Darley for Clarke for making this survey, by an order from Clarke, about 1820. I understood it was for making this survey.

"There is a Dunn's Lake which empties into the St. John's. It is the only one that I know of. I have never been there."

On the same day when this evidence was filed, viz., the 13th of November, 1841, the court passed an order to have the land surveyed. Owing to various impediments, this survey was not made until the 1st of July, 1843, nor returned to the court until the 1st of December, 1843. It was made by James M. Gould, the county surveyor of St. John's County, and upon its presentation was objected to by the counsel for the United States, because it did not conform to the grant, or to the calls of the grant. It was, however, allowed to be received in evidence, subject to the objection of the counsel for the United States, and without prejudice.

On the same day when the survey was returned, viz., the 1st of December, 1843, the counsel for the claimants offered the deposition of James Pellicier, taken under commission, which was read in evidence. The testimony and answers of the witness in this deposition were objected to by the counsel for the United States as being irrelevant and improper, and the whole evidence objected to as being incompetent. The counsel for claimants said that he offered the deposition to show that there is such a tract of land, and to identify and locate it. The deposition was received, as tending to show that there is such a tract of land, etc., but subject to the objection of the counsel of the United States, as to its relevancy and effect.

The deposition was as follows:

Interrogatories to be propounded to James Pellicier, a witness in the above entitled cause, and to be taken before George R. Fairbanks, Esq., clerk, and to be used in evidence on the trial thereof.

First. Were you or not acquainted with James Darley in his lifetime? Where did he reside, previous to the year 1817, and was he or not a Spanish subject?

To the first interrogatory witness answers:

*"I was acquainted with James Dar- [*18 ley in his lifetime. He resided in the city of St. Augustine previous to the year 1817; he was a merchant at that time; I believe that he was a Spanish subject, and have no doubt of it."

Second. Have you or not any knowledge of a concession of land made by the Spanish government to the said James Darley, on Dunn's Lake?

To the second interrogatory he replies:

"I understood from the said James Darley, at that time, that he had received a grant of land from the Spanish government, situated on Dunn's Lake. I think I so understood from him about the early part of 1817, or the early

part of 1818, I am not sure which. The quantity I think was six miles square, granted for a mill seat. I think. It was a fact generally known in the neighborhood where I lived, at Mantanzas."

Third. Do you or not know of the survey of a tract of land on Dunn's Lake, in favor of James Darley? If you do, say in what year that survey was made, who was the surveyor, and who the chain carriers. Were you, and who else were, present at this survey; and what was the number of acres to be surveyed, as near as you can recollect?

To the third interrogatory he answers:

"In the year 1818, I think in the early part, between the middle of March and the middle of April in that year, I was employed by Mr. James Darley in assisting him to make a survey of a tract of land claimed by him on Dunn's Lake. Robert McHardy was the surveyor employed. Two black men, one called George Bulger, belonging to Mr. Bulger, of St. Augustine, and Peter Survel, a free black mulatto, were the chain carriers. I sometimes carried the compass, and sometimes the chain, as Mr. McHardy directed me. Mr. Gibson, of Charleston, and Mr. Alexander, of Charleston, were both present at said survey, and I understand are neither of them living. I cannot recollect the number of acres to be surveyed; I think it was six miles square."

Fourth. State where the surveyor commenced his survey, whether he made any marks, and what marks, and how far the survey extended, and what prevented the surveyor from extending his survey further. State all the particulars, and what marks, if any, you made on the line.

To the fourth interrogatory witness answers:

"The surveyor commenced his survey on the edge of Dunn's Lake, at the south end of Cowen's old field, as it was called by the guide, Peter Survel; we run the line from thence, from three quarters of a mile to a mile and a half, west from the lake, and blazed the trees with one or two chops above the blazes; these marks were made by me. And then, on account of some misunderstanding between Mr. Darley and Mr. McHardy, the surveyor, 19*] *the survey was stopped. The misunderstanding arose from Mr. McHardy's wishing to see the order of survey, which Mr. Darley refused to exhibit to him, although he said he had it with him; we then broke up the survey, and went back to Mr. McHardy's, on the Tomoka."

Fifth. Say if it was the north or south line that McHardy surveyed.

To the fifth interrogatory witness replies:

"The line surveyed by Mr. McHardy was intended for the north line of the tract."

Sixth. Were you or not with James M. Gould, Esq., at the time he made a recent survey of a tract of land as claimed by the heirs of Darley? State whether or not you pointed out the starting point of this survey; was it the same at which McHardy commenced; did you see any mark there, such as you judged to be the same that was made by McHardy, or not?

To the sixth interrogatory witness replies:

"I was with James M. Gould, Esq., at the time he made a recent survey of a tract of land *as claimed by the heirs of Darley. I* showed Mr. James M. Gould the same point at which we had commenced the survey, when I was with Mr. McHardy. I saw and pointed out to Mr. Gould the same marks which I had made when I was with Messrs. Darley and McHardy. I showed him a blazed tree, as the starting point.

Seventh. Did you or not see other marks? State all the particulars.

To the seventh direct interrogatory witness says:

"I saw several blazes about the woods, but no other surveyor's marks. I did nothing more than to show them those old marks which I had made."

Eighth. State any other facts within your recollection.

To the eighth and last direct interrogatory witness says:

"That I do not know any other matter or thing pertinent to, or relating to, the subject matter of these interrogatories."

James Pellicier.

Cross-interrogatories to be propounded on behalf of the United States to James Pellicier, a witness for the petitioner in the above entitled cause.

First. If you say that you know James Darley, please state whether he is now alive or dead, when and where he died, and his age at the time of his death, and your age now.

To the first cross-interrogatory witness replies:

"I know James Darley. He died in St. Augustine, in the summer of 1832. I do not know of his age at the time he died; he must have been between forty-five and fifty years of age when he died. I am nearly forty-seven years of age now."

*Second. Where was said James Dar- [*20
ley born; was he not born in Scotland, or in some other foreign country?

To the second cross-interrogatory witness answers:

"I have heard Mr. Darley say that he was born in England; have often heard him say that he was of English birth."

Third. If you say that said James Darley was a Spanish subject, state how do you know that fact; do you know it of your own knowledge?

To the third cross-interrogatory witness answers:

"I have no other knowledge of James Darley being a Spanish subject than from having so understood from himself, and from the fact of his enjoying liberties and privileges which only Spanish subjects were permitted by the laws of the province to enjoy; he was reputed to be a Spanish subject."

Fourth. If you answer the second direct interrogatory in the affirmative, please state how you obtained such knowledge; was it not from report or hearsay, or the statements of said James Darley himself?

To the fourth cross-interrogatory witness says:

"My answer to the second direct interrogatory embraces all my knowledge on the subject, and is as full as I can make it."

Fifth. If you answer the third direct interrogatory in the affirmative, please state how you obtained your knowledge of said survey; was

it from report or hearsay, or the statements of the said James Darley himself? Did you assist in making a survey for said James Darley, at Dunn's Lake? If you did, state when and who was the surveyor, whether you know this of your own knowledge or from hearsay?

To the fifth cross-interrogatory witness says:

"I obtained my knowledge of the survey spoken of, by having been present at, and assisting in making, such survey at Dunn's Lake as before spoken of. It was in the early part of 1818; it might have been in the early part of 1817; it strikes me that it was in the early part of 1818. Mr. McHardy I know of my own knowledge was the surveyor."

Sixth. If you state who were the chain carriers, state whether you know this fact; do you know it of your own knowledge, or only from hearsay, or the statements of said James Darley himself?

To the sixth cross-interrogatory witness says:

"I know who were the chain carriers of my own knowledge, having been present at and assisting in the survey."

Seventh. If you state where the said surveyor commenced his survey, or testify as to other matters inquired of in the fourth direct interrogatory, please state how you know that fact; were you present at the making of the said survey?

To the seventh cross-interrogatory witness answers:

"I was present at the making of said survey, 21*] and know where the *survey commenced from my own knowledge; the other portions of the fourth direct interrogatory are fully answered in the answer to that interrogatory."

Eighth. How old were you at the time when you say the said survey was made? Was said James Darley present at the making thereof? Who was present? State the names (and age as near as you can recollect) of all the persons who were present.

To the eighth cross-interrogatory witness says:

"I was about the age of twenty-one years when that survey was made; the said James Darley was present at the making of said survey, and also a Mr. Gibson, and a Mr. Alexander of Charleston, and the two chain carriers, and myself, and Mr. McHardy, made up our party. Messrs. Gibson and Alexander took no part in the survey; Mr. Gibson was about twenty-five years of age; Mr. Alexander must have been full fifty years of age, or upwards. George Bulger must have been about forty years of age, and Peter Survel, the other chain carrier, must have been about thirty years of age; Mr. McHardy was about forty years of age, and Mr. Darley, from thirty to thirty-five years of age at that time."

Ninth. If you answer the sixth direct interrogatory in the affirmative, please state what marks you pointed out to the said James Gould, Esq., and how you "judged any of said marks to be the same that were made by the said McHardy."

To the ninth cross-interrogatory witness answers:

I pointed out to Mr. James M. Gould the blazes, with one or two chops above; I think two chops; I know them to have been the same marks made by me, on occasion of the survey

made by McHardy; I judge them to be the same marks, from having made them myself, and from the fact of no other surveyor at that time using the same marks besides McHardy; these were the marks always made by McHardy in all his surveys."

Tenth. What were said marks? Describe them, and also all the other marks that you there saw, particularly; were there any letters amongst them? If there were, state what letters.

To the tenth cross-interrogatory witness answers:

"Said marks made on said survey were such as I have just described, a blaze with one or two chops above it; I think two chops; we made no other marks, except these blazes and chops. I saw no surveyor's marks other than these at that time or since; I never saw any letters at or about that place."

Eleventh. Is there any other matter or thing within your knowledge material or pertinent to the issue in this case; if there is, please to answer the same as fully and particularly as though you were now thereto specially interrogated.

To the eleventh cross-interrogatory witness answers:

"There is no other matter or thing within my knowledge material or pertinent to the issue in this cause." James Pellicier.

*The claimants also offered the evi- [*22
dence of James M. Gould, who made the survey, which was as follows:

"The survey made by me, and now before me, is a correct survey, according to the certificate appended thereto. I took with me the maps from the land office.

"I found the marks of the government surveys, the sections and township lines; I took with me as a guide Mr. James Pellicier; I found trees marked, running nearly the same as the northerly line of the tract leading from the lake out in the woods; they were old marks; Mr. Pellicier pointed out to me a tree with old marks, and stated that within a hundred yards of that tree was the line of the grant, that is, the beginning corner; could not tell whether the marks on that tree were surveyor's marks or not; Pellicier represented it as a starting point, or as a tree which he recalled to mind as indicating about where the starting point was. He did not state to me that it began at a stake; he did not positively point out any tree as the starting point; he said the tract was south of that tree. I then sought for a line, and found the line spoken of; I did not find the line running from that tree, I found the line I supposed about a hundred yards south from that tree; the marked line of trees continued for half a mile from the lake, until we came to a pond; I found no old marks beyond and westwardly of the pond; my line varies a little from that line; it varies, however, several degrees; that old line was recognized by Mr. Pellicier as the line he had assisted in running; he stated that they were marked with a blaze and two chops, and I found trees marked with a blaze and two chops, which were old marks; I did not look for any other trees marked, after I had found the old line; I saw no other old marked trees; they varied a little from the line I run; it bore a little more northerly than mine; I ran the line I did because it was the course called for by

Geo. J. F. Clarke's survey; the line varied northerly perhaps ten degrees; I ran as I did, moreover, because the order of court directed me as nearly as possible to conform to Clarke's survey."

On the 28th of June, 1844, the court pronounced an opinion and decree, from which the following is an extract:

"It cannot be overlooked, in examining the papers thus far, that the evident intention of the Spanish governor was, that a saw-mill should be erected on the lands thus granted, and that that was the sole and only consideration for the grant; and it is singular that the governor did not, as in all other cases of mill grants, make the building of a mill a condition precedent to the giving of an absolute title; for I believe there is no other case of a mill grant, by the Governor of East Florida, where the absolute title was not made to depend upon the building of the mill, unless other considerations entered into the grant; but it seems that for some rea- [*23 sons best *known to himself, Governor Coppinger departed from the usual form, and dispensed with the usual conditions, inserted in such grants, and gave the land in 'absolute property' to the petitioner, trusting to his good faith to build the mill, which the governor himself sets forth as the sole consideration of the grant. If, therefore, the governor was willing to take that matter upon trust, and to make the grant absolute, and without condition, as it seems he did do, it is not within the province of this court to say that the grant is void, because the condition was not complied with, or the consideration for which it was made was not in fact rendered.

"According to the principles which have heretofore governed this court in the adjudication of these land cases, the proofs seem to be sufficient to warrant a confirmation of the grant, and upon the testimony exhibited I consider the claimants entitled to a decree of confirmation; and, after a careful examination of the recent survey made by James M. Gould, and the testimony connected therewith, I think that the location and boundaries of the tract, as defined in that survey, are according to the calls of the grant; and all things considered, it is, perhaps, as fair and proper a location as can well be made.

"It is manifest that Clarke's survey or location, or that which was pretended to have been made by him (and of which a plat has been given in evidence), could not be found, and I presume for the obvious reason that no survey was in fact ever made by him. The recent survey, therefore, could not follow his old survey, but the courses of the different lines of the tract, adopted by the surveyor recently, are the [same] as Clarke's; and on an inspection of the map of the adjacent country, I think that the location and survey, as made by Gould, not only follows the calls of the grant in all essential particulars, but corresponds, so far as it can, with Clarke's pretended survey.

"The grant is, therefore, confirmed, according to the recent survey of Gould, and a decree will be entered accordingly.

"June 28th, 1844.

"J. H. Bronson, Judge."

From this decree the United States appealed.

The cause was argued at the preceding term by Mr. Mason (then Attorney-General) for the United States, and by Mr. Yulee for the appellee, and held over to the present term under a curia.

Mr. Mason, for the United States, made four points:

1. That the petition should have been dismissed, because, from the neglect or delay of the claimant, it was not prosecuted to a final decision within two years.

2. Because there is no proof in the record that the plaintiffs are the devisees of Darley, the original claimant.

*3. Because the claimant never com- [*24 plied with the condition on which the concession was made, and the United States is not bound, by the laws of nations, the treaty with Spain, or our own laws, to recognize and confirm such an inchoate claim, without a performance of the condition upon which the grant was made.

4. If this obligation exists, the calls of the grant are so indefinite and uncertain, that a location cannot be made agreeably to such calls.

[All this argument is omitted except that upon the fourth point, as the decision of the court rested entirely upon that.]

IV. But if the United States were bound to recognize and confirm the claim without the performance of the condition, and without any consideration, the question recurs, are the calls of the grant so definite and certain that a location can be made under it agreeably to such calls? If they are not, the claim must be rejected.

The grant or concession is for the six miles square of land which the petitioner had solicited. Darley, in his petition, asked for "six miles square of land at the place called Dunn's Lake, upon the St. John's River."

There is no such place as Dunn's Lake upon the St. John's River. The land claimed was not surveyed before the transfer of the province to the United States.

The survey of G. J. F. Clarke purports to have been made on the 21st of December, 1817; but it does not follow the calls of the concession, and is evidently what is called an office survey, and not an actual survey; and so the court decided.

The one commenced by McHardy was not completed, and for a reason which throws much suspicion over that transaction, viz., because Darley, the grantee, would not show to McHardy, the surveyor, the order of the governor for making the survey, although he said that he had it. (See Pellicier's testimony).

McHardy was a private surveyor, and had no right to survey public lands without a special order. And the refusal of Darley to show him such an order leads to the presumption, either that he had none, or that Darley had taken Mr. McHardy to the wrong place. This proceeding, therefore, so far from aiding Gould's late location, makes strongly against it.

Dunn's Lake is fifteen miles long and three or four wide. It has, therefore, at least thirty-six miles of border. It is not on the St. John's River, but from seven to ten miles distant from it.

On which side should this land be located—east, west, north, or south? The concession does not show.

The settled doctrine in respect to these Florida grants is, that grants for lands, embracing a wide extent of country, or within a large area of natural or artificial boundaries, and which lands were not surveyed before the 24th of January, 1818, and are without such designations as will give a place of beginning for a survey, are not lands withdrawn from the mass of va- [*25 cant lands ceded to the United States in the Floridas, and are void as well on that account as for being so uncertain that locality cannot be given to them.

This doctrine was held in Buyck's case, 15 Peters, 215, which was for a grant of lands "at Musquito," south and north of said place. Also, in O'Hara's case, 15 Peters, 275.

And, again, in Delespine's case, 15 Peters, 319. And also in Forbes's case, 15 Peters, 182, "which was for a grant of land in the district or bank of the river Nassau."

And, again, in the case of The United States v. Maranda, 16 Peters, 159, 160, and 161, where all these cases are cited and affirmed.

It is believed, therefore, that this grant is void, for the reasons above stated.

It was not made in such a way as to distinguish it from things of a like kind; nor has the identity of the grant been shown by extraneous evidence. O'Hara et al v. The United States, 15 Peters, 283.

Mr. Yulee, for the appellees. [All of his argument is also omitted, except upon the 4th point made by the Attorney-General.]

2d. It is next objected by the Attorney-General, that the grant must be rejected for indefiniteness in its location.

It is not half as indefinite as many of the cases of Florida grants confirmed by this court. But the fact that it was located prior to the 24th January, 1818, by Clarke, a public officer, whose province it was to make location of grants, gives it certainty and definiteness of locality, if even the terms of the grant were in themselves indefinite.

The survey adopted by the court below is stated by the court to conform "to the calls of the grant in all essential particulars;" and Gould, the surveyor, states that, as directed by the court, he made the survey "to conform, as nearly as possible, to Clarke's survey."

The testimony of Joseph S. Sanchez, at the time United States marshal of East Florida, and that of Mauricio Sanchez, together with an inspection of the map, will show that there is no difficulty in making the location under the grant. Dunn's Lake is a sort of adjunct of the St. John's River, between which lake and the river there lies a strip of land of an average width of about five miles, being in some places six, in others more or less. A location on this strip would be strictly and literally as described in the grant, "at the place called Dunn's Lake, on the river St. John's."

The Attorney-General erroneously states Sanchez's testimony, in fixing the lake at from seven to ten miles' distance from the river. One of the Sanchez says it is from six to ten, the other (the best informed) says, "the average width of the strip of land lying between the lake and the river St. John's is about five miles," *and the survey of* Gould shows that the plat *extends from the river on one line to* the lake *on the opposite.*

*It is unnecessary to refer to the authori- [*26 ties cited by the Attorney General. The local court, familiar with the localities, decides that the survey is conformable with the calls of the grant; the surveyor of the county so also declares; the inspection of the map will confirm their judgment; and no person familiar with the topography of the vicinage will doubt for a moment that the grant is capable of ready location.

Mr. Justice Catron delivered the opinion of the court:

We are called on to ascertain the correctness of an opinion and decree pronounced by the Superior Court of East Florida, by which there was confirmed to certain claimants, through James Darley, a tract of land containing 23,040 acres. The only question proposed to be examined regards a location of the land by the decree. Darley solicited the governor of East Florida, in 1817, to grant to him in absolute property six miles square of land, "at the place called Dunn's Lake, upon the river St. John's;" and the grant was made as solicited. This is the entire description. The river St. John's is one of the principal waters of East Florida, and a principal object in its geography, and may, therefore, be judicially noticed, as minor objects have been, in our decisions affecting Spanish claims in the same section of country. The river is of considerable length, and runs through several lakes; there is no place on the river, however, known as Dunn's Lake, so far as we are informed, by the proofs or otherwise; but there is a considerable lake, well known as "Dunn's Lake," lying near the St. John's; it is proved to lie east of the river, nearly parallel with it, and about five miles from the river on an average. The lake is about fifteen miles long, and three or four miles wide. From the description of the land solicited, it is difficult to say whether the petitioner asked to have it laid off on the river or on the lake, but the purpose for which the grant was made decides the ambiguity of expression. The object was the erection of machinery for the sawing of lumber, and the advancement of commerce in the province, from the article of lumber; and therefore the land was solicited to be laid off on the river, for the purpose of establishing machinery, to be propelled by water power. Giving the most favorable intendment to the locality described in the petition and grant, still we can only say that the grant was for land on the river, opposite to the lake; and by further indulging a favorable construction, so as to limit the territory referred to within narrower bounds, hold that the survey should be made on that side of the river next the lake, and between the lake and the river. This was obviously the view taken of the matter by the experienced judge of the Superior Court, and in which we concur.

The St. John's River in its general course of northeast makes a large bend to the west, opposite to the upper end of the lake, and there passes through lake St. George, and by its meanders lies opposite *to each end and [*27 one side of Dunn's Lake. A copy of the plat filed in the land office, representing the township surveys of that locality, is in the record as evidence, from which these facts appear; and also, that the St. John's lies opposite Dunn's

Lake, by its various bends, for a distance of some thirty miles. This is the base line, on which the survey might front. Then, again, by the Spanish ordinances existing in Florida and governing such surveys, the front on the river could not exceed one third of the longitudinal extension back; nor does the description of "six miles square" alter the rule prescribed by the general law. Sibbald's case, 10 Peters, 313; United States v. Hanson, 16 Peters, 201. Governed by these rules, and with this extent of territory before it, the Superior Court was called on to identify the land granted, and render a decree. The difficulty lay in finding a point at which to commence the survey; from the face of the grant this could not be done, and therefore the court sought aid from the following additional circumstances: In December, 1817, Geo. Clarke, the Surveyor-General of the province, filed a plat and certificate of survey in his office, purporting to have been made of this grant; but no proof was offered to show that any such survey had ever been made by Clarke on the ground, and the Superior Court expressed its apprehensions that the survey was fictitious, as appears by the opinion found in the record; yet, as it might turn out otherwise on search being made on the ground, and as the survey might reasonably conform to the calls of the concession, should landmarks be found, a search and resurvey was ordered, and one was made and returned to the court by Gould, corresponding as near as might be, in the judgment of the surveyor, to the lines laid down on Clarke's plat, at the upper end of Dunn's Lake. But no line marks were found that had been made by Clarke, and his plat and certificate proved to be merely fictitious; his work not extending beyond what he had done on paper. As no aid could be derived from this source to direct the surveyor, Gould, when in the field, he resorted to another; it was this: In the spring of 1818, Darley had employed McHardy, a private surveyor, to lay off the six miles square of land, with the aid of Darley, and where he was present. They commenced at the head of Dunn's Lake, and run and marked a line about a mile, and then disagreed as to the propriety of making the survey as proposed by Darley, for what particular reason does not appear. This was all that was ever done in the field previous to the time Gould went on the ground, in July, 1843. Gould took with him Pellicier, who assisted McHardy in marking the line in 1818, for the distance of the mile above spoken of; and finding the marks at that point, Gould commenced the survey on which the decree is founded, and laid off the grant in a square form of six miles to each side, fronting on Dunn's Lake, and extending to St. George's Lake, through which the river St. John's passes. The survey has no connection with the St. 28*] John's River, further than that *at its southwest corner it reaches, to the extent of about one mile, the margin of Lake St. George.

In the first place, we are of opinion that the fictitious plat and certificate of Clarke can have no influence in fixing the identity of the land granted; nor, second, can any consideration be accorded to the line marks made by McHardy in 1818; and, therefore, we are compelled to resort to the face of the concession for a description that will identify the land granted. And here some legal principles interpose themselves for our government; the first of which is, that the powers of the United States courts are conferred by acts of Congress, and cannot extend beyond the powers conferred. Previous to the passing of the Act of May 26, 1824, conferring the jurisdiction on the courts to adjudge incipient titles, such as the present is, the political power could alone finally pass on them, and Congress uniformly did so. By that act the courts were invested with the jurisdiction that Congress had previously exercised; but to an extent considerably limited. The governing rules of adjudication, as prescribed, are found in the second section of that act; first, "The courts shall have full power and authority to hear and determine all questions in said cause relative to the title of the claimant. Second, the extent, locality, and boundaries of the said claim," etc. And by the sixth section, on a decree being had, and a copy thereof being served on the surveyor-general of the district, he shall survey the land decreed, for which a patent shall be issued by the President to the claimant. The "locality, extent, and boundaries," the court must find, before it can make an effective decree; and if these cannot be found, no decree can be made for any specific piece or parcel of land. The Superior Court had no power to grant land; nor had it any power to decree an equivalent for land that could not be identified; so this court has at various times held; as in the cases of Forbes, 15 Peters, 184, of Buyck, Ibid. 223, and in several other cases.

The court, not being enabled, in this instance, to derive any assistance from public acts, beyond the face of the grant, nor authorized to grant an equivalent, has presented to it a territory some thirty miles long, on the margin of the river St. John's, at any one point in which distance the survey might be commenced with equal propriety that it might be at any other point; it follows, that the description, when applied to the facts, is too vague and indefinite for any survey to be made, and that, therefore, the claimants can take nothing under the concession; and that it is our duty to order the decree of the Superior Court of East Florida to be reversed, and the petition to be dismissed.

We would remark, in addition, that this concession in its leading features cannot be distinguished from various others that have heretofore been brought before this court for adjudication, where no specific land was granted, or intended to be granted; but it was left to the *petitioner to have a survey made of the [*29 land in the district referred to by the concession, by the surveyor-general of the province, in due form, on the ground, and to cause the plat and certificate of such survey to be recorded, by the surveyor-general, by which additional public act the land granted was severed from the king's domain, but remained part of it until the survey was made and recorded. Until this was done, the warrant was a floating warrant of survey, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land on the petitioner; so this court in effect held in the case of Wiggins, 14 Peters, 351. From the time that such claims first came before this court, they have

not been deemed as coming within the cognizance of the courts of Florida, because the 8th article of the Treaty of 1819 did not embrace them; it only provided "That grants of land made by His Catholic Majesty, or by his lawful authorities, should be ratified and confirmed to the persons in possession of them, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." Actual manual possession has never been required to give title, but such identity must be established as to enable the courts to ascertain with reasonable certainty where the land lies; as was held in Hanson's case, 15 Peters, and others. And this may be shown either from the face of the grant, or by a legal survey made by the surveyor-general in conformity to the grant, during the time he had power to make such surveys.

Order.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel; on consideration whereof, it is the opinion of this court that the claimants can take nothing under the concession in this case; whereupon, it is now here ordered and decreed by this court, that the decree of the said Superior Court in that case be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby remanded to the said Superior Court with directions to dismiss the petition of the claimants.

THE UNITED STATES, Plaintiffs in Error,
v.
GORDON D. BOYD et al., Defendants.

Sureties on receiver's bond not liable for moneys accounted for by him as receiver before its execution—receiver's accounts do not conclude sureties—fraud in avoidance of bond—judgment on demurrer waived by withdrawal and proceeding to issue—U. S. not liable for costs.

The Act of Congress passed on the 24th of April, 1820 (3 Statutes at Large, 566): which substituted cash payments in lieu of credit sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government.

30*] *The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government, against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.

An instruction given by the court below, viz., that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government, to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void—was erroneous.

The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively.

Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the nonproduction of the original.

Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder.

If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi. It was formerly before the court, and reported in 15 Peters, 187.

The following statement of the case was made out by Mr. Justice Nelson, and prefixed to the opinion of the court:

The plaintiffs brought an action of debt against the defendants in the court below, upon a receiver's bond, in the district of Mississippi, for defalcation in office, and in which the latter obtained the verdict.

The declaration was in the usual form for the penalty, to which several of the defendants, after craving oyer, pleaded performance. The bond bore date the 15th June, 1837, in the penalty of $200,000, and after reciting that Boyd had been appointed receiver for the term of four years from the 27th of December, 1836, the condition was, that he should faithfully execute and discharge the duties of the office.

The plaintiffs in their replication assigned for breach, that after the 27th December, 1836, and while he was receiver, and as such, the said Boyd received divers large sums of the public moneys, amounting to the sum of $59,622.60, and which he had failed and neglected to pay over to the government.

To this replication the defendants demurred, and therefore the plaintiffs put in an amended replication; and in which a second breach was assigned, alleging that the said Boyd, after 27th December, 1836, and on divers days and times between that day and the 30th day of December, 1837, while he was receiver of the public moneys, and as such, received divers large sums of the public moneys, amounting in the whole to the sum of $59,622.60; and *further, that [*31 this sum remained in the hands of the said Boyd, as such receiver, on the 30th September, 1837, and that he, then and there, wholly failed and neglected to pay over the same.

To this amended replication the defendants demurred, and assigned for causes—

1. That the breaches set forth did not state the time when the said Boyd, as such receiver, received the moneys mentioned therein; nor whether the said sum was received before or after the day of the date of the bond.

2. That the said breaches did not state that the said Boyd failed or neglected to pay over the money received by him as such receiver, at any time after the date of the bond.

The plaintiffs joined a demurrer; and the

NOTE.—As to official bonds and liabilities of the sureties thereon, see note to 3 L. ed. U. S. 708; 21 L.R.A. 738; 51 L.R.A. 222.

As to actions upon, and construction of official bonds, see note to 6 L. ed. U. S. 578.

Sureties for second term not liable for delinquencies of first term, see note to 1 L.R.A. 118.

court below gave judgment for the defendants. The cause came up to this court on a writ of error, upon which the judgment was reversed, and the case remanded for further proceedings.

When the cause came back to the court below, Boyd, after craving oyer, pleaded separately performance, and to the replication assigning breaches he rejoined, setting forth a former recovery in assumpsit in bar of the action against him, to which the plaintiffs answered, nul tiel record. This issue being found for the defendant, he was discharged without day.

The other defendants then put in a rejoinder to the amended replication of the plaintiffs, and alleged that the said Boyd did not, as receiver, receive any public moneys at the time of the execution of said bond, or at any time thereafter, and before the commencement of the suit; and that no public moneys of the United States for the payment of which the defendants were chargeable by virtue of their bond remained in the hands of the said Boyd, as such receiver, at the time of the execution of the bond, or at any time thereafter and before the commencement of the suit, which the said Boyd had failed or neglected to pay over to the government.

To this rejoinder the plaintiffs demurred, and the defendants joined in the demurrer. The court below gave judgment for the plaintiffs, but allowed the defendants to amend, which was done accordingly; and in the amended rejoinder they aver that no public moneys of the United States came to the hands of the said Boyd, as such receiver, after the execution of the said bond, nor were there any such public moneys for the payment of which the defendants were chargeable by virtue of the said bond, received by him prior to the execution of the same, remaining in the hands of said receiver in his official capacity at the time of the execution of said bond, or at any time thereafter, which had not been paid or accounted for according to law, before the commencement of the suit, upon which issue was taken.

On the trial the plaintiffs gave in evidence two treasury transcripts, one dated Feb. 27, 1838, adjusting a balance against Boyd, as 32*] *receiver. of $59,622.60, due to the government on the 30th Sept., 1837, the other dated Sept. 17, 1838, adjusting a like balance against him of that date.

The plaintiffs also gave in evidence the returns of Boyd, as such receiver, to the Treasury Department, containing the account current as kept by him with the government, covering a period from Dec. 31, 1836, to Sept. 25, 1837; and which agreed substantially with the balance due, as shown by the treasury transcripts. They were made monthly to the department.

Upon this the plaintiffs rested.

The defendants then proved that no lands had been entered or sold at the office of the registers, at Columbus, or receiver's certificates issued by the receiver (Boyd), after the 29th of May, 1837. The last tract of land sold was entered on that day. This was proved by the register and confirmed by the records on file in the land office.

It was further proved that, while the sales of the public lands were going on at Columbus, and in the month of January or February, 1837, Boyd permitted one Pearle to enter lands to the amount of some $12,000 or $15,000, without paying any money for the same, taking only his checks upon the Planters' Bank in the vicinity, which were uniformly dishonored as soon as presented for payment.

It further appeared, that Boyd himself, while such receiver, and before the execution of the bond in question, made entries in his own name, and in the name of others for his benefit, of a large quantity of the public lands at the register's office, and gave the usual certificates for that purpose, without paying for the same, except by simply charging himself in his accounts with the receipt of so much money.

In the course of the trial evidence was given that a person by the name of Garesche appeared at Columbus, in May, 1837, claiming to be an agent from the Land Office Department authorized to examine the books and accounts of certain land offices, of which that at Columbus was one; he produced a letter from the department of his appointment, which was recognized as genuine, and thereupon the offices of the register and receiver were examined. The defalcation of Boyd was discovered by the agent, who communicated it to the register, but enjoined secrecy.

The counsel for the plaintiffs objected to the competency of the evidence offered to prove the agency of Garesche, but the objection was overruled, and the decision of the court excepted to.

*The defendants then offered Boyd, the receiver, as a witness, and with a view to remove all objections, on the ground of interest, releases were executed from them to him, discharging him from all liability in case a judgment should be rendered against them. They also produced a certificate of the clerk, stating that an amount of money had been deposited in court by Cocke, one of the *defend- [*33 ants, to cover all costs, and also a release by the said Cocke to the other defendants, discharging them from contribution.*

The witness was still objected to, but admitted; to which decision the counsel for the plaintiffs excepted.

In the course of the examination of this witness, an objection was taken to his testimony going to prove, that he had no moneys in his hands belonging to the United State, at the date of the bond, on the ground, it would be in contradiction of the statements contained in his official returns to the Treasury Department. The objection was overruled and the testimony admitted; to which decision the counsel excepted.

The witness testified that he had no money in his hands, as receiver, or otherwise, in court for the United States, at the date of the bond; and that he had so informed Garesche, the agent, before the execution of the same; and that after the execution he had paid over all moneys which he had received.

The testimony here closed, and the counsel for the plaintiffs prayed the court to instruct the jury—

1. That the official returns of the receiver to the Treasury Department were conclusive against the sureties.

2. That there was no sufficient legal evidence before the jury of the agency of Garesche.

3. That fraud could not be imputed to the United States.

And the counsel for the defendants prayed the court to instruct the jury—

1. That if the jury found that the balance claimed by the United States from Boyd arose from his returns, as receiver, of entries of public lands, made by him and others, prior to the execution of the bond, and that no money had been paid for the same on such entries before or after the execution of said bond, and that the entries have been made lawfully without payment, then the sureties were not liable.

2. That the facts stated in the transcripts of the returns made by Boyd, of moneys on hand, were not conclusive against the defendants, but might be explained, contradicted, or disproved by the evidence.

3. That if the jury believed that the balance claimed by the United States arose out of moneys received by Boyd before the execution of the bond, and that the same was not held by him, as receiver, in trust for the government, at or after the execution of the bond, but had been used, wasted, or converted by him to his own use, prior to said execution, then the sureties were not liable.

The court charged the jury, that the evidence on the part of the plaintiffs made out a prima facie case; but that if they believed, from the whole evidence, that the defalcation of Boyd arose from the entry of lands in his own name and in the name of others without payment 34*] *of money for the same, and previous to the 15th day of June, 1837, the date of the bond, the sureties were not responsible.

The court further charged the jury, that if they believed from the evidence that a fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of Boyd's defalcation from the sureties until they should execute the bond; and that such design was communicated to the Secretary of the Treasury, and his answer received before the actual execution of the bond, that then the bond would be fraudulent and void, and the sureties not liable.

To the instructions as given, and also to the refusal of the court to give the constructions as prayed for, the counsel for plaintiffs excepted. The jury found a verdict for the defendants.

The cause was argued at the preceding term by Mr. **Mason** (then Attorney-General) for the United States, plaintiffs in error, and by Messrs. **Cocke** and **Henderson** for the defendants in error.

Mr. **Mason** made the following points:

I. The court erred in admitting testimony objected to, and in rejecting testimony offered by the United States to rebut defendants' evidence.

1. There was no legal proof of Garesche's agency, or of the extent of his powers to bind the United States. If any such agency existed, the instructions were of record in the Treasury Department, could be made evidence in the mode prescribed by law, and secondary evidence was inadmissible. To this general rule of evidence there are some exceptions; but this is not one, or within the principle of them. *Jacob v. United States, 1 Brock. Rep. 528*, a case of exception. Agency is a contract, and what constitutes it is matter of law. 1 Livermore on Agency, 25. In this case, the learned judge refused to decide whether there was proof of agency, and yet admitted secondary evidence, which was not admissible to establish it; certainly not without notice to the plaintiffs to produce papers in their possession.

As the acts of an agent bind his principal only when within the scope of his powers, it is indispensable to prove the character and extent of his powers before it can be determined whether a particular act is to have that effect. United States v. Brig Burdett, 9 Peters, 682.

2. Boyd was an incompetent witness. He was a sworn officer, and made his returns under the sanction of an oath; he was admitted as a witness to prove that these returns were not true. Public policy strongly forbids this, and the maxim of law, nemo allegans suam turpitudinem est audiendus, applies.

The case of United States v. Leffler, 11 Peters, 86, does not conflict with this position. In that case the testimony of the principal obligor was not inconsistent with his official conduct.

*3. But if Garesche's acts were to be [*35 permitted to influence the jury, on the proof of agency submitted in establishing a fraudulent combination, then the bond previously executed by Boyd, and the defendants as his sureties, was admissible to rebut the inference that they were fraudulently induced to execute the bond on which this suit was instituted. Fraud is an extrinsic circumstance, which, if it exists, will vitiate the act infected; but all extrinsic circumstances are admissible to rebut such an allegation. 2 Starkie on Evidence, title Fraud, 586; Eatwick v. Caillaud, 5 Term Rep. 426.

II. After the decisions of this court in the cases of Linn v. The United States, 15 Peters, 290, Ferrar & Brown v. United States, 5 Peters, 373, and The United States v. Boyd, 15 Peters, 187, I do not feel at liberty to argue that the official accounts of the receiver are conclusive against his securities, or that they are responsible for past defalcations, when the language of the condition is not retrospective.

On the merits, it is respectfully submitted, that, on another assignment of breach of the condition, the sureties may be held liable for so much of Boyd's default as arose from his certificates for lands taken up by himself, for which he did not pay over the money when required to do so. There is no legal disability in the receiver to enter public lands.

In United States v. Boyd, 15 Peters, 187, the court held that "it matters not at what time the moneys had been received, if after the appointment they were held by the officer in trust for the United States, and so continued to be held at and after the date of the bond," the securities are bound. As a necessary counterpart of this proposition, if he was so indebted for lands entered by himself, while in office, and the United States chose to recognize the entry so made, and required payment at and after the date of his bond, his dereliction "was not complete" until his refusal to pay, or his failure to receive from himself; and for such dereliction his securities were liable. Issuing a certificate without payment to himself on his own entry is official misconduct; but that is

not such a misconduct as to vacate the sale, unless the United States insists that it is no sale.

In this view, if correct, it is important that there should be another trial to enable the government to make a new assignment of breach, so as to present this inquiry.

The verdict for the defendants is general. The court below refused to instruct the jury that fraud could not be imputed to the United States, but gave the third instruction, which it is submitted was wholly erroneous. The jury were charged, if they believed from the evidence "that a fraudulent design existed between Boyd and Garesche to conceal the fact of Boyd's defalcation from the sureties, until they should execute the bond, and that such design was communicated to the Secretary of 36*] the Treasury, and his answer *received before the actual execution of the bond, that in such case the bond would be fraudulent and void, and the sureties not liable."

Fraud to have this effect is either matter of law or matter of fact. The instruction proceeds on the assumption that the fraud in this case was fraud in fact, which was left to the jury. Assuming even that the United States may be responsible for the fraudulent conduct of its agents and officers, this instruction was erroneous.

1. Because the bond, being prospective in its operation, was not in law or in fact vitiated, if the prior defalcation was concealed from the sureties, or unknown to them.

2. Because there was no proof before the jury of Garesche's agency, or of the scope of his powers, and the court ought not to have left to the jury to frame their verdict on a state of facts which the evidence did not establish. The court having refused to charge the jury on the question, was in error to assume, in this instruction, that the agency existed to the extent of affecting the United States by his fraudulent acts. Hunter v. United States, 5 Peters, 173.

3. There is no intimation of what the secretary's answer was, to have the effect of vitiating the security. All that was required was that Boyd and Garesche conspired to conceal the default; that such design was communicated to the Secretary, and his answer received, no matter what it contained; that fact, with the others, wholly insufficient of themselves, in the opinion of the court avoided the bond. It is not conceived possible that such a state of facts is to deprive the government of its resort against the sureties for the official misconduct of their principal.

By law the receiver is to execute bond, with approved security. The duty of approving cannot be delegated to an agent; and as no agency can exist but to do a lawful act, the ministerial duty of seeing the bond executed, and transmitting it to the Treasury Department, where it was by law to be approved, could not, in the nature of things, include power to vacate the bond by misconduct of the agent. And hence the importance in this case of showing, by proof, the scope of the supposed agent's powers.

Mr. Cocke, for defendants:

[After arguing the point of the demurrer to the rejoinder, came to the treasury transcripts.]

We are here called upon to examine whether these certified balances are evidence sufficient to sustain the action. If we shall find that they are not, then the court cannot legitimately disturb the verdict of the jury for the defendants. To the point of the admissibility of the transcripts of the accounts in gross, we cite, that "the act of Congress, in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items both of debits and *credits [*37 as they were acted upon by the accounting officers of the department. United States v. Jones, 8 Peters, 375.

The defendant is unquestionably entitled to a detailed statement of the items which compose his account. Ibid. A certified statement of the balance due and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under the second section of the Act of the 3d March, 1797. United States v. Patterson, Gilpin's Dist. C. R. 47.

In looking to the duties and liabilities of receivers of public moneys, for the sale of public lands in any land district of Mississippi, there is, perhaps, no form in which public moneys can come into their hands officially, for the payment of which sureties are chargeable, except it be for moneys received for the sale of public land sold in conformity with the requirements of law. A detailed statement of the items is then indispensably necessary both to give information of the plaintiffs' demand, and to enable the defendants to defend themselves against any illegal or unjust charge; for example, if the item were for the sale of a certain section of land in a certain township and range, it would be competent for the defendants to show that the land was not in the land district, had never been offered for sale by the proclamation of the President, was some one of the variety of Indian or other reservations, and that the title had in no manner been affected by the supposed sale. But to allow a certified statement of a mere money balance in gross, or certified statements of money quarter balances, to inculpate the defendants would, of necessity, work judicial oppression and injustice; we therefore repeat that the plaintiffs have not made out such a case as would enable them to recover, and that the verdict of the jury for the defendants cannot in this court be disturbed.

The case having arisen in Mississippi and tried there, if her laws are to have effect on the subject (but it is believed they have not), the same principle there prevails; thus, in an action of indebitatus assumpsit, the plaintiff shall file with his declaration an account stating distinctly the several items of his claim against the defendant, and in failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration as to give the defendant full notice of the character thereof. Howard and Hutchinson's Digest of the Laws of Mississippi, 590, sec. 6.

From any view we have been enabled to take of the subject, whatever may be the nature or manner of the subsequent proceedings, the verdict in this case cannot be disturbed.

The next subject that may engage the attention of the court is an *authenticated [*38 abstract of lands purchased by Gordon D. Boyd

and others, previous to his being appointed receiver.

Also a certified abstract of lands purchased by Boyd in his own name previous to his being appointed receiver.

Also a certified abstract of lands assigned to Boyd previous to his being appointed receiver.

Also a certified abstract of lands purchased by Boyd after he was appointed receiver.

Also a certified abstract of lands purchased by Boyd in company with others after he was appointed receiver.

And also a certified abstract of lands assigned to Boyd after he was appointed receiver.

These several lists we have examined with care, and looked for their application to the matters in litigation in this suit with anxiety; and if they have the remotest connection with any matter here, on inquiry we confess we have not been able to discover it.

If, however, the court shall perceive their connection and importance, the judges will not fail to make the proper application and determine the weight to be given them in the evidence; we acknowledge our inability to do so.

The remaining balance of the plaintiffs' testimony is certain certified money accounts of the United States with Gordon D. Boyd, receiver of public moneys. These purport to be the quarterly statements of Boyd, of moneys remaining on hand from quarter to quarter, and stand obnoxious to the objections we have before considered. First, that they are not accompanied with transcripts from the books and proceedings of the treasury, showing the items which constitute the accounts in gross. Second, that the lands sold for which the balance is supposed to be created are not stated; and Third, that the sureties should not thereby be denied all opportunity of defending themselves, even by showing that the lands were not subject to sale, that the title thereto yet remained with the government, or to such person as they might otherwise belong. But we will ask the favor again to call the attention of the court to this subject, when we shall consider the testimony of the said Gordon D. Boyd and other witnesses for the defendants. The plaintiffs here rested their cause. The defendants, in their defense, offered the testimony of the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, Robert E. Harris, and the said Gordon D. Boyd.

To which the plaintiffs objected as incompetent, on the ground that the official returns or reports of Boyd, as receiver, could not be contradicted or explained by parol evidence; and the plaintiffs, by their attorney, thereupon moved the court to charge the jury that the official returns of Gordon D. Boyd, made to the Treasury Department, under the sanction of his oath of office, were conclusive against his sureties. But the court permitted the testimony of the said witnesses *to be given to the jury. Before we examine that testimony, we are called upon to determine whether the matters referred to in these treasury transcripts and abstracts are, in law, conclusive upon the defendants, and fix their liability beyond all controversy, like unto a judicial sentence or other legal estoppel, or whether, allowing them to be free from the objections we have interposed to their admissibility, they are to be taken as mere prima facie evidence, and like all prima facie or presumptive evidence may be rebutted by other contradictory proofs, or attacked for fraud and imposition.

39*] 40

The Act of Congress of the 3d of March, 1797, uses this language, "shall be admitted as evidence." Its admissibility only is provided for; but nothing is said as to its effect or the amount of credence to be given to it. It is exparte and in derogation of the fixed rules of evidence, and cannot be extended by implication to prohibit sureties from ascertaining the truth, or freeing themselves from the supposed liability of false reports made to the department.

In the case of The United States v. Eckford's Executors, 1 Howard's Supreme Court Reports, 262, 263, the court say: "The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them, and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. The restatement does not falsify the general account, but arranges the items of debts and credits, so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions or in the form of the transcript may not be material. We think that the transcript or restatement of the account as explained by the depositions was competent evidence to the jury. This statement, as appears from deposition of Tarbutt, is deficient in not giving all the credits to which the collector was entitled, but as it relates to the matter in controversy it is evidence. The jury will determine what effect it shall have; the amount charged to the collector at the commencement of the term is only prima facie evidence against the sureties.

"If they can show, by circumstance or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment they are not liable for the sum so misapplied."

It was, in the case here referred to, contended that the duty of the treasury officers in settling these kind of accounts were in their nature judicial and conclusive, but the court did not sustain such views; on the contrary, regarded them as prima facie only, and subject to be rebutted by circumstances or otherwise. But we contend that if they had been regarded in the nature of judicial sentences, being merely certified balances in gross, they were not admissible in evidence, any more than would be the minute of a final judgment of a court unsupported by any writ, pleadings, or proofs. The *instruction, therefore, of the court [*40 to the jury, that the evidence on the part of the plaintiffs made out a prima facie case, was certainly as strong for them as they had any right to demand. Taking these treasury transcripts, then, as containing a prima facie showing of the defendants' liability, we maintain that a full and complete defense is found for them on the following grounds:

1st. That all moneys that were in fact received by Boyd, as receiver, had been well and

truly paid by him into the treasury before the commencement of this suit.

2d. That the balance claimed by the United States arose from returns made by him of false and illegal entries of public lands in his own name and in the names of others, prior to the execution of the bond, and that on such entries no moneys were in fact paid to said receiver or in his hands before or after the execution of the bond; that such entries were unlawful, were nullities, and passed no title out of the government.

3d. That if any balance of moneys received by Boyd was received by him before the execution of the bond, that none such was held by him in trust for the government at or after the execution of the bond, but had been used, wasted or converted to his own use prior to the execution of the said bond, and,

4th. That the fact of Boyd's supposed defalcation existed prior to the date of the bond, and was known to V. M. Garesche, the agent of the government, who was bound in morals and in law to have the same known to the sureties, but who concealed such knowledge and enjoined official secrecy in fraud of the sureties. That the said bond was obtained from the sureties by fraud, and no liability exists against them on the bond.

As to the first point, it will be borne in mind that the bond is prospective both in its terms and legal effect, and that it is dated on the 15th of June, 1837. It will be seen by reference to the testimony of William Dowsing, the register of the same land office, that the first entry that purports to have been made before Boyd, as receiver, was on the second day of December, 1836, and that the entries closed on the 29th of May, 1837; both of these periods were before the date of the bond. According, then, to the opinion of the court made in this case on the former adjudication, the sureties are not liable, unless such public moneys remained on hand at and after the date of the bond.

The testimony of all the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, and Robert E. Harris, conduce to show that Boyd made his deposits of public moneys, as they accrued, in the office of the Planters' Bank, at Columbus, where he ought to have made them. By reference to exhibit A, part of the deposition of William B. Winston, it will be seen that the deposits were so made by him, and on comparing them with the statement of moneys paid by Boyd to 41*] the government, it is shown *that he well and truly paid over to the plaintiffs all the public moneys actually received by him, and that at or after the date of the bond no such moneys remained in his hands.

The testimony of these witnesses certainly conduced to show this, and the jury having found the issue for the defendants, the court would not be authorized to disturb the verdict. This is so without regard to the testimony of Boyd, but if the testimony of Boyd be competent it is a full defense to the defendants, and is conclusive of the issue in behalf of the defendants. He testifies that at the date of said bond he had no moneys in his hands, as receiver, and did not otherwise hold any moneys at that time for the United States or in trust *for them; that before the execution of said* bond he had fully informed V. M. Garesche, the agent of the Land Office Department, that he had no such moneys in his possession; and being further interrogated, he stated that his default, as receiver, was complete and consummated before the execution of said bond, and that after the execution of said bond he did not receive any such moneys not paid over.

If his testimony be competent, its weight and credibility were alone for the province of the jury; they having believed him, and having found their verdict for the defendants, there is no rule by which this court on error would be authorized to disturb the verdict.

We entertain no doubt of the competency of his testimony. He had been previously prosecuted at the suit of the United States in a distinct and separate proceeding for the identical same cause of action, and the United States had obtained a judgment against him on the 15th of June, 1838, for the sum of $53,722.50. These proceedings he relied upon as a bar to the plaintiffs' right to have another judgment against him for the same cause on the bond; nul tiel record was relied upon by the plaintiffs, but it was found that there was no such record; and as it was not thought regular for the plaintiffs to have two operative judgments against the same person for the same cause at the same time, Boyd was discharged from the second action and had no further connection with it. But he was principal in the bond and the other defendants his sureties only.

Before he was allowed to testify, the defendants, on behalf of whom he did testify, were required to release him, his heirs, executors, and administrators, from all claims against him for any money or other thing which he might be liable to them or either of them by reason of any recovery or judgment that might be had against them or either of them, and also all costs incurred or to be incurred by reason of any suit upon the bond, after the discharge mentioned; by these releases the said Boyd was rendered a competent witness for the sureties, who thus released him, and was correctly permitted to testify. United States v. Leffler, 11 Wheaton, 86. But whence, it may be asked, arose his supposed defalcation? We answer, by his having issued certificates for land before the date of the bond in his own name and in the name of others without having received *the purchase money therefor. See the [*42 testimony of William Dowsing, John Davies, John D. Montgomery, and Robert E. Harris, in the printed record. If this be so, allow us here, secondly, to say that whatever may be the nature of the liability of Boyd or his sureties for malfeasance in office, for and on account of these certificates, this proceeding for money received and on hand at and after the date of the bond cannot be supported. In this respect the jury having found for the defendants, this court would not be authorized to disturb the verdict.

We do not think that the United States can be deprived of any portion of the public domain by such false certificates. The Act of Congress of the 24th of April, 1820, changing the mode of the disposition of the public lands from the credit to the cash system, provides that "credit shall not be allowed for the purchase money on the sale of any public lands

which shall be sold after the first day of July, 1820. Lands remaining unsold at the close of a public sale may be sold at private sale by entry at the land office at one dollar and twenty-five cents per acre, to be paid at the time of making such entry. No lands which have reverted or which shall revert to the United States for failure in any manner to make payment, shall be subject to entry at private sale until they shall have been first offered to the highest bidder at public sale; no such lands shall be sold at public sale for less price than one dollar and twenty-five cents per acre, nor on any other terms than that of cash payment." Statutes of the United States at Large, 66, 67. It would seem that the actual payment of the money forms a condition precedent both in fact and in law to the right of the receiver, register, or other officer of the executive government to part with any portion of the public lands.

If, indeed, it be competent for Gordon D. Boyd thus to appropriate $59,622.60 worth of the public domain to himself without paying for it, the task would not be difficult, on the same principle, for him thus to appropriate the balance of the land in his land district; and if he could be permitted to do so, all other receivers of public moneys could do the same in their several land districts, and thus the title of the whole public domain could pass out of the government without the payment of a dollar. The principle or practice that shall thus deprive the United States of her public lands cannot be sound or be supported by this court.

If, indeed, it be true that the supposed defalcation of Boyd arose before the date of the bond, and from his having issued certificates for the public lands in his own name and in the name of others without receiving payment of the purchase money therefor—and it is shown by the testimony of the witnesses and the verdict of the jury that such was the manner of his defalcation—may we not legitimately protest against the right of the executive government successfully to call on the judiciary 43*] to aid them in violating the legislation *of Congress in this respect, and find security in the confidence that this court will never sanction such a disposition of any portion of the public domain. But what should be the course of the Land Office Department on the matter before us? We think it is easy and natural, and what their duty enjoins, and about which they will have no difficulty.

By proper proceedings to ascertain what lands have thus been entered, set aside the entries and have the lands disposed of as the act of Congress provides; these entries are nullities, and even if a patent had issued it would not affect the title of the United States. For this we beg leave to refer the court to the case of Stoddard et al. v. Chambers, 2 Howard Supreme Court Reports of the United States, 318. There, it is said "no title can be valid which has been acquired against law. The patent of the defendant having been for land reserved from appropriation is void."

We may, then, certainly say that a false certificate made in violation of law and in fraud is void, and does not pass any title to the land *out of the United States.*

3d. The matters of the third point we think we have sufficiently considered of in what has been said on the first and second.

The fourth point, that V. M. Garesche was the agent of the general land office to settle with Boyd, as receiver, that he made such settlement prior to the date of the bond, ascertained that the defalcation had thus accrued, and fraudulently enjoined secrecy on the officers and clerks in fraud of the defendants, we think we have sufficiently shown.

The fact is, he was such agent, and we think that the court below was bound to take notice that he was such without any direct proof. But William Dowsing, the register of the land office, says: "Sometime between the 10th and 20th of May, 1837, V. M. Garesche, Esq., produced to him the letter of his appointment from the general Land Office Department of the United States, authorizing him to examine certain land offices, of which this was one; and from a knowledge derived from a frequent correspondence with the Land Office Department, I knew the letter of appointment which he produced to be genuine."

John Davies says: "Sometime in the spring or summer of 1837, the general government sent an agent, named V. M. Garesche, for the purpose of examining into the condition of the land offices." Robert E. Harris says, that "In the latter part of the spring or the first of the summer of 1837, a settlement took place in the land office, between Col. Boyd, and a man by the name of Garesche, as agent of the government, in reference to such defalcation. He had no other knowledge of the agency of Garesche, or his authority as such, except that he was recognized and regarded by the register and receiver of the land office at Columbus as such agent, and who settled with him as such." This we have thought sufficient.

*His appointment, whatever may have [*44 been its form, was not in the possession or control of the defendants. The injunction of official secrecy by Garesche as to Boyd's defalcation, see the testimony of William Dowsing, and that of John Davies. This suppression of the fact of Boyd's defalcation was a gross fraud on the sureties, who after the defalcation became sureties. It is most probable that had the sureties been informed that Boyd had become a defaulter to the government to that large amount, they would have been sufficiently prudent never to have become responsible for him on the bond. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. 2 Howard, S. C. R. 318. It certainly ought to defeat a false certificate.

The plaintiffs further offered the copy of another and different bond, which was objected to by the defendants; and as it related to another, separate, distinct, and independent matter, the court very properly sustained the objection.

The plaintiffs also objected to some portions of the testimony, on account of the manner in which the several witnesses gave in their testimony, but as the objections were trivial, unbecoming the dignity of the investigation, and as the testimony is in other respects regarded amply sufficient to sustain the verdict, we have not thought it necessary to notice them in detail. When the court charged the jury that the

plaintiffs had made out a prima facie case, the plaintiffs' attorney substantially obtained all the charges he asked for; the court had already permitted the treasury transcript to be given in evidence to the jury, as being in judgment of law sufficient to establish the plaintiffs' right; the jury of necessity regarded them in that light. But the defendants were allowed to impeach the transcripts for illegality and fraud. It was equally regular to impeach them for any omission or mistakes, and thus they were compelled to yield the influence of the rebutting proofs.

In view of the whole case, we are satisfied it will be seen that the said Boyd had not any money of the United States at or after the execution of the bond, but that the same had all been paid into the treasury.

That his entire defalcation arose from his fraudulently and illegally issuing land certificates in his own name, and in the name of others, without being paid the purchase money, that they ought to be set aside, and the land considered as yet belonging to the government.

That it was a fraud in Garesche to conceal from the sureties the fact of Boyd's defalcation, and that the judgment of the court below ought not to be reversed, but the executive government left to the discharge of its duty in setting aside those illegal entries and certificates.

45*] *Synopsis of the Argument of John Henderson for Defendants.

The bill of exception filed in this case is of that form which has heretofore met, and we think deservedly, the reprehension of this court. It comprises, at length, all the testimony on both sides, and extends to 161 pages, being all the record, less 17 pages. The various parts of the testimony is chiefly objected to, with a generality of exception, which presents no specific matter of law for the consideration of this court, but devolves it upon this court to sift depositions at length, to ascertain if there be any exceptionable matter to justify the general objections taken.

We should feel ourselves justified, did we think our defense made it necessary, to object that most of this extended volume of testimony is not before this court on any sufficient points of exception as to entitle it to be reviewed by this court, under the common law rules of proceeding, as a court of error. But, waiving all such objections, we shall meet the plaintiffs' case, regardless of this deficiency.

In aggregating the general objections of the plaintiffs to the five several depositions of the defendants, that they were "incompetent" testimony, and with intimations that plaintiffs' case rested on "conclusive" proof, we can reduce these objections to no other legal position, than that the defendants were estopped from denying the plaintiffs' case by any proof whatever. For surely the defendants' testimony was pertinent to the issue, and it is not objected that the deponents were not competent and disinterested witnesses. Nor can it be doubted but the jury rightly estimated this testimony as disproving the plaintiffs' case. Reduced, then, to a legal elementary principle, the sum total of these objections is, that the defendants were concluded and estopped in law *from showing the truth against the fair seem-*

12 L. ed.

ing, but fictitious case the plaintiffs had presented.

To this view of the case, our first answer is, that, if this position has any foundation in law, then it was peculiarly a case in which the estoppel should have been pleaded. It was not an estoppel in pais, coming up incidentally as evidence. The supposed matters of estoppel were the treasury transcripts presented by the plaintiffs as their ground of action, and if regarded by them as records conclusive on the defendants, they should have pleaded them specially in their replication, and not joined the defendants in an open and general issue, and then objected that the defendants should not prove their issue as joined. If, then, it be a case of estoppel, it should have been so pleaded. 6 Munford, 120; 2 A. K. Marshall, 143; 3 Dana, 103; 2 J. R. 382; 6 Pick. 364; 14 Mass. 241; 2 Blackford, 465; 2 Penn. 492.

But we say this is not an estoppel, because neither matter of deed or of judicial record. 18 J. R. 490; 3 Wendell, 27.

*And is not an estoppel, because there [*46 was no mutuality of obligation between the parties to the matter of estoppel. The United States were not concluded by Boyd's returns, neither by the account as stated, nor the fictitious sales of the public lands, thereby reported to have been sold. Estoppel must be mutual. 2 J. R. 382; 3 Randolph, 563.

Boyd's returns were no stronger evidence than receipts, which never work an estoppel. 12 Pick. 557.

But, so far from the plaintiffs' proof from the Treasury Department being "conclusive," a part, if not all of it, was clearly inadmissible as evidence at all.

The account showing settlement and balance struck by the Treasury Department against Boyd was no sort of legal proof. It resulted from no accounts and charges kept in the Treasury Department, and included no charge for money advanced or paid out of the department, but was only the result of certain treasury officers, in stating Boyd's account from reported returns, and data furnished by himself.

Now, the rule is settled in the case of United States v. Buford, and in other cases, that in a suit for money which came to the hands of a collecting officer in pais, and not received from the Treasury Department, a treasury statement, in such case, is no evidence of the debt. 3 Pet. 29; 6 Pet. 202; 5 Pet. 292; 8 Pet. 375.

The papers certified from p. 17 to 22 of the record, are of this description, and should not have been admitted in evidence at all. Gilpin's D. C. R. 47.

The accounts certified from p. 48 to 55 as "true copies of the originals on file in said department," are, perhaps, by another provision of law than that which provides for certified transcripts of accounts from the treasury books, admissible as secondary proof of the facts contained, but not necessarily of a debt due, and certainly as open to correction or disproof, as accounts and receipts ever are, and having in no sense whatever any judicial verity. See cases cited above.

The plaintiffs' testimony shows that the alleged balance of account due from Boyd was

not of money received after execution of defendant's bond, but is carried forward as "an amount remaining on hand per last return," from the months of February or March preceding.

The facts, then, which we have assumed as our right to prove are, that this reported balance was a mere fiction of figures, without any reality; and that the fiction was made to figure as fact, by a device, palpably violative of the laws of the United States, in selling the public domain on credit, and charging up the price as cash received.

We have answered, that it was our province to show, and by our proof we have shown, to the satisfaction of a court and jury, that the balance of money on hand, as reported by 47*] Boyd, since the execution *of defendants' bond, was a fiction. 5 Pet. 373; 8 Pet. 399.

We have shown by our proof, too, that this balance arose from sales made of the public land on credit, and for which no money was received.

Can this court assume, for a moment, this may be lawfully done by the mere unmeaning device of a receiver, charging up his account sales, that the price was received, when in truth it was not.

The law says credit shall not be allowed for the purchase money on sale of the public lands after 1st July, 1821. Land Laws, 324. That lands subject to entry shall be paid for "at the time of making such entry." Land Laws, 324.

Is there any equitable license for the land officer, or this court, to dispense with the positive requirements of this law?

Now, we maintain, the provisions and requirements of this law rest in a superior and pervading public policy, and, as such, its high commands are in no sense directory, but mandatory and peremptory. Laws founded in public policy have no flexible equities authorizing any countenance to be given by the courts to their violation. Nor can it be tolerated, to meet any particular act of the citizen, that their known violation should be judicially covered up by an estoppel. Such are the English shipping acts, and so of ours; and of like high statutory policy is the system of our laws for the sale of public lands. 1 Story's Equity, sec. 177.

In this case, then, the court will declare it to be the duty of the Land Department of our government to disregard these affected and unreal sales, consider them as void, and resume the title to the government, as unaffected by the acts now attempted to be validated; and such, in effect and principle, has been the previous decisions of this court. No title is valid if acquired against law. . . . A patent issued against law is void. 2 Howard, 318; 13 Pet. 511.

Lands not subject to sale by law do not pass, without a register's certificate and payment; and the title of the United States is not diverted or affected thereby. 13 Pet. 498.

So, too, 11 Wheat. 384; 9 Cranch, 87.

The objection to Boyd as a witness is not well taken. He was exonerated by the parties for whom he deposed, for both debt and costs, *and had, therefore, no interests disqualifying* him. 11 Pet. 86; 7 Cranch, 206; 7 Wheaton, 356.

The objections to the charges and refusal to charge by the court below, we regard as wholly groundless. The court charged the full strength of the plaintiffs' case, and the other points vindicate themselves on reading.

But if this court should possibly find error in the trial, then we fall back upon the first error in the judgment of the court below on the pleadings, and demand the judgment of this court on the *plaintiffs' demurrer [*48 to defendants' first rejoinder, in which we think there is manifest error in the court's judgment against us.

John Henderson,
Attorney for Defendants.

Mr. Justice Nelson, after reading the statement in the commencement of this report, proceeded to deliver the opinion of the court:

When this cause was formerly before the court, involving a question arising out of the pleadings, it was held that the condition of the bond was prospective, and subjected the sureties to liability only in case of default or official misconduct of the principal occurring after the execution of the instrument; and that if intended to cover past dereliction of duty, it should have been made retrospective in its language; that the sureties had not undertaken for past misconduct. 15 Pet. 187.

The case is now before us, after a trial on the merits, and the question is, whether or not any breach of duty has been established which entitled the government to recover the amount in question, or any part of it, against the sureties within the condition of the bond as already expounded.

Since the verdict rendered under the instruction given by the court below, we must assume that the whole amount of the $59,622.60, of which the receiver is in default to the government, accrued against him in consequence of the entry of public lands in his own name, and in the name of others, without the payment of any money in respect to the tracts entered in his own name, and without exacting payment of others, in respect to the tracts entered in their names; and all happening before the 15th June, 1837, the date of the bond. So the jury have found.

The fraud, thus developed, was accomplished at the time by means of false certificates of the receipt of the purchase money by the receiver, which were given by him in the usual way, as the entries for the several tracts of land were made at the register's office, and also by entering and keeping the accounts with the government the same as if the money had been actually paid as fast as the lots were entered. The monthly or quarterly returns to the proper department would thus appear unexceptionable, and the fraud concealed until payment of the balances should be called for by the government.

According to the finding of the jury, therefore, the whole of the money, of which the receiver is claimed to be, and no doubt is, in default, and for which the sureties are and ought to be made responsible, were not only not in his hands or custody at the time of the execution of the bond, but, in point of fact,

never had been in his hands at any time before or since. No part of it was ever received by anybody. The whole of the account charged 49*] was *made up by means of fabricated certificates of the receiver, and false entries in his returns to the government.

The Act of Congress of the 24th of April, 1820, sec. 2 (3 Statutes at Large, 566), provides "That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next; but every purchaser of land sold at public sale thereafter shall, on the day of the purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office."

The acts of the receiver, out of which the defalcation in question arose, were in direct violation of this provision of law, and constituted a breach of official duty, which made him liable at once as a defaulter to the government, and would have subjected his sureties upon the official bond, if one had been given, covering this period. It was doubtless by some accident that the bond was omitted, as it will be seen by reference to the Acts of Congress, 3d March, 1833, sec. 5 (4 Statutes at Large, 653), and 3d of March, 1803, sec. 4, and 10th of May, 1800, sec. 6 (2 Statutes at Large, 75, 230), that a bond with sufficient sureties should have been given by the receiver before he entered upon the duties of his office.

It is clear, therefore, that the defalcation had accrued, and Boyd had become a defaulter and debtor to the government before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective, and to cover past as well as future misconduct, which has already been otherwise determined.

Whether a receiver can purchase the public lands within his district in his own name, or in the name of others for his benefit, while in office, consistent with law and the proper discharge of his official duties, it is not now necessary to express an opinion.

The register is expressly prohibited (Act of Congress, 10 May, 1800, sec. 10, 2 Statutes at Large, 77), and it would have been as well if the prohibition had included the receiver.

One thing, however, is clear, and which is sufficient for the purpose of this decision, the act of Congress, forbidding the sale of the public lands on credit, makes no exception in favor of any officers. He must purchase, if he purchases at all, upon the terms prescribed. If this is impracticable, it only proves that the duty of the receiver is inconsistent and incompatible with the duty of the purchaser, which might amount to a virtual prohibition. But, if otherwise, and the receiver allowed to purchase, the money must be paid over, as in the case of other purchasers, and deposited at the time of the purchase with the other moneys received and held by him in trust for the government. The public moneys in his hands 50*] constitute *a fraud, which it is his duty *to keep, and which the law presumes is kept,* distinct and separate from his own private affairs. It is only upon this view, that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of Congress.

It has been contended that the returns of the receiver to the Treasury Department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties; but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands, in his accounts with the government.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases.

If the case had stood upon the first instruction of the court below, and to which we have already adverted, there would be no difficulty in affirming the judgment. But the second instruction was erroneous.

The court charged, that if the jury believed from the evidence that fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of the former's defalcation from the sureties until they had executed the bond, and that such design was communicated to the Secretary of the Treasury, and his answer received before the execution, in that case the bond would be fraudulent and void, and the sureties not liable.

Now, in the first place, there is no evidence in the case laying a foundation for the charge of fraud in the execution of the bond, in the view taken by the court as matter of fact, and therefore the instruction was improperly given. And, in the second place, if there had been, inasmuch as the condition of the bond is prospective, any fraud in respect to past transactions not within the condition, which is the only fraud pretended, could not, upon any principles, have the effect of rendering the instrument null and void in its prospective operation. We may add, also, that, so far as the agency of Garesche was material in making out the allegation of fraud for the purpose of defeating the action, the proof was altogether incompetent. His acts and declarations for the purpose were admitted without previous evidence of his appointment as agent; and also secondary proof of the contents of a pretended letter of appointment, without first accounting for the nonproduction of the original.

*Before a party can be made respon- [*51 sible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter.

The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiffs' amended repli-

cation, overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants.

The answer to this is, that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a waiver of the judgment.

If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand.

Another ground upon which the judgment must be reversed is, that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs.

Some other points were made in the course of the trial, but it is unimportant to notice them.

The judgment of the court below reversed, with a venire de novo.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

JAMES PEPPER, Sarah H. Evans, George McCullough, and Louisa McCullough, Plaintiffs in Error,

v.

HUGH W. DUNLAP, Curator, etc., and his Wife.

Decree remanding case to inferior court for further proceedings not final—no writ of error lies.

Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court.

The writ of error must be dismissed, on motion.

THIS case was brought by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the State of Louisiana.

52*] *Mr. Crittenden moved to dismiss the writ for want of jurisdiction in this court.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought here by writ of error to the Supreme Court of the State of Louisiana; and a motion is made to dismiss it for want of jurisdiction in this court.

It is unnecessary to state, at length, the proceedings in the State courts, because it is evident that the decree of the Supreme Court of the State was not a final one. And as the case must be dismissed on that ground, the other objections to the jurisdiction of this court which were taken in the argument need not be examined.

It appears from the record, that the defendants in error obtained a decree in the District Court of Louisiana for the Ninth Judicial District, for a perpetual injunction, staying all further proceedings upon an order of seizure and sale of certain lands and other property mentioned in the proceedings, which before that time had been issued by the said District Court upon the petition of the present plaintiffs in error. From this decree an appeal was taken to the Supreme Court of the State; and at the hearing in that court it was decided that the present defendants in error, in whose favor the injunction had been granted, were entitled to relief for a large portion of their claim. The decree specifies sundry items which ought to be deducted from the claim of the plaintiffs in error, amounting to a very large sum; but states that the evidence before the court did not enable it to decide finally upon the rights of the parties, and especially upon the amount which the defendants in error were bound in equity to refund to the plaintiffs. And the court, therefore, decreed that the judgment of the District Court, granting a perpetual injunction, should be avoided and reversed; and remanded the case to the District Court for further proceedings in conformity to the opinion expressed in this decree.

This is the decree brought here by writ of error. It is evidently not a final one, and the writ of error must, therefore, be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, holding sessions for the Western District of Louisiana, and was argued by counsel; on consideration whereof, and it appearing to the court here that the judgment of the said Supreme Court is not a final one, it is thereupon now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

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*MORGAN McAFEE, Plaintiff in Error, [*53

v.

THOMAS C. DOREMUS, James Suydam, Cornelius R. Suydam, and John Nixon.

Evidence of protest, bills and notes in Louisiana, action against drawers and indorsers jointly—several pleas—nol. pros. as to drawer—Mississippi law adopted by rule of District Court.

By the laws of Louisiana, a notary is required to record in a book kept for that purpose, all protests of bills made by him and the notices given

NOTE.—As to what is a "final decree" or judgment of State, or other court, from which an appeal lies, see notes to 5 L. ed. U. S. 302; 4 L. ed. U. S. 97; 49 L. ed. 1001; 62 L.R.A. 515.

to the drawers or indorsers, a certified copy of which record is made evidence.

Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment; a subsequent protest and notice to the drawers and indorsers respectively, is good evidence.

The original protest must be recorded in a book. Its absence at the trial is, therefore, sufficiently accounted for.

Where a joint action against the drawers and indorser was commenced under the statute of Mississippi (which statute this court has heretofore, 16 Peters, 89, held to be repugnant to an act of Congress), the plaintiffs may discontinue the suit against the drawers and proceed against the indorser only.

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

On the 8th of December, 1839, the following bill of exchange was drawn:

$4,000. Locopolis, Miss., Dec. 8th, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan & McAfee, four thousand dollars, value received, and charge the same to account of your obd't servants.

Clymer, Polk & Co.

Messrs. Keys & Roberts, New Orleans.

The firm of Clymer, Polk & Co., consisted of Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer.

McAfee indorsed it, and it came to the hands of the defendants in error, merchants and partners in New York, trading under the firm of Doremus, Suydams & Nixon.

When the bill became due it was not paid, and was protested under the circumstances set forth in the first bill of exception.

In May, 1842, Doremus, Suydams & Nixon brought a suit against the four makers and also against McAfee, the indorser. The action was a joint one, as required by a statute of Mississippi, passed on the 13th of May, 1837, which was as follows:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, that in all actions founded upon bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and indorsers living and resident in this State in a joint action; and such suit shall be commenced in the county where the drawer or drawers reside, if living in the State; and if the drawer or drawers be dead, or reside out of the State, the suit shall be brought in the county where the first indorser resides.

"Sec. 2. Be it further enacted, that in all cases where any drawer, acceptor, or indorser shall have died before the commencement of 54*] *the suit, a separate action may be brought against the representatives of such drawers, indorsers, and acceptors.

"Sec. 3. Be it further enacted, that the court shall receive the plea of non assumpsit and no other, as a defense to the merits, in all suits brought in pursuance of this act; and all matters of defense may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict against part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall enter up the proper judgment in such verdicts against the defendants; which judgments and verdicts shall not be reversed, annulled, or set aside for want of form.

"Sec. 4. Be it further enacted, that new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against; and judgments shall be entered against all the other defendants in pursuance of the verdict.

"Sec. 5. Be it further enacted, that the clerk shall issue duplicate writs to the several counties where the various defendants may reside, and shall indorse on all executions the names of the drawers and indorsers, particularly specifying the first, second, and third indorsers.

"Sec. 6. Be it further enacted, that it shall be the duty of the sheriff, in all cases, to make the money on the executions out of the drawer or drawers, acceptor or acceptors; and in no case shall a levy be made on the property of any security or securities, indorser or indorsers, unless an affidavit from some credible person be made and filed among the papers in the case, setting forth that the principal or principals have no property in this State, out of which the plaintiff's money and costs can be made; and in such event the plaintiff may proceed with the executions against the defendants next liable, and so on until his executions be satisfied.

"Sec. 7. Be it further enacted, that no sheriff, or other officer, shall take more than one forthcoming bond, in any case, for the same cause of action.

"Sec. 8. Be it further enacted, that any plaintiff shall have the right to discontinue his suit against any one or more of the indorsers or securities, that he may sue in any joint action, before verdict, on payment of the costs that may have accrued by joining said defendant in such suit.

"Sec. 9. Be it further enacted, that in all suits brought under the provisions of this act, the defendants shall not be allowed to sever in their pleas to the merits of the action, and no plea of abatement shall be allowed to be filed in any cause, unless affidavit be made of the truths of the facts pleaded in the plea of abatement.

"Sec. 10. Be it further enacted, that if any plaintiff or plaintiffs shall cause to be levied an execution on any security, or their indorsers or their property, when the principal has sufficient property in this State to satisfy such execution, the party so offending shall be *deemed a trespasser, and shall be liable [*55 to an action from the party aggrieved, and exemplary damages shall, in all such cases, be awarded by the jury trying the same. Approved, May 13, 1837."

This statute was, in part, adopted by a rule of court in 1839, as follows:

"Rule XXX. The practice and proceedings in action at law, by the laws of this State, and the rules of practice for the government of the courts of law, made by the late Supreme Court, where not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this court, or with the existing rules of this court, shall be considered the rules and practice of this court; provided, however, and it is hereby expressly un-

derstood, that this rule does not adopt the whole of the Act entitled 'An Act to amend the laws respecting suits to be brought against indorsers of promissory notes,' approved May 13th, 1837; but that all of said act, except the tenth section thereof, is and it is intended to be adopted."

At June Term, 1842, McAfee pleaded the general issue.

In June, 1843, three of the four drawers of the bill having been served with process and the remaining one not, the suit was discontinued as to the drawers, and continued against McAfee alone.

In December, 1843, the cause came on for trial, when a verdict was found for the plaintiffs. During the trial, however, the two following bills of exception were taken:

First Exception.

Be it remembered, that, on the trial of this cause, on this 8th day of June, 1844, the plaintiffs in this case offered in evidence a bill of exchange in these words:

$4,000. Locopolis, Miss., Dec. 8th, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your ob't servants.

Clymer, Polk & Co.

Messrs. Keys & Roberts, New Orleans.

Having indorsed thereon the following names, three of which were erased:

"Pay to Doremus, Suydams & Nixon, or order. Morgan McAfee, Charleston P. O., Miss."

"A. H. Davidson, Charleston P. O., Miss.; G. Davidson, Charleston P. O., Miss.; M. L. Cooper & Co."

The plaintiff then proved that the names of A. H. Davidson and G. Davidson had been erased before the maturity of the bill. The plaintiff then offered in evidence the copy of 56*] the original protest, *accompanied by the deposition of the notary public, in these words: United States of America, Eastern District of Louisiana, city of New Orleans, ss:

Be it remembered, that on this thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-four, before me, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States in and for the Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled, "An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed Feb. 20, 1842, and the Act of Congress, entitled "An Act in addition to an act entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1, 1817, and the Act entitled "An Act to establish the judicial courts of the United States," passed Sept. 24, 1789, personally appeared H. B. Cenas, a person of sound mind and lawful age, a witness for the plaintiff in civil suit now depending in the District Court of the United States, in and for the Northern District of Mississippi, wherein Doremus, Suydams, and Nixon are plaintiffs, and Clymer, Polk & Co. (drawers), and Morgan McAfee (indorser) are defendants; and the said H. B. Cenas being by me first carefully examined, and cautioned, and sworn to testify the whole truth and nothing but the truth, did depose and say, that he is a notary public, duly commissioned and sworn, in and for the city and parish of New Orleans, State of Louisiana; that he held said office on the tenth day of March, A. D. 1840, on which day, at the request of the Commercial Bank of New Orleans, holder of the original draft, of which the following is a copy, to wit:

$4,000.

Locopolis, Miss., December 8th, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your obedient servants.

Clymer, Polk & Co.

Messrs. Keys & Roberts, New Orleans.

Morgan McAfee, Charleston P. O.

(Indorsed):

Messrs. M. D. Cooper & Co.

He, the said notary, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in), and demanded payment thereof, and was answered that the same could not be paid; whereupon he, the said notary, did publicly and solemnly protest said draft for nonpayment, and of protest did give notice to Clymer, Polk & Co., drawers, and to Morgan McAfee, indorser, and M. D. Cooper & Co., indorsers, by letters to the *drawer and first indorser severally writ- [*57 ten and addressed, informing them of said protest, and that the holders looked to them for payment; which letters he, the said notary, did direct to the said drawers and said first indorsers, respectively, as follows: The one for Clymer, Polk & Co., drawers, to them at Locopolis, Mississippi, and that for the said Morgan McAfee, the first indorser, to him at Charleston P. O., Mississippi, and by delivering that for the last indorsers to themselves. Which letters he, the said notary, did put into the postoffice at New Orleans aforesaid, on the day and date of said protest. All of which was done under the hand of said notary, and recorded in presence of competent witnesses and in due form of law.

The notary's fees for said protest and notices amounted to $3.50.

The document A, M. M. Cohen, United States commissioner, is sworn to by me.

H. B. Cenas, Notary Public.

United States of America, North Circuit and Eastern District of Louisiana, city of New Orleans, ss:

I, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States for the ninth circuit and Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled "An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the Act of Congress, entitled "An Act in addition to an act entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the Act entitled

"An Act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness lives in New Orleans, State of Louisiana, more than one hundred miles from Pontotoc, State of Mississippi, the place of trial of the cause for and in which said deposition is taken and is necessary. I further certify that no notification was made out and served on the defendants, or adverse parties, their agent or attorney, to be present at the taking of the deposition, and to put interrogatories if he or they may think fit, and that no notification of the time and place of taking the said deposition was made out and served on said defendants or adverse parties, because neither the said adverse parties, nor any attorney or agent of said adverse parties was, at the time of taking said deposition, within (100) one hundred miles of the said city of New Orleans, the place of taking the said deposition. I further certify that, on this thirteenth day of May, A. D. 1844, I was by the witness, who is of sound mind and lawful age, and the witness was by me 58*] *carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness; and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up, directing, and forwarding the same with my own hands to the court for which the same was taken.

I further certify that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, the words "are plaintiffs" being first interlined on page 1, ante.

M. M. Cohen, [L. S.]
U. S. Commissioner Circuit and District Court United States for the Ninth Circuit and Eastern District of Louisiana.

Commissioner's fee, $10.00 } Paid by
Notary for copy annexed, 2.50 } plaintiffs.
M. M. Cohen, U. S. C.

United States of America, State of Louisiana:

By this public instrument of protest be it known that, on this tenth day of March, in the year one thousand eight hundred and forty, at the request of the Commercial Bank of New Orleans, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in), and demanded payment thereof, and was answered that the same could not be paid. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interest, suffered or to be suffered, for want of payment of the said draft. Thus done and protested in the presence of Law. Dornan and Ernest Granet, witnesses.

In testimony whereof, I grant these presents under my signature, and the impress of
[L. S.] my seal of office, at the city of New Orleans, on the day and year first above written.

H. B. Cenas, Notary Public.
(Original signed) Law. Dornan,
E. Granet.

$4,000. Locopolis, Miss., Dec. 8th, 1839.

Ninety days after date, of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four *thousand dollars, value received, and [*59 charge the same to account [of] your obedient servants. Clymer, Polk & Co.

Messrs. Keys & Roberts, New Orleans.
(Indorsed) Morgan McAfee, Charleston P. O., Miss., M. D. Cooper & Co.

I, the undersigned notary, do hereby certify that the parties to the draft, whereof a true copy is embodied in the accompanying act of protest, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of said protest, and served on them respectively this day, in the manner following, viz., by depositing those for the drawers and first indorsers in the post-office in this city on the same day as this protest, directed to them respectively as follows: That for the drawers, to them at Locopolis, Miss., and that for the first indorser, to him at Charleston P. O., Miss., and by delivering that for the last indorsers to themselves.

In faith whereof, I hereunto sign my name, together with Law. Dornan and Ernest Granet, witnesses, at New Orleans, this 11th day of March, 1840.

(Original signed), Law. Dornan, E. Granet.
H. B. Cenas, Not. Pub.

I certify the foregoing to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in my office.

In faith whereof, I grant these presents, under my signature, and the impress of my seal of office, at New Orleans, on
[L. S.] this ninth day of November, in the year of our Lord one thousand eight hundred and forty-three.

H. B. Cenas, Not. Pub.

Sworn to before me,
M. M. Cohen, U. S. C.

To the introduction of which copy the defendant by counsel objected, but such objection was overruled by the court, and said copy allowed to be read; to which opinion of the court the defendant excepted, and this his bill of exceptions, before the jury retired from the box, was signed and sealed by the court, and ordered to be made a part of the record.

S. J. Gholson. [Seal.]

Second Exception.

The second bill of exceptions referred to the statute and rule above mentioned, and to the discontinuance of the suit against the drawers of the bill, after three of them had been served with process. A motion was made in arrest of judgment, which was overruled by the court.

to which overruling the second exception was taken.

60*] *The cause was argued by Messrs. Chalmers and Coxe for the plaintiff in error, and by Messrs. Stanton and Z. Collins Lee for the defendants in error.

Messrs. Chalmers and Coxe contended that the paper admitted in evidence by the court below, purporting to be a copy of the protest of the bill of exchange sued upon, was not duly proved to have been a copy of the protest of the bill of exchange, but a copy of an entry in the notary's book, and that it was not duly proved, even as a copy of the entry in the book.

Second. If proved as a copy, it was not admissible as evidence, without laying ground for it by showing the loss of the original, which was not done.

A protest is, properly speaking, a solemn declaration on behalf of the holder against any loss to be sustained by non-acceptance or non-payment (Story on Bills, sec. 276, p. 301), must be in writing, signed, and sealed by the notary (Chitty on Bills, 490, 642), and annexed to the bill itself, if it can be obtained, or otherwise a copy (Chitty on Bills, 362), with all the indorsements transcribed verbatim, with the reasons given by the party why he does not honor the bill; and this is so indispensably necessary, by the custom of merchants, that it cannot be supplied by witnesses or oath of the party, or in any other way, and, as is said, is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer, recognized in all parts of Europe, that a due presentment and dishonor has taken place, and all countries give credit to his certificate of the facts. Chitty on Bills, 490. It must be made according to the laws of the place where the payment ought to have been made. Story on Bills, p. 105, sec. 278; Chitty on Bills, 490. By the laws of Louisiana, where this bill was payable, it is enacted (page 41, Ballard and Curry's Digest Laws of Louisiana,) that

"The notaries shall keep a separate book in which they shall transcribe and record, by order of date, all the protests by them made, minutes of notices, etc., etc., made by them, which declaration, duly recorded under signature of such notary and two witnesses," etc.

This book, from which the copy admitted was obtained, is a new transcription of the original protest—a copy, wholly inadmissible itself, without accounting for the nonproduction of the original, and yet the court admitted a copy of this copy, without showing the loss, destruction, or that the original was not within the control of the party offering the copy. See Sebree v. Dorr, 9 Wheaton, 558; Brooks v. Marbury, 11 Wheaton, 78.

Second. The court below erred in overruling plaintiff in error's motion to arrest the judgment. This suit in the court below was com-

61*] menced *jointly against the drawers and indorsers of the bill of exchange sued upon under and by virtue of the provisions of an act of the Legislature of the State of Mississippi, and a long count of the declaration is framed upon that act, which provides that "in all actions founded upon bills of exchange and promissory notes the plaintiff shall be compelled to sue the drawers and indorsers living and resident within the State in a joint action." Act of May 13, 1837, Laws of Mississippi, 717; and by a rule of the District Court of the United States for the State of Mississippi, this act was adopted (see Rule XXX.), and, so far as it is not inconsistent with the laws of Congress and the rules of practice prescribed by the Supreme Court of the United States, became by that rule the law of the court. This being the case unless the act of the Legislature of Mississippi, in its application to this case, was incompatible with the laws of Congress, or the rules prescribed by the Supreme Court of the United States, or the existing rules of the District Court for Mississippi, and dismissal entered as to defendants below, Isaac Clymer, William C. Ivins, and Benjamin C. Polk, the makers, and taking judgment against McAfee, the plaintiff in error and indorser of the bill sued upon, was manifest error, for which the judgment should have been arrested. See Wilkinson & Turney v. Tiffany, Duvall & Co., 5 Howard's Mississippi Reports, 411. Was the Act of Mississippi, adopted by the District Court in its application to this case, a violation of the Judiciary Act of 1789, ch. 20? The eleventh section of that act gives jurisdiction to the circuit courts of suits between a citizen of the State where the suit is brought and a citizen of another State, and excepts "any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the contents, if no assignment had been made except in cases of foreign bills of exchange." The foundation of this action was a foreign bill of exchange, and although the drawers and indorser all resided in the State of Mississippi, it came within the exception of the act of Congress, and the District Court neither enlarged nor diminished the jurisdiction of the court by adopting the rule, nor is the rule in its application to this case incompatible with the laws of Congress, the rules of practice prescribed by the Supreme Court of the United States, or the existing rules of the District Court. The case of Keary et al. v. The Farmers' and Merchants' Bank of Memphis, 16 Peters, 89, was founded upon a promissory note, the makers and indorser all living in Mississippi, and the attempt, under this rule, to join them in the same action was pronounced by this court a violation of the Judiciary Act, in giving a jurisdiction to the District Court which that act had not conferred, and that, therefore, in that case the rule was void. Not so, however, in this case—the foundation of this suit being a foreign bill of exchange, the application *of the rule violates no law of [*62 Congress, nor is it incompatible with any rule prescribed by this court.

The rule established by the District Court, adopting the statute of Mississippi, is of great value to the citizens of that State; and, so far as it can be made applicable to the just jurisdiction of the District Court of the United States in that State, sound public policy, respect for her public functionaries, and the rights and interests of the parties litigant in the federal tribunals of the State, appeal strongly to this court to have the act fairly and fully executed.

Messrs. Lee and Stanton contended that the proof offered was sufficient; that the object of a protest was accomplished in giving the indorser notice; that certified copies of a protest were generally admissible; that a notary cannot serve the original protest upon each one of the indorsers; that the absence of the original at the trial was sufficiently accounted for by its being on file in the notary's office, and cited Story on Bills, 301, 304; 20 Wendell, 82; 8 Wheaton, 333; 4 Term Rep. 175; 2 Peters, 179.

As to the second exception, they contended that the plaintiffs living in New York had a right to sue the indorser and drawers, which right could not be taken away; that they had a right to discontinue the action as they did; that the plaintiff in error was estopped from making this objection; that this court has rejected the statute of Mississippi, and cited 3 Peters, 78; 11 Peters, 83-85; 16 Peters, 94; 2 Howard, 343.

Mr. Justice McLean delivered the opinion of the court:

This case is brought before this court by a writ of error to the District Court of the Northern District of Mississippi.

The suit was commenced on a bill of exchange against Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polk & Co., makers, and Morgan McAfee, indorser. The process was served on Polk and McAfee. The latter pleaded the general issue, and an alias summons was issued against the defendants not served. This writ was served on Isaac Clymer and William C. Ivins; and at the succeeding June Term the plaintiffs, by leave of the court, discontinued the suit against Clymer, Polk & Co., leaving McAfee, the indorser, the only defendant.

On the trial the plaintiffs offered the deposition of H. B. Cenas, a notary public at New Orleans, to prove a copy of the protest, which was objected to by the defendant; but the court admitted the evidence, and this constitutes the first exception.

By the Louisiana Acts of 1821 and 1827, the notary is required to record, in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers; a certified copy of which record is made evidence.

63] *Under these statutes it is held in Louisiana that "a certified copy of a protest is sufficient without producing the original." Whittemore v. Leake, 14 Louisiana Reports, 394.

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence. Townsley v. Sumrall, 2 Peters, 179. But the rule is different, under the principles of the common law, in regard to inland bills.

The protest offered is certified, under the seal of the notary, "to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in his office." But the deposition of Cenas, *the notary, was relied on as proving the protest and notice.* The exception taken was not to the deposition, but to the copy of the protest.

It is insisted that the deposition does not identify the protest, and if it does that it is not competent to prove the copy without accounting for the nonproduction of the original.

In regard to the latter objection, it appears from the statutes above cited that the notary records the protest and the manner in which notice was given, and this record is, in fact, the original. It is presumed that nothing more than a short memorandum of the demand and notice is taken, from which the record is made in due form; so that there is, strictly, no original except that which is of record. And a copy of this is made evidence by the statute. Now, this sufficiently accounts for the nonproduction of the original; and a sworn or a certified copy is the only evidence of the protest which can be produced.

And we think that the copy of the protest was properly considered as a part of the deposition. It was offered in connection with it, and is referred to as "Document A," as no other meaning can be given to that reference. The commissioner who took the deposition states the copy was sworn to before him, and the exception was to the "copy" and not that it was no part of the deposition. And the original being a matter of record, and of course not within the power of the plaintiffs in the Circuit Court, a sworn copy was admissible as evidence.

After the verdict was rendered against McAfee, the indorser, a motion was made in arrest of judgment on the ground that it appeared from the return of the marshal the process had been duly served on three of the partners of the firm of Clymer, Polk & Co., who were the drawers of the bill, and that the suit had been discontinued as to them; which motion the court overruled, and to which the defendant excepted.

It appears that the district judge, by a rule of court, adopted nine of the first sections of the statute of Mississippi, entitled "An Act to amend the laws respecting suits to be brought against indorsers of promissory notes," etc., approved 13th May, 1837, which required suit to *be brought against the drawers and in- [*64 dorsers of a bill of exchange jointly. Under this statute the suit was brought against the drawers and also the indorser of the bill.

This statute, as adopted by the district judge, was brought before this court in the case of Keary et al. v. The Farmers' and Merchants' Bank of Memphis, 16 Peters, 89, in which the court held that "the law of Mississippi is repugnant to the provisions of the act of Congress giving jurisdiction to the courts of the United States."

We see no objection, in principle or in practice, to the discontinuance of the suit against the drawers of the bill. Their liability was distinct from that of the indorser. In no respect could the indorser be prejudiced by the discontinuance. As a matter of course it was permitted at the costs of the plaintiffs.

In the case of Minor et al. v. The Mechanics' Bank of Alexandria, 1 Peters, 46, the court held that when the defendants sever in their pleadings, a nolle prosequi ought to be allowed against one defendant," that "it is a practice

which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form not absolutely subjected to authority may well yield to the substantial purposes of practice."

The judgment of the Circuit Court is affirmed with costs.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, and damages, at the rate of six per centum per annum.

ELIZABETH WALKER, Devisee of Robert Walker, Deceased, Plaintiff in Error,

v.

FRANCIS T. TAILOR, William Robinson, William E. Sablett, Thomas Cook, and John M. Cresup, Trustees of the town of Columbus, defendants.

Jurisdiction—the decision of State court declaring its own statutes unconstitutional not reviewable here.

Where the plaintiff below claimed a ferry right under an act of the Legislature of Kentucky, and the ground of defense was that the act was unconstitutional and void as impairing vested rights, and the decision of the highest State court was against the plaintiff, a writ of error, issued under the 25th section of the Judiciary Act, will not lie.

This court can entertain jurisdiction under that section only when the decision of the State court is in favor of the validity of such a statute. Here the decision was against its validity.

[*65] THIS case was brought up by a writ of error issued under the *25th section of the Judiciary Act from the Court of Appeals for the State of Kentucky.

The case was this.

In 1820 the Legislature of Kentucky passed an act, entitled "An Act for establishing and laying off a town at the Iron Banks." 2 Morehead & Brown's Digest, 1044. It recited that the General Assembly of Virginia, in 1783, had authorized the deputation of officers of the Virginia line to lay off four thousand acres of land in such manner and form as they might judge most beneficial for a town, on the Mississippi or the waters thereof, and vest the same in trustees for the common benefit and interest of the whole; that trustees were appointed, who located the four thousand acres of land upon the Mississippi, including the Iron Banks, and that said trustees, or a majority of them, had died before executing the trust reposed in them.

The statute then appointed trustees, who were to cause a survey to be executed for the four thousand acres of land and have the same duly recorded in the office of the surveyor of the lands set apart for the military bounty on State establishment, but declared that the trustees should not (unless thereafter authorized by law) sell or dispose of the same or any part thereof in any manner whatever, but hold the same subject to the control and future disposition by the Legislature. It then proceeded to authorize them to lay off a town, divide it into lots, cause a survey to be made, adopt rules for the government of the town, and then authorized them to sell at public sale any number of lots, not exceeding one hundred lots, of half an acre each. All the money arising from such sale was to be paid into the public treasury of the State.

In 1821 an act was passed to amend and repeal, in part, the above act. 2 Morehead & Brown, 1046. This authorized the trustees to appoint a treasurer, who should pay all the money received into the treasury of the State, to be then divided amongst the officers and soldiers of the Virginia lines; to sell fifty more lots; to sue trespassers, etc., etc.

Under these acts, the trustees laid off the town of Columbus into lots, streets, alleys, and public grounds, and made and recorded a plan therefor, by which they left an open space of ten poles, as a common, along the margin of the river, between low water-mark and the lots next to the river, and dedicated this common to public use.

In 1825 an act was passed (Acts of 1825, ch. 72), the first section of which authorized the trustees to sell the whole of the in and out lots, provided they should all concur; and the second section authorized the trustees, or a majority of them, to "fix the rates of ferriage across the Mississippi River, and lease out ferries for any term of years, not exceeding five, and apply the rents to the improvement of the town."

*In 1829, Acts of that year, page 31, it [*66 was provided, by an act passed in that year, "That a public ferry be, and the same is hereby established at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot, No. 3, in the town of Columbus, across the Mississippi River to the opposite shore, and that said ferry be in the name, and for the benefit, of said Cates and Walker, their heirs and assigns, forever: provided, however, that said Cates and Walker enter into bond, in the County Court of Hickman, in the penalty of $1,000, conditioned for the faithful performance of the duties required of other ferry keepers by law in this Commonwealth."

At the session of 1830, Act of 1830, ch. 533, page 148, an act was passed restoring the ferry privileges to the town of Columbus. The first section was as follows:

"That so much of 'An Act to establish a warehouse at the mouth of Jonathans' Creek, in Colloway County, and for other purposes,' as establishes a public ferry at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot, No. 3, in the town of Columbus, across the Mississippi River to the opposite shore, in the name of the said Cates and Walker, their heirs and assigns, forever, be, and the same is hereby repealed; it being satisfactorily proved that lot No. 3, in the town of Columbus, does not bind on the Mississippi River; that the

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NOTE.—As to jurisdiction of the United States Supreme Court, where is drawn in question statute, treaty, or Constitution of United States, see notes to 2 L. ed. U. S. 654; 6 L. ed. U. S. 571; 4 L. ed. U. S. 97.

Nature of decision as affecting right of review, see note to 68 L.R.A. 52.

margin of said river, opposite the town of Columbus, in laying off the same, was reserved as a public landing, and belongs to the trustees thereof, for the use of the inhabitants; that, under the laws of this State, the trustees of Columbus were vested with ferry privileges from the said public ground, on the margin of the river, across the Mississippi River, for the use of the inhabitants; that said Cates was the lessee of a ferry from the trustees of Columbus, and the said Walker his surety, at the time of granting the ferry hereby repealed; and that no notice of the application to the Legislature was given to the said trustees, nor a representation, that a ferry was already established there, made in their petition to the Legislature.

The second section repealed the grant to Cates and Walker, and the third section re-granted and confirmed to the trustees, and their successors, all the ferry rights and privileges from the public ground, and vested them with power to lease one or more ferries from said public ground, from time to time, not exceeding five years at any one time.

Cates and Walker had complied with the requisitions of the Act of 1829, and put their ferry into operation. Cates sold his interest to Walker, and he, dying, devised it to his wife, who continued in the exercise of it until interrupted by the trustees, who claimed the exclusive privilege of ferriage.

In September, 1842, Elizabeth Walker, the plaintiff in error, brought an action of trespass on the case against the trustees, in the Hick-
67*] man *Circuit Court. The defendants filed five pleas, but it is only necessary to notice the first. That plea set forth all the aforesaid acts of Assembly prior to the Act of 1829; averred that the legal title to the land on which the town was situated had been vested for that purpose in trustees, as is above stated; that, upon the sale of the lots, there was a reservation made of all ferry rights to the trustees of the town, for its use; that they had been constantly in the exercise of those rights; that between lot No. 3 and the river there intervened a street, ten poles in width, and between that and the river a "common." From these facts, it deduced and alleged the exclusive ferry right of the defendants, co-extensive with the limits of the town on the river, as incident to their alleged legal title to the common, as secured to them by said reservation on the sale of lots, and as granted to them by said prior acts of Assembly.

And it, therefore, further alleged, that the Act of 1829, granting a ferry to Cates and Walker, "was unconstitutional and void, being an attempt to impair and devest prior vested rights," etc.; and so justified the defendants for the disturbance and trespass complained of.

To this plea the plaintiff demurred; and, upon argument, the demurrer was overruled. The plaintiff, not filing any replication to this plea, judgment was entered for the defendants, for the want of a replication.

Mrs. Walker appealed to the Court of Appeals, where the judgment of the court below was affirmed, and a writ of error brought the case up to this court.

The cause was argued at the present term by Mr. Crittenden for the plaintiff in error, and Mr. *Cates for the defendants.*

Mr. Justice Grier delivered the opinion of the court:

This case comes before us by a writ of error to the Court of Appeals of the State of Kentucky.

It has been argued by counsel, on the merits, without noticing the important preliminary question of jurisdiction.

The power intrusted to this court of reviewing the decisions of State tribunals, is within narrow and well-defined limits, and has been, in some instances, looked upon with jealousy. Our decisions may fail to command respect, unless we carefully confine ourselves within the bounds prescribed for us by the Constitution and laws. If they have not conferred jurisdiction, the consent of parties will not justify its assumption. The record in this case shows that the plaintiff declared, in an action on the case, for a disturbance of her right of ferry, asserting an exclusive right in herself, by virtue of an act of the Legislature of Kentucky of the 31st of December, 1829. The defendants' first plea (the only one sustained by the court), *after averring a previous grant to them- [*68
selves, by an act of the 27th of December, 1820, and other facts, unnecessary to notice, concludes as follows: "And so the defendants say that the said act, dated the 31st of December, 1829, purporting to establish a public ferry at the warehouse landing of Owen G. Cates and Robert Walker, fronting their lot No. 3, in the town of Columbus, over the Mississippi River, to the opposite shore, is unconstitutional and void, being an attempt to impair prior vested rights, without compensation therefor; all of which defendants are ready to verify," etc.

To this plea the plaintiff demurred; the defendants joined in demurrer, and the Circuit Court of Kentucky gave judgment for defendants. The plaintiff then appealed to the Court of Appeals of that State, who affirmed the judgment of the Circuit Court.

The record, therefore, presented this single issue, "Whether the Act of the Legislature of Kentucky, of the 21st of December, 1829, under which the plaintiff claimed title, was unconstitutional and void," as being repugnant to the Constitution of the United States, and the decision of the Court of Appeals, is against its validity.

The twenty-fifth section of the Act of the 24th of September, 1789, which confers on this court the power of supervision over the State tribunals, so far as at present applicable, confines it to cases "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of such their validity." That this case does not come within the category, is too plain to admit of argument or require authority. The reason and policy of granting to this court the power to revise the decisions of the State courts when in favor of the validity of their own statutes, and refusing it to us when the judgment is against their validity, are obvious, and are fully stated by the court in the case of The Commonwealth Bank of Kentucky v. Thomas Griffith et al. 14 Peters, 56. That case is precisely in point with the present, and decides that, "Under this clause of the act of Congress,

three things must concur to give this court jurisdiction. 1st. The validity of a statute of a State must be drawn in question. 2d. It must be drawn in question upon the ground that it is repugnant to the Constitution, treaties, or laws of the United States. 3d. The decision of the State court must be in favor of their validity."

As the judgment of the Court of Appeals of Kentucky was rendered against the validity of the statute in this case, it must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals 69*] for the State of Kentucky, and was *argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

SAMUEL HILDEBURN, Plaintiff,
v.
HENRY TURNER, Defendant.

Notary's protest, sufficiency of.

When a bill of exchange is made payable at a bank, and the bank itself is the holder of the bill, it is a sufficient demand if the notary presents it at the bank and demands payment.

If, therefore, the protest states this and, also, that the notary was answered that it could not be paid, it is sufficient. It is not necessary for him to give the name of the person or officer of the bank to whom it was presented, and by whom he was answered.

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the Southern District of Mississippi.

The point of difference is fully set forth in the opinion of the court.

It was argued by Mr. Brent for the plaintiff, and by Mr. Bibb for the defendant.

Mr. Brent, for plaintiff:

The single question is on the admissibility of the notarial protest; and, if admissible for any purpose, it is competent evidence. The bill of exchange is drawn in Mississippi, payable in Louisiana; and, in such case the protest is evidence by the law merchant. 2 Peters, 593; 2 Peters, 691; Waldron v. Turpin, 15 Louisiana Rep. 555; 5 Martin's N. S. Rep. 513. On this head I also refer to the statute of Louisiana, 1827, Bullard and Cuny's Digest, 13, 43, and to 14 Louisiana Rep. 394; Franklin v. Verbois, 6 Louisiana Rep. 730. The demand is presumed to be made in business hours. Fleming v. Fulton, 6 Howard's Miss. Rep. 484. I also refer to the decision of this court in Musson v. Lake, 4 How. S. C. R. 262, and to Brandon & Lofftus v. Whitehead, 4 How. S. C. R. 127; also to Bank of the United States v. Carneal, 2 Peters, 549.

Mr. Bibb, for defendant:

The objection taken to the reading of the protest offered in evidence, was, that the protest did not contain a sufficient statement of the *presentment of the bill for* payment.

The bill was drawn by A. G. Bennett, at Canton, Mississippi, on H. F. Bennett, at same place, in favor of Henry Turner, in New Orleans, for $995.04, payable at the Merchants' Bank of New *Orleans twelve months [*70 after date. Accepted by H. F. Bennett, indorsed to Samuel Hildeburn by Henry Turner, and to A. H. Wallace & Co., by the indorsee, Hildeburn.

The notary in his protest for nonpayment states, "At the request of the Merchants' Bank of New Orleans, holder," "I presented said draft to the proper officer at the Merchants' Bank, where the same is made payable, and demanded payment thereof. I was answered that the same could not be paid." Whereupon he protested, etc.

No person is named to whom he presented the bill for payment.

The notary has undertaken to judge a matter of law, instead of certifying the name of the person supposed to be the proper officer of the bank. Was he the president, or the cashier, or a director? Who was he? What was his name?

The notary presented the bill to an officer of the holder, and demanded payment of the holder's servant or agent.

The notary should have exhibited the bill openly and publicly at the bank, and demanded payment openly and publicly, so that all persons at the bank, or in hearing, might have had notice.

As the presentment of the bill was not to the acceptor, nor to any person in his employ, the demand of payment, at the place appointed in the body of the bill, should have been general and public, so that any person interested might have taken up the bill.

The person, the name of the person, to whom the presentment and demand of payment was made, should have been stated.

See Chitty on Bills and Form of Protest, 9 Lond. ed. 462.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before the court upon a certificate of division from the Circuit Court for the Southern District of Mississippi.

The case stated is this: The plaintiff offered in evidence a bill drawn by A. G. Bennett, at Canton, Mississippi, upon Henry F. Bennett, payable twelve months after date, to the order of Henry Turner, in New Orleans, at the Merchants' Bank there, for nine hundred and ninety-five dollars and four cents, which was accepted by the drawee, and indorsed by Turner, the payee, to Hildeburn, the plaintiff. There were, also, subsequent indorsements upon the bill, which is not material to notice. And in order to show that the bill had been duly presented for payment and refused, the plaintiff offered to read the following notarial protest, upon the back of which was a copy of the bill and acceptance, and the indorsements thereon:

United States of America, State of Louisiana:

By this public instrument of protest, be it known that, on this fourth day of January, in the year one thousand eight hundred and forty-one, at the request of the Merchants' Bank of New Orleans, *holder of the original, [*71

whereof a true copy is on the reverse hereof written, I, Jules Mossy, a notary public in and for the city and parish of New Orleans, State of Louisiana, aforesaid, duly commissioned and sworn, presented said draft to the proper officer at the Merchants' Bank, where the same is made payable, and demanded payment thereof. I was answered that the same could not be paid. Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of said draft as against all others whom it may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered, or to be suffered, for want of payment of the said draft.

Thus done and protested in the presence of George Lanaux and Jas. P. Gilly, witnesses.

In testimony whereof, I grant these presents, under my signature, and the impress of my seal of office, at the city of New Or- [L. S.] leans, on the day and year first above written.

(Signed) Jules Mossy, Notary Public.

The defendant objected to the reading of this protest, upon the ground that it did not contain a sufficient statement of the presentment of the bill for payment. And upon this question the judges of the Circuit Court were divided in opinion, and thereupon ordered it to be certified to this court.

This protest is not altogether in the language usually employed in instruments of that description, but we think it contains enough to show that the presentment and demand were duly made. Undoubtedly, the principles of justice, and the safety of the commercial community, require that such instruments should be carefully examined, and should not be admitted in evidence unless they show plainly that everything was done which the law requires to charge the indorser. But in this case it appears by the protest that the Merchants' Bank, at which it was payable, was the holder of the bill, and that the notary presented it for payment at the bank, and demanded payment thereof, and was answered that it could not be paid. According to the current of authorities, nothing more need be stated in the protest of a bill of this kind, payable at a bank, and of which the bank is the holder, and it is not necessary to give the name of the person or officer of the bank to whom it was presented, or by whom he was answered. Neither does the statement in this case, that it was presented to the proper officer of the bank, give any additional validity to this protest. For when the law requires the bill to be presented to any particular person or officer of a bank, the protest must show that it was presented accordingly, and it would not be sufficient to say that he presented it to the proper person or proper officer. In this case, however, the presentment and demand at the place where it was made 72*] payable is all that was *necessary, and as this appears to have been done, the protest ought to have been received in evidence, and we shall cause it to be certified accordingly to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the protest offered in this case ought to have been received as evidence; wherefore, it is now here ordered and adjudged that it be so certified to the said Circuit Court.

HENRY MILLER, Administrator of George Miller, Deceased, Plaintiff in Error,

v.

BETSEY HERBERT and Caroline Herbert, Defendants in Error.

Manumission not recorded within six months after its date is void—court of equity cannot set up and establish that which is illegal or wholly void.

Under a statute of Maryland passed in 1796, a deed of manumission is not good unless recorded within six months after its date; and this law is in force in Washington County, District of Columbia.

The statutes and decisions of Maryland examined.

THIS case was brought up by writ of error from the Circuit Court of the District of Columbia, for the County of Washington.

The defendants in error filed their petition in the Circuit Court, by which they claimed a right to their freedom, under a deed of manumission executed to them on the 28th of February, 1842, by their owner, George Miller, who was an inhabitant of Washington County, at the date of the deed, and at the time of his death, and on whose estate the plaintiff in error had taken administration.

The petition, setting out the character of the claim of the defendants in error, was in the following words:

To the Honorable Judges of the Circuit Court of the District of Columbia for Washington County:

The petition of Betsey Herbert and Caroline Herbert humbly showeth, that your petitioners were the slaves of George Miller, late of the city of Washington, deceased; that the said decedent, in his lifetime, intending to manumit and set free from slavery your petitioners, caused to be prepared a paper writing for that purpose, and sent for S. Drury, Esq., a justice of the peace of said county, *to take [*73 his acknowledgment hereof, and also Charles Bowerman and John Hoover to witness the execution thereof; that on the 28th day of February, 1842, the said justice and the said witnesses came to the house of said George Miller, and the said George Miller did then and there, in the presence of the said witnesses, execute the said paper writing and did acknowledge the same before the said justice of the peace; but the said witnesses neglected to sign, or did not understand that they were called upon to sign the said in-

strument as witnesses; that the said George Miller retained the said paper writing in his possession until some short time before his death, when he gave it to your petitioners, with instructions to place it in the hands and follow the directions of Mr. John McLelland, of this city, which your petitioners did; and the said John McLelland, discharging the said trust, placed the said paper writing in the hands of Joseph H. Bradley, Esq., an attorney of this court, who lodged the said paper in the Orphans' Court of the county aforesaid.

Your petitioners claim that by the said paper writing, so executed and delivered, they are entitled to their freedom, and they are advised it was not necessary that the said paper should have been signed by said witnesses, and that the same is a good and operative deed. But if the said deed ought to have been signed by said witnesses, they claim that this court, acting as a court of chancery, will permit the execution thereof to be proved now, and will decree the said deed to be put on record.

They further show that, after the delivery of the said deed to your petitioners, the said George Miller departed this life intestate, and that Henry Miller administered on his estate, and now claims them as part of the personal estate of said George Miller, and they pray that he may be summoned and required to show cause why the paper writing shall not be admitted to record, and your petitioners declared free.

Joseph H. Bradley,
For Petitioners.

The counsel for the respective parties then filed the following agreement:

Agreement of Counsel.

It is agreed that if this court shall be of opinion that they would have power, sitting in chancery, to decree the record of the deed, the execution of which was imperfect under the law, because the witnesses did not sign it, "in such case this court shall have the same power to decree or adjudge the said defect to be rectified as it would if sitting as a court of chancery," it being distinctly understood that the facts are not admitted, but proof thereof is required, and the defendant is to offer any legal proof to meet the petitioners' case; and the petitioners are to sustain their petition by competent proof. It being the object of this agree- [*74 ment to avoid the expense of a bill in chancery, and to bring all the questions which may arise at law or in equity before the court under the petition.

Joseph H. Bradley, for Petitioners.
William L. Brent, for Defendant.

The instrument relied on in support of the petition, as the deed of manumission from George Miller, and referred to in the bill of exceptions as paper marked A, was in these words:

To all whom it may concern, be it known that I, George Miller, of Washington County, District of Columbia, for divers good causes and considerations me thereunto moving, have released from slavery, liberated, manumitted and set free, and by these presents do hereby release from slavery, liberate, manumit, and set free, my negro women, one named Betsey Herbert, about forty-two years of age, and the *other named Caroline Herbert*, about seventeen years of age, both able to work and gain a sufficient livelihood and maintenance; and they, the said negro women, named Betsey Herbert and Caroline Herbert, I do declare to be henceforth free, manumitted, and discharged from all manner of service or servitude to me, my executors or administrators, forever.

In witness whereof, I have hereunto set my hand and seal, this 28th day of February, in the year of our Lord one thousand eight hundred and forty-two.

George Miller. [Seal.]

District of Columbia, Washington County, to wit:

Be it remembered, and it is hereby certified, that on this 28th day of February, in the year of our Lord eighteen hundred and forty-two, personally appeared before me, a justice of the peace in and for said county and district, George Miller, and acknowledged the foregoing deed or manumission to be his act and deed for the purposes therein mentioned, as witness my hand and seal.

Samuel Drury, J. P. [Seal.]

Issue having been joined upon the right alleged in the petition, and a jury been impaneled to try that issue, the following bill of exceptions was, at the trial, sealed by the judges:

Defendant's Bill of Exceptions.

Betsey and Caroline Herbert,
v.
Henry Miller, Administrator of George Miller.

The plaintiffs offered evidence tending to prove that George Miller, who owned and held the slaves, petitioners, sent for a magistrate, Mr. Drury, and also two witnesses to witness the paper marked A, which paper was signed by said Miller in the presence of said witnesses, and acknowledged before said Drury, but was not then, and never was, signed by said intended attesting witnesses, before whom and in whose presence said Miller admitted the deed to be his, and desired said witnesses to attest to the same; to the reading of said pa- [*75 per in evidence the defendant objected, and said objection was overruled and excepted to by the defendant. The defendant then offered evidence tending to prove that the paper marked A, was, immediately upon the death of the maker, Miller, which took place about eighteen months after the execution thereof, delivered to Mr. McLelland, by the petitioners, who stated that it was so done by the direction of Miller, and who also stated that they held possession of the paper from the time of its execution until that time, and also that Miller, the grantor in said paper A, died largely indebted, and left no property other than said petitioners, sufficient to pay his debts; and, also, that defendant has regularly and duly administered upon the estate in this county of said deceased. Whereupon the defendant, by his counsel, moved the court to instruct the jury that upon the evidence aforesaid the plaintiffs are not entitled to recover; which instruction was refused by the court, and the defendant excepts to said refusal, and prays that this his several bills of exceptions may be signed, sealed, and enrolled, which is accordingly done.

W. Cranch, [Seal.]
B. Thruston, [Seal.]

Howard v.

The jury, under the instructions given by the court, found a verdict for the petitioners, viz., that they were free.

To review these two decisions of the court, the case was brought up by writ of error.

It was argued by Mr. Coxe for the plaintiff in error, and Mr. Lawrence for the defendants in error.

Mr. Coxe, for the plaintiff in error, insisted that there was error—First, in admitting the instrument A to be read in evidence to the jury; and, second, in refusing to instruct the jury that upon the said instrument, which was not recorded within eighteen months after the date, nor at any time during the life of George Miller, the petitioners could not recover.

Mr. Lawrence, for the defendants in error.

The only facts which can be taken into consideration in this case are those which appear in the record. Those facts afford no ground for the assumption, on the other side, that the deed of manumission, now in controversy, was retained in the possession of the grantor until the time of his death, and there is, consequently, no foundation for the argument that has been advanced—that although this deed was, on the face of it, to take effect in presenti, yet it was, as matter of fact, to take effect in futuro.

As to the remarks that have been made upon the double aspect in which the petition in the court below is regarded, that is, as a petition for freedom, and in the nature of a bill in equity, this court is referred to the agreement which is 76*] made part of the record, and *in which every defect that a court of chancery is competent to remedy, is to be considered as having been already remedied. This agreement is of special importance, in regard to any objection that might arise in consequence of the deed having been received in evidence in its then existing state.

The whole argument for the plaintiffs in error proceeds upon the ground that there was only one class of deeds comprehended in the Act of 1796, or, that if there were two classes, they were both to be authenticated in the same manner. I maintain that there were two classes of deeds to be differently authenticated; the one to take effect in presenti, and to be "evidenced" by two witnesses; the other to take effect in futuro, and to be acknowledged and recorded.

This was a deed of immediate emancipation, and was "evidenced" by two witnesses. It is to be presumed that the Legislature, in omitting the ordinary and technical words "attested and subscribed," and making use of a word hardly known in legal phraseology, did so understandingly. This is especially the case, when it is remembered that prior to the Act of 1752 (almost in the same words as that of 1796) there was no restraint in the manumission of slaves. Those acts were in restraint of a common right. The word "evidenced" is a verbal derivative from the term "evidence," and is equally extensive in signification, unless there is some technical usage to restrict it. There is no such technical usage. "Evidence" is a word of the largest signification known to the law, and embraces every kind of proof. Jac. Law Dic.; 3 Co. Litt. 487; 1 Greenleaf on Evidence, 1; 3 Bl. Com. 367. *Wherever any word* implying

proof, other than the words "attested" or "subscribed" has been used, the uniform decision (except in Maryland) has been, that the subscription of the names is not necessary. 2 Tuck. Black. 308, note; Turner v. Stip, 1 Wash. Va. Rep. 322, 4 Kent's Com. 514; 6 Cruise's Dig. Am. ed. 44, 47, notes.

The case of James v. Gaither, 2 Harr. & Johns. 176, has been cited as the Maryland construction of the Act of 1796, and as decisive of this case. That case is not of local authority here, in the sense in which this court usually defers to the local construction of local laws. By the act of Congress the laws of Maryland, then in force, were made the laws of the District of Columbia. But, if it were otherwise, this court would examine the subject de novo. Fenwick v. Chapman, 9 Peters, 461; Wallingsford v. Allen, 10 Peters, 593; see opinion of the judges, seriatim, on the case of James v. Gaither, in 7 Leigh, 300, et seq. But admitting the construction of the Maryland Court of Appeals in James v. Gaither to be correct, it touches this case only in a single point, viz., in the meaning it gives to the term "evidenced." That was a case of future emancipation, and the court decide that in such a case the deed *must not only be acknowledged and re- [*77 corded, but also "evidenced" by two witnesses. But it does not decide that the converse of the proposition is true; that deeds in presenti must not only be "evidenced," but also acknowledged and recorded. Admit, then, that the act requires the witnesses to subscribe their names, can a court of chancery require or permit it now to be done? There is no time limited in which it must be done. The act does not, like the statute of wills, require it to be done at the time. Whenever done the terms of the law are satisfied. What is it that is asked? That the requisitions of the act should be set aside? That merely fictitious names should be inserted, to present to the eye only a compliance with the statute? By no means. But that those who actually were witnesses to the deed should be permitted to put their names to it. The deed, when thus perfected, would present a literal, substantial, and conscientious fulfillment of the requisites of the act.

But it has been objected that this deed was in prejudice of creditors. To this the answer is, that there is no evidence in the record that the grantor was indebted at all at the time of the execution of the deed. Proof of this fact is necessary. It is, indeed, stated that he died, leaving no other property sufficient to pay his debts. This is too general from which to infer (if the court could indulge in any inference as to the facts) that he was indebted eighteen months before. The decisions, under the 13 Eliz., have uniformly been that a voluntary deed cannot be avoided by creditors, unless it is shown that the grantor was indebted at the time of its execution; and, in that case, there is a personal disability, and the deed is void, ab initio. 4 Cruise's Dig. 461, 462; 1 Atk. 93, 94; 1 Madd. Rep. 419, 420; 3 Johns. Ch. Rep. 490, 493. But, in this case, there was no such disability shown at the execution of the instrument. The grantor, having done everything on his part, had parted with all power over the subject. The act of subscribing, by the witnesses, was merely formal, and

no time limited in which it should be done. And although, until that act should be performed freedom might not pass, still no act of the grantor then could revoke the deed. This view is illustrated by the case of a bargain and sale, under Stat. 27 Hen. VIII., requiring enrollment before lands, etc., should pass. It has been decided, under that statute, that if the bargainer dies, or aliens the land, or marries, or becomes bankrupt, after the execution of the deed, and before its enrollment, and then within the time limited the deed is enrolled, it overrides any and all of these intermediate acts, and takes effect, by relation, from the time of its execution. Shep. Touch. 224, 226; 2 Vin. Ab. 419; 1 Bac. Ab. 688; 7 Leigh, 696, 711, 712. There can be no difference, as to the law of relation, whether the formal act, remaining to be done, be enrollment or attestation; nor whether a time be or be not limited in the statute.

78*] *As to the aid which courts of equity will extend in carrying into effect instruments of emancipation, cited 1 Hen. & Mun. 519; 2 Ibid. 132; 1 Leigh, 465; 6 Rand. 162.

Mr. Justice Daniel, after having read the statement of the case at the commencement of this report, proceeded to deliver the opinion of the court:

By the statute of Maryland, passed in 1715 (ch. 44, sec. 22), it is enacted, "That all negroes, and other slaves then imported, and their children, then born or thereafter to be born, shall be slaves for life." Upon examining the legislation of Maryland, from the period of the law of 1715, a variety of enactments will be seen, showing the policy of this State in the government of her slave population; and, as entering essentially into that policy, must be considered the several regulations under which she has permitted manumission, either by deed or by will. The enactments here referred to may be found in Kilty's Laws, Vol. I., session of 1752, ch. 1, where they are collated, by their dates, down to the Act of December 31st, 1796, under which last-mentioned statute the questions now before this court have immediately arisen. In the interpretation given to these statutes by the tribunals of the State, one characteristic will impress itself on every mind; and that is, the strictness with which the laws have been expounded in reference to the power of manumission conferred by them. It seems to have been thought that very little, or indeed nothing, was permitted by the policy of the State to construction or implication, but that rather the conditions prescribed for the exercise of the power conceded should be fulfilled almost to the letter. Of the propriety of views such as these, on the part of the State, with regard to her own internal policy, no just ground of complaint can be alleged; but of the reality of those views, a reference to a few of the adjudications of her courts will leave no doubt. By the Stat. of 1752 (ch. 1, sec. 5), manumission was allowed, by writing, under bond and seal, "evidenced by two good witnesses at least." Under this statute arose the case of Negro James v. Gaither, which was a claim to freedom, upon a writing signed and sealed, but subscribed by a single witness only. *Parol proof being offered to establish* the fact that the deed was executed in the presence of another witness, who did not attest it by subscription, the Court of Appeals ruled such proof to be incompetent and inadmissible under the statute. See 2 Harris & Johnson, 176.

The case of Wicks v. Chew et al. 4 Har. & Johns. 543, a case arising under the statute of 1796, is yet more strongly illustrative of the rule above mentioned. By the statute just referred to (ch. 67, Sec. 29, Kilty's Laws), deeds of manumission are required to be recorded within six months from their date. By another statute of Maryland, passed in 1785 (Kilty's Laws, ch. 72), it is *provided, in the [*79 third section thereof, "That in case any deed hath been or hereafter shall be executed, to the validity of which deed recording is necessary, and such deed hath not been or shall not be recorded agreeably to law, without any fraudulent intention of the party claiming under the same, the Chancellor, upon petition of the party to whom the said deed was executed, or of his, her, or their legal representative, or of any of them claiming the land or other thing conveyed or intended to be conveyed by such deed, and without the appearance or hearing of the defendant or defendants, shall have power to decree the recording of the said deed in the county or general court records, within such time from the date of the decree as it ought originally to have been recorded from the date of the deed"; giving to the deed, when thus admitted to record, the same effect it would have had if the irregularity thus cured had never occurred. Chew and others, claiming freedom under a deed from Darnell, against Wicks and others, heirs and devisees of Darnell, filed their petition with the Chancellor, stating that Darnell had died without putting the deed on record within the six months prescribed by law, and praying the Chancellor, upon due notice to the heirs and devisees, to decree that the deed be recorded, that thereby validity might be restored to it. The Chancellor, deeming himself so authorized by the third section of the Act of 1785, decreed that the deed be admitted to record within six months from the date of his decree. The Court of Appeals reversed this decision of the Chancellor, and the reasoning of the court conclusively shows the principle on which they place these instruments of manumission, and on which they distinguish them from transactions with a party who is sui juris.

They declare that the statute of 1785 embraces only cases of mutual but inchoate rights, but still of rights founded on some valid consideration, such as courts can take notice of and enforce; that manumission by the laws of Maryland is a mere gratuity, and until evidenced by all the acts or requisites the law prescribes, has no legal existence, and can have created no faculty in the contemplated object of that gratuity. The language of the Court of Appeals is as follows: "The acts of Assembly referred to (i. e., by the Chancellor in support of his decree) are not intended to give relief in cases which were before without remedy, but to give an additional remedy by enabling a party, acquiring equitable rights under a deed not operative in law for want of recording, to perfect those rights, by applying to the Chancellor to order the original instrument to be recorded, and thus to give it the effect which by law it

would have had if recorded in due time, instead of going into chancery to compel a conveyance, or enforce a specific performance. They are intended to give an accumulative remedy to persons able to contract, and who by deed acquire rights which equity will protect, with the power to prosecute those rights. But by the laws of this State, a negro, so long as he is a 80*] slave, can have *no rights adverse to those of his master; he can neither sue nor be sued, nor can be make any contract or acquire any rights under a deed which a court of law or equity can enforce. And as it is the recording of a deed of manumission within the time prescribed by law, which entitles him to his freedom, he continues a slave and can acquire no rights under such an instrument until it is so recorded, and consequently cannot go either into a court of law or equity for relief of any kind." Again, the court say in this case, that "A master may execute and acknowledge a deed of manumission, and afterwards destroy it or keep it, and refuse to have it recorded, and the slave remains a slave without redress." Another striking instance of the rule of interpretation of their own statutes, adopted by the courts of Maryland, is found in the case of Negro Anna Maria Wright v. Lloyd N. Rogers, reported in 9 Gill & Johns. 181. In this case, Tilghman, the owner of the female slave, executed and delivered to her, in 1832, a deed of manumission, which was duly acknowledged but not recorded. Subsequently, Tilghman sold and conveyed the same slave by bill of sale, duly acknowledged and recorded, to a purchaser who had notice at the time of the previous deed of manumission. This purchaser afterwards sold the slave to Rogers, to whom, in 1833, he executed and delivered a bill of sale, which was acknowledged and recorded according to law. The Legislature, at their session, December, 1834, passed a special law, authorizing the deed of manumission to be recorded, providing further that the same when recorded should be as valid and effectual for every purpose as if it had been duly recorded according to law. After the deed had been recorded pursuant to this law, the negro filed her petition for freedom; the judgment of the County Court was against her title, and that judgment was affirmed by the Court of Appeals.

By the 29th section of the statute of 1796, (Kilty's Laws, ch. 67), the power of manumission by writing under seal was re-enacted from previous statutes, enumerated and repealed in the 31st section of the Act of 1796. In the 29th section, many of the conditions contained in the prior laws are prescribed, and amongst these are the requisitions, that the slave to be emancipated shall be sound in mind and body, and not over 45 years of age; that the deed of manumission shall not be in prejudice of creditors; that it shall be acknowledged before a magistrate, and entered amongst the records of the County Court where the person or persons granting such freedom shall reside, within six months from the date of such instrument of writing. Upon the construction of this section of the Act of 1796 arose the questions presented to the court below, and now brought here for adjudication. These questions are various, as appears by the bill of exceptions sealed by the judges of *the Circuit Court, and by the assignment of*

errors upon the record; but they are all necessarily subordinate to a decision upon the validity of the *instrument of manumission as [*81 affected by the failure to record it within six months from its date. This omission is admitted in the petition for freedom, and is made out by the proofs upon which the instruction prayed by the defendant in the court below was asked and refused, and it remains to be considered how far such omission operated to destroy all foundation of the right sought to be asserted in this case. This inquiry, as a question of Maryland law, we think is without difficulty. The decisions already quoted are clear and explicit. They treat the right asserted and the instrument alleged in evidence thereof as having no legal existence, as nullities to all intents and purposes, and therefore as nothing of which common law or equity can take cognizance, until that right and the pretended evidence of it can be brought forward, attended with every mark and attribute of being, which the statute has called for, and one of these, as clearly defined as any other, is admission to record. This, indeed, is treated as the great, the capital test of existence, for it is this which places the transaction definitively beyond the control of the master, and proclaims, beyond the power of denial, both the intent and its consummation. And why should this not be treated as a question of Maryland law? The statutes of Maryland in being at the cession of the District of Columbia were adopted as the laws of the County of Washington, to be there enforced until altered by authority of Congress, and the rights of person and of property vested or existing under those laws, and all interpretations of those laws by the supreme tribunal of Maryland, became in like manner the rules of right within the same county. This case, too, is one of a right sought to be maintained under a Maryland statute, a right which seeks to lay its foundation in the terms of that statute, and nowhere else. But whilst it is conceded as a general proposition that the laws of Maryland, at the period of the cession of the District of Columbia, are laws of the County of Washington until changed by the authority of Congress, it has been urged that, in instances in which the Maryland statutes have received no settled interpretation by the Maryland courts anterior to the cession of this district, the federal courts are free to interpret the provisions of those statutes as they would be to pass upon any other subject of original cognizance, and would not be bound by decisions of the State courts made posterior to the cession. This position is not denied; it has indeed been sanctioned by this court in the cases of Fenwick v. Chapman, 9 Peters, 461, and Wallingsford v. Allen, 10 Peters, 583. But admitting this position fully, still we must also admit that the courts of the United States would feel great respect for the decisions of the State courts upon questions essentially connected with the general internal policy of the State, nay, would yield to those opinions upon matters of doubtful construction, or wherever well ascertained and paramount obligations did not forbid such an acquiescence. But the statute of 1796 was anterior to the cession of the District of *Columbia; and although the [*82 cases of Wicks v. Chew et al. 4 Harr. & Johns., and of Anna Maria Wright v. Rogers, 9 Gill

& Johns., were posterior to that event, still these cases cannot be correctly understood as deciding any new question, or as introducing any principle not well settled long before it. The case of James v. Gaither occurred under the statute of 1752, and upon an instrument of manumission executed in 1784; the statute of 1796, too, is a re-enactment of provisions of other statutes, going back as far as the year 1752, and the decision in James v. Gaither, and in the subsequent cases, are nothing more than the repeated expositions of a settled policy or rule of interpretation of the Maryland statutes, viz., that the conditions prescribed by them must be strictly fulfilled; that without such fulfillment any pretended instrument of manumission must be treated as a nullity, and can impart no rights, can give no standing in court, either at law or in equity. We think then that this is a question of Maryland law, which has been settled by the courts of Maryland, and should not now be disturbed; that in conformity with decisions of those courts, the recording of the deed of manumission in this case, within the time prescribed by the statute of 1796, was an indispensable prerequisite to confer any rights on the petitioners in the court below, or to give them any standing in a court of law or equity; that in accordance with this interpretation of the statute, the Circuit Court should have given the instruction asked for by the counsel for the defendants; that in refusing to give such instruction that court has erred, and therefore its decision should be reversed.

In reference to the agreement signed by counsel and annexed to the record in this case, and by which all the powers that a court of equity could properly exert in aid of instruments defectively executed were conceded to the Circuit Court as if sitting as a court of equity, we remark that the grounds presented by that agreement are entirely covered by the opinion above expressed of the absolute nullity of the deed in question, it being no more within the powers of a court of equity than it is within those of a court of law, to set up and establish that which is illegal or wholly void.

Order.

This case came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

83*] *THE ALEXANDRIA CANAL COMPANY, Plaintiff in Error,

v.

FRANCIS SWANN, Defendant.

Arbitration—in action of trespass no question of justification before arbitrators where only general issue pleaded—corporation as a party—submission—assent of attorney—umpire selected before disagreement.

Where a case is removed from Alexandria County to Washington County, in the District of Columbia, whatever defenses might have been made in Alexandria County, either as to the form of the action or upon any other ground, or whatever would have been a bar to the action, may all be relied on in the new forum.

But the mode of proceeding by which the rights of the parties are determined, must be regulated by the law of the court to which the suit is transferred.

A reference to arbitrators, therefore, which is sanctioned by the laws of Maryland governing Washington County, is not to be overthrown because it is not sanctioned by the laws of Virginia, governing Alexandria County.

The validity of the reference, and of the proceedings and judgment upon it, must be tested by the laws of Maryland.

Although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment.

So, also, a power to agree with a proprietor for the purchase or use of land includes a power to agree to pay a specified sum or such sum as arbitrators may fix upon.

It is immaterial whether the power of reference is lodged in the president and directors or in the stockholders assembled in general meeting; for the entire corporation is represented in the court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party.

Where the order of evidence provides for the appointment of an umpire, it is no error if he is appointed before the referees had heard the evidence and discovered that they could not agree.

Where the agreement for reference contained a clause, providing that upon payment of damages of the owner of the land he should convey it to the other party, it was proper for the umpire to omit all notice of this. It was not put in issue by the pleadings, nor referred to the arbitrators.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, in and for the County of Washington. It originated in the County of Alexandria, and was removed to the County of Washington under an act of Congress providing for such removals.

The circumstances of the case are so fully set forth in the opinion of the court that it is unnecessary to do more than refer to it for a statement of the facts.

The cause was argued at December Term, 1845, by Messrs. Bledsoe and Coxe for the plaintiff in error, and by Messrs. William T. Swann and Jones for the defendant in error. At the present term the court gave its opinion.

Mr. Bledsoe, for the plaintiff in error, contended:

1. That there was no legal or valid reference.
2. That there was no legal or valid award.
3. That there was no legal or valid judgment.

1. The president and directors had no power under their charter to submit a case to arbitration. The rule is well settled that they have no power except under the charter. 5 Conn. Rep. 568; 2 Cranch, 158; Angell & Ames on Corp. 200, 201, 229, 242; *7 Cranch, 299; 14[*84 Johns. 118; 12 Johns. 241; 15 Wend. 256; 7 Cowen, 462; 1 Cowen, 513; 12 Wheat. 58.

The charter (Davis's Laws, 558) says, that where land is to be taken, the company may agree as to the price. But if no agreement can be made, they are to apply to justices of the peace, who are to call a jury. But in that case the whole twelve must agree.

The thirteenth section of the act thus pointing

NOTE.—As to arbitrament and award, see notes to 6 L. ed. U. S. 516; 43 L. ed. U. S. 118.

out the mode of condemning land, none other was justifiable. The seventeenth section gives the company the right to enter upon land, and therefore they cannot be guilty of a trespass.

One partner cannot bind another by agreeing to arbitrate. Watson on Part. 445; 3 Bing. 101; 11 Com. Law. Rep. 52; Story on Part. 169; 1 Peters, 222, 228.

The attorney here has undertaken to make the president and directors do things which are not justified by law.

In England, where property is taken for public use, the party has no remedy; and in this case the remedy given by the charter is exclusive. 11 Mass. 364, 365, 368; 20 Johns. 735; 4 Wend. 347, 367, 370; 4 N. H. Rep. 547; 2 Johns. 283; 7 Johns. Ch. Rep. 315; 1 N. H. Rep. 339.

Mr. Bledsoe then examined the terms and mode of arbitration.

Mr. William T. Swann, for the defendant in error, made the following points:

1. It will be unnecessary to consider any part of the record prior to the submission of the case to arbitration; as the submission in such a case, under a rule of the court, operates as a waiver of all exceptions (if any could be conceived), or as a release of all errors anterior to the rule.

2. No exceptions having been taken in the court below to the award, the grounds of the appeal are unknown; nor can any, by the counsel in this case, be conceived. But if any objections could be presented, it is now too late; they should have been presented either by motion or exception in the court below.

3. In this case the award is supported by a recital of various matters of procedure under the arbitration in the award itself, by the certificate of two of the arbitrators, and by affidavits proving such matters of procedure in the case. This is a support far beyond what the law requires. A simple award of a sum of money under the submission, without any recital of such facts in the award, and without any proof of them, is sufficient; any omission or irregularity in regard to such extrinsic matters being brought forward by motion in the court below to set aside the award.

Mr. Swann then examined the record, and contended that the arbitration was according to law. The other matters of defense, he said, cannot be alleged here. There is no special 85*] plea in *Washington County, and we do not admit the facts upon which the argument rests. The charter does not give the remedy spoken of to the party aggrieved, because he cannot originate the process of summoning a jury, etc. 4 Gill & Johns. 147; 4 Wend. 667, 372.

If the company have power to enter land without condemnation, it ought to have been specially pleaded.

A submission of a cause to arbitration disembarrasses it of legal question. 1 Washington Rep. 320; 10 Mass. Rep. 215; 8 Serg. & Rawle, 3; 4 Hen. & Mun. 216; 5 Binney, 177. The statute of Maryland, passed in 1778 (ch. 21, secs. 8, 9), points out the mode of proceeding by arbitration. It is a common law process, too. The power to refer is a necessary incident to the power to be sued. If the company are sued they can *defend themselves in any* manner *known to the laws. The submission* in this case was by the company itself, and not by the president and directors only. The attorney in court represented the whole company.

Mr. Jones, on the same side:

If they object to the award they should have moved, in the court below, to set it aside. Otherwise it is presumed to be right. It is too late to urge the objections in an appellate court, because, as the court below never passed a judgment upon the point, it would make this a court of original jurisdiction. 2 Schoale & Lefroy, 712. When the cause was removed, it was to be tried by lex fori, of which arbitration is a part. It is denied that the president and directors had any power to submit the case. But how does it appear that the president and directors did it, and not the company? A corporation can only appear by its corporate name. This suit was so brought and they appeared to it. So the power of the attorney is denied. But will the court presume that he acted without authority? A corporation is liable for a tort. 16 East, 5; Angell & Ames on Corp. 328, 329; 8 Peters, 117.

Mr. Coxe, for plaintiff in error, in reply and conclusion, examined the history of the law of arbitration, and the statutes of Virginia and Maryland; and then contended that an action of trespass quare clausum fregit would not lie against a corporation. He then examined the authorities cited by Mr. Jones. If the corporation kept within their charter they were not suable, of course. If they went beyond it, and appointed agents to do things not justified by law, the agents are responsible. A suit only lies against the employer when the agent is acting within the scope of his authority. This suit was brought in Alexandria, where the corporation appeared by attorney and filed pleas. When it was removed to Washington an amended declaration was filed, but it was not a *substitute for the old one, because the [*86 old one remained in court, and so did the former pleas.

Mr. Coxe then contended that the reference was improper and illegal, and cited Kyd on Corp. 45, and commented on the charter of the company.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought here by writ of error from the Circuit Court for Washington County, in the District of Columbia. The suit was originally brought in Alexandria County by the defendant in error, against the plaintiff; and upon the motion of the former was removed to Washington County under the provisions of the Act of June 24, 1812, sec. 3. The points raised in the argument make it proper to state the pleadings more fully than is usually necessary.

It was an action of trespass for breaking and entering the plaintiff's close, situate in the County of Alexandria. The suit was brought in July, 1839. The declaration contained but one count, in the usual form, stating the trespass to have been committed on divers days and times between the 1st of January, 1835, and the commencement of the suit.

The defendant pleaded, first, not guilty; second, the statute of limitations; and third, that the canal company entered under the au-

thority of the Act of Congress, for the purpose of making the canal; and that it is ready to satisfy any damages to which the plaintiff is entitled, when they shall be ascertained in the mode pointed out in the act of incorporation.

After these pleas were put in, and before any replication was filed or issue joined, the cause was removed to the Circuit Court for the County of Washington, by an order passed on the 12th of November, 1841, upon the motion of the defendant in error. The case was continued in that court without any alteration in the pleadings until November Term, 1842, when an amended declaration was filed. This declaration consisted of a single count, and differed from the original one only in undertaking to set out the abuttals of the close in which the trespass was alleged to have been committed. The defendant in the Circuit Court pleaded not guilty to this declaration, upon which issue was joined and a jury sworn; but before a verdict was rendered a juror was withdrawn by consent, and upon the motion of the parties by their attorneys the matter in variance between them was by a rule of court referred to four arbitrators named in the order of reference. The reference was made upon certain terms specified in a written agreement filed in the case, setting forth the manner in which the arbitrators were to be selected and the damages calculated, with power to the referees to choose an umpire, if they or a majority of them could not agree.

87*] *The arbitrators, before they entered upon an examination of the case, appointed an umpire, who afterwards made his award, and thereby awarded that the defendant (in the District Court) should pay to the plaintiff the sum of six thousand nine hundred and sixty-eight dollars and seventy-five cents, in full satisfaction of all the matters of damage and value submitted to his umpirage. This award was filed September 21, 1843, and notice of it regularly served on the plaintiff in error; and thereupon a judgment was entered for the amount awarded on the 17th of January, 1844. It is upon this judgment that the present writ of error is brought.

It appears from the record that no objection was taken to the award in the Circuit Court, nor any affidavits filed to impeach it. Several depositions were filed by the defendant in error, which are not material to this decision, except in one particular, which will be hereafter noticed, on account of an objection to the award founded upon it.

The reference to arbitrators and the proceedings thereon, and the judgment given by the court below, were all under and intended to be pursuant to the Acts of Assembly of Maryland of 1788 (ch. 21, sec. 9, and 1785, ch. 30, sec. 11). It is admitted that these proceedings were not authorized by the laws in force in Alexandria County; and it is objected by the plaintiff in error that, inasmuch as no judgment could have been lawfully rendered upon these proceedings in Alexandria County, no judgment ought to have been rendered upon them in Washington; that the removal of a case under the laws of Congress is a mere change of venire; and that the rights of the *parties are still to be tried* according to the *laws and modes of proceeding* recognized and established in the Circuit Court for the county in which the suit was originally instituted.

Undoubtedly, whatever rights the canal company had in Alexandria County, and whatever defenses it might there have made, either as to the form of the action or upon any other ground, it might still rely upon them in the new forum; and whatever would have been a bar to the action in Alexandria County would be equally a bar in Washington. The question here, however, is not upon the rights of the respective parties, but upon the mode of proceeding by which they were determined; and this must evidently be regulated by the law of the court to which the suit was transferred. For after the removal took place, the action, according to the act of Congress, was pending in Washington County, to be there prosecuted and tried, and the judgment of that court to be carried into execution. And as the act neither directs nor authorizes any change in its practice or proceedings in removed cases, it follows that they must be prosecuted and tried like other actions in that court, and could not lawfully be prosecuted and tried in any other manner. In impaneling a jury, for example, for the trial of the facts, it could not put aside the jurors required by law to attend that court, and *direct a panel of twelve to be sum- [*88
moned for the particular case, pursuant to the law of Virginia. Nor could it deny to either party the right to strike off four names from the list of twenty, according to the law of Washington County, although the rule is otherwise in the County of Alexandria. And upon the same principles the selection of arbitrators, the proceedings before them, and the legal effect of their award, could be no more influenced by the law upon that subject, on the other side of the Potomac, than the summoning, striking and impaneling of a jury. The validity of the reference, therefore, and of the proceedings and judgment upon it, must depend upon the law of Maryland and not upon the law of Virginia. And if the judgment given by the Circuit Court was authorized by the former, it cannot be impeached upon the ground that such proceedings would not have been lawful in Alexandria County.

Trying the case upon these principles, it is very clear that as no objection was taken to the award in the Circuit Court, the judgment upon it was correct and must be affirmed in this court, unless some substantial objection appears on the face of the proceedings or in the award itself.

It has been urged, however, that it is apparent, on the face of the proceedings, that the arbitrators committed a mistake in the law; that the record shows the acts complained of to have been done in execution of the power conferred on the company to construct a canal; and that under the act of Congress they had a right to enter upon any land they deemed necessary for that purpose, leaving the damages to be afterwards ascertained in the mode pointed out by the law; and that, consequently, an action of trespass will not lie.

But it is very clear that this question of law was not before the referees or the court; nor was it in any way involved in the decision of either. For if the plaintiff in error could have justified the entry upon the ground suggested, the justi-

fication ought to have been pleaded. And as this was not done, the question as to the legal sufficiency of this defense was not referred to the arbitrators nor decided upon by their award.

It is said, however, that it was pleaded. This is true as relates to the pleadings filed to the original declaration. But an amended declaration was subsequently filed, and to this the plaintiff in error pleaded anew. The amended declaration was not an additional count to the former one, but was itself the entire declaration substituted for the former. And it was evidently so regarded by all parties at the time. For the plaintiff in error renewed his plea of not guilty, which he had put into the former one, omitting, however, his former pleas of limitation and justification; and these two must have been understood to be waived, for there was no replication to either of them, nor any issue joined upon them, formal or informal. The questions, therefore, which would have 89*] arisen on these pleas, *were not in issue --were not referred by the written agreement— and, consequently, could not have been considered or decided by the arbitrators.

Neither can the objection be maintained which has been taken to the power of the company under its charter to confer such a question of damage. The corporation was a party to the action in court, and it might lawfully take any step that an individual might take, under like circumstances, to bring it to final judgment. And a trial by arbitrators, appointed by the court with the consent of both parties, is one of the modes of prosecuting a suit to judgment as well established and as fully warranted by law as a trial by jury.

But independently of this principle and of the pendency of a suit, the thirteenth section of the act of Congress authorizes the canal company to agree to a reference. It provides that the president and directors may agree with the proprietor for the purchase, or for the use and occupation of the land for temporary purposes; and it does not confine the power to an agreement specifying a particular sum of money. On the contrary, it authorizes an agreement in general terms. And if the company agree to pay such sum as arbitrators may award, this agreement is as clearly within the words and intention of the law as if a specific sum had been fixed upon by the parties. We therefore see no objection to the reference in this case, nor to the agreement by which it was made.

We do not think it necessary to inquire whether the power to direct the proceedings in the suit and assent to the reference belonged to the president and directors, or to the stockholders assembled in general meeting. The corporation, however governed in this particular, was the party defendant in court, and was represented by its counsel, and his acts are presumed to be authorized by the party in conducting the suit. This has long been the settled law of Maryland, which is the law of Washington County.

It is true that in this case the agreement for the reference is signed by the counsel who had appeared for the canal company in Alexandria, but who did not appear on the record in the *Circuit Court for Washington. Yet the attorney* who did appear joined in the motion for the reference, received notice of the award after it was returned, and made no objection to the authority under which the arbitrators had been appointed. It is too late to make it here, even if it would have been available in the Circuit Court. But as the attorney on the record must have united in the motion for the reference, it is very clear that the objection would have been untenable there, as well as here.

We see nothing, therefore, in the pleadings or proceedings anterior to the order of reference, which can impeach the correctness of the judgment in the court below. It remains only to examine whether there is anything liable to objections in the proceedings of the referees or in the award returned by the umpire.

*The authority of the umpire has been [*90 objected to, because it appears, by the affidavits filed by the defendant in error, that he was appointed before the referees had heard the evidence and discovered that they could not agree. But whatever doubts may have been once entertained upon this question, it is now well settled, both upon principle and authority, that the appointment is good. And indeed, it has been said by this court that it is more expedient to appoint the umpire in the first instance, as was done here, than to wait until the evidence was all heard and the arbitrators had finally differed. 8 Peters, 178.

The umpire, therefore, being regularly appointed, the remaining question is upon the sufficiency of his award. There was no dispute as to the title to the land, and upon the issue joined in the case; therefore, the only matter in controversy was, whether the acts complained of had been committed, and if they had, what damage was the defendant in error entitled to recover. This was the only matter in variance referred. The written agreement filed by the parties states the principles upon which they mutually agreed that the amount of damages should be calculated; and the award of the umpire ascertains and awards the amount upon the principles mentioned in the agreement. His award is upon the subject matter referred. It covers the whole controversy submitted to him, and nothing more; and upon that it is certain and final.

There is, indeed, in the written agreement for the reference, a clause which provides that, upon the payment for the damages awarded, the defendant in error should convey to the company the land selected for permanent occupation; and the umpire has taken no notice of this agreement to convey. We think he very properly omitted to notice it, for it was not put in issue by the pleadings, nor proposed to be referred in the argument filed. On the contrary, the duty of the arbitrators was limited to the question of damage. The value of this land was indeed one of the items they were required to consider in calculating the amount of damage; but they had no power to award how or when it should be conveyed. Nor does the right of the canal company to the conveyance depend in any degree upon the award or direction of the arbitrators concerning it. Their right is absolute by the agreement, upon the payment of the damages awarded; and the conveyance may be enforced like any other right acquired by contract.

Upon the whole, we are of opinion that there is no error in the judgment of the Circuit Court; and it must, therefore, be affirmed, with costs.

Order.

This cause came on to heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, 91*] and was *argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

HENRY D. BRIDGES, John K. Mabray, James N. Harper, and Stern Simmonds, Late Merchants and Partners in Trade, under the Name, Firm, and Style of Bridges, Mabray & Company, Plaintiffs in Error,

v.

WILLIAM ARMOUR, Henry Lake, and Felix Walker, Late Merchants and Partners in Trade, under the Name, Firm, and Style of Armour, Lake & Walker, Defendants in Error.

Plaintiff in action after discharge in bankruptcy is not competent witness.

A party upon the record, although devested of all interest in the event of the suit, is not a competent witness in a cause.

If a person be declared a bankrupt at a time when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. His liability for costs, therefore, excludes him as a witness upon the ground of interest.

If the event of the suit may increase the effects of the bankrupt in the hands of the assignee, and thus increase the surplus which would belong to him, he is an incompetent witness.

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

On the 26th of September, 1840, Bridges, Mabray & Co., gave their promissory note to Armour, Lake & Walker, or order, payable one day after date, for $3,158.69, being balance of book account, bearing interest at eight per cent. per annum, from the first day of August, 1840, until paid.

The note not being paid, a suit was commenced on the 12th of November following. As no question arises upon the pleadings, it will be unnecessary to refer to them. They resulted in several issues of fact.

On the trial, in June Term, 1844, the plaintiffs offered in evidence the deposition of Walker, a coplaintiff on the record, taken in answer to interrogatories and cross-interrogatories before a commissioner in New Orleans, in pursuance of a stipulation between the attorneys; and in which the attorney for the defendants agreed to waive any exception for want of issuing a commission, in due form, to take the testimony, or for want of notice of its execution to the defendants.

It appeared on the trial that Walker had obtained a discharge under the Bankrupt Act, by which he was discharged from all his debts owing by him at the time of presenting his petition, to wit, on *the 30th of Decem- [*92 ber, 1842. The discharge was granted on the 12th of May, 1843.

In one of the interrogatories in chief the question was put to the witness whether or not he had any interest in the event of the suit, and, if none, in what manner his interest had ceased. To which he answered that he had none, and that his interest ceased on obtaining discharge.

The counsel for the defendants objected to the admission of the deposition, on the ground that Walker was a party to the record, one of the plaintiffs in the suit; but the objection was overruled, and the evidence admitted, to which the counsel excepted. The plaintiffs had a verdict.

The cause was argued by Mr. Coxe for the plaintiffs in error, and by Mr. Chalmers for the defendants in error.

Mr. Coxe contended—

1. That the deposition of Walker, then and still a party plaintiff on the record, was inadmissible.

2. That even if his discharge, under the Bankrupt Act, could make him a competent witness, it was necessary to establish that fact, as preliminary to the reading of his deposition, and by independent proof.

Walker's name is still upon the record, and he is one of the defendants in error in this court. The general rule upon the subject is clear, and the exceptions are few. The plaintiff in error must bring himself within one of the exceptions. 1 Peters, 596.

The case in 1 Peters C. C. R. 307, was overruled by this court in 12 Peters, 145, where it is said that the circuit decision is not to be sustained upon any ground.

The only exception to the general rule is in cases of tort where there are several defendants. The court will direct one to be acquitted, if justice requires it, in order that he may be a witness. 10 Pick. 18; 4 Wend. 453; 1 Bayley S. C. 308; 10 Pick. 57; 2 Bayley, 427. As to the extinguishment of his interest by the bankruptcy, see 10 Wheaton, 367, 375, 384.

An insolvent party cannot be a witness, but a certificated bankrupt may, provided his name be struck out of the record. 9 Cranch, 153, 158.

Mr. Chalmers, for defendants in error:

The only question presented upon the record in this case is the competency of Felix Walker, a party to the record, whose deposition had been taken upon interrogatories, by consent, after his discharge under the Bankrupt Act of Congress of the 19th of August, 1841. The suit was commenced 20th of November, 1840, by Armour, Lake & Walker (the witness) against plaintiffs in error; on the 12th of May, 1843, Walker was discharged; and on the 24th of *May, 1843, his deposition was taken, [*93 which, upon the trial, plaintiffs in error objected to being read, upon the ground "that the said Felix Walker is a party to the record;" which objection was overruled by the court, and the deposition was read; to which opinion

of the court a bill of exception was taken, and upon it the case is before this court.

It will not be seriously urged that Walker, the witness, was incompetent on the ground of interest, he having received his discharge under the Bankrupt Act, by which his interest was extinguished and so far his competency restored. For whatever interest he may have had, it was extinguished when he was sworn, and could form no objection to his competency. 1 Phillips on Ev. 133, by Cow. & Hill; Tennant v. Strachan, 4 Carr. & Payne, 31; 1 Mood. & Malk. 377. Indeed, if it did, plaintiffs in error waived the objection by failing to make it when the deposition was taken—it being known to them at the time. United States v. One Case of Hair Pencils, Paine's C. C. R. 400. So when a witness has been cross-examined by a party with a full knowledge of an objection to his competency, a court of equity will not allow the objection. Flagg v. Mann, 2 Sumner's C. C. R. 486. But the objection was to the competency of Walker as a party to the record.

It is a general rule in all common law courts, that a party on the record cannot be admitted to testify; the reason of this rule is the interest of the party called, and wherever that can be extinguished the rule ceases. In New York the rule, it seems, excludes the party without regard to the question of whether he be interested or not; but see Stein v. Bowman, 13 Peters, 209, 219, Worrall v. Jones, 7 Bing. 395, Aflalo v. Fourdrinier, 6 Bing. 306, Bate v. Russell, 1 Mood. & Malk. 332, Hart v. Heilner, 3 Rawle, 407, Scott v. Lloyd, 12 Peters, 145, 149, Henderson v. Anderson, 3 Howard, 73, Smyth v. Strader, 4 Howard, 404.

In the case of Willings v. Consequa, 1 Peters's C. C. Rep. 307, Washington, J., says "the general rule of law certainly is, that a party to a suit cannot be a competent witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed the objection ceases to exist." Mills, J., in Lampton v. Lampton's executors, 6 Monroe, 617, 618. Upon a full view of all the cases,[1] the counsel for defendants in error respectfully contends, that the District Court did not err in permitting the deposition of the 94*] party, Walker, to be read *to the jury, upon the ground of interest, or being a party, and that if incompetent for either cause the objection was waived by not having been made at the taking of the deposition.

Mr. Justice Nelson delivered the opinion of the court:

Whether a party on the record, devested of all interest in the result of the suit, and therefore unexceptionable on that ground, is a competent witness or not in the cause, can scarcely be regarded as an open question in this court after what has already fallen from it.

It is true, as stated by the counsel in the argument, that in all the cases in which the question has arisen, the party was liable for the costs of suit, and therefore interested; but whenever the question has been presented, the language of the court has been uniform, that the witness was incompetent on the ground of his being a party on the record. De Wolf v. Johnson, 10 Wheaton, 367, 384; Scott v. Lloyd, 12 Peters, 145; Stein v. Bowman et al. 13 Peters, 209.

In Scott v. Lloyd the court referred to a case in 1 Peters's C. C. R. 301, where it had been held, that a party named on the record might be made a competent witness, by a release of his interest, and expressed its unqualified dissent; and in Stein v. Bowman et al. 13 Peters, 209, in which Bowman, a party, had been admitted, the court, after noticing his liability for costs, remarked, that if he had been released, or a sum of money sufficient to cover the costs of suit brought into court, his competency would not have been restored.

The exclusion is placed on the ground of policy, which forbids a party from being a witness in his own cause, and that this would be the practical effect and operation of a rule of evidence, which would enable a party to qualify himself for a witness by releasing his interest in the suit. Though nominally discharged by the release, he would, usually, be the real and substantial party to the suit in feeling, if not in interest; thereby holding out to litigants temptations to perjury, and to the manufacturing of witnesses, in the administration of justice.

The question is one in respect to which different courts have entertained different opinions, and we admit that the argument in favor of the admission of the party, upon the general principles of evidence governing the competency of witnesses, is plausible, and not without force. But the tribunals which maintain the competency of the party, if devested of interest, still hold that he cannot be compelled to testify, and, also, that he cannot be compelled to testify when called against his interest; which, upon general principles, if consistently carried out and allowed to govern the question in the admission of the party, would lead them to an opposite result. They should be compelled to testify; for if the admission is *placed, [*95 as it undoubtedly is, upon principles applicable to the admission and rejection of witnesses generally, in the cause, and the party to be regarded as competent when without interest, or indifferent, or when called against his interests, then, like all other witnesses, he should be subject to the writ of subpœna, and to the compulsory process of the court; and not left at liberty to withhold or bestow his testimony at will.

There can be no distinction in principle, in this respect, in favor of a party to the record, if allowed as a witness at all; and the only ground upon which the court can stop short of going the length indicated, is, by giving up general principles, and placing itself upon policy and expediency, as upon the whole best subserving, in the instances mentioned, the interests of justice, and of all concerned in its ad-

1.—See those collected in 2 Phillips on Ev. by Cowen & Hill, notes, pages 134–136, 260–266; Haswell v. Bussing, 10 Johns. 128; Schermerhorn v. Schermerhorn, 1 Wend. 125; citing 3 Esp. and 3 Campbell; Supervisors of Chenango v. Birdsall, 4 Wend. 453; Duncan v. Watson, 2 Smedes & Marshall, 121; 1 Bing. 444; 6 Binney, 16; 4 New York, 24; 2 Day, 404; 11 Mass. R. 527; 12 Ibid. 258; 16 Ibid. 118; 3 Harr. & McH. 152; 3 Starkie on Ev. 1061, note.

ministration—a ground which has been supposed, by those holding a different opinion upon the question, quite sufficient to justify the entire exclusion of the party.

But the witness in this case is also liable to objection on the ground of interest. This suit was pending at the time he was declared a bankrupt and obtained his discharge; and it is quite clear, if the defendants had eventually succeeded, the discharge would not have been a bar to his liability for the costs of the suit. The judgment would have been a debt accruing subsequent to the discharge, which could not have been proved under the act. Act of Congress, August 19, 1841, sec. 4; 5 Statutes at Large, 443; Haswell v. Thorogood, 7 Barn. & Cress. 705; Brough v. Adcock, 7 Bing. 650. His future effects, therefore, would have been liable.

And even if the discharge could have operated in bar of his liability for the costs, the witness was still interested to procure a recovery in favor of the plaintiffs, as it would to increase the effects of his estate in the hands of the assignee, to the extent of his interest in the demand in suit, and to increase the surplus, if any, which would belong to him.

For this reason, a defendant, who has pleaded his certificate, upon which a nolle prosequi has been entered by the plaintiff, is not a competent witness for his co-defendant, without first releasing his interest in this fund. He would otherwise be interested in defeating a recovery of the demand in suit, as he would thereby diminish the claims upon his joint and separate property, and thus increase the surplus, if any, in winding up the estate. Butcher v. Forman, 6 Hill, 583; Aflalo v. Fourdrinier, 6 Bing. 306.

On all these grounds we think the witness was incompetent, and that the deposition should have been rejected.

It has been suggested that the objection to the witness came too late, and should have been made before the commissioner and before the cross-examination. But the case shows that both parties were aware of the legal objection to his competency, and that the testimony was taken by an arrangement between 96*] them, for the purpose *of presenting the question to the court. The counsel for the plaintiffs assumed, as is apparent from his interrogatories in chief, that the witness was incompetent on the ground of his being a party in interest, and took upon himself the burden of removing the objections. For this purpose, he produced his discharge in bankruptcy, and on the 14th inst., put the question to him whether he had any interest in the suit, and if not, to tell how it had ceased.

The question suggested does not arise in the case, and therefore it is unnecessary to examine it.

For the above reasons, we think the court below erred, and that the judgment must be reversed with a venire de novo.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of *Mississippi, and was argued* by counsel; on con*sideration whereof, it is now here* ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with directions to award a venire facias de novo.

HENRY A. HALL, Plaintiff,
v.
WILLIAM SMITH.

Surety's surety who pays the debt may maintain action against principal.

Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor, is a payment at his request, and is an express assumpsit to reimburse the amount.

Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Maryland.

The United States of America, District of Maryland, to wit:

At a Circuit Court of the United States for the fourth Circuit, in and for the Maryland District, begun and held at the city of Baltimore, on the first Monday in April, in the year of our Lord one thousand eight hundred and forty-four.

Present, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States; the Honorable Upton S. Heath, Judge of Maryland District; Z. Collins Lee, Esquire, Attorney; Thomas P. Pottenger, Esquire, Marshal; Thomas Spicer, Clerk.

Among other, were the following proceedings, to wit:

*Henry A. Hall } [*97
v. }
William Smith. }

District of Maryland, Circuit Court of the United States, April Term, 1844.

The declaration in this case contained counts, in the usual form, for money lent and advanced, money paid, laid out and expended, and money had and received, and an averment that the defendant was a citizen of the State of Mississippi, and the plaintiff of the State of Maryland. Plea, non-assumpsit, and issue upon it. The suit was instituted July 3d, 1843.

At the trial of the case, the plaintiff offered in evidence the two notes hereinafter inserted, with the indorsements thereon, and further offered in evidence to prove that the defendant being indebted to a certain Philip Thornton in the sum of money hereinafter mentioned, the

NOTE.—Rights and liabilities of sureties.

A surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such security is created, and by whatever means the surety's interest in it arises; and the creditor cannot himself, nor by collusion with the debtor do any act to impair the security or destroy the surety's interest in it.

said Thornton brought suit against him in Baltimore County Court, in the State of Maryland, on the 18th of July, 1839; while the writ was in the hands of the sheriff, and before the service thereof on the defendant, it was agreed between Smith and the attorney of Thornton that Smith should be permitted on his honor to go into an adjoining county to see his friends, to procure security in order to relieve himself from said suit. He went and returned; and on the 29th of July, 1839, in the State aforesaid, gave two promissory notes to Thornton, dated August 10th, 1839, one for $2,678.90, payable on the 1st of April, 1840, and the other for $2,669, payable on the 1st of June, 1840; both of which notes were indorsed by a certain James S. McCaleb and a certain James Kent, as securities for the said Smith; and upon receiving these notes, so indorsed, Thornton discontinued the suit against Smith. These notes were not paid at maturity, and were protested for nonpayment; and in June, 1840, Thornton brought suit on both of them against McCaleb, the indorser, in Baltimore County Court, upon which he, McCaleb, was arrested, and being in the hands of the sheriff, he applied to a certain Richard Lemmon, of the city of Baltimore, to become his bail. McCaleb was the son-in-law of Henry A. Hall, the plaintiff, who resides in the State of Maryland, about forty miles distant from the city of Baltimore, and Lemmon being an intimate friend of the said Hall, and knowing McCaleb to be his son-in-law, agreed to become his bail, from the confidence he had that the plaintiff would save him harmless; and he entered bail accordingly in both of these suits.

That at the first interview Lemmon afterwards had with the plaintiff, the latter introduced the subject, and without waiting for any application from Lemmon, assured him that he, the plaintiff, would save him harmless; and Lemmon having entire confidence in his verbal promise, did not ask any written security. Pending these suits Smith paid part of one of the notes, and before judgment was obtained upon either of them, Hall paid the balance of the last mentioned note, and upon an agree-
98*] ment made with the attorney of *Thornton, a suit by Philip Thornton against Henry Hall, the plaintiff, was docketed by consent on the 7th of September, 1840, in the Circuit Court of the United States for the District of Maryland, and on the declaration was indorsed a direction to the clerk to enter judgment for the amount of the damages in the narration, to be released on payment of $2,669, with interest from the 1st of January, 1840, and costs, and stay of execution until the 1st of July, 1841; which was signed by the attorneys for the plaintiff and defendant. That, accordingly, at the next term of said court, in November, 1840, on the 4th day of the month, said judgment was entered, and the suits against McCaleb, in which Lemmon was bail, according to an arrangement between the counsel of Thornton, McCaleb, and Hall, were dismissed, having been countermanded on the 1st of September, 1840, in consequence of an agreement made between said parties, Thornton, McCaleb, and Hall, previous to said countermand, that said suit should be docketed by consent, and judgment confessed, as was afterwards done in the manner above stated.

The judgment was confessed in the Circuit Court, in order to create a lien upon the real estate of Hall, which being situated in a part of Maryland which was not within the jurisdiction of Baltimore County Court, it was supposed that a judgment in that court would not be a lien upon it.

Upon the confession of this judgment in the Circuit Court, the notes above mentioned were delivered to Hall by the attorney of Thornton; a part of this judgment was paid to the attorney of Thornton, by a draft of Smith in favor of McCaleb, upon a house in New Orleans, and the balance due upon it was paid by Hall on the 30th of June, 1841. James S. McCaleb died in the State of Mississippi, of which he was a citizen, in the summer of 1842, and letters of administration on his estate were afterwards, on the 28th day of November, in the year 1842, granted by the proper authority in that State to Jonathan McCaleb; and on the 20th of May, 1843, the administrator assigned to Hall, the plaintiff in this case, the notes aforesaid.

The notes, with the several indorsements and assignments thereon, are as follows, to wit:

$2,669. Baltimore, August 10th, 1839.

On the first day of January next, I promise to pay to the order of James S. McCaleb, twenty-six hundred and sixty-nine dollars, for

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Nelson v. Williams, 2 Dev. & Bat. Eq. 118; Warner v. Beardsley, 8 Wend. 194; Selfridge v. Gill, 4 Mass. 95; Craythorne v. Swinburne, 14 Ves. 162; Parsons v. Briddock, 2 Vern. 608; Wright v. Morley, 11 Ves. 12; Harrison v. Glossop, Coop. 61; Folliott v. Ogden, 1 H. Black, 624.

As a general rule a surety in a bond is not liable beyond the amount of the penalty, although the principal and interest due by the condition of the bond exceeds that amount. Mower v. Kip, 6 Paige, 88.

In an ordinary case of suretyship for a debt which is justly due, if the principal debtor neglects to pay it at the time stipulated in the contract, the surety may file a bill against such a debtor and the creditor to compel the former to pay the debt and the latter to receive it, and thus to relieve the surety from further liability. Gibbs v. Mennard, 6 Paige, 258; Bishop v. Day, 13 Vt. 81.

Nothing short of a written agreement can render one liable as a surety under the provisions of the statute of frauds. Phelps v. Garrow, 8 Paige, 322.

The securities of a guardian are liable to the full extent of his obligation. M'Alister v. Olmstead, 1 Humph. 210.

Co-sureties assume the same risk, and stand relatively to the principal in the same situation, neither obtaining any benefit by the transaction, but each equally subjecting himself to responsibility. McPherson v. Talbott, 10 Gill & J. 499.

A surety who pays the debt of his principal has the same rights against his co-surety that he has against the principal. Woods v. Creaghe, 2 Hogan, 50.

Obligation of surety by the common law, not accessorial and consequential only; he is equally bound. It is his duty as well as that of the principal to discharge the obligation when due. Tudor v. Goodloe, 1 J. B. Moore, 323.

A surety may in equity compel the principal to relieve him by paying off the debt, and is entitled to the benefit of any security which the creditor may have taken from the principal debtor. Pride v. Boyce, Rice's Eq. 275.

Joint sureties are bound, as between themselves, to contribute equally to discharge the debt for which they are jointly holden, and if one of them pays the whole, he is, in equity, subrogated to all the rights and remedies of the original creditor for the payment of his debt, not only as against the principal debtor, but also as against the co-sure-

value received, payable and negotiable at the Union Bank of Maryland. Wm. Smith.

4th of January, 1840.—J. G., N. P. Non-payment.

No. given.—H. & S.

Indorsements.—651. Wm. Smith, $2,669. January 1. James McCaleb, James Kent.

99*] *In consideration that the amount of the within note, with interest thereon, was paid by Henry A. Hall, Esq., in behalf of James S. McCaleb, deceased, the indorser thereon, now I do hereby assign to said Henry A. Hall, said note.

Jona. McCaleb, Administrator of James S. McCaleb, deceased.

May 20th, 1842.

$2,678.90. Baltimore, August 10th, 1839.

On the first day of April next I promise to pay to the order of James S. McCaleb twenty-six hundred and seventy-eight dollars and 90-100 for value received, payable and negotiable of the Union Bank of Maryland.

Wm. Smith.

April—Prot. nonpayment, 4th April, 1840.

Indorsed.—Union, 583. William Smith, $2,678.90. April 1. Jas. S. McCaleb, James Kent.

Baltimore, July 13th, 1840. $1,500. By cash, received of James S. McCaleb, on account, the within fifteen hundred dollars.

John M. Gordon, Attorney for P. Thornton.

$400. July 24th.—By cash, $400. John M. Gordon.

$200. By cash, two hundred dollars. August 3d, 1840. J. M. Gordon.

I assign the within note to Henry A. Hall, for value received.

Jonathan McCaleb, Administrator of
May 20th, 1843. James McCaleb.

The defendant offered to give in evidence that Smith and McCaleb, the drawer and payee of the two notes given to Thornton, were citizens of the State of Missisippi at the date of the notes, and that McCaleb continued to be so until his death, and that Smith still continues to be so.

Upon this evidence the following questions occurred:

1. Is the plaintiff entitled to recover of the defendant the money paid by plaintiff to Thornton, or any part of it, as being money paid for his (Smith's) use?

2. If the first question is answered in the negative, then can the defendant, upon the issue joined in this case, offer evidence that Smith and McCaleb were both citizens of Mississippi when the notes stated in the testimony were given in order to bar the plaintiff of his action in this court as assignee of said notes?

And the judges being opposed in opinion upon each of these points, they are, at the request of the plaintiff, ordered to be certified to the Supreme Court at their next session.

Upon this certificate the case came up to this court.

*It was argued by Mr. Dulany for the [*100 plaintiff, and by Mr. Giles and Mr. David Stewart for the defendant.

Mr. Dulany:

As to the first question presented by the record, it cannot be denied that the money paid by Hall to Thornton was expended for the benefit of the defendant, Smith. It went pro tanto to extinguish the debt due by Smith to Thornton; it was money, therefore, advanced for the use of Smith, and of which, in fact, he obtained the full benefit. What reason then can be alleged why an action for money laid out and expended for the use of Smith cannot lie to recover it again on the part of Hall? The Circuit Court has jurisdiction over the subject matter of such a suit, and over the parties; for Hall is a citizen of the State of Maryland, and Smith of the State of Missisippi.

But it is alleged that Smith became indebted to James S. McCaleb, on his, Smith's, failure to pay the two promissory notes, on each of which notes said McCaleb was indorser; that Smith and McCaleb were citizens of the same State; that, as such, McCaleb could not have sued Smith in the courts of the United States; and that, by the assignment of the notes to Hall, he was placed in the shoes of McCaleb, and could no more appear in the courts of the United States as plaintiff, to enforce payment of the notes against Smith, than McCaleb himself could have appeared for that purpose.

The principle that the Circuit Court of the United States has not jurisdiction, on account

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ties to the extent they are equitably bound to contribute. Cuyler v. Ensworth, 6 Paige, 32; Eddy v. Traver, Idem. 521.

A person who has been compelled to pay money by the judgment of a court of competent jurisdiction, to the payment of which, others should in justice have contributed, may by bill in equity, compel them to contribute. Mitchell v. Sproul, 5 J. J. Marsh. 270.

Anciently, it was in courts of equity alone that one surety who had been made to pay the whole debt could compel contribution from his co-sureties. But now a surety who has been compelled to pay the whole debt, may coerce contribution from his co-sureties by an action at law. Ibid.

If surety pay debt of principal, in money, he is entitled to sum paid and interest, if in property, he is only entitled to value of property and interest. The same criterion as to recovery from co-surety. Ibid.; Hickman v. M'Curdy, 7 J. J. Marsh. 569.

Where one of the several sureties pays the whole debt or more than his share in proportion to the number of sureties, he may call on the others to contribute their proportion. If all the sureties *are solvent*, an equal division of the debt amongst all or of the excess paid by any one among the others, ascertains the amount of contribution; but if any of the sureties are insolvent, such as are so in equity are not reckoned, but a division is made among the remaining solvent sureties. Thus where one of three sureties has paid the whole debt, he may be allowed a moiety for contribution from a co-surety, because the third was insolvent. Peter v. Rich, 1 Ch. R. 19; Hole v. Harrison, 1 Ch. C. 246; Layer v. Nelson, 1 Vern. 456.

But at law, the insolvency of a co-surety is not considered, and the one who has paid can recover from the solvent sureties no more than an aliquot part of the sum he has paid and his expenses, regard being had only to the number of the sureties, deducting any sum which has been re-imbursed to him by the debtor or from counter securities. Cowell v. Edwards, 2 Bos. & Pull. 268; Brown v. Lee, 9 D. & R. 700; 6 B. & C. 697; Babcock v. Hubbard, 2 Conn. 536; Willy v. Poulk, 6 Conn. 74, 4 Wend. 432; Knight v. Hughes, 4 Car. & P., N. P. C. 467; Knight v. Hughes, 3 Car. & P. 46; Taylor v. Savage, 12 Mass. 101; 1 Moo. & Mal., N. P. C. 247; Roach v. Thompson, Id. 487; Swain v. Wall, 1 Ch. R. 80, 17 Mass. 470.

of the character of the parties, in a contest between citizens of different States, where the cause of action arises upon a debt assigned, and originally contracted between citizens of the same State, is fully admitted. But its application to the present case is denied. It is admitted that, when the assignor could not sue there, in an action on the debt assigned, the assignee is in no better situation than the assignor, although he may be a citizen of a different State from the original debtor.

In the case now under consideration the action is not instituted upon the notes assigned, but for money expended for the use of Smith, and upon his implied request. The money expended, which is the cause of action, was paid on the 30th of June, 1841. The notes was not assigned until the 20th of May, 1843. The cause of action, then, under the money counts of the declaration, arose long anterior to the assignments, and subsisted wholly independent of them; the notes, with the assignments upon them, being introduced in evidence to show in what manner the money paid by Hall inured to the benefit of Smith, and were therefore collateral to the true cause of action, and designed merely as links in the chain of evidence to support it.

The declaration shows that the suit is be- 101*] tween citizens of different *States, and clearly, therefore, within the general jurisdiction of the Circuit Court, unless it falls within the restrictive clause of the eleventh section of the Judiciary Act of 1789, ch. 20, which declares, that the Circuit Court shall not "have cognizance of any suits to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in said court to recover the said contents if no assignment had been made."

In Bean v. Smith et al. 2 Mason, 279, it is said, speaking of the above clause, "It is perfectly clear that the statute never contemplated an exclusion of jurisdiction in cases where a negotiable instrument or chose in action was mixed up in the ingredients of the case; but where that chose in action constituted the sole cause of action, and the assignment the whole ground of the plaintiff's right."

In the present case it is manifest that the assignment of the notes does not constitute the whole ground of the plaintiff's action; but, on the contrary, that the cause of action subsisted independent of, and anterior to, the assignments, and at and from the moment when the money was paid by the plaintiff to the attorney of Thornton, in discharge pro tanto of his claim against Smith. If this be so, then it is clear that the restrictive clause of the Judiciary Act, above quoted, does not exclude the jurisdiction of the Circuit Court over the parties and the subject matter of this cause.

But it may be replied, that if the money advanced by Hall is regarded as the true cause of action, and not the assigned notes, then the plaintiff is not entitled to recover; because the debt of Smith, to which the money was applied, was paid without his request or consent, and was therefore a mere voluntary act, from which no cause of action can arise against him.

A consideration of the evidence in this case, and the relation of the parties, will, we think, show that this objection cannot be sustained. Smith was the drawer of both of the notes in favor of James S. McCaleb, who became the accommodation indorser, and who redelivered them to Smith, who, from his own accommodation, and to relieve himself from a threatened arrest, gave them to Thornton, to whom he was indebted, and at whose instance the writ against Smith had been issued. These notes were not paid at maturity, as they should have been, by Smith; in consequence of whose default writs were issued out of Baltimore County Court against James S. McCaleb, as indorser, under which he was arrested by the sheriff, and whilst in the hands of that officer applied to Mr. Lemmon to become his bail, who consented to do so, in the confidence that he would be indemnified by the plaintiff, who was the father-in-law of the said McCaleb. Lemmon accordingly became bail for McCaleb, who was then released by the sheriff.

Afterwards, at the first interview Lemmon had with the plaintiff, *he assured him [*102 that he, the plaintiff, would save him harmless for having gone bail for his son-in-law. Pending these suits Smith had paid part of one of the notes; and before judgment was obtained upon either of them Hall paid the balance of the other note. Suit was then docketed against Hall in the Circuit Court by Thornton, and judgment was confessed, to be released on payment of $2,669, with the interest from the 1st of January, 1840. The payment of the balance of the note by Hall, and the confession of the judgment aforesaid, was the fulfillment, on the part of Hall, of his agreement with Lemmon to save him harmless for having gone bail for McCaleb; the suits against him in Baltimore County Court being dismissed, upon the confession of the judgment by Hall in the Circuit Court, as has been previously agreed between the attorney of Thornton and Hall. At the same time that the judgment was confessed the notes above mentioned were delivered to Hall by the attorney of Thornton.

The argument upon the second question is omitted.

Mr. Stewart and Mr. Giles made the following points:

1. That the plaintiff cannot recover of the defendant the amount of the payments so made, because, in making them, the plaintiff was a mere volunteer so far as the defendant was concerned.

2. That the plaintiff cannot recover upon the promissory notes referred to, because he claims title through an assignment made by Jonathan McCaleb, administrator of James S. McCaleb, the payee of the said notes, both of whom were citizens of the State of Mississippi, of which State the defendant was also a citizen.

3. That it was perfectly competent for the defendant, after the plaintiff had given the promissory notes in evidence under the declaration in this case, to rely under his plea, filed upon the defect of title in the plaintiff as assignee of the said notes, to recover in the Circuit Court.

Mr. Justice Wayne delivered the opinion of the court:

Upon the trial of this cause in the Circuit Court, two points were made, upon which the judges differed in opinion; and it has been certified to this court, as is provided for in the sixth section of the Act of 1802, entitled "An Act to amend the judicial system of the United States." 2 Statutes at Large, 159. From the evidence, we think that all the persons in this transaction became privies in the same contract to secure the payment of a debt due by the defendant to Thornton. The payment of it, therefore, by any one of them, other than the debtor, was a payment at his request, and an express assumpsit to re-imburse the amount.

But suppose such a privity not existing between the parties, the evidence shows it also to be a case of the surety of a surety paying the debt of a principal, under a legal obligation, 103*] from which the *principal was bound to relieve him. Such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, though the payment was made without a request from the principal. Tappin v. Broster, 1 C. & P. 112; Exall v. Partridge, 8 Term R. 310; Child v. Morley, Ibid. 610.

We shall decide the first point certified to be answered in the affirmative, which makes it unnecessary to notice the second.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the acts of Congress in such case made and provided, and was argued by counsel; in consideration whereof, it is the opinion of this court that the plaintiff in this case is entitled to recover of the defendant the money paid by the plaintiff to Thornton, as being money paid for his (Smith's) use. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JOHN A. BARRY, Plaintiff in Error,
v.
MARY MERCEIN and Eliza Ann Barry.

Habeas Corpus ad subjiciendum—writ of error will not lie to re-examine judgment of circuit court refusing to grant.

This court has no appellate power, in a case where the Circuit Court refused to grant a writ of habeas corpus, prayed for by a father to take his infant child out of the custody of its mother.

The judgments of a circuit court can be reviewed only where the matter in dispute exceeds the sum or value of two thousand dollars. It must have a known and certain value which can be proved and calculated in the ordinary mode of business transactions.

But a controversy between a father and mother, each claiming the right to the custody, care, and society of their child, relates to a matter in dispute which is incapable of being reduced to any pecuniary standard of value.

The writ of error must be dismissed for want of jurisdiction.

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

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

A motion was made by the counsel for the defendants in error, viz., Mr. William W. Campbell and Mr. Rockwell, to dismiss the case for want of jurisdiction, which motion was opposed by Mr. Barry, in proper person.

Mr. Campbell for the motion:

In the summer of 1844, John A. Barry, the plaintiff in error, presented *his peti- [*104 tion to the Circuit Court for the Southern District of New York, praying that a writ of habeas corpus ad subjiciendum might issue, directing Eliza Ann Barry, the wife of petitioner, and Mary Mercein, her mother, to bring up the person of an infant child, the daughter of the petitioner, and the said Eliza Ann, his wife, and which infant daughter was in the custody of the said Mary Mercein and Eliza Ann Barry. Previous to this period, and for more than five years, a controversy had been going forward in the courts of New York, prosecuted by the petitioner, for the purpose of obtaining the custody of this same child. Three or four times writs of habeas corpus had been granted by the local courts of that State, and indeed in one form or another all the courts, both of common law and of equity, had passed upon this vexed and protracted litigation. Twice had the court of last resort, the Court of Errors, after solemn and able arguments, passed upon the case, and refused to grant the application of the petitioner. The relatives of Mrs. Barry were wearied in mind, and exhausted almost of resources, by the long, persevering, and vexatious proceedings of the plaintiff in error in this cause.

Prior, however, to the application to the Circuit Court for the Southern District of New York, the plaintiff in error applied to this court for a writ of habeas corpus, which was refused. I shall have occasion to refer to these decisions hereafter.

In his application to the Circuit Court, in order to bring himself within the provisions of the Constitution and laws of the United States, the petitioner sets forth that he is a natural born subject of the Queen of Great Britain, and claims that the said infant child, though born in the State of New York, of a mother who is a native of that State, is also a British subject, and allegient to the British crown.

After a patient hearing and a careful investigation of the law and the facts, Judge Betts refused to allow the writ, and he gave his reasons in an opinion of great length, in which he enters upon a review of the whole law upon the subject. I feel that there is nothing to be added to that opinion. It is able, lucid, and it seems to me entirely conclusive. While it is in the highest degree creditable to him as a judge of the courts of the United States, it is at the same time a masterly vindication of the decisions and the learning of the courts of New York.

He closes that opinion by saying—

"I deny the writ of habeas corpus prayed for, because—

"1. If granted, and a return was made ad-

mitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common law functions of parens patriæ and has no common law jurisdiction over the matter.

"2. Because the court has not judicial cognizance of the matter by virtue of any statute of the United States.

105*] *"3. If such jurisdiction is to be implied, that then the decision of the Court of Errors of New York supplies the rule of law or furnishes the highest evidence of the common law rule which is to be the rule of decision in the case.

"4. Because by that rule the father is not entitled on the case made by this petition to take this child out of the custody of its mother."

It is this decision which the plaintiff in error seeks to reverse, and on this motion to grant this writ of error, it is respectfully submitted—

1. That this is not such a final judgment as is contemplated by the statute of 1789, which a writ of error may be brought to reverse.

2. That there is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascertained so as to allow a court of error to bring up the matter to this court from the Circuit Court.

3. That the application was to the discretion of the Circuit Court, and this court will never interfere to control the discretion of the inferior court. The parties who are proceeded against are the wife and mother of plaintiff in error. The plaintiff in error cannot proceed against his wife in this court, her domicil in the eye of the law being the same as her husband's.

5. The Circuit Court possess no other or different powers in relation to habeas corpus under the act, than are possessed by this court, and this court have already passed upon this case by refusing to grant the writ when application was made upon the same state of facts directly to this court. This court have no jurisdiction over the subject matter, and the writ of error should be quashed for want of jurisdiction.

1. This is not such a final judgment as is contemplated by the statute.

The language of the statute (sec. 22) is, that final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, may be re-examined and rendered or affirmed in a circuit court holden in the same district upon a writ of error whereto shall be annexed and returned therewith at the day and place thereby mentioned an authenticated transcript of the record, assignment of errors, prayer for reversal, citation, etc.

"And upon a like process" (that is, writ of error, record, etc.), may final judgments, and decrees in civil actions, and suits in equity in a circuit court, brought there by original process or removed there from State courts, or by appeal from district courts, etc., and "when the matter in dispute exceeds the sum or value of two thousand dollars," etc., be re-examined and reversed or affirmed by the Supreme Court.

106*] *Now, it is respectfully but confidently submitted to this court that the decision of the Circuit Court in this matter, upon an ex-parte application, and where no summons or other process was served upon the defendants in error, or either of them, is not a final judgment in a civil action, or a final decree in a suit in equity.

It is stated that the petition was filed; but it was not served, nor was any original process issued or served; there were, therefore, no parties before the court, there was no action in personam or in rem; there cannot well be an action at law or a suit in equity where there are no parties before the court.

The Act of March 3d, 1803, uses the expression, "cases in equity," but they are confined to cases of admiralty and maritime jurisdiction, and to be carried up to the Supreme Court by appeal.

Judge Betts says, in this case: "A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties." Holmes v. Jennison et al. 14 Peters, 540, refused to discharge under habeas corpus. If a suit not a suit between private parties.

2. There is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascertained. Now, by the twenty-second section of the Judiciary Act, to which I have referred, a writ of error to this court does not lie unless the matter in controversy, exclusive of costs, exceeds the sum of two thousand dollars. Now, though in some cases the court have allowed testimony of value to be given by affidavits or viva voce, when the demand is not for money, yet this appears to have been done only in cases where real value could be readily fixed, and it has allowed the value of an office or its emoluments to be thus established.

I do not see how the value is to be ascertained in this case; and, indeed, it does not seem to be one of the actions at law or suits in equity contemplated by the act to reverse the judgment or decree in which writs of error may be brought.

In the case of Columbian Insurance Co. v. Wheelwright et al. 7 Wheaton, 534, a writ of error was held to lie for this court to the Circuit Court for the District of Columbia, upon a judgment overruling a peremptory mandamus. But it was quashed on account of the matter in controversy not being of the value of one thousand dollars, though in that case the value of the office was allowed to be appraised. But the language of the Act of February 27, 1801, is different from that of the Act of 1789.

In the Act of 1801, writs of error may be brought to reverse or affirm final judgments, orders, or decrees in said Circuit Court. But, as in the Act of 1789, final judgments in civil actions and suits in equity. Act of 27 February, 1801, sec. 8, 2 Stat. at Large, 106, contains the provision in relation to writs of error to Circuit Court for the District of Columbia.

*3. The application was to the dis- [*107
cretion of the Circuit Court, and this court will not interfere to control the discretion of an inferior court.

It has been repeatedly decided in this court that the exercise of the discretion of the court below in refusing or granting amendments of pleadings on motions for new trials, and refusing to re-instate cases after nonsuit, affords no ground for writ of error. See United

States v. Buford, 3 Peters, 31; United States v. Evans, 5 Cranch, 280; Maryland Insurance Co. v. Hodgson, 6 Cranch, 206.

See, also, the case of Boyle v. Zacharie, 6 Peters, 657, where the object of the writ of error was to reverse the decision of the Circuit Court in refusing to quash a writ of venditioni exponas, and where it was held not to lie. In that case, Mr. Justice Story said: "A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient."

The case before the court is one of a similar character, and resting equally in the sound discretion of the Circuit Court.

4. The plaintiff in error cannot proceed in this court against his wife; her domicil being in law the same as his. If the proceeding in the Circuit Court can be annulled as an action at law or a suit in equity, then clearly the plaintiff in error could not carry on such action or suit in any of the courts of the United States against his wife, as one of the defendants.

5. The Circuit Court possesses no other or different power than this court in relation to a writ of habeas corpus, and this court have already passed upon this case and refused the writ for want of jurisdiction. The writ of error should therefore be quashed for want of jurisdiction.

The language of the fourteenth section is, "that all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, etc. The power of this court to issue writs of habeas corpus has never been doubted by the court, and has repeatedly been exercised; but its power to issue a writ in the present case has been doubted and the writ refused. The court, after hearing the plaintiff in error on original application to this court on the same state of facts as were presented to the Circuit Court, refused to grant the writ. It is respectfully submitted that the application to a circuit court has in no respect changed the aspect of the matter, and if this court had no jurisdiction over the subject matter when the original petition was presented, neither can it have jurisdiction now, when the subject comes up for its decision from the judgment of an inferior court.

In the case of Ex-parte Barry, 2 Howard, 65, Mr. Justice Story says: "It is plain, there- [*108 fore, that this court has no original *jurisdiction to entertain the present petition, and we cannot issue any writ of habeas corpus, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution and laws of the United States."

Is it not equally plain that the Circuit Court can issue no writ of habeas corpus, except when it is necessary for the exercise of its jurisdiction, original or appellate, given to it by the Constitution and laws of the United States? Was this habeas corpus necessary to the exercise of the jurisdiction of the Circuit Court? True, the eleventh section of the Judicial Act gives the Circuit Court original cognizance with *the courts of the several States, of* all suits of *a civil nature at common law* or in equity.

But "a procedure by habeas corpus (says Judge Betts) can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of sovereign, to ascertain whether the infant in this case is wrongfully detained, and in a way conducing to its prejudice."

It has been well and often remarked, that the power of the courts of the United States is given to them by express and written grant; and where they exercise the power of issuing writs of habeas corpus, they find their authority in "thus it is written." They derive no jurisdiction from the common law. The grand inquisition of the sovereignty of the United States is not to be invoked unless in cases where the written law gives the power to invoke it. Certainly, this is not one of the cases. It is a case for the grand inquisition of the State of New York. That grand inquest has repeatedly decided this matter.

"What question (says Judge Betts in this same opinion) can be regarded as in principle more local or intraterritorial than those which pertain to the domestic institutions of a State —the social and domestic relations of its citizens? Or, what could probably be less within the meaning of Congress than that, in regard to these interesting matters, the courts of the United States should be empowered to introduce rules or principles, because found in the ancient common law, which should trample down and abrogate the policy and cherished usages of a State, authenticated and sanctified as a part of her laws by the judgment of her highest tribunals."

I submit this question of jurisdiction, with entire confidence, to this court. I know its practice has been in conformity with the language of its late eminent Chief Justice.

"We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it."

I submit, therefore, with great deference, the motion that this writ of error should be quashed, as irregular, and for want of jurisdiction.

*Mr. Barry, in opposition to the mo- [*109 tion, made the following points, which he maintained at great length:

1. The record in the above cause presents the case of a "final judgment" by the Circuit Court for the Southern District of New York in a "suit," within the meaning of the twenty-second section of the Judiciary Act of 1789; and the plaintiff in error is therefore entitled to have such judgment re-examined in this court by writ of error, provided the court below had jurisdiction of the case, authority to issue the writ of habeas corpus ad subjiciendum, and the record presents a prima facie case for the award of such writ. United States Laws, Statutes at Large, 81; Holmes v. Jennison, 14 Peters, 540; Weston et al. v. City Council of Charleston, 2 Peters, 449; Kendall v. United States, 12 Peters, 614; Sto. Com. Abr. 608; Columbian Ins. Co. v. Wheelwright et al. 7 Wheat. 534; Co. Litt. 288, b.

2. The court below had jurisdiction of the

case, and authority to issue the writ of habeas corpus under the Constitution, at the common law, by implication, and by statute; and consequently committed error in deciding that it had not such jurisdiction and authority. The petition on the record presents a prima facie case for the award of such writ, and the court below committed error in denying it to the plaintiff in error, to whom it belonged as a writ of right by the "law of the land;" his title resting, in debito justitiæ, on probable cause shown by affidavit. 36 Edw. III. cap. 9; 42 Edw. III.; 8 Henry IV.; 8 Henry VI.; 28 Edw. I.; 3 Car. I.; 16 Car. I. cap. 10; 31 Car. II.; Bac. Abr., title Hab. Corp.; Greenhill's case, 4 Adolph. & Ellis, Eng. Com. Law Rep. 624; United States v. Green, 3 Mason, 482; Rex v. Winton, 5 D. & E. 89; Rex v. Isley, 5 Adolph. & Ellis, 441; Constitution United States; Yates's case, 6 Johns. 422, 423; Bollman and Swartwout, 4 Cranch, 75; Ex-parte Randolph, 2 Brock. C. C. R. 447; 3 Bl. Com. 132; 3 Bac. Abr. 421; Judiciary Act, 1789, sec. 14; United States Stat. 2 Mar. 1831, sec. 39; Kearney's case, 7 Wheat. 38; Crosby's case, 3 Wilson, 172; 1 Kent's Com. 301; Wood's case, 3 Wilson; 3 Bac. Abr. 3; In re Pearson, 4 Moore, 366; Mag. Char. cap. 29; United States v. Bainbridge, 1 Mason, 71; 1 Kent's Com. 220; United States Supreme Court, Ex-parte Barry, 2 How. 65; 19 Wendell, 16, and cases cited; Vernon v. Vernon, MS. case, New York Chancery, 11th June, 1839; Ahrenfeldt's case, Ch. New York, July, 1840; Commonwealth v. Briggs, 16 Pick. 204; In re Mitchell, Charlton's Rep. 489; State of South Carolina v. Nelson, MS. case, 1840; Prather's case, 4 Desaus. 33; 25 Wendell, 72, 73; Gov. Seward's Mess. to Senate, Albany, 20th March, 1840; 5 East, 221; 12 Vesey, 492; 2 Russell, 1; Review of D'Hauteville's case, 30; 2 and 3 Victoria, cap. 54; 11 Vesey, 531; People v. Mercein, 3 Hill, 399; Ex-parte Burford, 3 Cranch, 449.

110*] *3. The court below, if it had jurisdiction by implication, committed error in assuming that the Court for the Correction of Errors, by its decision on the case of the plaintiff on two former writs of habeas corpus, in 1840 and 1842, had either "supplied the rule of law," or given "evidence of the common law rule" which was to be the rule of decision in the case on this record, two years after—a case entirely de novo—in 1844. And the court below committed further error in deciding, that by such assumed rule of law or evidence of the common law rule, the plaintiff in this cause was not entitled, on the case made by him, to the custody of his child—the same being a prejudication on the merits—no argument being had before the court in respect of either such assumed rule, or the evidence thereof, or on the merits. No such rule existed in point of fact, and consequently no evidence thereof could exist. Decision Supreme Court New York, 1842, 3 Hill, 399; MS. Opinion, Chan. New York, April, 1844.

4. The plaintiff in error being of legeance to the crown of England, his child, though born in the United States during his father's temporary residence therein—twenty-two months and twenty days—notwithstanding its mother be an American citizen, is not a citizen of the United States. It is incapacitated by its infancy from making any present election, follows the legeance of its father, partus sequitur patrem, and is a British subject. The father being domiciled and resident within the dominions of Her Britannic Majesty, such is also the proper and rightful domicil of his wife and child, and he has a legal right to remove them thither. The child being detained from the father, its natural guardian and protector, without authority of law, the writ of habeas corpus ad subjiciendum is his appropriate legal remedy for its restoration to him from its present illegal detention and restraint. Constitution United States, art. 3, sec. 2; Judiciary Act, 1789, sec. 11; Inglis v. Trustees Sailor's Snug Harbor, 3 Peters, 99; 7 Anne, cap. 5; 4 Geo. III. cap. 21; Warrender v. Warrender, 2 Clar. & Fin. Ap. Ca. 523; Story's Confl. Laws, 30, 36, 43, 74, 160; Shelford on Marriage, Ferg. Rep. 397, 398.

5. If the laws of the proper domicil of the plaintiff (and by necessary consequence that of his family), applicable to the case on the record, be not repugnant to the laws or policy of this country, and this be proved to the court, the case is one proper for the exercise of the comity of the American nation—not of the court, but of the nation; and the court below will extend that comity to the plaintiff, not only by awarding him the writ of habeas corpus ad subjiciendum, the appropriate legal remedy sought, but also by deciding the case on its merits, at the hearing, agreeably to the law of his domicil. In re Wilkes, 1 Ken. 279; Dartmouth College v. Woodward, Con. Rep. United States, 577; Warrender v. Warrender, 2 Clar. & Fin. Par. Rep. 529; 9 Bligh. N. S. 110; *Bill for Protection of Minors, Senate [*111 of New York, 1840; Gov. Seward's Message to Senate, 20th March, 1840.

Mr. Rockwell, for the motion to dismiss, in reply and conclusion:

1. The writ of habeas corpus is not issued as matter of course, upon the application, but is addressed to the discretion of the court, and may be refused if upon the application itself it appears that, if admitted to be true, the applicant is not entitled to relief. 2 Bl. Com. 132, 133, n. 16; 3 Bulstr. 27; 2 Roll. Rep. 138.

King v. Hobhouse, 2 Chitty, K. B. Rep. 207, marg. note. "The writ of habeas corpus, whether at common law or under the 3 Car. II., does not issue as a matter of course in the first instance, upon application, but must be grounded on affidavit, upon which the court are to exercise their discretion whether the suit shall issue or not." See, also, The Spanish Sailors, 2 Sir W. Blackstone, 1324.

King v. Barnard Schiever, 2 Burr. 765. Habeas corpus for a prisoner of war taken on board an enemy's prize ship denied in the first instance.

Ex-parte Kearney, 7 Wheat. 38. In this case the application was ex-parte, and in the first instance denied by the court, and in subsequent cases.

Commonwealth v. Robinson, 1 Serg. & Rawle, 353. The court declared it a matter of discretion whether to grant or refuse a writ of habeas corpus to discharge an apprentice from military service on application of the master.

Ex-parte Tobias Watkins, 3 Peters, 193. Petition denied in the first instance.

2. A writ of error does not lie to review the decision of a court, except upon final judgment, and the order of a court, denying in the first instance an ex-parte application for a writ of habeas corpus, cannot be reviewed by writ of error.

The People v. President of Brooklyn, 13 Wend. 130, Court of Errors, Mandamus, marg. note. "A writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory mandamus when application is made by motion. It only lies for the relator when judgment is pronounced after issue joined upon plea or demurrer interposed upon the coming in of the return of the alternative mandamus."

Boyle v. Zacharie et al. 6 Peters, 648, marg. note. "A writ of error will not lie to a Circuit Court of the United States, to revise its decision in refusing to grant a writ of venditioni exponas, issued on a judgment obtained in that court."

Per Story, J. p. 657: "A very strong case, illustrating the general doctrine, is, that error will not lie to the refusal of a court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient. 3 Bro. Parl. Cas. 505.

112*] *The Dean and Chapter of Dublin v. King, 1 Bro. Parl. Cas. 73. Application to the King's Bench for mandamus to admit Robert Dugdale to his office as clerk, upon which there was an award of a peremptory mandamus; held, writ of error not to lie, there being no plea and judgment.

Weston v. City Council of Charleston, 2 Peters, 449.

Holmes v. Jennison, 14 Peters, 540. "I do not intend to examine the question whether proceeding upon a habeas corpus is a 'suit,' within the meaning of the twenty-fifth section; or whether writ of error will lie to review proceedings upon a habeas corpus, although the case on these points is not free from doubts," etc. Per Thomson, J., 550; Judge Baldwin's opinion, 622, 625.

Columbian Insurance Co. v. Wheelwright, 7 Wheat. 534. Mandamus valuation of office.

II. The Circuit Court had no jurisdiction of the subject matter.

1. That court derives all its jurisdiction from the Constitution of the United States and the acts of Congress, and is strictly confined to the acts of Congress conferring jurisdiction, and defining the powers of the court.

1 Kent's Com. 294. "With judicial power, it may be generally observed, as the Supreme Court declared in the case of Turner v. Bank of North America, 4 Dall. 8, that the disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the Constitution might warrant."

McIntyre v. Wood, 7 Cranch, 504, to the same effect; United States v. More, 3 Cranch, 159; 6 Cranch, 305; 3 Dall. 321; 1 Cranch, 212.

Mr. Barry. The Circuit Court must enlarge *their jurisdiction, as the Circuit Court has the residuum of authority inherent, and incidental* powers at common law as a high court of record.

2. The only power conferred on the Circuit Court is in the Judicial Act of 1789:

Sec. 14. "That all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

"And that either of them, as well as judges of the district court, shall have power to grant writs of habeas corpus, for the purpose of inquiring into the cause of commitment.

"Provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless when they are in custody under or by order of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

*1. This statute provides that "all [*113 the before mentioned courts," etc., referring to the supreme, circuit, and district courts, and conferring like powers on all. The original jurisdiction of all these courts, and the appellate jurisdiction of the supreme and circuit courts had been all defined. The court derives all its power from this statute, and the limitations of it are to be precisely followed, expressio unius exclusio est alterius.

Ex-parte Ballard; Ex-parte Swartwout, 4 Cranch, 75, per Marshall, Ch. J. 93. "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, but the courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend their jurisdiction."

"The power to award the writ by any of the courts of the United States must be given by written law."

Page 95. "If the power be denied to this court, it is denied to every other court of the United States."

Ex-parte Tobias Watkins, 3 Peters, 193, by Marshall, Ch. J. p. 201. "The judicial act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment."

Ex-parte Barry, 2 Howard, 65, marg. note. "The original jurisdiction of this court does not extend to the case of a petition by a private individual for a habeas corpus to bring up the body of his infant daughter, alleged to be unlawfully obtained from him."

Why not? If not conferred on the Supreme Court it is not conferred on the circuit or district court by this statute.

2. The object of this section was not to confer upon any of these courts a general authority to issue this writ. It was designed as auxiliary—"Which may be necessary for the exercise of their respective jurisdictions."

The scire facias is a writ of execution, in all cases founded upon a record, and is a necessary incidental power to the exercise of the jurisdiction of any court. So of habeas corpus, without which power the court would not be able even to protect suitors or witnesses attending court from a writ, etc., etc.

3. That part of the section conferring the power upon the judges in vacation to issue the writ "for the purpose of inquiring into the cause of commitment," as does the proviso, indicates that reference was only had to confinement under a United States process, or "under color of authority of the United States."

31 Car. I. ch. 2, provides, "That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless," etc.), "the Chancellor, etc., shall award a writ of habeas corpus," etc.

The powers of the section had doubtless reference to the English statute, and to confer a limited and not general authority.

114*] *The decisions of the United States courts in relation to writs of mandamus are entirely analogous. They are both prerogative writs, and the defining and limiting the power to issue writs of habeas corpus by statute restricts them more than the others.

1 Kent's Com. 294. "It has been decided that Congress has not delegated the exercise of judicial power to the Circuit Court but in certain specified cases. The eleventh section of the Judicial Act of 1789, giving jurisdiction to the Circuit Court, has not covered the whole ground of the Constitution, and these courts cannot, for instance, issue a mandamus but in those cases in which it may be necessary to the exercise of their jurisdiction."

McIntire v. Wood, 7 Cranch, 504; McClung v. Silliman, 6 Wheaton, 598; Kendall v. United States, 12 Pet. 524-618.

If this is considered one of "the other writs not specified by statute" (sec. 14, Judiciary Act), the term is very properly used—"necessary for the exercise of their respective jurisdictions"—giving a judicial construction to the meaning of the latter term.

Ex-parte Colura, 1 Wash. C. C. R. 232, marg. note. "The courts of the United States and the justices thereof are only authorized to issue writs of habeas corpus to prisoners in jail under color of the authority of the United States, or committed by courts of the United States, or required to testify in a case depending in a court of the United States."

"The jurisdiction of the courts of the United States is limited; and the inferior courts can exercise it only in cases in which it is conferred by act of Congress."

United States v. French, 1 Gallison, 1 marg. note. "The Circuit Court has no authority to issue a habeas corpus for the purpose of surrendering a principal in discharge of his bail, when the principal is confined in jail merely under process of a State court.

Per Curiam. "We have no authority in this case to issue a habeas corpus. The authority given by the Judicial Act of 1789, chap. 20, sec. 14, is confined to cases where the party is in custody under color of process under authority of the United States, or is committed for trial before some court of the United States, or is necessary to be brought into court to testify."

N. B.—The party in this case was confined under a penal law of Congress (2 Statutes at Large, 506), in which State courts have, by repeated decisions, no jurisdiction.

In all the following cases habeas corpus was issued, *where the party was confined* under *color of process of the United States*, and although any other exercise of the power was not in express terms denied, yet in a number of them the court proceed upon the assumption of its being so limited, and in no instance form a contrary opinion: Ex-parte Wilson, 6 Cranch, 52; Ex-parte Kearney, 7 Wheaton, 38; Ex-parte Randolph, 2 Brock. 476, 477; 3 Dall. 17; 4 Dall. 412; 3 Cranch, 447; 4 Cranch, 75; 3 Peters, *201; 9 Peters, 704; 1 Mason, [*115 71; 2 Brock. 6, 447; 1 Wash. 277. The case in 3 Mason, 482, of United States v. Green, the only case where granted and point not then raised.

3. Although in numerous decisions infants are doubtless under the control of courts of law as to their custody, and courts having jurisdiction may issue writs of habeas corpus, yet the courts, representing the sovereign power of the State, adopt the course which they may deem for the benefit of the child at their discretion. It is an extension of the original purposes of the writ, and not contemplated by the powers of the Judicial Act, nor consistent with the limited authority of the general government.

De Manneville v. De Manneville, 10 Ves. 52-66, Ld. Chan. in conclusion, p. 66. "I must either give the child to the father, when I know not what he proposes to do if it remain with him; or to the mother, to which, upon some principles, there is great objection; or I must take some middle course; and I shall take care that the intercourse of both father and mother with the child, so far as is consistent with its happiness, shall be unrestrained." Ordered that the child should not be removed out of jurisdiction.

King v. Grenhill, 4 Adol. & Ellis, 624, "Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house, or into contact with his children, and does not intend to do so." Marg. note.

The general government is one of defined and limited powers. It is the design of the Constitution that the judicial should be co-extensive with the legislative authority, but not to exceed it. These powers are comparatively free and well defined, and are exceptions to the authority residing in the State, and subject to their judicial authority. The great mass of authority remains in the States, and is governed by and dependent upon State authority.

All questions arising out of the domestic relations are peculiarly and appropriately within the province of the State governments; and the court will be slow in countenancing any principle, or giving any construction of the Constitution and laws that shall decree to itself this branch of local authority.

In relation to husband and wife, parent and child, the various and diversified and vexed questions that arise concerning the custody of children, the court will not be anxious by any doubtful construction to enlarge their jurisdiction. The court exercising that jurisdiction cannot dispose of the various questions involved, as in ordinary questions of pecuniary value, by a judgment and execution. They must enter the nursery and inquire as to the character and habits of the respective parents

—the wishes of the child—and make such orders from time to time as may be required by the ever changing circumstances of all the parties concerned. What portion of these ques- 116*] tions *would this court have to take charge of, and what new set of rules or officers for these wards of the court?

If the writ of error is sustained, and the case remanded, and the Circuit Court ordered to issue the writ, it will be the duty of the Circuit Court to make such orders as will be for the benefit of the child, and vary them from time to time. Can these be reviewed by this court?

This proceeding is really a question as to the custody of an infant child, and of guardianship on the part of the courts of the United States; and although called habeas corpus ad subjiciendum, it is so by fiction of law. It is not a question of the personal liberty of the child, but of its custody and nurture. It is not in substance at all that great writ of English or American liberty, but a great extension, if not entire perversion, of its object.

Master and Servant.—Are the relative rights and duties of the master and servant a matter of local or national jurisdiction?

Suppose a servant from Kentucky flies to Ohio. His master pursues him and takes him. He is ordered to bring his writ of habeas corpus before the Circuit Court. The court denies the application. He brings his writ of error to this court. Has the court jurisdiction? Will it order the Circuit Court to issue the writ? If not, why not?

If in obedience to the order the Circuit Court issues the writ, and refuses to discharge the person, a writ of error lies to this court.

Petition for Divorce.—It is not embraced in the tenth section of the Judicial Act of 1789.

1. The power of the court to issue the writ at all is given by statute, in the fourteenth section, and must be limited to the purposes, and by the restriction in the act.

2. It is not a "suit of a civil nature at common law or in equity, when the matter in dispute exceeds the sum or value of $500."

3. The phraseology in the twenty-fifth section is different—"in any suit." The object is different, to have the power of the United States, in relation to treaties, Constitution, laws, or authority of United States. The term is used in its most general sense—civil, criminal, equity, and all others. The object is to control the decisions of State courts on national questions. See Holmes v. Jennison, 14 Peters, 2.

III. The court has not jurisdiction of the parties. One of the defendants in error, Mrs. Barry, has no domicil in the United States, but follows that of her husband.

1. In order to give the court jurisdiction all the defendants must be liable to be sued before the United States court. 1 Kent's Com. 324; Strawbridge v. Curtiss, 3 Cranch, 267.

2. "A married woman follows the domicil of her husband. This results from the general principle, that a person who is under the power 117*] *and authority of another possesses no right to choose a domicil." Story on Conflict of Laws, 45, and authorities there cited.

Greene v. Greene, 11 Pick. 410. "The domicil of the wife follows that of the husband." *14 Pick. 181.*

So in settlement cases. "A wife and minor child can have no settlement separate from the husband and father." Shirley v. Watertown; Sears v. City of Boston, 1 Met. 242, absent a number of years, etc. The petitioner himself declares (p. 4), "That the said Eliza Ann, by her intermarriage with your petitioner, became a denizen of the British empire, and entitled to inherit within the said realm as though she were a British subject. All the privileges, advantages, and immunities, being supervenient upon those of her domicilium originis as an American citizen." If so, can anything but a divorce or death deprive her of these rights? He speaks of her going "to her own proper home at Liverpool"; and (p. 6) that his wife should "return to her own proper home and duties."

3. The Supreme Court have their appellate jurisdiction only in those cases in which it is affirmatively given by the acts of Congress, and no such appellate jurisdiction is given in this case. Wiscart v. Dauchy, 3 Dall. 321; Clarke v. Bazadone, 1 Cranch, 212; Court of United States Territory northwest of the Ohio, United States v. More, 3 Cranch, 159, criminal case from Circuit Court of District of Columbia; Ex-parte Kearney, 7 Wheat. 38. No appeal from Circuit Court in criminal cases.

IV. The Supreme Court has not jurisdiction, as the matter in dispute does not amount to $2,000. Ex-parte Bradstreet, 7 Pet. 634. "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States has been to allow the value to be given in evidence."

In this case evidence was offered in the court below between Martha Bradstreet and Apollos Cooper, a writ of right of the value of the land in dispute; but that value not appearing on the record the court dismissed the proceedings. Mandamus issued to re-instate the case.

Per Marshall, Ch. J., p. 647: "Every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of two thousand dollars.

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States is to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the value of *the property demanded in evidence at [*118 or before the trial of the cause," etc.

United States v. More, 3 Cranch, 172, per Marshall, Ch. J., p. 172. "But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation under the Constitution, prohibiting the exercise of other powers than those described." "Thus the appellate jurisdiction of this court from the judgments of the Circuit Court is described affirmatively; no restrictive words are used. Yet it has never been supposed that a decision of a circuit court could be reviewed, unless the matter in dispute should

exceed the value of two thousand dollars. There are no words in the act restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the Circuit Court when the matter in dispute exceeds the value of two thousand dollars." The words "matter in dispute" seem appropriate to civil cases, when the subject in contest has a value beyond the sum mentioned in the act.

Wilson v. Daniel, 3 Dall. 401. "The verdict or judgment does not ascertain the value of the matter in dispute," etc.

All the judges, in giving their opinions, proceed upon the ground that the case must be one of pecuniary value.

United States v. Brig Union, 4 Cranch, 216, marg. note. "It is incumbent on the plaintiff in error to show that this court has jurisdiction of the cause." "This court will permit viva voce testimony to be given of the value of the matter in dispute."

Gordon v. Ogden, 3 Peters, 33. The plaintiff claimed two thousand dollars; had judgment for less; writ of error by defendant below; court held no jurisdiction; aliter where writ in such case is by plaintiff below; action for violating a patent.

Ritchie v. Mauro & Forrest, 2 Peters, 244, per Marshall, Ch. J. of Supreme Court, p. 244. "In the present case the majority of the court are of opinion that the court has no jurisdiction of the case; the value in controversy not being sufficient to entitle the party by law to claim an appeal. The value is not the value of the minor's estate, but the value of the office of guardian. The present is a controversy merely between persons claiming adversely as guardians, having no distinct interest of their own. The office of guardian is of no value, except so far as it affords a compensation for labor and services, thereafter to be earned."

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought up by writ of error to the Circuit Court for the Southern District of New York.

It appears from the record that the plaintiff in error is a subject of the Queen of Great Britian, and resides in Liverpool, Nova Scotia. 119*] *In April, 1835, he intermarried with Eliza Ann Barry, one of the defendants in error, who is the daughter of the late Thomas B. Mercein of the city of New York; and upon some unfortunate disagreement between the plaintiff in error and his wife, a separation took place in the year 1838, and they have ever since lived apart; she residing in New York, and he at Liverpool. They have two children, a son and a daughter. The son is with his father; and the daughter, now about ten years of age, is with her mother.

The plaintiff in error filed his petition in the Circuit Court of the United States for the Southern District of New York, at April Term, 1844, stating that his wife had separated from him without any justifiable cause, and refused to return and unlawfully detained and kept from him his daughter; that she was harbored, countenanced, and encouraged in these unlawful proceedings by her mother, Mary Mercein, the other defendant in error; and prayed that the writ of habeas corpus ad subjiciendum might issue, commanding the said Mary Mercein and Eliza Ann Barry to have the body of his daughter, Mary Mercein Barry, by them imprisoned and detained, with the time and cause of such imprisonment or detention, before the Circuit Court to do and receive what should then and there be considered of the said Mary Mercein Barry. The petition was supported by the usual affidavits and proofs. The case came on to be heard in the Circuit Court, and it was then ordered and adjudged by the court that the petition be disallowed, and the writ of habeas corpus denied. It is upon this judgment that the writ of error is brought.

A motion has been made to dismiss the writ of error for the want of jurisdiction in this court. In the argument upon this motion, the power of the Circuit Court to award the writ of habeas corpus, in a case like this, has also been very fully discussed at the bar. But this question is not before us, unless we have power by writ of error to re-examine the judgment given by the Circuit Court, and to affirm or reverse it, as we may find it to be correct or otherwise. And the question therefore to be first decided is, whether a writ of error will lie upon the judgment of the Circuit Court in this case refusing to grant the writ of habeas corpus. It is an important question; deeply interesting to the parties concerned; and we have given to it a full and mature consideration.

By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes.

The Act of 1789, ch. 20, sec. 22, provides that final judgments and decrees in civil actions and suits in equity in a circuit court, when the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be re-examined and reversed or affirmed *in the Supreme Court. And it [*120 is by this law only that we are authorized to re-examine any judgment in a circuit court by writ of error.

Before we speak more particularly of the construction of this section, it may be proper to notice the difference between the provisions contained in it and those of the twenty-fifth section, in the same act of Congress, which gives the appellate power over the judgments of the State courts. In the latter case, the right to re-examine is not made to depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the State court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or can not be measured by a money standard.

But in the twenty-second section, which is the one now under consideration, the provision is otherwise; and in order to give this court jurisdiction to re-examine the judgment of a circuit court of the United States, the judgment or decree must not only be a final one, in a civil action or suit in equity, but the

matter in dispute must exceed the sum or value of two thousand dollars, exclusive of costs. And in order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.

In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute. And it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the twenty-second section of the Act of 1789. Is it one of those cases in which we are authorized to re-examine the decision of a circuit court of the United States, and affirm or reverse its judgment? We think not. The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor, indeed, is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the Circuit Court. And since this court can exer- 121*] cise *no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.

Order.

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

JACOB S. MAYBERRY, Plaintiff in Error,
v.
JAMES H. THOMPSON, Defendant.

Jurisdiction—this court can revise only final judgments.

Under the acts of 1839, chap. 20 (5 Statutes at Large, 315), and 1840, chap. 43 (5 Statutes at Large, 392), where a case was carried from the District Court for the Middle District of Alabama to the Circuit Court for the Southern District of Alabama, and the Circuit Court reversed the judgment of the District Court, it was *not a proper mode of proceeding to bring the case to this court upon such reversal.*

The judgment of the District Court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. This court could then have re-examined the judgment of the Circuit Court, if a writ of error were sued out.

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

It was orginally brought by Mayberry in the District Court of the United States for the Middle District of Alabama. Mayberry was a citizen of Mississippi.

The action was brought at the May Term, 1841, and was an action of trespass to recover damages from Thompson, for forcibly taking, seizing, and carrying away certain goods, wares and merchandise of the plaintiff, at Warsaw, in Sumter County, Alabama.

At the November Term, 1842, the cause came on for trial, when the jury found a verdict for the plaintiff, and assessed his damages at $3,709.94. On the trial, the defendant's counsel filed the following bill of exceptions:

Be it remembered, that, in the trial of this cause, the plaintiff in the first instance introduced testimony tending to show that sometime in February or March, 1841, he sent cotton and drafts to Mobile, and received the proceeds thereof, about $3,200, and that he went with the same, and with letters of recommendation, to the city of New York, for the purchase of goods, and there purchased sundry bills of goods, of different houses, for which he paid to each house about one half of the price of each purchase in money, the proceeds of the cotton and drafts aforesaid, and gave his own notes *to said several houses for the [*122 residue of the purchase money, maturing at different dates, which said notes still remain unpaid, and that the sellers of said goods knew no persons in the transaction except the plaintiff; that said goods were marked in the name of the plaintiff, and sent forward to his address for Cooksville, in the State of Mississippi, but that, before reaching their destination, they were seized by the defendant, at Warsaw, in the State of Alabama, and by him sold.

The defendant then introduced testimony, conducing to show that a fraudulent and collusive arrangement had been entered into between the plaintiff and one James Randalls, sometime in June, 1840, for the purpose of screening the property of said Randalls from claims of his creditors, by which a certain stock of goods and other property, which said Randalls then had, were collusively passed to said plaintiff, and the business of said Randalls thereafter, until after the seizure of said goods by defendant, was carried on in the name of said plaintiff; but that said business, including the sending of said cotton and drafts to Mobile, the raising of said money, and the purchase of said goods in New York, though done ostensibly by said plaintiff, and in his name, was really done by said Randalls, acting by and through said plaintiff, and in his (the plaintiff's) name, and that said goods, seized and sold by the defendant, were by him seized and sold as an officer on process in his hands against said Randalls, as his (the said Randalls') property, and for his debts; and also that the

plaintiff had little or no cotton at or about the time said cotton was forwarded to Mobile as aforesaid.

The plaintiff then introduced the said Randalls as a witness, and asked him the single question, whether he had interest in said goods seized, at the time they were seized and sold; to which question the witness answered that he had not. The defendant then, on cross-examination, for the purpose of contradicting said Randalls by the testimony of other witnesses, if he answered in the negative, and thus impeaching his testimony, inquired of him whether he had stated to an individual, at about the time said cotton was sent to Mobile, that he (the said Randalls) had succeeded in sending cotton to Mobile, so that the same had not been attached; but the plaintiff's counsel objected to the witness answering the question, and the court ruled that the inquiry was of matter collateral and irrelevant, and that the witness need not answer the question propounded, and he did not answer the same. The defendant, also, for the same purpose last expressed, proposed to inquire of said Randalls, whether he had not stated to a certain individual, at or about the time said plaintiff left for New York, for the purchase of said goods, that he (the said Randalls) had sent said plaintiff for goods; but it was ruled by the court that it would not be competent for the defendant to discredit said witness by showing that he had made statements when out of court, 123*] and not on oath, different from *his testimony given in court; and the question was not permitted to be put.

The court instructed the jury, that if they believed that the goods purchased by the plaintiff in New York were purchased with the money of the said Randalls, and that the plaintiff acted merely as a shield for said Randalls, to protect the said goods from Randalls' creditors, that the said goods were to be considered as the goods of Randalls, and were lawfully attached by the defendant on an execution against Randalls; but that when the goods were purchased for said Randalls in part with the money of Randalls, and in part upon the credit of plaintiff, he giving his note to the several New York mercantile houses from which the purchases were made, and they being ignorant of any fraud between the plaintiff and said Randalls, then the said goods thus purchased could not lawfully be sold by the defendant on execution against said Randalls; that the remedy of creditors of Randalls, when the goods were purchased in part with the money of Randalls, and in part upon credit of plaintiff, was in a court of equity, where the interest of all concerned might be apportioned and adjusted.

The defendant thereupon requested the court to instruct the jury, that if they should find for the plaintiff, they might, in making up their verdict, deduct from the amount the money and lawful interest thereon, in all cases where said goods were purchased in part with the money of Randalls, and in part upon the credit of the plaintiff; which charge the court refused to give.

And the defendants took exception to the before mentioned ruling and charge of the *court, and the refusal to charge as requested, and prayed that his said exceptions might* be signed, sealed, and allowed, and the same is done accordingly.

The defendant, Thompson, sued out a writ of error, and carried the case to the Circuit Court of the United States for the Southern District of Alabama, under the Act of 1839, ch. 20 (5 Statutes at Large, 315).

At March Term, 1843, the Circuit Court passed the following order: "This day came the parties, by their attorney, and this cause coming on to be heard upon the transcript of the record, and the matters assigned for error being heard by the court, and mature deliberation being thereupon had, it is considered by the court that there is error in the record and proceedings of the said District Court; whereupon, it is ordered and adjudged by the court there that the judgment of the District Court be reversed and annulled, and that the said plaintiff recover his costs."

From which judgment Mayberry sued out a writ of error, and brought the case up to this court.

It was argued by Mr. Brockenbrough and Mr. Sherman for the plaintiff in error, and Mr. Dargan for defendant in error.

*The third point of the counsel for [*124 the plaintiff in error was the one upon which the opinion of this court turned, and is therefore the only one inserted. It was as follows:

III. As to the venire facias de novo and an absolute reversal.

There can be no doubt that if the Circuit Court was clear, from the record, that the plaintiff had no cause of action, and was not entitled to recover in any event, under the facts, that that court was right in absolutely reversing the judgment. But if the Circuit Court considered the District Court correct in its judgment as to the illegality of the levy and sale, but wrong as to the question of evidence in the cross-examination of Randalls only, then it should not have reversed the judgment absolutely, but have remanded it with a venire de novo, that the plaintiff might have the benefit of his meritorious right of action, and the defendant not be deprived of his full rights in the cross-examination.

But as we contend the District Court was right in both points, we ask to set aside the reversal, and set up the judgment of the District Court.

But if this court thinks the District Court did not err upon the main question, but did err on the question of the cross-examination, then this court will reverse the decision of the Circuit Court, with the proper directions; because that court did not award a venire facias de novo.

The counsel for the defendant in error noticed this point as follows:

The act of Congress that established the Middle District of the State of Alabama, and allowed appeals and writs of error from that court to the Circuit Court for the Fifth Judicial Circuit, does not by any express words make it obligatory on the Circuit Court to award a venire de novo, but is silent on the subject; therefore we must look to the general rules of practice on this subject. I admit that the Circuit Court may award the venire de novo on reversing the judgment of the District Court, but I deny that an omission to do so can be

reached by a writ of error, unless the party claiming the venire had asked the court below to award it, and the court had refused it. It is a settled rule, that a party complaining of errors must show it affirmatively; he must show that the inferior court erred, and this error was prejudicial to his rights. Bradstreet v. Huntington, 5 Peters, 402.

Now, the defendant in error in the Circuit Court (who is plaintiff here) could have demanded a venire de novo, but he did not; the Circuit Court, therefore, did not deny him the right of the writ of venire, nor act on it. How did this action of the Circuit Court leave the rights of the plaintiff in error?

The judgment of the District Court was reversed, and held for naught. The parties were put by this judgment in the same situation they occupied before the suit was brought; and the 125*] plaintiff *in error in this court could have issued a new writ. In Bank of the United States v. Bank of Washington, 6 Peters, 8, the Supreme Court held, that a party who had derived a benefit from a judgment which had been reversed, must make restitution; that is, the reversal of the judgment puts the parties in statu quo. So in 2 Gal. 216, it is held, that a judgment reversed is no bar to an action on the same subject matter. So in 1 Root, 421, it is decided that, if a judgment on a note is reversed the note is revived; to the very same effect see 10 Mass. 433; 5 Mass. 264; 3 Johns. 443.

These authorities, I think, settle the point that Mayberry, on the reversal of the judgment by the Circuit Court, could have brought a new suit in the State or federal courts, or he could have demanded a venire de novo. But he had the option to do the one or the other; he did not inform the court which remedy he chose. Can he now complain of error that the court left him to select for himself? Can he complain that the court did not grant him a remedy which he did not apply for, when he had the power to select between two remedies? This view will show that the court did him no injury —the court was merely passive; it did not decide on any right, nor act on any. Will error lie, therefore, in such a case? If so, may I not well ask, in what did the court err?

Again. The motion for the venire must be made in the court below. I think it plain that the party cannot come here by writ of error, and, for the first time, move for the venire in this court; the object of the writ of error being merely to make such a motion.

Mr. Chief Justice Taney delivered the opinion of the court:

Upon looking into the record, in this case, we find that there was no final judgment in the Circuit Court, and consequently no writ of error will lie from this court.

It appears that the plaintiff in error brought an action of trespass against the defendant, in the District Court for the Middle District of Alabama, for taking and carrying away certain goods and chattels alleged to be the property of the plaintiff, and recovered a judgment for $3,709.94 and costs.

A bill of exception was taken by the defendant to the rulings of the court upon several points raised at the trial, and the case removed by writ of error to the Circuit Court for the Southern District of Alabama, where the judgment of the District Court was reversed with costs. And upon this judgment of reversal, without any further proceedings in the Circuit Court, the plaintiff sued out a writ of error from this court.

The writ of error to remove the case to the Circuit Court is given by the Act of 1839, ch. 20, sec. 9; and as this law contains no special provision in relation to the judgments of the Circuit Court in such cases, the decisions of that court must be re-examined here, *in [*126 the manner and upon the principles prescribed in the general laws upon that subject.

The Judiciary Act of 1789, sec. 24, provides, that where the judgment of a district court is reversed in the Circuit Court, such court shall proceed to render such judgment as the District Court should have rendered. Under this act, however, the judgment of a circuit court upon a writ of error to a district court could not be re-examined in this court; no writ of error in such cases being given. And so the law stood until the Act of July 4th, 1840, ch. 43, sec. 3, which provides that writs of error in such cases shall lie, upon the judgment of a circuit court, "in like manner and under the same regulations, limitations, and restrictions as were there provided by law for writs of error on judgments rendered upon suits originally brought in the Circuit Court." And, under the 22d section of the Act of 1789, writs of error on judgments rendered in a circuit court upon suits originally brought there will lie only in cases when the judgment is a final one, and the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs.

It is evident that the judgment of the Circuit Court now before us is not a final one. It does not dispose of the matter in dispute. And if it was affirmed in this court, it would still leave the matter in dispute open to another suit; and might result in another writ of error to remove it to the Circuit Court, and then again to this court. The Act of Congress certainly never intended to sanction such fruitless and inconclusive litigation; and therefore directed that the Circuit Court should give such judgment as the District Court ought to have given, that is to say, a final judgment upon the matter in dispute. Instead of suing out a writ of error upon the judgment of reversal, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. And if he supposed any of the rulings or instructions of the court at the trial to be erroneous, he would have been entitled to his exception, and this court could then by writ of error have re-examined the judgment of the Circuit Court, and finally decided upon the matter in controversy in the suit.

But upon the judgment of reversal only, which leaves the dispute between the parties still open, no writ of error will lie, and the writ issued in this case must therefore be dismissed.

Order.

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

127*] *JOHN G. NELSON, Charles G. Carleton, William H. Stewart, Partners in Trade Under the Name of Nelson, Carleton & Co., Henry Parish, Daniel Parish, John R. Marshall, John B. Seaman, Thomas Parish, Leroy M. Wiley, Partners in Trade Under the Name of Parish, Marshall & Co., Appellants,

v.

JOHN J. HILL, John P. Lipscomb, Absalom Hardin, Lorenzo I. Sexton and Ann R. Sexton, his Wife, and James Gray, Defendants.

Multifariousness, objection of, cannot be taken by defendant for first time after answer —death of partner—creditor's right of action —proper parties.

It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill.

An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself.

The creditor of a partnership may, at his option, proceed at law against the surviving partner or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased.

Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partner of one of the firms.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The suit originated in the District Court of the United States for the Middle District of Alabama, from which it was carried, by appeal, to the Circuit Court, and thence was brought to this court.

In 1834, the appellants, consisting of two mercantile houses in New York, became the creditors of two firms in the State of Alabama, namely, the firms of Whitsett, Gray & Co., and of Whitsett & Gray; the former composed of William H. Whitsett, Thomas Gray, John J. Hill, the latter of William H. Whitsett and Thomas Gray.

The debts of these Alabama houses to their New York Creditors set forth as follows:

Whitsett, Gray & Co. to Nelson, Carleton & Co., a note dated May 17th, 1834, for $1,061.36, at 9 months; Whitsett, Gray & Co. to Parish, Marshall & Co., two notes, one dated May 10th, 1834, for $1,470.95, at 9 months, and one, same date, for $1,470.95, at 11 months; a bill of exchange drawn by Whitsett, Gray & Co. on John C. Sims & Co. for $1,901.56, at 4 months; and a note to White, Brothers & Co., by Whitsett, Gray & Co., for $331.46, at 12 months.

Of the individuals composing the two Alabama firms, William H. Whitsett died in October, 1835, and administration of his estate was committed to Lipscomb & Hardin. Thomas Gray died in 1835, and administration of his estate was granted to James Gray and Ann R. Gray, the widow of Thomas, who afterwards intermarried with Lorenzo Sexton.

*Upon three of the above notes, judg- [*128
ments were obtained in December, 1835, against Hill, as surviving partner of Whitsett, Gray & Co. In January, 1840, a bill was filed on the equity side of the District Court of the United States for the Middle District of Alabama by the New York firms, which, in August, 1841, was amended. The amended bill included, as defendants, James Gray, Lorenzo Sexton, and Ann R. Sexton (formerly Ann Gray), administrators of Thomas Gray, deceased, Absalom Hardin, John P. Lipscomb, and Joseph J. Hill, administrators of William H. Whitsett, deceased.

The bills recited the above fact; stated that execution had been sued out against Hill, but that no property could be found; that the estate of Whitsett had been reported to the County Court as insolvent, but that the estate of Gray was fully able to pay the debts of the partnerships; praying for a discovery and payment, etc.

NOTE.—As to multifariousness, see note to 11 L. ed. U. S. 402.

Partnership—How far partners liable for each other's acts.

One partner can bind another in the settlement, adjustment and compounding of a debt due to them jointly, without the knowledge or express assent of the other. Cunningham v. Littlefield, 1 Edwards, 104.

A partner may appoint an agent to make and indorse bills, etc., and such power is not void, although granted under seal by one partner only. Lucas v. Bank of Darien, 2 Stew. 280.

The rest of the members of a copartnership cannot engage the firm in another partnership, so as to bind a member who was not privy or consenting to it. Tabb v. Gist, 6 Call, 279.

If one of two partners in trade gives a bond or note without the consent of the other, and for a debt not contracted with or due from the partnership, such bond or note is not binding on such other partner, at law; nor will a court of equity hold him bound on the ground that the debt in question was contracted by the partner who gave the bond or note for goods, the greater part of which were applied to the use of the firm. Poindexter v. Waddy, 6 Munf. 418.

Where two are joint proprietors of certain patent rights, one of them cannot make the other liable merely on the ground of such, their joint interest, on a special agreement not connected with the enjoyment of their common rights under the patent. Lawrence v. Dale, 3 Johns. Ch. 23.

The act of a majority of the partners of a firm binds the rest; and one of three partners acting individually and under a letter of attorney from another, may bind the remaining partner. Kirk v. Hodgson, 3 Johns. Ch. 400.

Co-obligees occupy the attitude of partners; and all are in general bound by the acts of any one. Clark v. Patton, 4 J. J. Marsh. 34.

The law implies no agreement to compensate either of the partners for their various and unequal duties and services in the management of the business of the firm; but one of the co-partners may be answerable to the other for an injury which the company has sustained by his fraudulent misconduct, in violation of his duty as a partner. Caldwell v. Leiber, 7 Paige, 483.

Joint owners or partners are not entitled to

Lipscomb and Hardin answered the bills, denying generally the merits of the claim.

Hill answered separately, and concluded his answer with denying the right of the complainants to unite their claims in one suit.

Gray filed a separate demurrer, assigning therefor the following causes:

I. That the said complainants have not by their said bill and amended bill made such a case as entitles them in a court of equity to any discovery from this defendant or any relief against him as to matter contained in the said bill and amended bill, etc.

II. That the complainants have joined in their bill and amended bill distinct matters which, according to law and the practice of this court, ought not to be joined, etc.; that is to say, have joined matters against the late firm of Whitsett & Gray, composed of Wm. H. Whitsett, deceased, and Thomas Gray, deceased, with matters against the late firm of Whitsett, Gray & Co., composed of the said Whitsett & Gray and one John J. Hill, the said John J. Hill having no interest in the matter against the said late firm of Whitsett & Gray. They have joined matters of debt against said late firm, Whitsett & Gray, created by note, payable to certain persons using the name and style of White, Brothers & Co., to which debt the said complainants, or either of them, have not any interest, as far as appears by their said bill or amended bill, and in which the said defendant, Hill, is in no wise interested, nor in any wise liable, etc.

III. The complainants' bill and amended bill do not show that complainants had exhausted their remedy at law before coming into this court in such manner as to entitle them to the aid of this honorable court as a court of chancery, etc. Wherefore, for the foregoing causes, and for divers other causes of demurrer appearing in the said bill and amended bill, this defendant doth demur thereto; and he prays the judgment of this honorable court whether he 129*] shall *be compelled to make further and other answers to the said bill; and he humbly prays to be dismissed from hence with his reasonable cost in this behalf sustained.

In December, 1841, the cause came before the District Court, which sustained the demurrer.

The complainants appealed to the Circuit Court, which in March, 1843, affirmed the decree of the District Court. From the decision of the Circuit Court the complainants appealed to this court.

The cause was argued by Mr. Dargan for the appellants, and Mr. Crittenden for the appellees.

Mr. Dargan:

The decree, rendered on the demurrer of James Gray, dismissed the bill as to all the defendants, and they were adjudged to recover their costs. This was the necessary result upon sustaining the demurrer of James Gray, for he being a joint administrator with Sexton and wife, the suit could not proceed without him. The appeal was taken against all the defendants, and the cause was pending properly in this court, when Gray died; his death did not abate the suit or render it defective, for his entire interest survived to Sexton and wife, and the administrator of James Gray has no interest in the suit. Therefore the cause is not out of court or abated by the death of James Gray, nor is it necessary to make his representatives parties. The only question that can be raised against the bill is, that it is multifarious.

The bill is not multifarious because it is filed in the name of Parish, Marshall & Co. and Nelson, Carleton & Co., two distinct firms.

It is well settled that when a creditor seeks the aid of a court of equity to subject the assets of a deceased debtor to the payment of his debt, he may sue for himself and all other creditors who will make themselves parties to the suit, unless his application to a court of equity be founded on a specific lien on a specific chattel, or on particular real estate, as a mortgagee. But in the absence of any specific lien, that would give him an exclusive right as against the thing bound by the lien, he may sue for himself and all other creditors. Story's Equity Pleadings, secs. 99, 100, and the cases cited.

Indeed, if the bill seeks to subject the real estate of the decedent, it is said the creditor must sue in behalf of all; here two firms sue for themselves and all other creditors who will join in the suit.

The bill is not multifarious because it seeks to obtain satisfaction of debts due Nelson, Carleton & Co. and Parish, Marshall & Co. by Whitsett, Gray & Co., and also debts due Parish, Marshall & Co. by Whitsett & Gray alone.

The debts due the complainants by Whitsett Gray & Co. had been sued at law against Hill, the surviving partner, and executions have been returned—"no property"; *of [*130

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charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose. Franklin v. Robinson, 1 Johns. Ch. 158; Bradford v. Kimberly, 3 Johns. Ch. 434.

But where the several partners, who are joint owners of a cargo, appoint one of the partners their agent or factor, to receive and sell it, receive the proceeds, etc., a compensation is necessarily implied in such special agreement. Bradford v. Kimberly, 3 Johns. Ch. 431.

If a partner withdraws funds, he will not be chargeable with compound interest, unless he trades or speculates with them to a profit. Stoughton v. Lynch, 2 Johns. Ch. 210.

One member of a firm is not bound by an indorsement made by another member of the firm, of an accommodation bill of exchange, without express or implied authority to make such indorsement, independently of that arising from the partnership connection. Chenowith v. Chamberlain, 6 B. Mon. 60.

One member of a firm cannot bind his co-partner by a bond under seal. McNaughten v. Partridge, 11 Ohio, 223.

One partner has no power to bind his co-partner by deed, unless he be expressly empowered to do so by deed, and that power cannot be proved by parol. Napier v. Catron, 2 Humph. (Tenn.) 534.

The implied authority of one partner to bind his copartner, is generally limited to such acts as are in their nature essential to the general objects of the co-partnership. Kirby v. Ingersoll, Harrington's Ch. 172.

One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of the creditors of the firm without the knowledge or consent of his copartner, when he is on the spot, and might have been consulted. Ib.

When money is lent to part of the members of the firm, who give a note for it in their own names only, the lender is not a creditor of the firm although the borrowers apply the money towards payment of the debts of the firm. Green v. Tanner, 8 Met. 411.

course the complainants can come into equity against the assets of the deceased partners on those debts, for they have done all at law they can do. Now, if it be true that, as to the two debts due by Whitsett & Gray alone to Parish, Marshall & Co., they have a perfect remedy at law, or if they have as yet no equity, because they must proceed at law first against the administrators of Whitsett, the question will then be raised, if complainants seek to enforce an equitable right, and in the same bill state a different and legal right, as to which equity will afford no relief, and this is apparent on the bill, will the statement of this legal right and prayer for relief, which by possibility cannot be granted, render the bill defective as to the equitable right? To hold that a bill thus framed would be defective, would be a rigid rule, not, perhaps, productive of benefit or convenience; would it not go to the full extent, that a complainant must recover on all causes of actions or suits stated in his bill, or he could not recover at all? I have not found a case that goes thus far, and I submit that no case can be found where a bill is held to be multifarious because it states and seeks relief as to a clear equitable right, and also states and seeks relief as to a different and distinct legal right; but relief would be granted as to the equitable right; and so far as it sought relief on a legal title the bill would be dismissed at the hearing. If I am right in this view, the demurrer should not have been sustained, even if the debts due by Whitsett & Gray alone to Parish, Marshall & Co. cannot be enforced in equity against the representatives of Gray, or if their remedy on these two debts is at law. As to the doctrine of multifariousness, see Gaines v. Chew et al. 2 Howard, 619; Story on Eq. Pleadings, 515-517.

This view is submitted on the supposition that the court may hold that Parish, Marshall & Co. have a perfect right at law on the two debts not sued at law, and due by Whitsett & Gray alone to them. But I think the rule is now well established, that a creditor may file his bill in the first instance against the assets of a deceased partner, notwithstanding the surviving partner may even be solvent. See 1 Mylne & Keen, 582. This seems to be a well considered case, and maintains this position; also Story on Partnership, sec. 362, pp. 513, 514; also the case of Devaynes v. Noble, 1 Merivale, 589. I admit that formerly the reverse was held to be the law; but since the decision in the case of Devaynes v. Noble, the rule seems to be settled, that a creditor may go into equity in the first instance against the assets of a deceased partner, although the surviving partner may be solvent. The text writers have adopted this rule without objection. If the court should hold this to be the rule, then Parish, Marshall & Co. would be entitled to relief against the administrators of Thomas Gray, although no suit was brought against Whitsett's representatives who had survived Gray; and in that aspect or the case, could Thomas Gray, 131*] administrator, demur, because *Parish, Marshall & Co. sought to enforce debts chargeable on the estate, because the deceased was liable on them—on one jointly with A, the *other jointly with B? The estate is bound for both, they are both merely debts, and due to the* same complainant. The same authorities show that when a bill is thus filed against the representatives of the deceased partner, the surviving partner, whether solvent or insolvent, is a necessary party to the bill, although no decree can be rendered against him, for the remedy as against him is at law.

In conclusion, if the remedy on the bill and note to Parish, Marshall & Co., due by Whitsett & Gray, is at law exclusively; or if, as yet, Parish, Marshall & Co. are not entitled to equitable relief as to these two debts, then the demurrer is too broad, and should not have been sustained. But if they can go into equity in the first instance against the assets of Gray, these two debts are merely debts due by Gray, and what inconvenience will result from uniting them with other debts due the same complainant by Gray? For the reasons above stated, the court erred in sustaining the demurrer.

Mr. Crittenden referred to the complicated nature of the suit, brought by two firms against two other firms, and contended that it was objectionable on account of multifariousness, misjoinder of parties, and causes of action That a judgment should have been obtained against the surviving partner at law, before resorting to equity. For these principles, he cited 2 Madd. Chan. 294; 2 Anstruther, 447; Hardress, 337; 2 Vesey, Jun. 323; 1 Story on Partnership, 512-514.

Mr. Justice Daniel delivered the opinion of the court:

Amongst the causes assigned for the demurrer in this case no objection is urged as founded upon the joinder of the different complainants in the bill and amended bill, unless it be supposed that an objection may be implied in the general language of the first assignment, namely, that the complainants had not by their bills made such a case as entitled them to relief. From a statement thus vague and indefinite it would be difficult to deduce any one objection rather than another; but could this assignment be understood as pointing specifically to the structure of the bills as multifarious, from the number or relative position of the complainants, it is certain that no valid exception could on either of those grounds be sustained.

These bill are formally, as well as substantially, creditors' bills, by which the complainants are regularly and properly united in seeking satisfaction from subjects against which, as creditors of the defendants, they can properly claim. As to the nature and regularity of such a proceeding, see Mitford's Equity Pleadings, 166, 167; Story's Equity Pleadings, secs. 99, 100, and the authorities there cited.

*From a want of perspicuity in the [*132 statements contained in the bill and amended bill, in the former especially, there might seem at first view some plausibility in the second cause assigned for the demurrer, namely, the multifariousness of the bills from the joinder of parties as defendants, who are supposed to be unconnected in interest and in liability. The objection of multifariousness is one of which it is said by the authorities a defendant can avail himself by demurrer or exception taken to the pleading only. That being designed for his protection against the vexation

and expense of answering to matters irrelevant to the true controversy existing between him and the complainant, if instead of arresting the irregularity at the commencement and claiming the exemption intended for him, he will go on and answer the bill, the reason for the exemption designed by the rule no longer exists; and although at the hearing the court may, sponte sua, make an objection for multifariousness, it is no longer in the power of a party, after answer, to do so. See Whaley v. Dawson, 2 Sch. & Lef. 370, and Ward v. Cooke, 5 Madd. 80. From the character of this objection, then, and from the established requisition as to the time and mode of making it by a defendant, it must of course be tested and determined by the structure of the bill alone, and cannot be enforced, explained, or removed by proceedings posterior to the bill and demurrer, nor by the evidence. From this obscurity in the bill and amended bill, as has already been observed, there might seem to be a want of connection in interest and in liability between the defendants, such as would not warrant their being joined in the same suit. This objection, however, will entirely vanish upon a closer examination of the relative positions of the parties.

The complainants consist of two sets of creditors. First, the firm of Nelson, Carleton & Co.; second, the firm of Parish, Marshall & Co. To each of these firms the copartnership of Whitsett, Gray & Co. became indebted. The debt contracted to the former house was evidenced by the note of Whitsett, Gray & Co. The debts (for there were several in the second instance) due to Parish, Marshall & Co. were evidenced by two notes of Whitsett, Gray & Co. by a bill drawn by Whitsett, Gray & Co. on Sims & Co. (which it is alleged was not accepted), and by a note of Whitsett & Gray, payable to White, Brothers & Co., and passed in some mode not distinctly set forth by Whitsett, Gray & Co. to Parish, Marshall & Co. The firm of Whitsett, Gray & Co. was composed of William H. Whitsett, Thomas Gray, and John J. Hill; that of Whitsett & Gray was composed of William H. Whitsett & Thomas Gray. Thus it appears that Thomas Gray was a member of both firms. The complainants allege the deaths of both Whitsett & Gray, leaving Hill as surviving partner of the firm of Whitsett, Gray & Co. They aver that Lipscomb & Hardin administered upon the estate of Whitsett, and had 133*] reported that estate *to the County Court to be insolvent; that Ann R. Gray, widow of Thomas Gray, and who had intermarried with L. Sexton, had, conjointly with James Gray, taken administration of the estate of Thomas; that upon judgments obtained on the notes of Whitsett, Gray & Co., against Hill, the surviving partner, executions had been sued out and returned nulla bona. There is, in the next place, charged a belief of frauds and concealment on the part of Hill, and of the administrators of Whitsett, and also the perfect solvency of the estate of Thomas Gray; the whole concluding with a prayer for accounts of the effects of Whitsett, Gray & Co., of William H. Whitsett, and of Thomas Gray, in the hands of their representatives, and for satisfaction.

It is now a rule of law too well settled to be *shaken, that the creditor of* a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner. See the several cases on this point collected in Story on Partnership, sec. 362, note. This being conceded, there can be no valid exception to the prosecution of this suit immediately against the representatives of Thomas Gray, and it is to the advantage of his estate that the representatives of Whitsett, and the surviving partner, Hill, should both be called in, that they may be required to contribute from any appropriate means in their possession towards the discharge of their joint and several obligations. Here, then, will be perceived the answer to the third cause assigned for the demurrer, namely, that the complainants had not exhausted their remedy at law before going into a court of equity. It is the right also of the representatives of the deceased partner, Whitsett, and that of the surviving partner, Hill, to participate in settlements in which their interests are directly involved; and an omission in the bills to convene these joint parties in interest for this purpose, with the representatives of the other deceased partner, Gray, would have exhibited a palpable and material defect in the proceedings of the complainants.

According to the case made in the bill and amended bill, there are no visible partnership effects, and it may be the fact, that the surviving partner, Hill, and the estate of the deceased partner, Whitsett, are both insolvent. Should this turn out to be true, then the separate estate of the partner, Gray, said to be solvent, must be responsible to the creditors of each of the firms of which he was a member. In order to ascertain the precise extent of Gray's responsibility, accounts would be proper, not only between the two firms and their respective creditors, but also between these firms themselves. Accounts would likewise be proper of the separate effects of the deceased partners. This view of the case removes the ground set forth in the second assignment of causes of demurrer. We are of opinion that the court could, in equity, properly take cognizance of this cause without the necessity for further previous *proceedings at law; that the [*134 bill and amended bill of the complainants were not exceptionable for multifariousness; that the decree of the Circuit Court dismissing those bills for either of the causes assigned for the demurrer is erroneous. The decree is therefore reversed, and this cause is remanded to the Circuit Court, with directions to be there proceeded in, conformably with the principles here established.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

JOHN A. ROWAN and John L. Harris, Copartners in Trade under the Name and Style of Rowan & Harris, Plaintiffs in Error,

v.

HIRAM G. RUNNELS, Defendant in Error.

SAME v. SAME.

Decision of this court declaring contract valid not reversed because State court subsequently declared similar contract invalid under State constitution.

In the case of Groves v. Slaughter (15 Peters, 449) this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale.

This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case.

This court adheres to the construction of the constitution which was given in the case of Groves v. Slaughter, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of Groves v. Slaughter, declared such contracts to be void.

THESE cases were brought up by writ of error from the Circuit Court of the United States for the Southern District of Mississippi. Rowan and Harris were citizens of Virginia, and Runnels was a citizen of Mississippi.

Both cases depended upon the same principle, and differed only in this, that in one, Runnels executed to Rowan & Harris his own note, and in the other, indorsed over to them a promissory note executed by George W. Adams. Both notes were due on the 1st of March, 1840, one being for $2,950.70, and the other for $8,671.33. At maturity the notes were protested for nonpayment, and suits brought upon them.

At the trial, the defendant offered in evidence a transcript of the record of a suit pending in the Supreme Court of Chancery of the 135*] *State of Mississippi, wherein Rowan & Harris were complainants, and George W. Adams and others, defendants, one object of which was to show that the consideration for the notes was a sale of slaves by Rowan & Harris to Runnels. Whereupon the defendant moved the court to instruct the jury, that if they believed from the evidence that the original consideration of the note sued on was the sale by plaintiffs to defendant of slaves introduced into the State of Mississippi for sale and as merchandise by plaintiffs, since the 1st day of May, 1833, that then said note was void, and they should find for the defendant. Which instruction the court gave to the jury as moved for by the defendant. To the giving of which instruction the plaintiffs excepted, and upon this exception the case came up to this court.

Mr. Nelson, for the plaintiffs in error, contended that the case was entirely covered by the decision of this court in 15 Peters, 449.

Mr. Bibb, for appellees:

These cases grew out of that provision of the constitution of the State of Mississippi which is in these words: "The introduction of slaves into this State as merchandise, or for sale, shall *be prohibited from and after the first day of May, one thousand eight hundred and thirty-three.*"

The decision of this court, at the January Term, 1841, upon the construction of that clause of the constitution of the State of Mississippi, in the case of Groves v. Slaughter, 15 Peters, 449, was, that the constitution of the State of Mississippi referred the subject of the prohibition to the Legislature as a duty to be performed by that body, and that there was no prohibition until the Legislature should act.

That decision is a precedent, not binding upon the appellees in these two cases, because they were not parties to that case, neither are they privies. They have a right to avail themselves of the benefit of all the additional lights and after-circumstances.

The principle is well settled and firmly established by the decisions of this court, again and again repeated and exemplified, that the construction which the courts of the several States have given to their own constitutions and statutes, respectively, ought to control the decisions of this court upon questions of right growing out of State constitutions and statutes, unless they come in conflict with the Constitution, laws, or treaties of the United States. The decision in the case of Groves v. Slaughter, 15 Peters, 449, alludes to this principle; but, in the opinion of the court, it is said: "The case chiefly relied upon is that of Glidewell et al. v. Hite and Fitzpatrick, a newspaper report of which has been furnished to the court. It was a bill in equity filed sometime in the year 1839, since the commencement of the suit now before *this court, and [*136 the decree of the Chancellor affirmed in the Court of Appeals by the divided court, since the judgment was obtained in this cause. But if we look into that case, and the points there discussed, and the diversity of opinion entertained by the judges, we cannot consider it as settling the construction of the Constitution."

As the case of Groves v. Slaughter itself was decided by a "divided court," as there was a "diversity of opinion entertained by the judges," as it was a case of first impression, deciding upon the construction of a clause in the constitution of the State of Mississippi, which the decisions of the courts of that State had not then settled, as the court then said; and as Mr. Justice Barbour died before the decision, and Mr. Justice Catron did not sit in the case from indisposition, and as Justices Story and McKinley dissented from the opinion delivered, it is submitted, with great deference, that the opinion in Groves v. Slaughter is open to argument upon these two points—

1st. The imperative obligation upon this court to adopt the construction given by the courts of Mississippi to their constitution, when settled.

2d. That decisions of the courts of the State of Mississippi have now settled the construction contrary to the decision in Groves v. Slaughter.

1. The imperative obligation upon this court to adopt the construction given by the courts of the State of Mississippi to their constitution, when settled by such decisions.

Out of a very great number of precepts and examples given by this court upon that subject, a single decision will suffice.

In the case of Elmendorff v. Taylor, 10 Wheat. 159, the opinion of the court, delivered by Chief Justice Marshall, declares: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the Judicial Department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes; and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of 137*] the several States *to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This case is the more impressive because this court adopted the construction given by the Court of Appeals of Kentucky to a statute enacted by the State of Virginia, and conformed to the last three decisions of that court, which conflicted with nine former decisions of the court by the former judges, which former decisions were in a degree fortified by the opinion of this court in the case of Wilson v. Mason, 1 Cranch, 100—that the particular descriptions in a certificate of survey, before a copy could be demanded as of right, and when it could only be inspected by the courtesy of the surveyor, could not be used by a locator to help out his entry and communicate the necessary notoriety. This court did, notwithstanding, in the case of Elmendorff v. Taylor, say: "We must consider the construction as settled finally by the courts of the State; and this court ought to adopt the same rule, should we even doubt its correctness." 10 Wheat. 165.

The reasoning just quoted is so clearly demonstrative and convincing that the citations of the other decisions of this court would be superfluous.

2. The decisions of the Supreme Court of the State of Mississippi have now settled the construction of the constitution of that State relating to the point involved in these cases.

The cases decided by the court of Mississippi, as reported in 5 Howard's Missisippi Rep. 100, 110, 769, and 7 Ibid. 15, are referred to as having settled the construction of the clause of their constitution now under consideration.

The courts of Louisiana have, in questions growing out of the prohibition in the constitution of Mississippi before quoted, conformed to the decisions of the court of Mississippi, of which an example is to be found in 6 Robinson's La. Rep. 115. And the courts of Tennessee have in like manner conformed; but as the book of reports, containing the decisions of the Supreme Court of Tennessee, has been taken out of the library of the court, I am not able to cite the particular case, nor do I deem it material; the decisions of the court of Mississippi being the proper standard to which all other courts should conform upon such a question.

It would be highly inconvenient that one construction of the organic law of the State of Mississippi should prevail in the courts of that State and of the adjoining States, and that another and different construction of the same instrument should prevail in the federal courts.

The decision in Groves v. Slaughter, 15 Peters, 449, was by "a divided court;" two justices were absent, in a case of the first impression, and when the construction fixed by the Judiciary Department *of the gov-[*138 ernment of Mississippi had not settled the proper construction.

Now that it is settled by the courts of that State, this court is bound to adopt it as the proper and true construction.

According to the principles decided by this court between Elmendorff v. Taylor, 10 Wheat 165, and various others too tedious to mention this court is no more at liberty to depart from the construction of the State constitution, so settled by the Judicial Department of the State of Mississippi, than the courts of that State would be to depart from the construction of the Constitution, statutes, and treaties of the United States, as settled by this Supreme Court of the United States.

Mr. Chief Justice Taney delivered the opinion of the court:

This action was brought in the Circuit Court for the Southern District of Mississippi, by the plaintiffs, upon a promissory note made to them by the defendant for $2,950.70, dated March 27th, 1839, and payable on the 1st of March, 1840.

The defendant offered in evidence that the only consideration of this note was certain slaves sold by the plaintiff to him in Mississippi in the year 1836, this note being given to take up former securities which had not been paid; and that the said slaves were introduced and imported into the State in the year last above mentioned, by the plaintiffs, as merchandise and for sale.

Upon this evidence, the court instructed the jury that if the slaves were so introduced after the 1st of May, 1833, the note was void, and their verdict must be for the defendant. The plaintiffs excepted to this instruction, and the verdict and judgment being against them, they have brought the case here by writ of error.

The Circuit Court held this contract to be illegal and void, under the following section of the constitution of Mississippi, adopted in 1832:

"The introduction of slaves into this State, as merchandise or for sale, shall be prohibited from and after the 1st day of May, 1833; provided the actual settler or settlers shall not be

prohibited from purchasing slaves in any State in this Union, and bringing them into this State for their own individual use, till the year 1845."

The question presented in this case is precisely the same with that decided by this court in the case of Groves v. Slaughter, reported in 15 Peters, 449. And the court then held, after hearing a very full and elaborate argument, that the clause in the constitution of Mississippi, relied on by the defendant, which went into operation on the 1st of May, 1833, did not of itself prohibit the introduction of slaves as merchandise and for sale; and that contracts for the purchase and sale of slaves so introduced, made before the passage of the law of that State of May 13th, 1837, were valid and binding upon the parties. The reasoning upon 139*] which that opinion was *founded is fully set forth in the report of the case, and need not be repeated here.

It now appears, however, that the question has since been brought before the courts of the State, and it has been there settled by its highest tribunals that the clause in the constitution above referred to did, of itself and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale; and rendered all the contracts for the sale of such slaves, made after May 1st, 1833, illegal and void. And it is argued that inasmuch as this court adopts the construction given by the State courts to their own constitution and laws, we ought to follow the decisions in Mississippi, and declare the contract before us to be void, notwithstanding the case of Groves v. Slaughter.

But we are not aware of any decision in this court which presses the rule so far, or that would justify this court in declaring contracts to be void upon this ground which, upon the fullest consideration, it has so recently held to be good. It will be seen, by a reference to the opinion delivered in the case of Groves v. Slaughter, that the court were satisfied not only that the construction it then placed on the constitution of Mississippi was the true one, but that it conformed to the construction upon which the Legislature of the State had acted, and that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the time when this contract was made; and that as late as the beginning of the year 1841, when Groves v. Slaughter was decided, it did not appear, from anything before the court, that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the State.

Acting under the opinion thus deliberately given by this court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

*But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For, if such a rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory.

We are of opinion, therefore, that the decision in the case of Groves v. Slaughter must rule this case, and consequently that the judgment of the Circuit Court must be reversed.

*The same judgment must also be [*140 given in the other case before us between the same parties, as it depends on the same principles.

Mr. Justice Daniel dissented.

From the decision of the court pronounced in these causes, I feel myself constrained to dissent. The rule heretofore announced and uniformly observed by this court, with respect to the construction to be given to the constitutions and statutes of the several States, has been this: that the interpretations put upon those constitutions and statutes by the supreme tribunals of the States respectively, should be received and followed as the true interpretation. This rule, so reasonable in itself, so inseparable from every idea of the competency, or indeed the very being of the systems of which those constitutions and statutes make an essential part, is not even now denied; but whilst it is, in general terms, assented to in the decision of these causes, it is in effect, if not in terms, by the same decision utterly overthrown. In the case of Groves et al. v. Slaughter, 15 Peters, 449, this court, as it was constrained to do in the absence of any interpretation by the State courts, gave its own construction to the constitution of Mississippi. Since the decision of Groves v. Slaughter, decisions of the Supreme Court of Mississippi, giving an interpretation to the constitution of that State, have become generally known—they are familiar, unequivocal, uniform, numerous. That any or all of these expositions may have been made posterior to the decision of the cause of Groves v. Slaughter, I hold to be perfectly immaterial, so far as this circumstance can affect their force and validity. If these expositions establish the meaning of the constitution of Mississippi, such meaning must have relation to the period of the consummation of that instrument. The constitution has always been the same thing from the time of its adoption. It could not have been some other thing than the constitution, because it had not been interpreted to this court, and subsequently have become the constitution merely because its interpretation was then generally declared. The decision of the causes now before this court gives to the constitution of Mississippi different meanings at different periods of its existence, and deduces those meanings from circumstances wholly unconnected with the intrinsic signification of the terms of the instrument itself. Such a rule of interpretation involves, in my view, a contradiction which I am wholly unwilling to adopt.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the 141*] *said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

BENNET R. TRULY, Complainant and Appellant,
v.
MOSES WANZER, Jabez Harrison, and John R. Nicholson.

Judgment for consideration of sale—collection not enjoined on grounds that judgment debtor apprehends failure of title—lapse of time.

The preceding case of Rowan & Harris v. Runnels reviewed and confirmed.

The general principle with regard to injunctions after a judgment at law is this: that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorise a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment.

Hence, where a party has remained for ten years in the undisturbed enjoyment of the property which he purchased, it was no ground for an injunction to stay proceedings for the recovery of the purchase money, to say that the original purchase was void by the laws of the State, but that he had neglected to urge that defense at law, or to say that he had heard that some persons unknown might possibly at some future time assert a title to the property.

Such an injunction, if granted, must be dissolved.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

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

The case was argued by Mr. Crittenden for the appellant, and Mr. Coxe for the appellees.

Mr. Justice Grier delivered the opinion of the court:

It is not easy to apprehend or appreciate the grounds upon which the complainant in this case has invoked the aid of a court of chancery.

He purchased some negroes from one Herbert, in 1836, to whom he gave two notes in payment. On one of these, suit was brought and a judgment obtained, which has been paid and satisfied. The other remains unpaid, but the complainant has been summoned as garnishee of Herbert in a suit by Wanzer and Harrison, in which a judgment has also been obtained, and an execution issued; and he now asks the interposition of a court of equity, not only to protect him from the judgment and execution, but also to restore to him that portion *of the consideration which has* been recovered *by due course of law.*

The reasons alleged for this request are, first, because the negroes purchased by him were brought into the State of Mississippi for sale contrary to the provisions of the constitution of the State; and therefore the contract was illegal and void. And, *secondly, because [*142 he has been informed that the vendor had not a good title to the negroes, but held them as guardian for his infant brothers and sisters, "and ran them off to the State of Mississippi." As the complainant still retains the undisturbed possession of the property without even a threat of molestation, this allegation would seem to have been inserted in the bill not as containing in itself different grounds for an injunction, but rather to give some plausibility to the charge of fraud and thus veil the naked deformity of his case.

That a note, given for the purchase of negroes brought into the State of Mississippi after 1833 (when the constitution was adopted), and before 1837 (when the Legislature imposed penalties to enforce the constitutional prohibition), was not void, has been decided by this court in the case of Groves v. Slaughter, 15 Peters, 449, and again at the present term in the case of Rowan & Harris v. Runnels.

But even if the alleged illegality of the contract would have constituted an available defense to the payment of note, it would be a strange abuse of the functions of a court of equity to grant an injunction against the recovery of a judgment at law, because a purchaser with a full knowledge of his defense had omitted or was ashamed to urge it.

It may be stated as a general principle, with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. See 2 Story's Equity Jurisprudence, sec. 887.

It is too plain for argument that none of these conditions can be predicated of the present case.

The complainant has had the undisturbed enjoyment of his purchase, without challenge of its title, for ten years; and it is with a bad grace that he now invokes the aid of a court of equity to shield him from the payment of the consideration, on the allegation that he had neglected to urge an unconscionable defense, or that he had heard that some persons unknown might possibly at some future time assert a claim to the property. It is in vain to search the annals of equity jurisprudence for a precedent of an injunction granted on such bald pretenses.

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must *be clear, [*143

the injury impending, and threatened so as to be averted only by the protecting preventive process of injunction." Baldwin's Rep. 218. It never should be permitted to issue where it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their just demands.

Let the judgment of the Circuit Court be affirmed.

Order.

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

CHRISTOPHER FORD, Appellant,
v.
ARCHIBALD DOUGLAS, Maxwell W. Bland, and Emeline, his Wife, Appellees.

Judicial sale though fraudulent stands until set aside by proper proceedings had—sale on creditor's execution enjoined in action—sufficiency of answer to bill in Louisiana—cross bill.

By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside.

The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross bill. Exceptions to the answer upon this account were properly sustained by the court below.

But if the court below should perpetuate the injunction, upon the defendants' refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross bill. If the injunction does not clearly reserve these rights to the creditor it goes too far, and the judgment of the court below must be reversed.

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

As the merits of the case were not involved in the decision of the court, it will only be necessary to give such a narrative of the facts as will illustrate the points of law upon which the decision turned.

On the 24th of November, 1837, James S. Douglas, of the State of Louisiana, made his last will and testament as follows:

I, James S. Douglas, of the parish of Concordia, and State of Louisiana, being feeble in body, and knowing the uncertainty of this life, but of sound and disposing mind and memory, do make and publish this my last will and testament.

First. I direct that all my just debts be paid as soon after my decease as my execu-[*144 tors shall realize the same from the real and personal estate intrusted to their care and management.

Second. Reposing the utmost confidence in my beloved wife, Emeline Douglas, I hereby constitute and appoint her executrix, and my brother, Stephen Douglas, and my friend, Passmore Hoopes, executors of all my estate, real and personal, lying and being in the State of Mississippi.

Third. I also appoint my brother, Stephen Douglas, and my friend, Passmore Hoopes, executors of all my estate, real and personal, lying and being in the said State of Louisiana.

In witness whereof, I have hereunto set my hand and seal, this twenty-fourth day of November, one thousand eight hundred and thirty-seven.

(Signed) James S. Douglas. [Seal.]

This will, being duly attested, was admitted to probate in Mississippi on the 25th of December, 1837, and letters testamentary granted. It is not necessary to follow the proceedings in Mississippi further.

In 1838, May 26th, in the State of Louisiana, before Richard Charles Downes, parish judge in and for the parish of Madison, ex officio judge of probates, came Stephen Douglas, presented his petition, setting forth the death of his brother, James S. Douglas, as happening in November, 1837; that he made his last will and testament, wherein he appointed the said Stephen Douglas and Passmore Hoopes testamentary executors of his estate in Louisiana; that probate of the will had been made in Claiborne County, Mississippi; therefore, praying letters in pursuance of the testament, and an inventory; whereupon, the judge ordered that, upon probate of the testament, an inventory be taken.

On the 30th of March, 1839, the will was proved in Louisiana, as it had before been in Mississippi. Amongst other claims against the estate, Stephen Douglas, the executor, filed an account, claiming a debt due to him of $53,150.42.

On the 31st of October, 1839, Emeline Douglas, the widow, was appointed guardian of her four children, and Archibald Douglas, a younger brother of Stephen, was appointed under-tutor or guardian. A family meeting was called, and attended the parish judge, which advised the sale of the plantation and slaves, implements, cattle, etc., at the head of Lake St. Joseph's, to satisfy the balance due to Stephen Douglas, the executor.

The sale was accordingly ordered by the parish judge, and took place on the 23d of March, 1840, when Mrs. Emeline Douglas and Archibald Douglas became the purchasers.

On the 1st of April, 1840, Emeline Douglas obtained a judgment in her favor against the estate for $76,634.74, and, on the 22d of April, the parish judge ordered another sale to take place for the purpose of paying this debt.

*On the 8th of June, 1840, the parish [*145 judge made sale of a plantation called Buck Ridge, slaves, cattle, corn, etc., all of which belonged, jointly, to James S. Douglas, the deceased and Stephen Douglas, the executor. This

property was purchased by Emeline Douglas and Archibald Douglas for $83,000.

In December, 1840, and January, 1842, Ford, a citizen of Virginia, obtained the three following judgments against the executor, in the Circuit Court of the United States, viz.: the one judgment obtained on the 23d of December, 1840, for $9,180, with interest, at the rate of eighty per cent. per year, from the 15th of January, 1838, on one half thereof, and from 15th of January, 1839, on the other half thereof, besides costs.

Another judgment, of the 26th of December, 1840, for $4,590, with interest at same rate from 15th of January, 1840, besides costs.

The third, of January 3d, 1842, for $4,590, with interest at same rate until paid, besides costs—making together $18,360, besides interest and costs.

Executions were issued upon these judgments and levied upon the property which had been purchased by Emeline Douglas and Archibald Douglas.

On the 21st of December, 1842, Archibald Douglas, Maxwell W. Bland, and Emeline, his wife (late Emeline Douglas), filed their bill in the Circuit Court of the United States for the Eastern District of Louisiana, against Christopher Ford and the marshal, praying for an injunction to stay further proceedings under the judgments, and that they might be quieted in their possession of the property which they had purchased.

On the 30th of December, 1842, an injunction was issued accordingly.

On the 21st of April, 1843, Ford filed his answer, in which he alleged that the proceedings under the will, as well in Mississippi as in Louisiana, were the result of fraud, collusion, and combination, in consequence of which they were null and void, and passed no title to the complainants. The answer then proceeded to set forth, with great particularity, the acts of which he complained, and concluded as follows:

"This respondent, having answered the allegations in said petition set forth, prays this honorable court that the said petition may be decreed to be dismissed, and the injunction had and obtained in this case may be dissolved, and a judgment rendered against the said petitioners and the sureties on their injunction bond for damages, according to law. That this honorable court make such other judgment, orders and decrees, as may be found legal and proper, to declare void and null the sales relied on in said petition; to finally dissolve the said injunction with legal damages in favor of this respondent; to dismiss said petition and relieve this respondent from the opposition of said petitioners; to order the marshal to proceed to 146*] *the sale of said property under the said three writs of fieri facias, for the satisfaction of said judgments of this respondent; and that this respondent have judgment for his costs.

"And this respondent will ever pray, etc.

(Signed) Christopher Ford."

On the 22d of April, 1843, the following exception to the answer was filed:

The said plaintiffs except to the answer filed *by the said defendants in this* behalf, because *the matters and things set forth in the said answer cannot, by law, be inquired into in the present suit or proceedings instituted by the said plaintiffs.* And the said plaintiffs not admitting any of the facts or matters set forth and alleged in the said answer of the said defendants, but, on the contrary, denying and protesting against the truth of all and every part thereof, and alleging that the truth thereof cannot be inquired into in this action, pray that they may have the benefit of their injunction, and that the same may be made perpetual, etc.

(Signed) John R. Grymes, for plaintiffs.

And on the same day and year aforesaid, to wit, on the 22d day of April, 1843, the following agreement was filed:

Douglas et al. v. C. Ford et al.

Circuit Court of the United States, Eastern District of Louisiana.

It is agreed that this case may be set down for argument on the matters of law arising on the petition and answer, as on an exception to the answer; and that if the judgment of the court, on the matters of law, should be for the defendant, the plaintiffs may join issue on the facts, and the testimony taken in the usual manner. The plaintiffs to be at liberty, at any time before hearing, to file special exceptions in writing.

(Signed) John R. Grymes, for Plaintiffs.

On the 22d of April, 1843, the cause came on for trial upon the plaintiffs' exceptions to the answer of the defendant, and on the 24th the following order of court was entered of record:

Monday, April 24th, 1843.

The court met pursuant to adjournment Present, the Honorable John McKinley, Presiding Judge; the Honorable Theodore H. McCaleb, District Judge.

Christopher Douglass et al. v. Christopher Ford et al.

The consideration of exception filed in this case to the answer of the defendant was this day resumed before the court, the complainants not appearing either in person or by his solicitor, and F. Houston, Esq., for the defendant. Whereupon, the arguments of counsel being closed, it is ordered, adjudged and decreed by the *court, that the exception of the [*147 complainants to defendants' answer be sustained, and that the defendant answer over.

Archibald Douglas et al. v. Chirstopher Ford et al.

The defendant, Christopher Ford, by his counsel, declines to answer further in this case the bill of the plaintiffs, relying and insisting on the sufficiency of the ample and conclusive answer filed by him in this cause, and the utterly null and void character of the title set up by said plaintiffs, apparent on their said bill, and the record of the mortuary proceedings of the succession of the said James S. Douglas, deceased. The defendant having declined to answer further in this case, and to submit it to the court to render such final decree in the case as may appear to them to be proper, it is therefore ordered, adjudged and decreed, that the injunction heretofore awarded in this case be,

and the same is made perpetual; and it is further ordered, adjudged and decreed, that the plaintiffs recover the costs of suit, without prejudice to the right of the defendant to any action he may think proper.

From this decree Ford appealed to this court.

The cause was argued by Mr. Bibb for the appellant, and Mr. Meredith for the appellees.

Mr. Bibb examined the facts very minutely as they were presented in the record, with a view of sustaining the charge of fraud, and then proceeded:

The appellant assigns the errors following, as appellant on the record:

1. The judge erred in sustaining the exception to the answer, and also in giving relief upon the bill; thereby, in effect, decreeing that the plaintiffs could, as complainants in equity, ask the court to aid them in consummating their unfair practice of frauds, appearing on the face of their bill and exhibit referred to as part of their bill.

2. The judge erred in adjudging that the matters of fraud and collusion, alleged in the answer of the defendant, now the appellant, were not defenses competent, fit and proper, legal and equitable, to be inquired into in the suit prosecuted by the plaintiffs, now appellees.

3. The court erred in sustaining the bill, and in giving any relief to the complainants upon the bill.

4. The court erred in the nature and extent of the relief given to the said complainants.

5. Upon the face of the bill and exhibit referred to, as the evidence of the title claimed by the plaintiffs, it appears that the plaintiffs had no title, had not capacity to become purchasers, that they had paid no consideration, and that the proceedings in the Parish Court were had, done, and procured by fraud and collusion, and combination between the said 148*] Emeline and Archibald Douglas, *Stephen Douglas, the executor of the will and testament of James S. Douglas, and others, with intent and for the purpose of delaying, hindering, and defrauding the creditors of said testator, James S. Douglas, and Christopher Ford in particular; and therefore the bill should have been dismissed.

6. Upon the bill and transcript of the proceedings in the Parish Court of Madison, Louisiana, exhibited by the plaintiffs in the court below, as the evidence of their title, it appears that the title pretended by the said plaintiffs is invalid, prohibited by the policy of the law, denounced and interdicted by the principles of equity; and therefore the bill should have been dismissed.

7. The bill does not contain any equity; made no case proper for the aid of a court of equity.

Having set forth the facts which are relied on in the answer, most of which are proved by recorded proceedings in the two courts respectively—the Court of Probate, in Mississippi, and the Parish Court of Louisiana—it remains to inquire whether these matters of fact were admissible defenses for the defendant against the bill and relief prayed.

The property levied upon by the marshal was confessedly of the estate of the testator, James S. Douglas, at the time of his death, and liable to the satisfaction of the executions against Stephen Douglas, executors of James S. Douglas, unless the complainants, Emeline Douglas, one of the testamentary executors, now Emeline Bland, and Archibald Douglas, they being the tutrix or guardian and underguardian of the infants, have, by color of the sales and purchases had and contrived by fraud and collusion, and without ever making payment, under their collusive fraudulent doings, changed the title, and are above the powers of a court of equity in relation to the frauds.

At the threshold these questions are presented: Does a report that a person was the best bidder for lands and slaves at public auction, advertised for sale for cash, change the title and vest it in the bidder, without any report of payment of the price, without any receipt for the purchase or evidence of payment, without payment made, and without ability in the bidder to make payment of the price? Does the report of a sale of lands and slaves, as having been made by a parish judge in the State of Louisiana, to a bidder at the price of $83,000, shield and defend the bidder from all inquiries as to his fraud, collusion, art, and part in procuring a fraudulent judgment and order of sale; and also as to the facts of nonpayment of the purchase money, his inability to pay, and that the bidder had never been let into possession?

The complainants, Archibald and Emeline, to maintain their bill, and their exception to the answer of the defendant, Chrisopher Ford, are under the necessity to assert the affirmative of these propositions.

*The record of the proceedings in [*149 the Parish Court of Louisiana, offered by complainants in equity as evidence of their title to the property levied upon by the marshal to satisfy the executions, contains no report of the payment of the prices which they bid; the complainants offer no proof of payment; their bill does not allege payment; the sum was above their circumstances and ability to pay in cash; the record abounds with evidence of fraud and collusion; the answer charges, that the design, end, and aim of the whole proceeding to judgment and sale was by a sham sale and colorable purchase, to protect the property from the creditors of the testator, whilst Stephen Douglas yet is the possessor of the estate as before the pretended sale. The transcript of the proceedings in the Probate Court of Claiborne County, Mississippi, corroborates and multiplies the acts of fraud and collusion; and the averments in the answer of Christopher Ford, if true, leave no room to doubt the fraud.

Shall these pass without inquiry, without examination, without trial, upon a bill brought by two of the confederates in the fraud and collusion, asking a court of equity to call its moral powers into activity to protect them and their confederate in the fruits of the fraud?

By the exception to the answer, and the decision of the judge below, the frauds are said not to be proper subjects of inquiry "in the present suit or proceedings instituted by the said plaintiffs."

The exception, as taken and sustained, implies that the matters and things set forth in

the answer may be inquired into in some other suit, in some other proceeding.

Does the attitude of Mrs. Douglas and Archibald Douglas, as complainants in equity, ensconce them from reprobation for having art and part in the fraudulent and covinous proceedings which they make the groundwork and gravamen of their accusation and prayer for relief? The maxim in equity is, a complainant must come into the court with clean hands.

I propose to comprise my argument, as to the principles of law and equity which should rule the decision of this appeal, under these general heads:

1. The effect of fraud in contaminating and avoiding all proceedings and acts, as well semi-judicial as judicial, had and done, contrived and procured, by fraud.

2. That the jurisdiction of the courts of the United States, to carry into execution and full effect their judgments and decrees, is plenary; and that the jurisdiction of the court of the United States, to execute the judgments in favor of said Ford, the appellant, is not to be remitted and referred to the tribunals of the State of Louisiana, to give him execution and satisfaction of these judgments.

3. That, upon the face of the transcript of the proceedings in the Parish Court, as exhibited by the plaintiffs, now appellees, they were 150*] *incapable, and prohibited by the policy of the law, and the established principles of equity, to become purchasers at the sales therein mentioned, and by their own showing have not the title to the property mentioned in their bill.

1. As to the effect of fraud.

Lord Chief Justice De Grey, in delivering the answer of the judges to a question put to them in the Duchess of Kingston's case, expressed the opinion of the judges thus: "Fraud is an extrinsic, collateral act, violating the most solemn proceedings of courts of justice; as Lord Coke says, avoiding all judicial acts, ecclesiastical and temporal." The Duchess of Kingston's case, 20 Harg. State Trials, 602, Cobbett's ed. 594.

A decree of Exchequer, that a will was duly proved which was obtained by fraud, relieved against in chancery, by Lord Hardwicke. Barnsley v. Powel, 1 Ves. Sen. 120; and Ibid. 286, 287.

Where a fine and non-claim is levied by fraud, a court of equity will relieve against the fine; per Lord Hardwicke. Cartwright v. Pultny, 2 Atk. 381.

An original bill to set aside a decree obtained by gross fraud, sustained by Lord Chancellor Macclesfield. Loyd Mansell, 2 P. Williams, 74, 75.

At law, defendant may plead that the judgment against his testator was by fraud and covin. If a decree was by fraud and covin, the party may be relieved against it; not by rehearing or appeal, but by original bill. By Lord Hardwicke, Chancellor; Bradish v. Gee, Ambler, 229.

"Equity has so great an abhorrence of fraud, that it will set aside its own decrees, if founded thereon." 13 Viner, Fraud (Aa.), pl. 9, 10, p. 543.

"*Equity will never countenance* demands of an unfair nature; in this case it was to have an allowance for attending at auctions to enhance the price of goods; nor will equity suffer them to be set off against fair and just demands; and a cross bill for that purpose was dismissed with costs." 13 Viner, p. 544, pl. 13.

In chancery, between Richard Fermor, plaintiff, and Thomas Smith, defendant, to set aside a fine levied by said Smith, by fraud and covin, to bar the plaintiff of his inheritance. The proclamations and five years had past; Smith, the tenant for years, all the time continuing in possession, and paying rent until his term expired, and then he claimed the inheritance, and to bar the plaintiff by force of the said fine and proclamations and five years. On the hearing of the case, the Lord Keeper of the Great Seal, because it was a case of great importance, and considering that fines with proclamations were general assurances of the realm, referred the case to all the justices of England and the barons of the Exchequer, all of whom met (except two) and consulted, and resolved that the plaintiff was not barred, because of the fraud and covin. And it was said *that the common law "doth so abhor [*151 fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet, being mixed with fraud and deceit, are in judgment of law wrongful and unlawful." And various examples and precedents of decisions are cited. Fermor's case, 3 Coke, 77, 78.

Chancellor Kent, in the case of Reigal v. Wood, 1 Johns. Ch. Rep. 406, said: "It is a well settled principle in this court, that relief is to be obtained, not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition."

In the case of Kennedy v. Daley, 1 Schoale & Lefroy, 355, Chancellor Redesdale relieved against a decree obtained by fraud and imposition, and declared it should have no effect. And that a fine levied and non-claim, by a trustee to a person having notice of the trust, shall not bar the cestui que trust.

And in the case of Giffard v. Hort, Ibid. 386, he held a decree, obtained without making parties of those persons who were known to have rights in the estate, to be fraudulent and void as to those not made parties, and a purchaser under the decree, with notice of the defect, not to be protected by it. The fraudulent decree was in the Exchequer. Lord Redesdale laments numerous proceedings in the Exchequer, at a time when that court was oppressed with business, and could not take time for full investigation and right decision, whereby advantage was taken by such proceedings to defraud persons of property to which they were entitled. "It was one of the crying grievances of time. A systematic use has been made of the decrees of a court for the purpose of effecting fraud; and it has been as much a swindling contrivance to deprive a family of its estate, as any of those contrivances which swindlers practice upon unwary young men. I shall therefore think myself bound to struggle to the utmost of my power to relieve against such oppressive combinations." Giffard v. Hort, 1 Scho. & Lef. 396.

Certain it is that distant creditors, legatees,

and heirs have had as ample cause to lament that a systematic use has been made of the parish courts of Louisiana for effecting fraud and swindling, as Lord Redesdale had for lamenting such like uses made of the Court of Exchequer in Ireland.

The cases which I have cited show the active relief given upon bills to annul those fraudulent judicial proceedings. The courts of equity, true and consistent to the doctrine that "all acts, as well judicial as others, mixed with fraud and deceit, are in judgment of law wrongful and unlawful," have ever refused to grant any relief to a party who comes into a court of equity as plaintiff, asking to have advantage of fraudulent or unfair proceedings.

The maxim in equity is, "He that hath committed iniquity shall not have equity." Francis's Maxims, II. old ed. p. 5, new ed. p. 7.

152*] *Under that maxim, various examples are given of plaintiffs whose suits were dismissed because the subjects of the bill were founded in fraud or unfair dealing.

The plaintiff upon a loan of £90 got a bond for £800, and had judgment. Thereupon he brought a bill to subject to the satisfaction of the debt certain lands of the defendant in right of his wife, estated to trustees for her benefit. "But the security being gotten from the defendant when he was drunk, the lord keeper would not give the plaintiff any relief in equity, not so much as for the principal he had really lent, and so the bill was dismissed." Rich v. Sydenham, 1 Cases in Ch. 202.

Upon a bill to have the benefit of articles of marriage, which had been reduced to writing but not sealed, containing an extreme portion for the married daughter, more than would be left to her father and mother, and two other daughters not provided for, the Lord Chancellor would not decree the agreement, but left the plaintiff to recover at law if he could. Anonymous, 2 Cases in Ch. 17.

To sustain the exception to the answer, or to give relief upon the bill without an answer, upon the idea that the fraud was not a fit subject of inquiry upon a bill by the actors, contrivers, and participators in the fraud and covin, was in contradiction to the established principles of equity.

The complainants having brought their case into the Court of Equity for relief, it was open to every defense, to every objection which could have been made against it by a bill, on behalf of those prejudiced by the proceedings in the Parish Court, to have relief against the fraud and covin. If the Circuit Court of the United States had jurisdiction to hear and determine the complaint, as a matter cognizable in equity, it had jurisdiction to hear and determine the defense to the bill alleging the acts of fraud, collusion, and covin, charged in the answer, which, if true, avoided the proceedings relied upon as the foundation of the bill.

The cause which had moved the complainants to come into equity for relief did not curtail the powers and jurisdiction of the court to hear and determine any and every equitable defense to the bill. Fraud, covin, and collusion in the plaintiffs, had and used in the proceedings on which they relied, was an equitable *defense, a bar to the relief prayed by the* bill. *That the judgment creditor, C. Ford,* the defendant, had caused the marshal to levy the executions upon the property alluded to in the proceedings in the Parish Court, as exhibited by the complainants, neither purged the proceedings of the fraud, covin, and collusion, nor deprived the Circuit Court of the United States of its powers, duties, and dignity as a court of equity.

The powers and jurisdiction of the Circuit Court of the United States were prescribed and conferred by the Constitution and laws of the *United States, not by the will and [*153 convenience of the complainants in that bill.

Are the proceedings of the Parish Court of Madison, in the State of Louisiana, final and conclusive against all persons, parties, and those not parties? Are the frauds by which those judgments in favor of the executor, Stephen Douglas, and in favor of Mrs. Emeline Douglas, and the fraudulent, collusive, and covinous proceedings under those judgments, final, conclusive, sacred; beyond the power of all courts to overhaul them for fraud, deceit, and covin? No such sanctity can be ascribed to them.

Being liable to be impeached and avoided for fraud and covin, the complainants, who have carried a transcript of those proceedings into the Circuit Court of the United States, and therein made those proceedings the substratum of their bill in equity and prayer for relief, have thereby subjected those proceedings to the examination in that court, sitting as a court of equity.

But such jurisdiction of the Circuit Court did not depend upon the volition of the said Archibald and Emeline.

II. The jurisdiction of the courts of the United States, to carry into execution and full effect their judgments and decrees, is plenary, not to be remitted and referred to the tribunals of the States.

The jurisdiction of the circuit courts of the United States in each particular case is not exhausted by the rendition of the judgment or decree, but continues until that judgment or decree shall be satisfied. The beneficial exercise of the jurisdiction of the court to compel satisfaction is not less important than the exercise of the jurisdiction to pronounce the judgment or decree. The jurisdiction to enforce satisfaction by execution is a necessary incident to the jurisdiction to give the judgment or decree; it is expressly given in the acts of Congress establishing the courts and defining their jurisdiction. The execution and satisfaction of the judgment is the very "life of the law."

But I need not labor this point; the doctrine is well settled by the decisions of the Supreme Court of the United States. Wayman v. Southard, 10 Wheat. 23; Bank of the United States v. Halstead, 10 Wheat. 64.

The learned counselor who argued this case for the appellees cited many decisions of the State court of Louisiana, and passages of the Civil Code of Louisiana, to show that an execution, issuing from a State court of Louisiana, could not have been levied upon this property until, by some proceeding, the orders, judgments, and sales by the parish judge of Madison had been reversed, set aside, and annulled. The drift of that argument, and the exception

taken to the answer of Ford, and the opinion of the judge in sustaining the exception, all seem intended to drive C. Ford into the State courts of Louisiana, to seek satisfaction of his [*154] judgments rendered in the Circuit Court of the United States, to confine the process of execution to the mode of proceeding under the law of that State.

To all those arguments and citations, I reply, that the State of Louisiana has rightful authority to regulate her own courts and modes of executing their judgments, but has no rightful authority to regulate the modes of proceeding and processes of execution of the courts of the United States.

The jurisdiction of the courts of the United States, and the process of execution of their judgments and decrees, depend upon the Constitution of the United States and the laws made by Congress in pursuance of the Constitution, not upon the laws of the States. The laws made by Congress in pursuance of the Constitution "shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding." So the Constitution of the United States (art. 6, sec. 2) declares.

Any law of the State contrary to the law of the United States, or impliedly or expressly prohibiting the execution of the process of the courts of the United States within the State, in a manner different from that prescribed by the law of the State to her own courts, would be null and void.

The differences between the process of execution of the judgments of the courts of the United States, as regulated by the laws of the United States, and the process of execution of the judgments of the State courts as regulated by State laws, have been the subjects of solemn argument, matured consideration, and decision in the Supreme Court of the United States.

In the cases of Wayman v. Southard, 10 Wheat. 1; The Bank of the United States v. Halstead, 10 Wheat. 54; Suydam v. Brodnax, 14 Peters, 67, the laws of the United States regulating the process of modes of executing the judgments of the courts of the United States were considered, expounded, and adjudged.

In the two former, the certificates of the decisions and mandates expressly declare, "That the statutes of Kentucky in relation to executions, which are certified to this court, are not applicable to executions which issue on judgments rendered by the courts of the United States" (10 Wheat. 50); "cannot operate upon, bind the mode in which the venditioni exponas should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three fourths of its value." 10 Wheat. 65.

The decision in Suydam v. Broadnax declared, that the law of the State of Alabama, which commanded that claims of creditors upon an estate declared to be insolvent should be prosecuted before the commissioners appointed to manage the estate, has no binding force whatever on the circuit courts of the United States; and the right of said circuit courts to *take cognizance of* claims against such an estate *was undoubted, the statute of* Alabama to the *contrary notwithstanding.* 14 Peters, 67.

*The Judicial Department of the gov-[*155 ernment of the United States, in relation to the extent of its jurisdiction, the distribution of its powers between the Supreme Court and the inferior courts, the supervising power over the decisions of the State courts in specified cases, the tenures of office of the judges, the provision for the adequate support of the judges, their responsibility, and the mode of appointment, was constructed with great wisdom, caution, and deliberation. Profiting by history and examples of the past, the sages who framed the Judiciary Department looked to the future with anxious desire to preserve the Union, to maintain peace at home and abroad, so far as an impartial and enlightened administration of justice can conduce to those ends. Considerations of the highest importance demand that the supremacy of the laws of the Union, and the judicial cognizance assigned to the courts of the United States, shall be maintained in their full extent and proper vigor.

The jurisdiction in controversies between citizens of different States, and in questions of conflict of State laws with the Constitution and laws of the United States, forms an important provision for establishing justice and preserving domestic tranquility. Past experience of "fraudulent laws, which had been passed in too many of the States" before the federal Constitution was proposed, taught the framers of that compact to apprehend that the spirit which had produced those would in future produce like instances, or assume new shapes with like evil tendencies; therefore the Constitution established particular guards against such evils, one of which is the jurisdiction of the federal courts in controversies between citizens of different States. Multiplied instances, which have occurred since the federal Constitution was adopted, attested by the records of this court, prove but too well that the apprehensions of the framers of the Constitution were not idle, nor their foresight and prudent provisions for arresting the evils unprofitable.

III. Upon the bill and the transcript of the proceeding in the Parish Court, exhibited thereby to make title to the property claimed by the complainants, now appellees, by their own showing they have not the title to the property.

They, said Emeline and Archibald, were in a fiduciary capacity, the one as tutrix (or guardian), the other sub-tutor (or under-guardian), and therefore not capable in law to become purchasers at those sales.

The purchase money was not paid; no possession was delivered; the whole contrivances of debts claimed against the estate of her testator, the judgments in favor of Stephen Douglas and of said Emeline, respectively, were false, fraudulent, and covinous; the sales and pretended purchases were shams, simulations, deceitful, illegal, and passed no title to the said Emeline and Archibald.

Upon this point I cite the case decided at the last term of this court, Michoud et al. v. Girod et al. 4 Howard, 553–555, etc.

*That opinion is drawn with such [*156 perspicuity, research, and demonstration, that nothing is left to be supplied by me.

It is of itself an example of overhauling and

relieving against the iniquities committed by the Court of Probate and Parish Court of Louisiana, in proceedings similar to those of the Parish Court of Madison relied on by the complainant.

The incapacity of the tutor, or guardian, to purchase at such a sale is one of the points adjudged in that case.

I have labored this case because of the value in controversy, but more on account of the consequences in all time to come, for good or for evil, which hang upon the decision of this appeal in this way or in that. Many things I have said which might perhaps have been well omitted. Some things I have intentionally omitted which might have been said, which will be supplied by the intelligence of the court. But, ex dictus, et ex non dictus, I pray the decree of this court for the appellant; that the injunction be dissolved and the bill dismissed, so that the appellant may have execution of his judgments.

Mr. Meredith, for the appellees:

Upon the facts disclosed by the record, the counsel for the appellees, in the oral argument which he had the honor of addressing to the court, when the case was called in its order upon the calendar at the present term, submitted two propositions which he respectfully insisted were fully sustained by an uniform series of decisions of the Supreme Court of Louisiana, establishing them as fixed rules of property in that State. They were the following:

1. That the appellees, at the time the executions were levied, were possessed of the property seized, under and by virtue of judicial sales, translative of title, as by public and authentic act.

2. That the appellees being so possessed the appellant had no right, on a suggestion of fraud, to treat the proceedings of the Probate Court as null and void, and cause his executions to be levied on the property; but that the fraud alleged by him could only be inquired into in an action to set aside the sales, under which the appellees claimed the possession and title; in which, if he should succeed, the property would became liable to the operation of his judgments. Until when, the appellees had a right to be protected by injunction in the possession and enjoyment of the property.

I. Upon the first proposition, as to the legal effect of the adjudications of the probate sales upon the title and possession, the counsel for the appellees referred to the following decisions: Zanico v. Habine, 5 Martin's Rep. 372; 1 Condensed Rep. 384; Bushnell v. Brown, 8 Mart. Rep. New Series, 157; 4 Cond. Rep. 466; Marigny v. Nivet, 2 Louisiana Rep. 498; De Ende v. Moore, 2 Mart. Rep. N. S. 336; 2 Cond. Rep. 675; La Fon's Executors v. Phillips, 2 Martin, N. S. 225; 2 Cond. Rep. 157*] 644. *These cases all concur to show that in judicial sales the proces verbal is sufficient evidence of title; and that neither deed from the officer making the sale, nor act under the signatures of the parties, is necessary to perfect it. Such, indeed, are the express provisions of the Civil Code. See articles 2586, 2594, 2601.

Further, the adjudication, being by public *and authentic act, was complete evidence of* 12 L. ed.

delivery and possession, where there was no adverse possession at the time of the sale. Such a possession is nowhere alleged or suggested in this case, and could not, indeed, have existed, because all the parties in interest were before the court when the decrees were made by the Court of Probates, as appears by the transcript of the record exhibited with the bill. The bill itself avers that the appellees were in possession long before the issuing of the executions; and the only denial of the answer is as to the lawfulness of the possession. Upon this point, the case of Fortin v. Blount, 1 Martin, N. S. 179; 2 Cond. Rep. 429, was referred to.

The first proposition, then, appeared to be clearly sustained under the Louisiana jurisprudence; that is to say, that the appellees were in possession of the property upon which the appellant's executions were levied by adjudications which passed the title to them.

II. The second proposition, it was contended, was equally clear upon authorities. It is held as settled, in the courts of Louisiana, that no man can take the law into his own hands, and, ex mero motu, undertake to render himself justice; that, however good his title may be, he cannot take possession of property without form of law; and that the courts will not, in a possessory action, investigate his title, but will restore the possession, and leave him to his petitory action. It is equally well settled, that what one cannot do by himself, he shall not be permitted to do through the instrumentality of a mere ministerial officer—such as a sheriff or marshal—acting under his directions and orders, and under pretense of judicial authority, disturbing third parties in the possession and enjoyment of their property, leaving them to the uncertain and inadequate remedy of action for the trespass, against the officers, or to follow the execution creditor, perhaps into a distant State, in quest of satisfaction. If such creditor believes that the title of the party in possession is founded in fraud, and that the property is liable to his execution, the law imposes upon him the duty of bringing his revocatory action to annul the title and subject it to the satisfaction of his judgment. This he is bound to do first; he cannot forestall or provoke the inquiry by a seizure under execution; and should he attempt to do so, the courts will enjoin the proceeding. This principle has its foundation in the Roman and Spanish laws, and has been the established jurisprudence in Louisiana from the earliest period, and is free from all doubt and conflicting decisions. It imposes no hardship on the plaintiff in the execution, because a *revocatory action for [*158 cause of fraud is one of the plainest and most simple remedies in practice in the courts of that State; in which, if the plaintiff succeeds, the sale is avoided, and the property restored and subjected to his claim. In such an action the parties are entitled to a jury. If the judgment be in a court of the United States, and the creditor prefer that jurisdiction, it is submitted that a bill on the equity side would afford every relief that his case would require.

In support of this proposition and these views, the counsel for the appellees referred to the following decisions: St. Avid v. Wiemprender's Syndics, 9 Martin, 648; 2 Cond. Rep.

39; Barbarin v. Saucier, 5 Martin, N. S. 361; 3 Cond. Rep. 577; Henry v. Hyde, 5 Martin, N. S. 633; 3 Cond. Rep. 689; Peet v. Morgan, 6 Martin, N. S. 137; 3 Cond. Rep. 780; Yocum v. Bullitt, 6 Martin, N. S. 324; 3 Cond. Rep. 858; Trahan v. McManus, 2 La. Rep. 214; Childress v. Allen, 3 Ibid. 479; Brunet v. Duvergis, 5 Ibid. 126; Samory v. Herbrard, 17 Ibid. 558; Laville v. Hebrard, 1 Robinson's Rep. 436; Fisher v. Moore, 12 Ibid. 98. In Henry v. Hyde, and Yocum v. Bullitt, above referred to, the question arose, in a case exactly like the one under consideration, where property had been seized in execution, and an injunction had been granted to the party claiming it by purchase, from or under the defendant in the execution, as the former owner. Indeed, injunction is the remedy expressly given by the law of Louisiana. Code of Practice, art. 298, n. 7.

Upon these two propositions, then, and the authorities cited, the counsel for the appellees contended that the decree of the Circuit Court perpetuating the injunction should be affirmed. The only effect of such a decree being to stay the proceedings on the appellant's executions, issued under his judgments at law, and put him to his direct action to annul the sales and subject the property to their payment.

It was, moreover, contended that these, being the established principles of State jurisprudence, must be considered as rules of property in Louisiana; and therefore, under the repeated decisions of this court, as obligatory upon the courts of the United States as upon the State tribunals. And for this were cited 8 Wheat. 542; 12 Ibid. 162; 6 Ibid. 127; 7 Ibid. 550; 8 Ibid. 535, 542; 10 Ibid. 159; 11 Ibid. 367; 5 Cranch, 32; 9 Ibid. 98; 1 Peters, 360; 2 Howard, 619.

These were the positions and authorities on which the counsel for the appellees relied, in the argument before referred to. A printed brief, however, having since been filed, with the permission of the court, by the counsel for the appellant, he prays leave to subjoin a few additional remarks.

The greater part of this brief consists of a very labored analysis of the record of the Probate Court, exhibited with the bill, with 159*] *intent to show "collusion, combination, and fraud," on the part of the executor of James S. Douglas and the appellees, as the purchasers of the property in controversy. Whether the learned counsel has failed or succeeded in this attempt is not material now to consider, because such an investigation assumes the very question now before the court; that is to say, whether, in answer to a bill praying an injunction to restrain him from levying executions upon judgments recovered against a third person, on property the title and possession of which are alleged to be in the appellees, by purchase at a judicial sale, under decrees of a court of unquestioned jurisdiction, it is competent to the appellant to aver that such decrees were procured by "collusion, combination, and fraud." Should this court sustain such an answer, in such a proceeding, it is presumed that the case would be remanded to the Circuit Court, where the appellees will have the right, *under the agreement before* referred to, to join *issue on those allegations* in the answer, and, under a commission, take such testimony as they may deem expedient or necessary.

The learned counsel has comprised his argument under three general heads.

1. The first is as to the "effect of fraud in contaminating and avoiding all proceedings and acts, as well semi-judicial as judicial, had and done, contrived and procured, by fraud." This general principle is too indisputable to have needed the support of the numerous cases cited in the brief. If, however, the learned counsel, in stating his proposition, intended to apply the phrase "semi-judicial" to the proceedings in the Probate Court of the Parish of Madison, it is only necessary to refer to article 924 of the Code of Practice to show that the courts of probate in that State have exclusive original jurisdiction of all matters touching the administration of the real and personal estates of deceased persons to a larger extent, perhaps, than the orphans' courts of any other State of the Union. Their proceedings are, in the fullest sense, judicial, and unless reversed on appeal their decisions are conclusive and cannot be impeached collaterally, except, as all judicial acts may be, upon the ground of fraud. But though fraud vitiates all judicial proceedings, it is surely not necessary to remind the court that he who seeks to impeach a judgment of decree collaterally must show that he was neither a party nor a privy to it. If he stand in either of these relations he cannot be permitted to allege fraud in the judgment itself, or in the mode of proceeding by which it was procured. He can only do it directly by motion for a new trial, or appeal, or writ of error. Prudham v. Phillips, Ambler, 763; Bush v. Sheldon, 1 Day, 170, which was a judgment of an orphans' court; Peck v. Woodbridge, 3 Day, 30, are among the numerous cases upon this point, collected in 3 Cowen's Phillips on Evidence, 854, note 610. It is admitted that there is no such limitation upon the operation of the *general principle, where the party al- [*160 leging the fraud is a stranger to the judgment he assails; because he has no power to reverse such judgment by appeal. But in this case the appellant was a party to all the proceedings in the Probate Court. The law of Louisiana makes all creditors of deceased persons parties to such proceedings. It is not necessary that they should be specially cited or summoned—a general notice is all that is required; and the record proves that notice by advertisement was given by the judge of probates, at every stage of the proceedings, conformably to the law and practice of the State. De Ende v. Moore, 2 Martin, N. S. 336; 2 Cond. Rep. 679; La Fon's Executors v. Phillips, Ibid. 225, 644; Ancieuse v. Dugas, 3 Robinson, 453.

But further, the appellant was not merely a party in contemplation of law, but an actor in these proceedings. The record shows that on the 3d of May, 1841, he appeared by counsel, alleging himself a creditor, and filed an "opposition" to the homologation of the several accounts of the executor, averring them to be entirely incorrect and illegal, and praying that they might be disallowed, and that the executor should be ordered to file an amended account in which the appellant ought to be placed as a creditor for the amount of his judgments in the Circuit Court. But he neglected to sup-

port his opposition by any evidence whatever, and the court very properly overruled and dismissed it with costs. It is true that the appellant, in his answer, states that the attorney had no instructions or authority to file such a petition; and the attorney himself acknowledges that fact. Had this disavowal been made in the Probate Court in proper time, supported by affidavit, the court no doubt would have noticed it. But surely it cannot be contended that it can now be made, in a collateral proceeding, and before a different tribunal. In contemplation of law, therefore, and in point of fact, the appellant was a party to the proceedings, from which he took no appeal, though the law allowed him one, but by his executions attempted, in the language of one of the cases, "to seize at once, and by short hand," property which in the progress of those proceedings the appellees had purchased under the sanction of judicial decrees. If he had taken an appeal it would have been competent for him to allege the frauds of which he now complains, and, establishing them by proof, to set aside the whole proceedings. But that he cannot do collaterally, as he has attempted in his answer.

It may be remarked, that the appellant instituted his suits in the Circuit Court, after the letters testamentary had been granted by the Court of Probates to Stephen Douglas, which was on the 26th of May, 1838; at all events, the judgments were subsequent to the grant of the letters. Why did he seek the jurisdiction of the Circuit Court? Not from ignorance, because he states in his answer that he "had expressly ordered his agent to avoid the State courts altogether, for reasons sufficient, and to sue in 161*] the federal courts *only." What reasons? The jurisdiction of the probate courts in Louisiana has been shown, and it is so exclusive that it has been repeatedly decided by the Supreme Court of that State, that creditors have no right to enforce their claims by action in any other forum (De Ende v. Moore, 2 Martin, N. S. 336; 2 Cond. Rep. 675; La. Fon's Executors v. Phillips, Ibid. 225; Ibid. 644); and for this just and obvious reason, that such a right would have a tendency to defeat one of the great objects of all testamentary systems, an equal distribution of assets among all the creditors of the decedent. This was exactly what the appellant most desired to avoid. It was to overreach the other creditors—to obtain more than his just dividend at their expense—that, in fraud of the law of the State, he brought his suits in the Circuit Court. If he fails in the attempt, the consequences are of his own seeking. But he has still a locus penitentiæ, for, by the Civil Code of Louisiana, articles 1060, 1061, creditors who omit or neglect to present their claims are entitled, even after final distribution, to an equal dividend with those who have been more diligent; to be made up by contribution from the legatees in the first instance, and if there are none, or the amount of legacies be insufficient, then by the creditors who have been paid, so as to put all upon equality.

2. The second proposition of the counsel for the appellant may be safely assented to. The plenary power of the courts of the United States to carry into execution and full effect their judgments and decrees is unquestioned. Nor has any attempt been made, in this case, to "remit or refer" the judgments recovered by the appellant against the executor of James S. Douglas to the tribunals of the State of Louisiana for execution or satisfaction; or to interfere with the rightful jurisdiction of the Circuit Court over those judgments; or to claim that it should be regulated by any other process or execution than that which is prescribed by the laws of the United States for their courts. The appellees do not deny that the writs of fieri facias issued regularly upon the judgments, and that the marshal acted regularly in the performance of his duty, according to their mandate. Their only complaint is, that in obedience, not to the writs, but to the orders and directions of the appellant, the marshal has seized and taken in execution their property, instead of the property of the defendant in the judgments; and their only claim is to have the question of property tried by the law of Louisiana; and not before the tribunals of that State, if the appellant should prefer the forum which he at first selected; but if in that forum, by the law of that State, which, as it had been shown, does not permit a party to take property in execution, claimed by a third person, upon a suggestion or allegation of fraud, without first establishing the fraud by judicial decision. This the appellees respectfully insist that they have a clear right to ask, under the provision of the thirty-fourth section of the Judiciary Act of 1789, in the exposition *of which [*162 Chief Justice Marshall, delivering the opinion of the Court in Wayman v. Southard, 10 Wheat. 25, and speaking of judgments in the courts of the United States, puts the very case in the following words: "If an officer takes the property of A to satisfy an execution against B, and a suit be brought by A, the question of property must depend entirely on the law of the State."

3. It is lastly contended, that the appellees were incapable in law of becoming the purchasers of the property they now claim; and that, therefore, no title passed to them under the sales made in virtue of the two decrees of the Court of Probates. This incapacity, it is said, arose from the fact that Emeline Douglas, who has since intermarried with Maxwell W. Bland, was at that time the tutrix of her minor children, and that Archibald Douglas, the other purchaser, was their under-tutor, by the appointment of the Court of Probates. This the record itself shows, and is admitted.

It is, undoubtedly, a general rule that all qui negotia aliena gerunt are incapable of purchasing, for their own benefit, property in which those they represent are interested. And this not on the ground of fraud, but because the law will not allow one, sustaining the character of an agent, to create in himself an interest opposite to that of his principal. And it is admitted that this rule has been applied to executors, administrators, trustees, guardians, tutors, curators, judicial officers, and all other persons, who, in any respect, as agents, have a concern in the disposition and sale of the property of others, whether the sale is public or private, or judicial, bona fide, or fraudulent in point of fact.

But this rule is not inflexible. Where it is for the interests of the parties concerned, a court will permit a person, standing in any of those

relations, to become a purchaser. And, therefore, it has been frequently held that a purchase made by a trustee, under judicial sanction and approbation, was not on that ground to be questioned or set aside. Campbell v. Walker, 5 Vesey, Jun. 678; Prevost v. Gratz, 1 Peters' C. C. Rep. 368; Jackson v. Woolsey, 11 Johns. 446; Gallatin v. Cunningham, 8 Cowen, 361.

So in Louisiana, where the general rule unquestionably prevails, it has been expressly held that a mother, being tutrix of minor heirs, might lawfully become a purchaser at a probate sale of property belonging to her deceased husband's succession, if sanctioned by the judge within whose jurisdiction the minors have been brought; and that this sanction may be given before or after the sale. McCarty v. Steam Cotton Press Company, 5 Louisiana Rep. 16, 20.

Now, the record in this case shows that both sales were preceded by family meetings, to deliberate and advise touching the interests of the minors; that they recommended the sales as necessary and expedient; that their proceedings were homologated by the judge, who thereupon ordered and decreed the sales to be 163*] *made; that the property was appraised by sworn appraisers; notice of the time and place of sale regularly given; and, finally, that the sales were made by the judge of probates, ex officio, and in person, and by him struck off and adjudicated to the two appellees by name, they being the actual and highest bidders for prices above the appraisements. There can be no doubt, therefore, that both purchases were made with the knowledge, approbation, and sanction of the Court of Probates, and were recognized as valid in the subsequent proceedings of the succession; and, on the authority of the decision above referred to, were valid by the law of Louisiana, which, of course, must be obligatory in this case upon every other tribunal.

But further, if there had been no such judicial sanction, it is not competent to the appellant to make the objection. A purchase by a trustee, or other fiduciary, is not absolutely void, but voidable only. The heirs in this case are the cestuis que trust, and it is their right, and not the right of the appellant, who is a creditor only, and a creditor who has renounced all benefit under these mortuary proceedings, to call in question, or set aside, the sales made to the appellees. Winchester v. Cain, 1 Robinson, 421; Prevost v. Gratz, 1 Peters's C. C. Rep. 368; Wilson v. Troup, 2 Cowen, 195, 238; Opinion of Sutherland, J.; Davoue v. Fanning, 2 Johns. Ch. Rep. 252; Jackson v. Woolsey, 11 Johns. 446; Harrington v. Brown, 5 Pick. 519; Denn v. McKnight, 6 Halst. 385; Gallatin v. Cunningham, 8 Cowen, 379, per Colden, Senator.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States, held in and for the Eastern District of the State of Louisiana.

The complainants below, the appellees here, filed their bill against Christopher Ford, the appellant, and Robertson, the marshal of the district, for the purpose of obtaining injunctions to stay proceedings upon the several judgments and executions, which Ford had recovered in the Circuit Court of the United States against one Stephen Douglas, as executor of J. S. Douglas, deceased.

The judgments amounted to some $18,000, and the marshal had levied upon two plantations, and the slaves thereon, of which the testator, J. S. Douglas, had died seized and possessed.

The bill set forth that Stephen Douglass, against whom the judgments had been recovered, neither in his own right nor as executor of J. S. Douglas, deceased, had any title to or interest in the plantations and slaves which had been seized under and by virtue of the said executions; and that the same formed no part or portion of the succession of the testator in the hands of the said executors to be administered. But that the whole of the said plantations and slaves, including the crops of cotton, and all other things thereon, were the *true and lawful property of the com- [*164 plainants; that they were in the lawful possession of the same, and had been for a long time before the issuing of the executions and seizure complained of; and had acquired the said property, and the title thereto, at a probate sale of all the property belonging to the estate and succession of the said testator—which sale was lawfully made, and vested in the complainants a good and valid title. All which would appear by the proces verbal of the said adjudications, and the mortuary proceedings annexed to and forming a part of the bill.

An injunction was granted, in pursuance of the prayer of the bill, staying all proceedings on the judgments rendered in the three several suits, and also on the executions issued thereon against the property.

Christopher Ford, the adjudged creditor, in answer to the bill, denied the validity of the probate sales of the plantations and slaves to the complainants; and charged that they were effected, and the pretended title thereto acquired, by fraud and covin between the executor, Stephen Douglas, and the executrix, the widow of the testator, and one of the complainants, for the purpose of hindering and defrauding the creditors of the estate; that in furtherance of this design a large amount of simulated and fraudulent claims of the executor and executrix were presented against the succession, to wit, $53,000 and upwards in favor of the former, and $76,000 and upwards in favor of the latter, which were received and allowed by the Probate Court without any vouchers or legal evidence of the genuineness of the debts against the estate; that these simulated and fraudulent claims were made the foundation of an application to the said Probate Court for an order to sell the two plantations, and slaves thereon, under whom the widow and one Archibald Douglas became the purchasers at the probate sale; that neither had paid any part of the purchase money to the executor or Probate Court; and which was the only title of the complainants to the property in question, upon which the defendant had caused the executions to be levied.

In confirmation of the fraud, thus alleged in the probate sales in the parish of Madison and State of Louisiana, the defendant further charges, that the testator died seized and pos-

sessed, also, of a large plantation and slaves and personal property therein situate in the County of Claiborne and State of Mississippi, inventoried at upwards of $70,000, besides notes and accounts to the amount of $161,000 and upwards; that the said plantations and slaves were, on application of Stephen Douglas, the executor, to the Probate Court in that State, and an order for that purpose obtained, sold and purchased in by the widow and executrix for about the sum of $40,000, and that the personal estate of $161,000 and upwards, of notes and accounts, were not, and have not been, accounted for by the executor to the Court of Probate.

165*] *In short, according to the answer of the defendant, the estate and succession of the deceased debtor, inventoried at about the sum of $300.000 and for aught that appears available to that amount, has been sold and transferred through the instrumentality and agency of family connections, under color of proceedings apparently in due form in the Probate Court, into the hands of the widow and a brother of the deceased, without adequate consideration, if consideration at all, and with the intent to hinder, delay, and defraud the creditors of the estate and particularly the defendant.

The complainants excepted to the answer filed by the defendant, because the matters and doings set forth therein could not, in law, be inquired into in the present suit, or proceedings instituted by the said complainants, and prayed that they might have the benefit of their injunction, and that it might be made perpetual.

And thereupon it was agreed that the case might be set down for argument on the matters of law arising on the bill and answer; and that if the judgment of the court in matters of law should be for the defendant, the complainants might join issue on the fact, and testimony be taken in the usual manner.

The court, after argument of counsel, decreed that the exception of the complainants to the defendant's answer was well taken, and gave leave to answer over, which was declined; and, therefore, the court adjudged and decreed that the injunction therefore awarded in the case should be made perpetual; and it was further adjudged and decreed that complainants recover the costs of suit, without prejudice to the right of the defendant to any action he might think proper.

The decision of the court below, and the view which we have taken of the case here, do not involve the question, whether the matters set forth in the answer sufficiently established the fact that a fraud had been committed by the complainants against creditors, in the several sales and transfers of the property in question, through the instrumentality of the Probate Court, nor, as it respects the effect of the fraud, if established, upon the title derived under these sales. If the case depended upon the decision of these questions, we entertain little doubt as to the judgment that should be given.

The ground of the decision below, and of the argument here, is, that the complainants were not bound to answer the allegations of fraud against their title, in the aspect in which the case was presented to the court; that a title derived under a public sale, *in due form of law, by the probate judge, protected them in the* full and peaceable possession and enjoyment of the property until the conveyance was vacated and set aside by a direct proceeding instituted for that purpose; and that this step, on the part of the judgment creditors, was essential, upon the established law of the State of Louisiana, *before he could subject the property [*166 to the satisfaction of his judgment.

We have, accordingly, looked into the law of that State on this subject, and find the principle contended for well settled and uniformly applied by its courts in cases like the present. The judgment creditor is not permitted to treat a conveyance from the defendant in the judgment made by authentic act, or in pursuance of a judicial sale of the succession by a probate judge, as null and void, and to seize and sell the property which had thus passed to the vendee. The law requires that he should bring an action to set the alienation aside, and succeed in the same, before he can levy his execution. And so firmly settled and fixed is this principle in the jurisprudence of Louisiana, as a rule of property, and as administered in the courts of that State, that even if the sale and conveyance by authentic act, or in pursuance of a judicial sale, are confessedly fraudulent and void, still no title passes to a purchaser under the judgment and execution, not a creditor of the vender, so as to enable him to attack the conveyance and obtain possession of the property. In effect the sale, if permitted to take place, is null and void, and passes no title. Henry v. Hyde, 5 Martin, N. S. 633; Yocum v. Bullitt, 6 Ibid. 324; Peet v. Morgan, 6 Ibid. 137; Childress v. Allen, 3 Louisiana Rep. 477; Brunet v. Duvergis, 5 Ibid. 124; Samory v. Hebrard et al. 17 Ibid. 558.

The case of Yocum v. Bullitt et al., among many above referred to, is like the one before us.

The court there say: "The record shows that the slaves had been conveyed by the defendant in the execution by a sale under the private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent it must be regularly set aside by a suit instituted for that purpose; that it was not less a sale and binding upon third parties until declared null in an action which the law gives (Curia Phil. Revocatoria, n. 2); that the possession of the vendee was a legal one, until avoided in due course of law." The court further remarked, that "The same point had been determined at the preceding term, in which it had been held that a conveyance alleged to be fraudulent could not be tested by the seizure of the property or estate belonging to the vendor, but an action must be brought to annul the conveyance."

The principle runs through all the cases in the books of reports in that State, and has its foundation in the Civil Code (art. 1965, 1973, 1984), and in the Code of Practice (sec. 3, art. 298, 301, 604, 607), and in Stein v. Gibbons & Irby, 16 Louisiana Rep. 103. And from the course of decision on the subject it is to be regarded not merely as a rule of practice, or mode of proceeding in the enforcement of civil rights, which would not be binding upon this court, but as a rule of property that affects the title and estate of *the vendee, and cannot, [*167 therefore, be dispensed with without disturb

ing one of the securities upon which the rights of property depend. It gives strength and stability to its possession and enjoyment, by forbidding the violation of either, except upon legal proceedings properly instituted for the purpose. Neither can be disturbed, except by judgment of law. For this purpose the appropriate action is given, providing for the secession of all contracts, as well as for revoking all judgments when founded in fraud of the rights of creditors.

In this court, a bill filed in the equity code is the appropriate remedy to set aside the conveyance. In the present case a cross bill should have been filed, setting forth the matters contained in the answer of the defendant. The vendees would then have had an opportunity to answer the allegations of fraud charged in the bill, and, if denied, the parties could have gone to their proofs, and the case disposed of upon the merits.

It is said that in some of the western States an answer like the one in question would be regarded by their courts in the nature of a cross bill, upon which to found proceedings for the purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of proceeding in a court of equity.

We are of opinion, therefore, that the appellant mistook his rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill; and that instead thereof he should have filed a cross bill, and have thus instituted a direct proceeding for the purpose of setting aside the sales and subjecting the property to his judgments and executions; and that in this respect, and to this extent, the decree of the court below was correct.

But on looking into the decree, we are apprehensive that it has been carried further than the assertion of the principle which we are disposed to uphold, and which may seriously embarrass the appellant in the pursuit of a remedy that is yet clearly open to him.

The injunction issued, on filing the bill of complainants, commanded the appellant to desist from all further proceedings on his three judgments, or on the executions issued against the property; and the court, on the coming in of the answer, has decreed that the same be made perpetual. And further, that the complainants recover the costs of suit, without prejudice to the right of the defendant to any action he may think proper.

It is at least a matter of doubt, and might be of litigation hereafter, whether, upon the broad and absolute terms of the decree used in enjoining the proceedings, the party is not concluded from further proceedings against the property in question, founded upon these judgments and executions.

They must constitute the foundation of his right and title, upon filing a cross bill, to any relief, that he may hereafter show himself en- 168*] titled *to. The saving clause may not be regarded as necessarily leaving a proceeding of this description open to him. A question might also be raised, whether the judgments are not so effectually enjoined as to prevent *their enforcement against property* of the judg- *ment debtor not in controversy* in this suit. At all events, we think it due to the appellant, and to justice, looking at the nature and character of the transaction and proceeding as developed in the pleadings, that the case should be cleared of all doubts and dispute upon this point. We shall therefore reverse the decree, and remit the proceedings to the court below, with directions that all further proceedings on the three judgments and executions be stayed, as it respects the property seized and in question, but that the appellant have liberty to file a cross bill, and take such further proceedings thereon as he may be advised.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court that all further proceedings on the three judgments and executions be stayed, as it respects the property seized and in question; but that the appellant have liberty to file a cross bill, and to take such further proceedings thereon as he may be advised; and that such further proceedings be had in this cause, in conformity to the opinion of this court, as to law and justice shall appertain.

HEZEKIAH H. GEAR, Appellant,
v.
THOMAS J. PARISH.

Judgment by confession, force and effect of—question of fact.

In this case, the pleadings and proofs show that a mortgage executed by the debtor to the creditor was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover.

As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment.

THIS was an appeal from the judgment of The Supreme Court of the Territory of Wisconsin, sitting as a court of chancery.

Parish filed a bill in the District Court of Iowa County, Territory of Wisconsin, for the purpose of compelling Gear to enter satisfaction of a certain mortgage executed by the former to him, or to reconvey the premises therein, charging, that it had been fully paid and satisfied; and for the purpose, also, of a perpetual stay of *a certain judgment [*169 confessed, and entered up in favor of Gear against Parish.

The mortgage was executed on the 27th of April, 1836, and was given to secure the payment of $4,200, four months after date; and the bill charged that the whole amount, with interest thereon, had been paid on the 1st of August, thereafter, and a receipt taken for the

same; that Gear had refused to deliver up and cancel the said mortgage, or reassign the premises unless the complainant would pay, in addition, the amount of a certain judgment that had been obtained against him, and which, he charged, was given for part and parcel of the money secured by the mortgage, and of course satisfied with it.

The defendant, in his answer, set up that previously to the execution of the mortgage the parties had been engaged in extensive business transactions with each other; that he had, at different times, advanced large sums of money to and incurred many liabilities for the complainant; and that the mortgage in question was given to secure the payment of such an amount as complainant would be found indebted in on the final adjustment of their accounts. That no settlement had taken place or balance been struck between them; but that defendant had subsequently ascertained that the sum of $1,562.38 was justly due him, over and above the amount secured by the mortgage. That this demand was placed in the hands of an attorney for collection, whereupon the complainant confessed the judgment in question, with a stay of execution for six months.

The defendant further answered, and admitted that the mortgage had been fully paid and satisfied; but denied that he had refused to reconvey the mortgaged premises. On the contrary, he had executed and delivered to the complainant a release of all his right and title to the premises, and which had been accepted as satisfactory.

The complainant put in a replication, and the parties went to their proofs.

There were but two witnesses examined, one of them present at the execution of the mortgage, the other at the giving of the judgment.

Hamilton, who was present at the execution of the mortgage, states that he was at Galena in the spring of 1836, when the parties were engaged in closing their business; that the amount on book due Gear exceeded $3,000, besides other charges and accounts outstanding, the amount of which was not then ascertained. That it was agreed a mortgage of $4,200 should be given, which, as was supposed by both parties, might be sufficient to cover the whole of the indebtedness; but that a settlement was to be made thereafter, and the exact balance ascertained; and to be adjusted accordingly, whether it should exceed or fall short of the sum specified in the mortgage. Neither party was to be concluded as to the amount; that was to depend upon the final adjustment of the accounts.

170*] *Mr. Turney, the attorney who gave the judgment for Parish, states that he was consulted by him at the time a suit was threatened for the recovery of this balance, claimed as due over and above the mortgage; that at the request of Parish he had an interview with the attorney of Gear on the subject, when it was agreed that, if judgment was confessed for the amount claimed, the mortgage should be given up and cancelled, and all errors corrected, if any, on ascertaining the balance between the parties; that the judgment was given with this understanding.

Upon this *state of the pleadings and proofs, the District Court decreed that the injunction* which had been previously issued, enjoining the defendant, Gear, from collecting his judgment against Parish, should be made perpetual, and that the complainant recover his costs of suit.

On an appeal to the Supreme Court of the territory, by the defendant, the decree was affirmed, with costs. The case was brought here on an appeal from that decree.

The cause was argued by Mr. Breese for the appellant, and Mr. May for the appellee.

Mr. Breese contended that the decree was erroneous, because the answer of Gear denied all the material allegations of the bill on which the injunction was allowed, and they were not sustained by the depositions of Hamilton and Turney.

Mr. May, for the appellee:

The principle questions presented for adjudication in this case are the following:

I. Does the bill, answer, and proofs disclose a case in which equity can relieve?

II. What is the nature and extent of the relief to be granted in this case.

As to the first proposition, it is submitted that this is a case in which relief can alone be obtained in a court of equity. It may be viewed as an application to compel the specific performance of an agreement, which is exclusively the province of a court of equity; for at law redress may be had after a wrong is done, but equity can interpose and prevent the commission of a wrong. 1 Story's Eq. Jurisp. sec. 30. The relief sought in this case is the cancellation of a deed, and equity alone can afford this relief. 1 Johns. Ch. R. 520.

But in this case a judgment at law is sought to be rendered inoperative, and all proceedings thereon stayed and restrained. It is true that a judgment at law is conclusive between the parties thereto when the merits have been passed upon, and unless reversed operates as an estoppel; but when, in the procuring of such judgment, fraud or misrepresentation, or any description of mala fides has been practiced, *equity will grant relief. 2 Story's [*171 Eq. Jurisp. secs. 885, 887; 1 Ibid. sec. 192; 1 Fonblanque Eq. b. 1, ch. 1, sec. 3, note, 3d Am. ed. pp. 28, 29. The only way in which a defendant can reverse or annul a judgment at law is by a writ of error; but when a judgment is obtained by confession, he is without redress at law, for confession takes away error.

But where the plaintiff's attorney, in an action at law, made an agreement with a defendant that if she would confess judgment he would levy an execution, and satisfy the judgment out of the property of another defendant, keeping her harmless; and upon such agreement a judgment was confessed, but the plaintiffs neglected and refused to comply with the agreement, a court of chancery decreed a perpetual injunction of the judgment, and, on appeal, this court affirmed the decree. Union Bank of Georgetown v. Geary, 5 Peters, 99. It is submitted that this case is in all respects in point and conclusive, in this cause, so far as the question of jurisdiction and power to relieve is involved. Equity will relieve against a judgment obtained at law by confession. 3 Harris & Johns. 568.

The remaining inquiry in disposing of the first question is as to the case made out by the complainant. The allegation of the bill in re-

lation to the original transactions are, in most material respects, admitted by the defendant, and are also fully proved by the deposition of Wm. S. Hamilton, who states that the books of account of Gear were produced, showing Parish's account, and that the amount of $4,200 was considered by all the parties as amply sufficient to cover all contingencies. The testimony of John Turney fully sustains the averments of the bill in relation to the compact and terms on which Parish confessed the judgment. But it may be argued that inasmuch as the defendant, in his answer, denies the allegations and equity of the bill in relation to this compact or agreement, it should be sustained by stronger proof in order to merit relief. It is conceded that, in equity, where any matter is averred by the complainant in his bill which is material, and the same matter is positively denied by the defendant in his answer, then the answer will prevail, unless the bill is sustained by two witnesses, or one witness and corroborating circumstances; but it is contended and insisted, that in this cause the principle is in no way applicable, and can have no bearing whatever. Equally as clear as the foregoing principle of chancery practice is another, that if a defendant, by his answer, introduces new matter, not responsive to the allegations of the bill, such new matter must be proved by other means (12 Peters, 190), or it cannot avail, and it may prejudice him by evincing a desire, on his part, to evade and lead off to matters foreign to the points in issue, or if a defendant's answer contains contradictory, unreasonable, or irreconcilable statements, or makes averments which are disproved by written instruments on the same point, or if it positively deny charges 172*] of which in the very nature of *the thing the defendant could have no personal knowledge, then the testimony of one disinterested witness, with corroborating circumstances, will prevail, and in some instances the court will treat the answer as a nullity, disproving itself, and the bill will prevail with one witness. 9 Cranch, 160; 2 Johns. Ch. R. 92; 5 Peters, 111; 4 Monroe, 174; 1 Munford, 373. In this case, Gear, in his answer, positively denies that Parish was induced to confess the judgment by the promise and undertaking of Mr. Hoge. Now, it requires no argument to demonstrate that this was a matter of which Gear could have no knowledge whatever. He was not present, and even if he had been informed, still he is unwarranted in stating positively, as of his own knowledge, what were or were not Parish's motives. Moreover, he avers directly that the mortgage or deed was never acknowledged or recorded, and yet the instrument itself, which was then in his possession, directly contradicts his averment, although it may be of but little importance whether this instrument were acknowledged and recorded or not, still a defendant, who has the means of correct knowledge within his exclusive control, is bound and expected to answer truly in all things, and if he makes statements in his answer, and at the same time presents that which absolutely disproves those statements, he thereby throws suspicion on his answer, and affects and taints its credibility.

*If, then, the statements of the answer in regard to the agreement between Hoge and Parish are unreasonable and can have no effect we then have the averments of the bill (which is sworn to) sustained by testimony of Turney, and the admissions of Hoge as proved by Turney. And strong corroborating circumstances are observable in the supineness of Gear in this matter. Hoge was his attorney, admitted to be such in the answer, and resided in the same place with him, and if the agreement really was not such as stated by Parish, was it not very easy for him (Gear) to obtain Hoge's deposition disproving the bill? Yet he speaks positively, as of his own knowledge, of transactions and motives of which he could know nothing, except from information, and neglects to use the proof (if any such existed) of these things, which any reasonable man would have certainly resorted to. In this relation, the case from 5 Peters, 111, is very much in point; in that case, as in this, the agreement was with the attorney, and the defendants in that case denied the agreement with their attorney, of which they could have no positive knowledge; in this case the defendant has pursued the same course. The agreement between Parish and Hoge, the appellant's attorney, must be considered as proved. True, it is denied by Gear in his answer, but, as has already been shown, he knew nothing about it, and his denial amounts to nothing. It was expressly and exclusively the consideration in confessing the judgment, and it was a valuable consideration to Parish, as he alleges in *his bill, and appears [*173 by the testimony of Turney. It would have enabled him to free the title of the lands he had sold, and convey them, and, it may be argued, receive a pecuniary advantage by it; for this consideration Parish relinquished all defense in the suit at law. He states that he owed Gear nothing, that he had a good defense.

In the language of this court, in 5 Peters, 114, "It is unnecessary to examine whether this defense would have been available or not; the validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question, and that they supposed that they were gaining some benefit by foreclosing all inquiries on the subject; and the complainant, by precluding himself from setting up the defense, waived what she supposed might have been of material benefit to her."

Gear did not fulfill this agreement, made by his attorney, Hoge; he states, as the reason for his failure, that he could not find the mortgage. But it is afterwards produced, and it must be presumed to have come from his custody. The promise and inducement to the confessing the judgment was not kept by Gear, or realized by Parish. Was not this transaction, then, an imposition or fraud upon Parish? If so, all proceedings on the judgment ought to have been restrained. Did not Gear make, by his attorney, an improper and unfair use of his possession of the mortgage, which had been fully discharged by Parish, as appears by the receipt, and the terms of the mortgage itself to induce Parish to confess the judgment. 1 Schoale & Lefroy, 205.

It is plain that Gear intended to hold the mortgage until the pretended balance was paid. That, as he recollected it, "said deed was given to secure this defendant the payment of the

sum of $4,200, and such other sum as the complainant might be indebted to this defendant."

Again, there is no proper jurat to the answer in this case—the answer appears to have been "sworn to and subscribed" before a proper officer; but it is submitted that this cannot, by correct chancery practice, be taken as a sufficient jurat (1 Harrison's Chan. Prac. 218; 1 Turner and Venable's Chan. Prac. 544); there is not that certainty as to what the deponent swears to, whether of his knowledge or of his belief (9 Cranch, 160); so that an indictment for perjury might be sustained if the deponent swore falsely. If this position be correct, then the answer in this case is, as in the case in 5 Peters, 99, merely tantamount to the general issue at law, and the material averments of the bill, so far as they are denied by the answer, are fully proved by Hamilton and Turney, and sustained by every reasonable deduction from the circumstances.

But in relation to the second question presented by this cause, which is as to the nature and extent of the relief to be extended, it is submitted that the main relief sought by the 174*] complainant, is the *cancellation of a deed. The bill, however, prays for a discovery and general relief, and the weight and current of authority is, that when equity obtains cognizance for the purpose of discovery and injunction it will retain the cause in order to do ample justice in cases such as this, where a matter of account is involved. 1 Story's Eq. Jurisp. sec. 64; 2 Johns. Cases, 431; 3 Conn. 141; 10 Johns. 595; 17 Johns. 388; 12 Peters, 188.

It was no sufficient reason for dissolving the injunction, that Gear afterward offered to give up, release, or cancel the mortgage; the fraud or imposition had been then completed. His faith had been violated. The injury to Parish was then inflicted. His damage may have been suffered. He had been compelled, by Gear's own conduct, to bring him into a court of equity. Being there, Gear was in no wise injured, he had the fullest and fairest right and opportunity to claim his demand, and if just have it allowed.

The relief given in this case should therefore go farther than the cancellation and pass upon and decide the unsettled account between the parties. If there was, as Gear understood and recollected, an unsatisfied balance charged on the mortgage, that very question was presented for the consideration of the court; as the bill prays to have "the mortgage indenture cancelled, on praying the balance of the mortgage money, if any," etc. The account between the parties was then fairly presented to the court.

The appellant had ample time and opportunity to sustain his account, if any he had, to show that the balance claimed was omitted by mistake or otherwise in the settlement of their accounts in 1836, when the mortgage was given to secure the full sum claimed, and more; but Gear did not offer any evidence to prove the balance of his account.

Besides, the account on which the judgment was confessed was very properly, under the circumstances, to be reviewed; it was, according to the testimony of Turney, a judgment upon terms, that is, "any errors in the account sued on would be corrected by Gear."

The defendant made the indebtedness of Parish, upon which the judgment was obtained, a substantive allegation in his answer; the onus probandi was with him to prove these allegations, and undoubtedly if he had proved his claim the Chancellor would have decreed payment in accordance with equity and justice. But when he neglected to do so, having ample time and opportunity, and being presumed to know his legal rights, and allowed the cause to be heard by the court without the shadow of any such proof, the fair and just inference is that he could not prove any further indebtedness against Parish, especially when Hamilton's testimony shows that the books of account of Gear were produced on the original settlement, and they then presented no such indebtedness; but, on the contrary, all parties appeared satisfied that $4,200 would cover the whole claim.

*Mr. Justice Nelson delivered the [*175 opinion of the court:

We are unable to discover any foundation for the decree of the court below. The pleadings and proofs narrowed the question down to the simple inquiry as to the force and effect of the judgment between the parties, which had been rendered upon confession. The answer appears to have removed all further complaint about the refusal of Gear to cancel the mortgage and disencumber the premises, as the subject is not carried into, nor made a part of, the decree. That is confined to the order enjoining the defendant, his agents and attorneys, perpetually from collecting the judgment.

The sole question, therefore, is, whether or not, upon the pleadings and proofs, the appellant is justly entitled to enforce the payment of this money.

The bill of complaint admits, and the answer reiterates the admission, that the mortgage was executed to secure the payment of an unadjusted balance of accounts arising out of extended business transactions. The exact sum being, at the time, unascertained, an amount was agreed upon, and carried into the mortgage, supposed to be large enough to cover any balance that might be found due.

Neither party was to be concluded by the mortgage, or the amount agreed upon. The actual indebtedness was to depend upon a future settlement of the accounts.

The proofs confirm this view, and further establish, that the judgment was confessed voluntarily and advisedly, for a balance ascertained, and claimed by Gear to be due over and above the mortgage; and that the only reservation made, at the time, was the privilege of correcting errors in the adjustment of the accounts, if any should be made to appear thereafter.

The judgment was not given, as in the case of the mortgage, for an unascertained balance; and therefore a security, simply, for whatever sum the plaintiff might thereafter show to remain due and unpaid. A specific sum was claimed, as the true balance of the accounts, and a suit threatened. The judgment was confessed for this sum, subject to the right of Parish to reduce the amount. Failing or omitting to do this, the whole amount was collectible. The burden lay upon him to show the errors, if any; that he assumed, according

to the very terms upon which he consented to confess the judgment; and as no errors were shown, or are even pretended, in the case before us, it is clear the plaintiff is entitled to the whole amount of his judgment and to execution for the same; and that the court below erred in entertaining the bill and awarding the injunction.

We shall therefore reverse the decree of the court below, with costs, and remit the proceedings, with direction to dissolve the injunction, and dismiss the bill with costs of suit.

Order.

This cause came on to be heard on the tran-176*] script of the record *from the Supreme Court for the Territory of Wisconsin, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, with directions to that court to dissolve the injunction in this case, and to dismiss the bill of the complainant with costs of suit.

In the Matter of NICHOLAS LUCIEN METZGER.

Extradition—this court no jurisdiction to issue writ of habeas corpus to inquire into cause of commitment of fugitive from justice by warrant of district judge to await President's order under convention with France.

The treaty with France, made in 1843, provides for the mutual surrender of fugitives from justice, in certain cases.

Where a district judge, at his chambers, decided that there was sufficient cause for the surrender of a person claimed by the French government, and committed him to custody to await the order of the President of the United States, this court has no jurisdiction to issue a habeas corpus for the purpose of reviewing that decision.

MR. COXE moved for a habeas corpus, according to the following petition, which he read, and also the decision of the judge below:

"To the Honorable, the Justices of the Supreme Court of the United States:

"The petition of Nicholas Lucien Metzger respectfully sheweth, That he is restrained from his liberty, and is now a prisoner in jail, and under the custody of the Marshal of the Southern District for the State of New York, and that he has been committed to such jail and custody, and is now confined and detained therein, under and by virtue of a warrant and order of the Hon. Samuel R. Betts, District Judge for the Southern District of New York, as an alleged fugitive from justice, pursuant to the provisions of the convention signed between the United States and the French government, on the 9th of November, 1843.

"That annexed hereto is a copy of the order, under and by virtue of which your petitioner has been apprehended and committed and is now detained in custody.

"Wherefore, your petitioner prays that a writ of habeas corpus may issue from this honorable court, to be directed to the Marshal of the Southern District of the State of New York, or to such other persons as may hold or detain your petitioner under and by virtue of said order, commanding him or them to have the body of your petitioner before this honorable court, at such time as in said writ may be specified, for the purpose of inquiring into the cause of commitment of your petitioner, and to do and abide such order as this honorable court may make in the premises.

"And your petitioner will ever pray, etc.

"Metzger."

*"Sworn to before me, this 20th day [*177 of January, 1847.

"George W. Morton,
"United States Commissioner for the Southern District of New York."

"In the Matter of Nicholas Lucien Metzger:

"This case having been heard before me, on requisition through the diplomatic agents of the French government that the said Metzger be apprehended and committed for the purpose of being delivered up as a fugitive from justice, pursuant to the provisions of the convention signed between the United States and the French government on the 9th of November, 1843:

"And exceptions having been taken by the counsel of the said Metzger, in his behalf, to the competency of a judge of the United States to take cognizance of the subject matter, and to the sufficiency of the evidence to justify any judicial action under the treaty:

"And these exceptional objections being fully argued before me by Messrs. Blunt and Hoffman, of counsel for Metzger, and by Messrs. Tillon and Cutting in support of the requisition, and by Mr. Butler, United States Attorney, on the part of the United States (in respect to the jurisdiction of the judge, and the period the treaty went into operation):

"I find and adjudge, that a judge of the United States has competent authority, under the laws of the United States now in force, to take cognizance of this case, and to order the apprehension and commitment of the accused, pursuant to the provisions of the said treaty.

"I further adjudge, that the said treaty took effect and went into operation on and from the day of the signature thereof.

"I further adjudge, that the laws of France are to determine the constituents of the crime of forgery, or 'du faux,' of which Metzger is accused, and that the facts in evidence adequately prove the commission of that crime by him in France, since the date of the treaty.

"I further find and adjudge, that Metzger is, within the meaning and description of the treaty, a person accused, 'individu accusé,' of the crime of forgery, or 'du faux,' named in the treaty, and therefore subject to apprehension and commitment under our laws, pursuant to the provisions of the treaty.

"And I find and adjudge, that the evidence produced against the said Metzger is sufficient in law to justify his apprehension and commitment on the charge of forgery, had the crime been committed within the United States.

NOTE.—As to habeas corpus, when may issue and from what courts and judges; and what may be inquired into on, see note to 1 L. ed. U. S. 491. In extradition cases, see note to 34 L. ed. U. S. 464.

"Wherefore I order, that the said Nicholas Lucien Metzger be apprehended and committed, pursuant to the provisions of the said treaty to abide the order of the President of the United States in the premises.

178*] *"Given under my hand and seal at the city of New York, this nineteenth
[L. S.] day of January, one thousand eight dred and forty-seven.

(Signed) "Samuel R. Betts,
"Judge of the United States for the Southern District of New York.

The case was argued by Mr. Coxe on behalf of the petitioner, and by the Attorney-General (Mr. Clifford) and Mr. Jones in opposition to the motion.

Mr. Coxe, for the motion:

In conveying the intimation that the court would hear an argument on behalf of the petitioner, no suggestion was thrown out as to the points to which counsel were desired to address themselves under these circumstances. What fell from the bench conveyed merely the idea that doubts were entertained by the court, but it conveyed no intelligence as to the character of these doubts, to what part of the case they extended, or whether they embraced the substantial merits of the petitioner's case, or were limited to the form and language in which the application was presented.

Had the posture of the case permitted the court to adopt a practice which has on many occasions heretofore prevailed when similar applications have been made, and grant a rule upon the United States, or those who represent the French government, to show cause why the prayer of the petitioner should not be granted, it would have relieved his counsel from much embarrassment. The grounds upon which the application was to be resisted would have been distinctly announced, and full opportunity would have been afforded to meet, and, if practicable, to answer them. In the situation, however, in which the case then stood, ignorant whether either government felt any such interest in the proceeding as would induce it to intervene by a direct opposition to the motion which was submitted, it would scarcely have been proper for me to have suggested, or for the court to have sanctioned, the adoption of such a course.

At the same time, the appearance of counsel to resist the application only augments the difficulties of the position I occupy. Whatever may have been the origin of the doubts entertained on the bench, it by no means follows that the learning and abilities of counsel may not multiply and increase the number, as well as weight, of these objections. Placed, therefore, in this predicament by the very nature of the case, it imposes upon me the necessity of pursuing a course between two opposing difficulties—of neither undertaking to anticipate, and attempting to answer by anticipation, the views and arguments of my learned friends, or of failing to exhibit a prima facie case at least calling for the interposition of this court.

179*] *Reserving, therefore, the privilege of answering the objections which may be urged against my application, I proceed briefly to state the grounds upon which reliance is placed to sustain it.

The petition, then, alleges, that the party on whose behalf and in whose name it is presented is now in actual confinement in jail, in the custody of the marshal of the Southern District of New York, by whom he is thus held and restrained by virtue of an order or warrant of commitment, issued and signed by the Hon. Samuel R. Betts, District Judge of the Southern District of New York. It appears that this warrant of commitment is a process utterly unknown to the common law or statute law of the United States. It is not for the purpose of bringing the accused to trial before any court of the Union, for any offense committed against the laws of the United States, or triable before any of its courts; it is not for the purpose of enforcing any responsibility in the shape of a debt due to any creditor, for the violation or breach of any contract, or to answer to any allegation of a tort of which those courts have cognizance; nor is it in the nature of an execution to compel the prisoner to respond to any process in the nature of an execution upon any judgment rendered against him by any court of the United States, or in the nature of an attachment for any contempt committed against such tribunal.

All this is fully set forth in the petition, and in the order of commitment annexed to it. The object, therefore, of the writ now sued for is, to enable this court to pronounce its judgment upon the lawfulness of such an imprisonment, and upon the authority under which it has been made.

The simple fact that such imprisonment exists under color and pretense of right presents a prima facie case warranting the application now made, and the language of the Constitution and statutes of the United States, taken in connection with the reiterated judgments of this court asserting its power, and actually exercising the jurisdiction and authority now invoked, would seem clearly to establish prima facie a right in the petitioner to have the benefit of this high prerogative writ. If there is any ground of objection, growing out of the circumstances of the case, which destroys this prima facie presumption as to the facts, they are to be found in the peculiar characteristics of those circumstances which attend the arrest of the petitioner; if any to meet the legal authorities upon which we rely, they must in consequence of these circumstances be held inapplicable to the case under consideration.

The points which are thus presented for the adjudication of this court are:

1. Whether the facts as presented exhibit a proper case for the awarding of a writ of habeas corpus.

2. Whether, if such be the case, this court has authority and jurisdiction over it.

*1. As to the facts. It is understood [*180 that an application was made to the executive by the minister representing the French government, for the apprehension and delivery of the petitioner. This application was declined, on the ground that no such power resided in that branch of the government, and the French government was referred to the judicial department. In declining itself to act without farther legislative authority, I conceive the executive rightly judged. In the opinion that the judiciary possessed the power, I think it erred.

This, however, was clearly an obiter expression of opinion, and not decisive on this question. The former part of the opinion is opposed by very eminent authority.

Be this as it may, the executive refused to comply with the requisition, and there has been no warrant of arrest or order of commitment emanating from that quarter.

An arrest was then made by a local magistrate of New York, who decided that he had authority over the case. The petitioner was then liberated by a circuit judge of that State, who decided that the State judiciary had no jurisdiction, and on this ground discharged the party on habeas corpus.

The diplomatic representative of the French government then addressed Judge Betts, the district judge of the United States, who, after full hearing, decided that the federal judiciary had jurisdiction over the party and the case, and awarded the order of commitment.

The entire judgment of the district judge rests upon the ground that he is exercising judicial power, and determining a question of judicial jurisdiction.

If he be right on this point, this court will probably refuse the habeas corpus, because, concurring in the opinion, they would feel themselves compelled to remand the prisoner, his imprisonment being for lawful cause and by competent authority. If wrong, the writ ought to issue, because the arrest was unlawful.

I am aware that this court was held, that, in awarding this writ, it does so in the exercise of appellate and not original jurisdiction, and that a doubt has been expressed whether, this being a proceeding before the district judge at chambers, this court can exercise any revisory power over it. This question will be presented more fully hereafter. In the mean time I would suggest, that to act upon this distinction would seem to involve this extraordinary conclusion, that if the district judge, acting in open court upon a case regularly before him, should commit a party to prison, this court would possess the jurisdiction to award the writ; but inasmuch as the commitment was in the exercise of an undoubted power, the judgment of the District Court, not being revisable here, would be final, and the court, seeing that it must necessarily remand upon the hearing, would decline to issue the writ; whereas, if it appeared that the judge exercised an authority 181*] not granted by law, *and assumed a jurisdiction not belonging to him, then, as he did not act in open court, his proceedings, however erroneous and unauthorized, cannot be drawn in question here through the instrumentality of this writ.

Such has not been the interpretation heretofore given by this court to its own grant of power. With this general remark this point will be postponed for the present, until we reach it in the regular progress of the argument.

Let us now examine whether the district judge, either as presiding in the District Court or at chambers, had any authority to hear this application, to exercise any jurisdiction over the case, and to make the order for commitment. *I apprehend this question must be answered in the negative.*

The courts of the United States, and the judges of those courts, can exercise no powers of a judicial character, and can possess no jurisdiction, except that which is conferred upon them under the authority of the Constitution by act of Congress.

The Supreme Court is the only court named in the Constitution, and even this high tribunal has no existence simply by the force and operation of the constitution itself. Until Congress brought it into existence, and gave it organization, it existed rather in posse than in esse. But the inferior courts, the circuit and district courts, exist only under the authority of legislation. Congress alone created them, meted out to each the powers which it enjoys, prescribed the orbit within which it should move, and prescribed every limit by which its jurisdiction was to be ascertained. I am entitled to put the question which I now address to this court, and to my learned friends, Where is to be found any grant of jurisdiction to a district court, far more to a district judge, to exercise the power assumed in the present case? Upon what act of Congress can the finger be laid which confers it? None such exists.

The only ground upon which this claim was rested before and by the district judge is that of the treaty stipulations with France, and the means by which he acquired jurisdiction on application addressed to him by the diplomatic agent of the French government. With great deference, I cannot but think the mode as irregular as the authority unfounded.

Under our institutions, there exists but one legitimate channel of communication between this and any foreign nation; that organ is the executive. It is unprecedented in our judicial and legislative annals, for the diplomatic representative of a foreign government to address himself immediately to the judicial or legislative departments. Such a course is equally unknown to the history of England.

Nor in my judgment is it less extraordinary in an American judge to regard such an application to him as in the nature of the original writ out of chancery, to call into action the latent powers of the judiciary. A record which should begin by setting forth such a paper *would be a judicial if not a political [*182 curiosity, and it is hoped it may be brought before the eyes of this court by a writ of certiorari to accompany the habeas corpus.

But no such jurisdiction exists to be evoked and called into exercise by this or any other process. It has been observed, that no such authority is conferred by any statute. With submission I may say, that to me it seems preposterous to assert that it may be conferred by treaty. It is a new idea to me that the treaty making power can, by the most latitudinarian construction, be held to be a constitutional source of power and jurisdiction to any court or judge of the United States. New objects of judicial power, new subjects upon which it is to operate, may extend the number of cases which may be presented for judicial decision, but can never be appealed to as a grant of judicial power. Treaty stipulations operate only directly upon the parties to them, and not upon the citizens, except as part of the law of their own land. All may recollect the recent circumstance arising between England and

Brazil, in which it was thought necessary to invest, by legislative authority, the British courts with jurisdiction to enforce the provisions of the treaty upon Brazilian subjects.

In 1794, Jay's Treaty, 27th article, provided for the surrender of fugitives from justice. 8 Stat. at Large, 129. In 1842, the Ashburton Treaty, art. 10, Ibid. 576. In 1843, the convention with France. Ibid. 580. In the absence of legislative provisions can either of these treaties be executed?

A recent occurrence in our history may illustrate this. Act of Aug. 8, 1846, ch. 105; Acts, etc. p. 78.

If, then, the district judge has assumed a power not conferred upon him, can this court award a habeas corpus? If adherence is had to judicial precedents, not hastily or inconsiderately decided, there is an end to this question. United States v. Hamilton, 3 Dall. 17, precisely in point, in 1795; in 1806, Ex-parte Burford, 3 Cranch, 448; in 1807, Bollman and Swartwout, 4 Cranch, 75; Ex-parte Cabrera, 1 Wash. C. C. R. 232; Ex-parte Kearney, 7 Wheat. 38; Ex-parte Watkins, 3 Pet. 200; 7 Pet. 568.

Mr. Clifford, the Attorney-General, submitted three propositions:

1. That the treaty took effect and went into operation on and from the day of the date thereof.

2. That the judge of the District Court had competent authority, under the provisions of the treaty and the laws of the United States now in force, to take jurisdiction of this case, and to order the apprehension of the accused in the manner in which it was done, pursuant to the stipulations of the treaty.

As the decision of the court was exclusively on the point of jurisdiction, it is not considered 183*] necessary to do more than give the *authorities cited by the Attorney-General to sustain these two propositions. On the first he cited, 1 Kent's Com. 169, 170; Hylton v. Brown, 1 Wash. C. C. R. 312; Wheaton's International Law, 306, 573; United States v. Arredondo, 6 Pet. 748, 758; 2 Burlamaqui, 223; Vattel, B. 3, sec. 239; Rutherford's Inst. B. 2, chap. 9, sec. 22; Martens, B. 2, chap. 1, sec. 3; 2 McCulloch's Dict. Com. 654–674. On the second he cited, Foster v. Neilson, 2 Pet. 314; United States v. Arredondo, 6 Pet. 734, 735; Constitution, art. VI.; Case of Thomas Sheagle, Massachusetts District, October Term, 1845, MS.; 8 Statutes at Large, 129; Jay's Treaty, art. 27; United States v. Nash, alias Robbins, Bee, 266; 3 Story's Com. secs. 1640, 1641; Osborn v. Bank of the United States, 9 Wheat. 738; Constitution, art. III. sec. 2; Chisholm v. State of Georgia, 2 Dall. 419; Rhode Island v. Massachusetts, 12 Pet. 657; Barry v. Mercein, ante, p. 103; United States v. Bevans, 3 Wheat. 336; United States v. Wiltberger, 5 Wheat. 76; Judiciary Act of 1789, secs. 9, 11, 33; Picquêt v. Swan, 5 Mason, 42; United States v. Schooner Peggy, 1 Cranch, 109, 110; 3 Story's Com. sec. 1515; Case of Santos, 2 Brock. 494.

3. The third proposition admitted was, that the Supreme Court has no authority, under the Constitution and laws of the United States, to grant the writ of habeas corpus prayed for in the petition. 1st. Because its original jurisdiction is restricted to cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. 2d. Because it possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, where conferred, be exercised in any other form or by any other mode or proceeding than that which the law prescribes. 3d. Because the Supreme Court was created by the Constitution, and its jurisdiction was conferred and defined by that instrument and the laws of Congress made in pursuance thereof; consequently, it possesses no inherent common law powers beyond the written law.

1st. No original jurisdiction in this case. By art. III. sec. 2, of the Constitution, it is provided, that the judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The second section describes the whole circle of the judicial power of the United States, giving its extent and boundaries; it then distributes that power, first in marking and defining the original jurisdiction of the Supreme Court, limiting it, with a precision and certainty defying all construction, to cases affecting ambassadors, other public ministers, and consuls, and cases to which a State shall be a party. So firmly is this view of the case established by the Constitution, that Congress itself has no power to enlarge the original jurisdiction of this court, or to extend it to any other cases than those enumerated. * It was accordingly held, [*184 that so much of the thirteenth section of the Judiciary Act as gave authority to the Supreme Court to issue writs of mandamus to public officers was unconstitutional and void. Marbury v. Madison, 1 Cranch, 173–175; Cohens v. Virginia, 6 Wheat. 400. The original jurisdiction of the Supreme Court can neither be enlarged or restrained, but must stand as it is written in the Constitution by which it is conferred.

2d. No appellate jurisdiction. The appellate power of the Supreme Court is described in the Constitution in these words: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The appellate authority, though somewhat extensive under the Constitution, is not general, but is limited and confined to the cases specially enumerated, and is made subject to such exceptions and regulations as Congress may from time to time prescribe. The grants conferring original and appellate jurisdiction disclose this marked distinction—the former can neither be restrained or enlarged; the latter, while it cannot be enlarged beyond the limits of its circle, yet within those limits Congress may confer as much or as little as in its discretion it may consider wise and expedient. Barry v. Mercein, ante, p. 103.

The authority to issue writs of habeas corpus is not claimed to be among the enumerated cases of original jurisdiction conferred upon the Supreme Court. The language of the grant in this respect leaves nothing for implication; if any doubt could arise, the case of Marbury v. Madison silences argument and dispute upon the point. Ex-parte Barry, 2 How. 65. The appellate jurisdiction, being

given with such exceptions and under such regulations as Congress may make, can only be exercised in pursuance of an Act of Congress conferring the authority and prescribing the mode in which it shall be performed; that is, the manner of exercising the power must first be regulated by law. The question, therefore, in any given case, whether the court has appellate jurisdiction over it, resolves itself into the simple inquiry, whether such case falls within the legislative provisions enacted in pursuance of the Constitution relative to the exercise of this branch of jurisdiction. Wiscart v. Dauchy, 3 Dall. 327; United States v. More, 3 Cranch, 172; Durousseau v. United States, 6 Cranch, 313. In search of the vagrant power to issue this writ, all other resorts failing, it must be found, if it exist anywhere, in the appellate jurisdiction of this court. That is clearly admitted in the case of Bollman and Swartwout, 4 Cranch, 100, mainly relied on by the petitioner. In all cases where this power has been claimed or exercised, it has been invariably justified on the ground that it was an element of appellate authority. Thus, in Ex-parte Watkins, 3 Peters, 202, Chief Justice Marshall says: "It is in the nature of a writ of error to ex-
185*] amine the legality of the *commitment." Same case, 7 Peters, 572. In Ex-parte Milburn, 9 Peters, 704, in note, Chief Justice Marshall again says: "As the jurisdiction of the Supreme Court is appellate, it must be first shown that the court has the power in this case to award a habeas corpus." In the final opinion in the case, the writ was refused upon other grounds. Subsequently, in Ex-parte Barry, 2 Howard, 65, Mr. Justice Story maintains the same view, and discloses what may be considered the true doctrine upon the whole subject of the power of this court to grant writs of habeas corpus under existing laws. He says: "No case is presented for the exercise of the appellate jurisdiction of this court, by any review of the final decision and award of the Circuit Court upon any such proceedings. The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now, the Constitution of the United States has not confided any original jurisdiction to this court, except in cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. The present case falls not within either predicament. It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition, and we cannot issue any writ of habeas corpus, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States." The appellate power must be sought and found, if it exist, in the acts of Congress conferring it upon this court. Certainly no question can arise upon the twenty-fifth section of the Judiciary Act, which stands in many respects upon different principles. The thirteenth section of that act provides, that "the Supreme Court *shall also have appellate jurisdiction from the circuit courts, and courts of the* several States, in the cases hereinafter specially provided for." The twenty-second section limits the appellate power upon a writ of error of a circuit court to final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs. And upon a like process, this court may re-examine and reverse or affirm final judgments and decrees in civil actions and suits in equity in a circuit court, brought there by original process, or removed there from the courts of the several States, or by appeal there from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs. The proceeding in this case cannot be sustained under this section. There is no writ of error, which is the only process mentioned by which it could be instituted; there is no final judgment or decree in any inferior court, within the meaning of the law; it is not a civil action, much less a suit in equity, and therefore not within the scope and meaning of the section.

*The Supreme Court has no appellate [*186 jurisdiction in criminal cases, according to repeated decisions which have never been questioned. United States v. More, 3 Cranch, 172; United States v. La Vengeance, 3 Dall. 297; United States v. Hudson et al. 7 Cranch, 32.

Jurisdiction is defined to be the power to hear and determine a cause. Appellate jurisdiction is the power to correct and revise the judgment of an inferior court. Chief Justice Marshal says, in Marbury v. Madison, 1 Cranch, 175: "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create the cause." The case, or subject matter in dispute, now under consideration was not instituted in any tribunal over which this court may exercise any supervisory power; it was not a proceeding in court, but before the district judge, sitting and acting in his capacity as a magistrate, under the thirty-third section of the Act of 1789. The power of this court, under the Constitution and laws of Congress, does not and can not reach the forum where the matter was instituted and decided. This court has no revising power over the District Court, nor is it authorized to issue a writ of prohibition to it in any case, except where that court is proceeding as a court of admiralty and maritime jurisdiction. Ex-parte Christie, 3 How. 352. And this is true, although writs of prohibition are enumerated in the fourteenth section of the act. The application in that case was, that the writ might issue to an inferior court, performing the functions of a court, and having exclusive jurisdiction of the subject matters in controversy. If there is no power to revise the doings of a bankrupt court under federal authority, where is the right to assume control over the doings of a justice of the peace, or a district judge, while sitting as a committing magistrate? McCluny v. Silliman, 2 Wheat. 369; McIntire v. Wood, 7 Cranch, 504. The revising power of this court does not extend to the person, but, when it exists, it operates upon the inferior tribunal and the subject matter in controversy. The district judge, in the capacity in which he acted, under the laws of the United States, was entirely independent of this court; his decision was final and con-

clusive; and this court could not reverse or affirm it were the record brought up directly by writ of error, and so is the decision in Ex-parte Watkins, 3 Peters, 201. It has already appeared that the Supreme Court has no appellate jurisdiction of crimes and offenses, and of course no process issuing here can extend to the subject matter of this application. This is therefore, undeniably, a call upon the court to exercise orignial power in granting the writ in question. That power this court has directly and solemnly, on several occasions, decided it does not possess. In all the cases where the power has been exercised or countenanced, it has been upon the ground of revising, in some 187*] form, the doings of an inferior *tribunal, over which this court possesses appellate power. Here the Attorney-General cited and commented on the following cases on this point, in addition to those already mentioned: United States v. Hamilton, 3 Dall. 17; Ex-parte Buford, 3 Cranch, 453; Ex-parte Dorr, 3 Howard, 104.

3d. The Supreme Court possesses no inherent or common law power to grant writs of habeas corpus. On this point it was insisted, that a review of all the cases would show that the doctrine had been uniformly repudiated by the court, and that since the decision of Bollman and Swartwout it has been abandoned by the bar. Some comments were made on the second clause of section ninth of the first article of the Constitution, which provides that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion, or invasion, the public safety may require it. This provision was regarded as one containing a prohibition upon the powers of Congress, and not as one conferring any authority on the federal courts. 3 Story's Com. sec. 1332.

In conclusion, it was insisted that all the power of this court to issue writs of habeas corpus was derived from the fourteenth section of the Judiciary Act. There are two clauses in the section upon this subject which should be treated separately. The seeming inconsistency, if any exists, in the cases decided, has doubtless arisen by omitting to keep clearly in view the manifest distinction in the nature and character of the power conferred by these two clauses. The first provides, that "all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law." This clause undoubtedly authorizes the issuing of inferior writs of habeas corpus in aid of jurisdiction, which have been long known in the practice of courts, and are indispensable in the course of legal proceedings. Bac. Abr. Habeas Corpus, A; 2 Chitty's Black. 130. The second clause is in these words: "And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment." Undoubtedly this clause authorizes the issue of the great writ of habeas corpus ad subjiciendum, which is of general use to examine the legality of commitments in *criminal cases. The power conferred by this* clause is expressly delegated to either of the justices of the Supreme Court, and not to the whole, when convened for the trial of causes. If the question were one of new impression, it would seem to follow that the authority to be derived from the law should be exercised according to the language of the act. In the present case, however, it is not necessary to insist on the point, as the proceeding below was not in a tribunal over which this court has any appellate power.

*Mr. Justice McLean delivered the [*188 opinion of the court:

This is a petition for a habeas corpus, in which the petitioner represents that he is a prisoner in jail, under the custody of the marshal for the Southern District of the State of New York, by virtue of warrant issued by the judge of the United States for said district, as an alleged fugutive from justice, pursuant to the provisions of the convention signed between the United States and the French government on the 9th of November, 1843.

On a full hearing at chambers, the district judge held "that the evidence produced against the said Metzger was sufficient in law to justify his apprehension and commitment on the charge of forgery, had the crime been committed within the United States;" and the prisoner was "committed, pursuant to the provisions of the said treaty, to abide the order of the President of the United States."

In the first article of the convention for the surrender of criminals between the United States and His Majesty the King of the French, on the 9th of November, 1843, it was "agreed that the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the required party, shall seek an asylum, or shall be found within the territories of the other: provided, that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugutive or the person so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed."

The second article specifies, among other crimes, that of forgery, with which the prisoner was charged.

The third article declares that, "on the part of the government of the United States, the surrender shall be made only by the authority of the executive thereof."

It is contended that the treaty, without the aid of legislation, does not authorize an arrest of a fugitive from France, however clearly the crime may be proved against him—that the treaty provides for a surrender by the executive only, and not through the instrumentality of the judicial power.

The mode adopted by the executive in the present case seems to be the proper one. Under the provisions of the Constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, it may become a subject of judicial cognizance. The surrender of fugitives from justice is a

matter of conventional arrangement between States, as no such obligation is imposed by the laws of nations.

Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender 189*] of Metzger was made, *very properly, as we suppose, referred it to the judgment of a judicial officer. The arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty.

The jurisdiction of this court in this matter is the main question for consideration. As this has been argued fully, and as it is supposed that there is a conflict in the decisions of this court on the subject, a reference will be made to the cases which have been adjudged.

In The United States v. Hamilton, 3 Dallas, 17, a writ of habeas corpus was issued, to which the defendant, who was charged with high treason, was brought into court. He had been committed on the warrant of the district judge. A motion was made for his discharge, "absolutely, or at least upon reasonable bail." The court held the prisoner to bail. From the opinion pronounced, it appears the deliberation of the court was chiefly on the subject of appointing a special circuit court to try certain offenses, which, for the reason assigned, they refused to do.

Here, it is said, was an original exercise of jurisdiction by the court, as it does not appear that the district judge was holding a court at the time of the commitment. No objection seems to have been made to the jurisdiction, and the court did not consider it. The defendant was discharged on bail, and this may be presumed to have been one of the main objects of the writ.

The thirty-second section of the Judiciary Act of 1789 provides, that, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court," etc. Hamilton's case was within this section, the charge against him being treason, which was punishable with death. The case is not fully reported. The motion to discharge the prisoner is not noticed in the opinion of the court, and this omission may be accounted for on the ground that they had no power to discharge. But, whether this presumption be well founded or not, it is clear, if this were not the exercise of an original jurisdiction, that the court had a right to admit to bail, under the section, and for that purpose to cause the defendant to be brought before them by a habeas corpus.

Ex-parte Buford, 3 Cranch, 448, was a habeas corpus, on which the prisoner, who had been committed by the Circuit Court of this district, was discharged, there being no sufficient cause for the commitment.

Ex-parte Bollman and Swartwout, 4 Cranch, 75, gave rise to much discussion on the power of the court to issue a writ of habeas corpus; and, in their opinion, they consider the subject *with great care.*

190*] *The Chief Justice disclaimed all jurisdiction in the case, "not given by the Constitution or laws of the United States."

He refers to the fourteenth section of the Judiciary Act above cited, in these words: "That all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Bollman and Swartwout had "been committed by the Circuit Court of the District of Columbia, on a charge of treason against the United States."

The court held that the proviso limiting the cases in which the writ should issue extends to the whole section, and that they could issue the writ, as it was clearly the exercise of an appellate jurisdiction; that "the revision of a decision of an inferior court, by which a citizen has been committed to jail," is an appellate power.

In Ex-parte Kearney, "who was committed by the Circuit Court of the District of Columbia, for an alleged contempt" (7 Wheat. 38), the court said, that the case of Bollman and Swartwout expressly decided, upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest." And they held "that a writ of habeas corpus was not a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction."

The preceding cases were all referred to in Ex-parte Watkins, 3 Peters, 193, and the court said: "Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of habeas corpus ought not to be awarded."

Again, in 7 Peters, 568, the case of Ex-parte Watkins was brought before the court on a writ of habeas corpus, on the ground that the prisoner "would not be detained in jail longer than the return day of the process, and he had been brought into court and committed, by the order of the court, to the custody of the marshal." This committal was required by the law of Maryland, in force in this district, and it not having been ordered, the court discharged the petitioner.

In all the above cases, except in that of Hamilton, this court *sustained the power [*191 to issue the writ of habeas corpus, in the exercise of an appellate jurisdiction under the fourteenth section of the Act of 1789; and the case of Hamilton was probably sustained under the thirty-third section of the same act, for the purpose of taking bail. The same doctrine was maintained in Ex-parte Dorr, 3 Howard, 104. In that case the proviso in the fourteenth sec-

tion was considered as restricting the jurisdiction to cases where a prisoner is "in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify."

The case under consideration was heard and decided by the district judge at his chambers, and not in court; and the question arises, whether the court can exercise jurisdiction to examine into the cause of commitment, under such a state of facts.

There is no pretense that this can be done, in the nature of an appellate power. This court can exercise no power, in an appellate form, over decisions made at his chambers by a justice of this court, or a judge of the District Court. The argument of the court, in the case of Bollman and Swartwout, that the power given to an individual judge may well be exercised by the court, must not be considered as asserting an original jurisdiction to issue the writ. On the contrary, the power exercised in that case was an appellate one, and the jurisdiction was maintained on that ground.

It may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus. In this form nothing more can be examined into than the legality of the commitment. However erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction and the defendant has been duly committed, under an execution or sentence, he cannot be discharged by this writ. In criminal cases, this court have no revisory power over the decisions of the Circuit Court; and yet, as appears from the cases cited, "the cause of commitment" in that court may be examined in this, on a writ of habeas corpus. And this is done by the exercise of an appellate power—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court. This does not conflict with the principles laid down in Marbury v. Madison, 1 Cranch, 137. In that case, the court refused to exercise an original jurisdiction by issuing a mandamus to the Secretary of State; and they held that "Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the Constitution."

There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provision for the revision of his 192*] judgment. It cannot be brought *before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it.

Upon the whole, the motion for the writ of habeas corpus in this case is overruled.

Order.

Mr. Coxe, of counsel for the petitioner, having filed and read in open court the petition of the aforesaid Nicholas Lucien Metzger, and moved *the court for a writ of habeas corpus, as* prayed for in the aforesaid petition, to be directed to the Marshal of the United States for the Southern District of New York, commanding him forthwith to produce before this honorable court the body of the petitioner, with the cause of his detention; on consideration whereof, and of the arguments of counsel thereupon had, as well against as in support of the said motion, and after mature deliberation thereupon had, it is now here ordered and adjudged by this court, that the prayer of the petition be denied, and that the said motion be, and the same is hereby overruled.

ALBERT G. CREATH'S ADMINISTRATOR, Complainant and Appellant, v. WILLIAM D. SIMS.

Court of equity will give no relief in the case of judgment in action on illegal contract—bill to enjoin showing no reason for omission of legal defense, dismissed—voluntary forbearance towards principal will not discharge surety.

The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence.

Therefore, where a complainant prays to be relieved from the fulfillment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are in pari delicto. The complainant cannot be admitted to plead to his own demerits.

Nor is it any ground of interference when a complainant applies to be relieved from the payment of a promissory note given under the above circumstances, upon which judgment had been recovered at law. The consideration upon which the note was given was then open to inquiry, and it is a sufficient indulgence to have been permitted once to set up such a defense.

The cases examined, showing how far and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor.

Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond.

The authorities upon this point examined.

THE reporter finds the following statement of the case prefixed to the opinion of the court, as delivered by Mr. Justice Daniel:

*This is an appeal from a decree of [*193 the Circuit Court of the United States for the 9th Circuit and Southern District of Mississippi. The facts of this case, so far as it is necessary to set them forth, are as follows: On the

NOTE.—What forbearance, or extension of time to principal debtor, will discharge surety.

Mere delay to prosecute the principal without a valid agreement will not discharge a surety. Schweppel v. Shaw, 3 N. Y. 446; Fulton v. Matthews, 15 Johns. 433; Hunt v. U. S. 1 Gall, 32; Montgomery v. Dillingham, 3 Sm. & M. 647; Allen v. Brown, 124 Mass. 77; Lumsden v. Leonard, 55 Ga. 374; Johnson v. Planters' Bank, 4 Sm. & M. 165; Summerhill v. Tapp. 52 Ala. 227; Hooker v. Gooding, 86 Ill. 60; People v. Jansen, 7 Johns. 332; Moore v. Gray, 26 Ohio St. 525, 9 Ves. 734; 1 Bos. & Pull. 419; Clopton v. Spratt,

25th of June, 1838, A. G. Creath, together with William N. Pinkard (who signed himself as principal), John I. Guion, and Samuel Mason, executed their promissory note to the appellee, as administrator of John C. Ridley, for the sum of $10,392.25, payable on the 1st day of October following, at the branch of the Planters' Bank at Vicksburg, in Mississippi. Upon failure to pay this note, an action was instituted thereupon, in the Circuit Court above mentioned; a judgment was recovered for the amount at the May Term of the court, 1839; and upon a fieri facias sued out upon this judgment, the marshal having returned, on the 2d of October, that he had levied upon certain slaves enumerated in his return, the parties to the promissory note, the defendants in the judgment, together with a certain T. L. Arnold, on the 2d day of October, 1839, executed to the plaintiff in the action a forthcoming or delivery bond, which has the force of a judgment, by virtue of which the property levied upon was released. The condition of this forthcoming bond not having been complied with, a fieri facias was, on the 16th of December, 1839, sued out thereupon, and on this process the marshal, on the 24th of March, made a return that it had been levied on several lots and parts of lots in the town of Vicksburg, which were not sold by order of the plaintiff's attorney. A copy of the order referred to by the marshal is made a part of the record, and is in the following words: "The marshal is authorized to levy on property enough of the defendants to pay the plaintiff's execution, and return the levy to court without selling or advertising for sale, unless other judgments younger than this are pressed to an amount to endanger this debt; if so, the property will have to be sold, March 24th, 1840." On the 21st of May, 1840, a venditioni exponas was sued out, ordering the sale of the property which had been levied upon, and on that process there was a return that there had been no sale for the want of bidders. A second venditioni exponas was next sued in November, 1840, and on this the marshal returned that the property had been sold on the 2d of March, 1841, and the proceeds applied to the execution. The amount made by this sale does not appear by the return of the officer, but it is stated, in the answer of the respondent, to have been $101 only. In consequence of the insufficiency of the sale, under the last venditioni exponas, to satisfy the judgment, process of fieri facias alias fieri facias, pluries and alias pluries fieri facias was sued out, until the autumn of the year 1842, when the marshal, having levied upon certain real and personal estate of the said A. G. Creath, as set forth in the return of that officer, and in his advertisement for the sale thereof, the complainant, on the 25th day of November, 1842, obtained from the District Judge *of the Southern District of Mis- [*194
sissippi an injunction to stay all proceedings upon the judgment recovered against him and others at law. The grounds set forth in the bill, and on which relief is prayed, are the following: 1st. That the complainant was a mere surety in the note on which the action was instituted, and that the indulgence granted by the direction to the marshal after judgment obtained was in fraud of defendant's rights as a surety; was in its operation, in fact, injurious to him, from the deterioration of the property of Pinkard, the principal, during the interval of that indulgence; was an infraction of the undertaking of the surety, and therefore absolved him from all responsibility. 2d. That the instrument on which the judgment was obtained was one of several notes given for the purchase of a number of slaves sold by the intestate of the plaintiff to Pinkard, several of whom were unsound, although, as the plaintiff charges, they were (as he believes) warranted to be sound and healthy. 3d. That although the slaves for which the notes were given were delivered in the State of Tennessee, yet the contract for them was in fact made at Vicksburg, in Mississippi, and was designed to be, and was in reality, a fraud upon the constitution and laws of Mississippi, forbidding the introduction of slaves, as merchandise, within that State.

The respondent denies that the complainant, Creath, could properly be regarded as a surety, either in the note on which the action at law was instituted, or in the forthcoming bond executed posterior to the judgment; but insists that in both the complainant must, with respect to the respondent, be considered as a principal, equally with the other makers of the note, or obligors in the forthcoming bond. But even could Creath be viewed as a surety, it is further insisted that he could have no just cause of complaint, because, in the short space of five weeks, during which the execution was held up, there could be no material depreciation in property of any intrinsic value; and because, moreover, the forbearance was merely voluntary on the part of counsel of the respondent, was wholly without consideration, and without any agreement for delay with

52 Miss. 251; Clark v. Sickler, 64 N. Y. 231; Butler v. Hamilton, 2 Desaus. 226; Dorlon v. Christie, 39 Barb. 610; Thompson v. Hall, 45 Barb. 214.

Even if by delay the principal becomes insolvent (Lyle v. Morse, 24 Ill. 95); otherwise where surety has requested creditor to sue principal and he afterwards become insolvent. Martin v. Skehan, 2 Col. T. 614; King v. Baldwin, 17 Johns. 384; Pain v. Packard, 13 Johns. 174; Manchester v. Sweeting, 10 Wend. 162; Herrick v. Borst, 4 Hill, 650, 14 Wend. 165.

In order to discharge a surety by mere delay to proceed against the principal, there must be a request by the surety to proceed without delay against the principal, neglect to do so and loss of the debt or injury to the rights of the surety by the delay. Valentine v. Farrington, 2 Edw. Ch. 53; *Warner* v. Beardsley, 8 Wend. 194, 10 East, 24; *People* v. *Bemer*, 13 Johns. 383; Mut. Life Ins. Co. v. *Davies*, 56 How. N. Y. 440; Russell v. Weinberg, 2 Abb. N. C. 422; Remsen v. Beekman, 25 N. Y. 652.

A valid agreement to extend the time of payment to the principal without the consent of the surety, discharges the surety, and this, too, whether the surety is injured by it or not. Hogshead v. Williams, 55 Ind. 145; Ashton v. Sproule, 35 Penn. St. 492; Hampton v. Levy, 1 McCord. Ch. 112; Galphin v. McKinney, 1 Id. 297; Baird v. Rice, 1 Call. 18; Hill v. Bull, Gilmer, 149; Norton v. Roberts, 4 Monr. 492; Robinson v. Offutt, 7 Monr. 541; Ellis v. Bibb, 2 Stewart, 63; Rathbones v. Warren, 10 Johns. 587; Clagett v. Salmon, 5 Gill & Johns. 314; Thornton v. Dabney, 23 Miss. 559; Brooks v. Wright, 13 Allen 72; Stewart v. Parker, 55 Ga. 656; Woodburn v. Carter, 50 Ind. 376; Scott v. Saffold, 37 Ga. 384; Robinson v. Miller, 2 Bush. (Ky.), 179; Dunham v. Downer, 31 Vt. 249.

And the surety is released although he has sustained no injury by the extension. Miller v. Mc-

either of the parties, and might have been terminated at any moment, at the will of the respondent, or at the request of either of the defendants, had this been desired by them. The allegations in the bill of a warranty of the soundness of the said slaves, and of the making of the contract of sale within the State of Mississippi, and in fraud of the constitution and laws of that State, are, in the first instance, directly denied; and it is next insisted by the respondent, that these are objections which, if they ever had any validity, should have been urged as grounds of defense to the action at law. A copy of the bill of sale from Ridley to Pinkard and others, conveying the slaves, is made an exhibit in the cause, and upon the face of that instrument there is no warranty of anything except of the title to the property conveyed. Several depositions were taken on behalf of [*195] *the complainant, and some exhibits filed by the respondent, but as these are deemed immaterial to the questions on which the decision of this cause properly depends, they will not be made subjects of comment. Upon a final hearing before the circuit judge, on the 15th of May, 1844, it was decreed, that the injunction awarded by the district judge on the 25th of October, 1842, should be dissolved, and the bill of the complainant dismissed with costs.

From this decree, an appeal was taken to this court.

The cause was argued by Mr. Crittenden for the appellant, and by Mr. Coxe and Mr. Chalmers for the appellee.

Mr. Crittenden, after stating the case, proceeded with the argument.

The question arising upon the case thus presented is, whether the complainant, as the surety of Pinkard, is discharged, in equity, from his liability as such.

The proof in the cause leaves no room to doubt that he was a surety. Being such, it is contended that the successive suspensions of the executions of the 16th of December, 1839, and of the 15th of March, 1841, discharge the plaintiff as a surety. The former execution was levied on the 24th of March, 1840, and the real estate levied on was not sold until the 2d of March, 1841, being an interval of eleven months and a few days. Contemporaneously with the date of the execution, the marshal was directed by the plaintiff's attorney "to return the levy to court without selling or advertising for sale," unless other judgments were pressed to an amount endangering the debt. The marshal returned on the execution, "Levied this fieri facias on lots No. 93, etc., and not sold by order of attorney."

Another execution did not issue on the judgment until the 21st of May, 1840, that being the date of the venditioni exponas.

It is clear that the stay of the execution was produced by an agreement between Pinkard the principal, and the attorney of the plaintiff. The answer of the defendant does not deny this. On the contrary, it would seem to be admitted. For it says: "This respondent is informed, and believes, that the only reason which influenced the attorney of record to consent to one day's time in the sale, and the only reason assigned to him by Pinkard when asking such time, was to enable Pinkard, if possible, to complete some negotiations that he had then going on, to relieve his property," etc. "And this respondent believes he (the complainant) well knew that said Pinkard and the attorneys of record in this and other cases were trying to aid him, Pinkard, to get through his difficulties," etc.

Proof to the same point is contained in the deposition of Pinkard. *He says: "The [*196 stay of execution was granted at my request, and the only consideration that I knew for granting it was, that the attorney, F. Norcom, who granted it, believed I would be able to pay it in a short time, as he knew it was the first levy that had ever been made on my property, and that he considered it ample to pay every dollar against me under any circumstances."

If, however, it should be supposed that the evidence does not establish an agreement for the delay, the foregoing statement of the witness, together with other proof to which the attention of the court will be called, sufficiently maintains the position, that, by the postponement of the sale, the risk of the surety was materially increased, and the property levied on, which he had a right to rely on for his indemnity, was greatly depreciated in value.

The bill charges, that "the property on which the execution was levied, together with other property of Pinkard's not levied on, was, at the time of the levy, and until after the return term of the execution, amply sufficient to pay, not only this judgment, but all other judgments and liens of prior date to the time when the lien of this judgment took effect; and had said sale been made, said judgment would have been satisfied out of the property of said Pinkard."

It also charges, "that after the return term of the execution by which said property was

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Can, 7 Paige, 451; Davis v. People, 1 Gilman, 409; 10 Peters, 257, 10 Johns. 587, 3 Met. 255; 4 N. J. 112, 11 Wend. 312.

The law does not stop to inquire whether the surety is injured. Bangs v. Strong, 7 Hill, 250.

The agreement must, however, be a valid and binding one, a mere voluntary promise or agreement without any consideration to extend the time of payment will not discharge the surety, because it is not binding and does not prevent immediate proceedings. Draper v. Romeyn, 18 Barb. 166; Reynolds v. Ward, 5 Wend. 501; Halliday v. Hart, 3 N. Y. 474; Van Rensselaer v. Kirkpatrick, 46 Barb. 194; Anderson v. Mannon, 7 B. Mon. 217; Vilas v. Jones, 10 Paige, 76; Hunter v. Clark, 28 Tex. 159; Thompson v. Watson, 10 Serg. 302; Wright v. Watt, 52 Miss. 624.

The time of the extension must be definitely fixed, for a sufficient consideration and, a fixed time. Gardner v. Watson, 13 Ill. 347; David v. Malone, 43 Ala. 429.

Part payment of the debt does not constitute a valid consideration. King v. State Bk. 9 Ark. 185; Matthewson v. Strafford Bk. 45 N. H. 104; Halliday v. Hart, 30 N. Y. 274.

If the agreement is valid the surety is discharged though at the time of the extension the principal was actually insolvent. Huffman v. Hulbert, 13 Wend. 375; Gahn v. Neincewics, 11 Wend. 312.

An usurious agreement to extend time will discharge a surety. The usury can only be set up by the borrower or those claiming under him. It is not available to the lender. Scott v. Harris, 76 N. C. 205; Brown v. Prophit, 53 Miss. 649; Myers v. First Nat'l B'k. 78 Ill. 257; Billington v. Wagoner, 33 N. Y. 31, 7 Hill. 391, 9 N. Y. 241; 1 Barb. 271; 4 Barb. 346; Draper v. Trescott, 29 Barb. 401; La Farge v. Herter, 9 N. Y. 241. This was, however, questioned in Silas v. Jones, 1 N. Y. 274, by some of the judges; and see, contra, Burgess v. Dewey, 33 Vt. 618.

levied on, it became (as indeed all real property had) greatly depreciated in value, in consequence of commercial embarrassments and other causes, and there being other judgments, of younger date, against said Pinkard, the effect of the suspension of said sale was thought by many to give those younger judgments the preference—at least the doubt which this suspension created on this point caused said property, which was sufficient at the time of the levy to have twice paid the judgment, to sell for little or nothing."

In support of these allegations of the bill, the undersigned refer the court to the deposition of Pinkard. The deponent states: "There were two stays given on the execution by F. Norcom, attorney for W. D. Sims, administrator of John C. Ridley's estate, at my request, without the knowledge or consent of Creath, and the sureties in the case. The first was given in writing on the execution at the marshal's office, in Vicksburg, on the 4th of March, 1840, erased"—"the second was given between the 15th of March and the first Monday of May, 1841." "I had sufficient property at the time the stay was given to pay five times the amount of judgments then against me; and I could, if the execution had been pressed, at any time within two weeks of the time the suspension was granted, have raised the money to pay it, as the counsel granting the stay was perfectly satisfied at the time."

"The effect of the stay was to cloud the title to the property levied on in this case, and cause doubts in the minds of the best 197*] *attorneys, whether the executions which had taken their regular course had not a preference lien in every instance where they had not been paid, which would not have been the case if the suspension had never taken place. These doubts in the minds of purchasers operated seriously against the sale of the property when it was finally offered."

Again, the same deponent says: "if said stay had not been granted, I would and could have paid the money rather than the property should have been sold, but the stay operated so seriously against me, that when the property was sold it was impossible for me to protect it."

"At the time the sale was made, Major Milkie was anxious to purchase the property" (one half at $16,000, and General Vick was in treaty for lots 93 and 94 at $32,000, one half in Planters' Bank money, the balance in good funds); "and was deterred from doing so owing to the advice of Mr. Yerger, who gave as his opinion that he could not get a title, owing to the stay given on said execution."

This evidence, connected with the additional statement of the deponent, that, "at the time the stay was granted, the amount of liens older than this judgment was comparatively small, not exceeding $20,000," shows very clearly that the interests of the complainant were materially affected by the suspension of the execution; and that if the property had been regularly sold, it would have brought much more than it produced on the final sale. The court will not inquire into the degree of the injury received by the surety, for that would lead, in the language of Lord Loughborough (Rees v. *Berrington, 2 Ves. Jun. 543), "into a vast variety of speculation, upon which no sound principle could be built." Nor will the court, it is contended, look into the incumberances upon the property, alluded to in the defendant's answer, with a view of determining the liability of the surety. Pinkard's testimony is ample to show, that at all events, if the sale had taken place, the debt for which the complainant was bound could have been made; not only was the property itself sufficient, but Pinkard asserts he would have paid the money rather than it should have been then sold. The complainant was entitled to the benefit of these chances. The creditor, with an execution levied, was a trustee for all the parties interested in the subject matter concerning which such execution was taken out. Pitman on Principal and Surety, 177; Mayhew v. Crickett, 2 Swanston, 185.

Upon the proof in the cause, therefore, it is contended, that the complainant is released from his obligation as surety. The authorities are fully to the point.

The rule was distinctly recognized in Rees v. Berrington, 2 Ves. Jun. 540. Lord Loughborough said in that case: "It is the clearest and most evident equity, not to carry on any transaction *without the privity of him [*198 (meaning the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own), without consulting him." The authorities fully warrant me in this; though I should have granted the injunction, even without that strong authority before Lord Thurlow." "There the creditor," "thinking that by leaving the debtor at large, and taking a judgment against him, which affected all his property, he pursued a better mode, using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit, and holding him in prison. But he did it without consulting the surety; and therefore Lord Thurlow held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous; after circumstances of communication, that showed great embarrassment, great difficulty, and great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man who had so great an interest."

A question, similar in principle, arose in the case of Mayhew v. Crickett, 2 Swanston, 193, in which the Lord Chancellor said: "I always understood that, if a creditor takes out execution against the principal debtor, and waives it, he destroys the surety, on an obvious principle which prevails both in courts of law and in courts of equity," for "the principle is," he observed in another place, "that he is a trustee of his execution for all the parties interested."

In the case of Bullitt's Executors v. Winstons, 1 Munf. 269, the Court of Appeals of Virginia had occasion to allude to the question now before us; and Judge Tucker held, that a plaintiff, by directing the sheriff to put off the sale of property taken in execution to a day after the return day, and to suffer it to remain in the possession of the principal releases the sureties altogether from that or any subsequent

executions, such direction being given without their concurrence.

The case of Jones v. Bullock, 3 Bibb. 467, is directly to the same effect. There the party interested in an execution directed it to be stayed after it had been levied. The court say: "The execution which was levied upon the property of the principal debtors was postponed by the creditor without the privity or consent of the complainants. This course of proceeding evidently tends to their prejudice as securities; and it is a principle recognized by courts of chancery and perfectly consonant to the dictates of natural justice, that any arrangement between the creditor and principal debtor, for the easement of the latter, and to the prejudice of the securities, will, if the securities are not privy to or approve of such arrangement, operate in equity to release them from their responsibility." And the court directed a decree, making the injunction of the surety to the judgment perpetual.

199*] *In The Bank of Steubenville v. Carroll, 5 Ohio, 207; S. P., Bank of Steubenville v. Hoge, 6 Ohio, 17, the court held, that if the principal at the instance of the creditor confess a judgment with a stay of execution, the sureties are discharged.

I will merely direct the attention of the court, without comment, to the question presented by the record as to the consideration of the note on which the judgment was rendered.

On the whole, it is submitted that the decree of the Circuit Court is erroneous, and ought to be reversed.

Mr. Coxe and Mr. Chalmers, for the appellee:

The errors alleged in the decree, so far as we can learn them from the record, are supposed to be three.

1. That complainant Creath was exonerated from his responsibility by the postponement of the sale of Pinkard's property, which had been levied upon under the execution issued upon the judgment obtained upon the forthcoming bond.

2. That the original contract for the sale of the negroes made by Colonel Ridley, and for part of the purchase money of which the note in which this suit was originated was given, was null and void, on the ground of fraud in the vendor in making the sale, either because of his false representations as to the soundness of the slaves when sold, or because of his having made an actual warranty of such soundness, which was broken.

3. That the original contract as aforesaid was void, because of the violation of the provision of the constitution of Mississippi, prohibiting the importation of slaves.

The decree of the Circuit Court does not show upon its face whether these grounds were overruled, because not supported in point of fact, or because under the circumstances they were not deemed to constitute a legal defense to the action. In vindicating the correctness of this decree, the counsel for the appellee feel themselves fully authorized to sustain it as well upon the law as the facts. They therefore insist, that neither of these grounds of defense is established by the proof in the cause; and, second, not under circumstances which justify the *interposition of a court of equity to* prevent *a party who has obtained a judgment* at law from having the full benefit and effect of such judgment.

I. The alleged suspension of the execution which had been levied upon the property of Pinkard.

1. It appears from the record, that Sims brought his action in the Circuit Court at the May Term, 1838, against sundry defendants upon the same promissory note. The declaration in this case sets forth a joint promise by Pinkard, as principal, Creath, Guion, and Mason, as sureties, on the 25th June, 1838, to pay on the 1st October, 1838, to the plaintiff, or order, the sum of $10,392.57, and it avers a joint responsibility on all the parties defendants. *The defendants all united in [*200 the plea of the general issue, and upon the trial the jury found a general verdict against all, upon which judgment was entered.

Upon this judgment a writ of fieri facias issued against all the defendants jointly. Upon this writ the marshal returned a levy upon sundry slaves, and that he had taken a forthcoming bond, with Thomas L. Arnold as surety, which bond is set forth in the record.

This bond having been forfeited, another fieri facias issued against all the parties, including all the defendants in the original suit, together with Arnold, the security, but without designating him as such. The marshal returned, that he had levied upon certain real estate, designated, "not sold by order of attorney." The levy does not indicate to which of the defendants the property levied on belonged, and the order of plaintiff's attorney, set forth in the bill, and in the transcript of record, does not name any one of the defendants to whom indulgence was to be granted. Whatever favor was granted would seem to have been extended equally to all. This order, as well as the levy, bears date 24th March, 1840. May 21, 1840, a venditioni exponas issued in like manner, without distinction of parties, which was returned, "Not sold for want of bidders." An alias issued on the 3d December, 1841, which was returned, "Sold to S. S. Prentiss, and proceeds applied." March 15th, 1841, a pluries issued, which was stayed as against the other defendants. June 8th, 1841, an alias pluries issued, to which the marshal returned a levy on certain specified property of Pinkard. Subsequent process was issued, but the fieri facias which was enjoined does not appear in the record.

The only act complained of as an undue act of forbearance, or giving of time, is that of March 22d, 1840; quære, if not March 24, 1840. This obviously was in no respect detrimental to complainant. It was an indulgence, if any, equally extended to all the defendants; and if any contract of forbearance is to be inferred from it, all were parties; neither has cause of complaint.

But what was then the position of the parties? A judgment at law had been obtained against all jointly. The responsibility of each was then fixed. The plaintiff was at perfect liberty to issue an execution, or to withhold it, to issue against all or any, to compel payment of his debt from any or either.

Even if the engagement of Creath was a subsidiary one at any time, which is denied, it had become absolute and primary by the ren-

dition of the first judgment against him. The right of the plaintiff was perfected. He might now pursue his remedy against either or all, and the omission to proceed against one, or even a positive indulgence granted to one, would in no degree impair his rights as against any other.

But the strength of the appellee's case does not rest here. He did take out execution; he caused a levy to be made; and complainant 201*] *again, with his associates, enters into a new and solemn instrument, under hand and seal, in the shape of a forthcoming bond. This bond created a new and substantive contract; and, being forfeited, gave rise to another judgment, comprehending all the parties to it. Again, plaintiff had a perfect right to proceed against one or all; to direct the marshal to levy upon any property of any one of the defendants. He did issue execution, a levy was made, a sale advertised, when complainant resorted to equity, and obtained an injunction. The first question arising in the case is, whether the original direction given to the marshal, prior to the forthcoming bond, to the forfeiture of that bond, the judgment upon it, and the issue of the fieri facias, invalidate all these subsequent proceedings, and discharge complainant's liability.

For the appellee it is contended, that no such legal or equitable consequences result.

1. Because, by the terms of the original note, all the parties were equally bound, jointly and severally. There was no primary responsibility in one, or a contingent and subordinate responsibility in the other.

2. Because, even had such been the case, by the judgment all became principals. Even in the case of indorsers, whose contract is confessedly conditional and contingent, such is the law. Lenox v. Prout, 3 Wheat. 520, is express upon this point. It was there held, that, when judgment has been obtained against the drawer and indorser, both become principals; and the creditor ought not to be restrained by any fear of exonerating the indorser from countermanding the service of any execution he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. But it is obvious, that in this case the designation in the original note of one of the parties does not have this effect. 5 Johns. Ch. R. 315. In the case of Bay v. Tallmadge, which was, in many particulars, analogous to the present, but in which bail, who are always especially favored, sought to be exonerated in consequence of the postponement of proceedings against their principal, Chancellor Kent says, "that even an express dissent by the bail will not discharge them from their obligation to pay the judgment against them. Their privileges as bail were lost, and they had become fixed as principal debtors." I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes, then, too late to inquire into the antecedent relations of the parties. Those relations become merged in the judgment.

The case of Rees v. Berrington, 2 Ves. Jun. 540, is a leading case upon this point, and the cases cited in the note to that case (Phil. ed.) fully illustrate the distinctions which exist.

*116

*3. The act complained of was not [*202 one which, in any case, and with the most rigid application of the most favorable decisions in favor of sureties, would operate a discharge. No peculiar benefit is granted to the so-called principal. No especial forbearance as regards him. The order is general as to all the defendants in the execution.

Nor was there any agreement obligatory on the parties to grant indulgence to the principal debtor. In Reynolds v. Ward, 5 Wend. 501, it was held that an agreement, without consideration, by a creditor with a principal debtor, enlarging the time for the payment of a note, does not discharge the surety.

Bank of Utica v. Ives, 17 Wend. 501. Indulgence to the maker of a note, on receipt of security from him, does not discharge the indorser, where there is no valid agreement extending the time for payment for a definite period. Nelson Ch. J., in this case, distinctly says: "Mere indulgence at the will of the creditor, extended to the debtor, in no way impairs the obligation of the surety. If it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is well settled, there must be a valid common law agreement to give time, founded of course upon a good consideration, to have this effect."

In M'Lemore v. Powell, 12 Wheat. 554, this court, after a review of the authorities in the case of an indorser while holding merely that character, held that a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is no discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawer and due notice to himself.

If such be the law, as thus laid down by the unanimous voice of this court, and the authority of this decision has never been questioned, a fortiori the complainant in this case was not discharged by the facts which he avers in his bill; as between himself and the creditor he never occupied the position of a surety. The designation of the relative characters of the parties to the note was simply to indicate their relative rights and obligations as among themselves, to confer upon the sureties the right of complete indemnification as against their principal, and of contribution among themselves. The order of the attorney to the marshal, upon which complainant relies, is destitute of every feature and character which has hitherto been regarded by courts as requisite to operate the results sought to be deduced from it.

If further answer be required upon this point, it will be found in the fact that the objection comes too late. If ever available, it should have been urged before the issue of the execution upon which the forthcoming bond was given, before judgment had upon that bond—the forfeiture of which was a satisfaction and extinguishment *of the origi- [*203 nal judgment. King v. Terry, 6 Howard's Miss. Rep. 513; The United States Bank v. Patton, 5 How. Miss. Rep. 200—before the execution against which the injunction was prayed. With full knowledge, complainant

Howard v.

omitted to avail himself of a defense, which was equally effective at law as in equity, and he is concluded. 2 Story's Eq. 179; 1 Johns. Ch. R. 465; 9 Wheat. 552.

II. The next ground is, that Redley, Sims's intestate, perpetrated a fraud in the sale of the negroes, for whose payment this debt was originally incurred.

The particular point of this objection is not very apparent. The bill says that Redley represented fraudulently, as complainant has been informed and believes, all said slaves to be perfectly sound and healthy, and warranted them, as he has been informed, to be sound and healthy. Whether the sale is sought to be avoided on account of the alleged false and fraudulent representation, or on the ground of the breach of an express warranty of soundness, is not made distinctly to appear.

It is manifest that the purchaser never rescinded, or sought to rescind, the sale, on any pretense that it was vitiated by fraud; he holds on to the property purchased, pays through the enforcement of the law a part of the purchase money, and now, after six years of acquiescence, this ground is brought forward in a court of equity. The bill of sale of the negroes contains no convenant of warranty, and completely falsifies the pretense that one was given; nor was the appropriate remedy, by action for breach of such convenant, ever resorted to.

2. It is wholly unsupported by any evidence in the cause.

3. It appears by the record of the suit, that the then defendants, in an action at law upon one of these notes, endeavored to avail themselves of the same defense, but wholly failed, and a verdict and judgment were rendered against them. See Groves v. Slaughter, 15 Pet. 449, which has been again affirmed during the present term.

4. In regard to this particular note, the parties when sued at law omitted to avail themselves of this defense, and are now precluded from making this the ground of invoking the aid of chancery. See authorities before cited, and see the case of Green v. Robinson, 5 How. Miss. Rep. 80, on the exact point, and Cowen v. Boyce, Ibid. 769.

III. The last objection is, that Redley made this contract in violation or invasion of the provision in the constitution of Mississippi.

This ground of appeal to chancery comes with a bad grace from parties who have continued to hold the property purchased for a period of six years, without their title being questioned on the ground of an illegal importation. But this point admits of the same answer which has just been given to the former point. It has 204*] been once *tried at law and overruled. It was not urged in this case on the trial at law, and it is now too late to make it a ground for equitable relief.

In brief, the whole of these objections involve a palpable mistake of the grounds of equitable relief. Chancery will relieve from the effect of a judgment at law which has been obtained by fraud; but it is believed no case can be found in which, after judgment has been obtained at law, which judgment is unimpeachable for fraud, a court of equity has gone behind the judgment, and looked into the character of the contract in which that suit originated.

Upon the whole, and on every ground upon which equitable relief is sought, it is confidently submitted that the decree of the Circuit Court ought to be affirmed, with ten per cent. damages.

Mr. Justice Daniel, after having read the statement of the case prefixed to this report, proceeded to deliver the opinion of the court:

In reviewing the ground relied on by the complainant as the foundation of his claim to relief, the second and third, being coincident with the order and progress of the transactions between the parties as stated in the bill, and evincing especially the circumstances and the attitude under which this approach to a court of equity has been made, will be first considered and this examination will be premised by stating the following principles of equity jurisprudence, which may be affirmed to be without exception; that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. The effect of these principles upon the statements of the complainant is obvious upon the slightest inspection. The complainant alleges, that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfillment. This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this: that, however unworthy may have been the conduct of your opponent, you are confessedly in pari delicto; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you. And so with respect to the omission by the complainant to *set up at law either the failure or the [*205 illegality of the consideration for which the note was given; no reason is perceived why such a defense should not have been made or attempted. The action at law was founded upon a simple promissory note, a parol contract in legal intendment, and not upon specialty; the consideration was fully open to investigation, and it was surely a sufficient indulgence to the payees of that note to have been permitted once to set up a defense by which payment may have been resisted, whilst the whole consideration received by them for their undertaking would have been withheld, and absolutely possessed and enjoyed by them. But these payees of the note did not stop even here. After the first judgment recovered against them, and after the levy of an execution sued out on that judgment, they voluntarily go forward, the complainant amongst them, execute

to the respondent their forthcoming bond, equivalent in effect to a confession of a second judgment, and after these repeated and conclusive recognitions of their liability, they invoke the aid of a court which repels whatever is unfair, or even illiberal, to declare that these proceedings, thus solemnly had and evidenced of record, shall be utterly null; that the respondent shall be stripped of his property without the promised equivalent, and that property be secured, if not to the complainant, to one with whom he was associated in effecting its relinquishment by the owner.

Recurring now to the first ground for relief set up in the bill, being that on which greatest stress is laid—viz., the suretyship of the complainant, and the wrong alleged to have been done him by a change of his position and responsibility, by the indulgence extended to his co-defendant Pinkard—let us test this ground, first, by the proofs upon the record, and next, by trying the accuracy of the deductions attempted to be drawn from them. The promissory note, on which the action at law was founded, is made an exhibit, and it appears that to the name of Pinkard, the first signer of that note, there is added the word "principle," and to the name of each of the other makers is added the word "surety." It is insisted by the respondent, that these designations upon the note had no effect upon the obligations of these parties to him, however it might be supposed to operate upon their relations with each other; that with respect to the respondent all the makers of the note were from the beginning principles, but that at any rate, after their liability was fixed by judgment upon the note, and still more after their uniting in the forthcoming bond, in the nature of a second judgment, their equal responsibility as principals was irrevocably settled. In connection with this view of the case it may not be irrelevant here to remark, that by the statute of the State of Mississippi, promissory notes, though it be not so expressed upon the face of them, are declared in their legal effect to be joint and several. See Howard & Hutchinson's Statutes of Miss. 578. The proposition contended for by 206*] *the respondent, were it necessary here to pass upon it, would not be found without support from decided cases. Thus, for instance, it was ruled by Chancellor Kent in Bay et al. v. Tallmadge (5 Johnson's Chancery Reports, 305), that where bail become fixed with the payment of the debt of the defendant, their character of bail ceases; that after judgment and execution against bail and sureties, there is an end of the relation of principal and surety, and the bail cannot claim any advantage against the creditor on the ground of want of diligence in prosecuting the principal debtor. In Prout v. Lenox, 3 Wheat. 520, it is laid down by Livingston, Justice, in delivering the opinion of the court, that "the indorser of a note, who has been charged by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety. But without pushing further an investigation which is unnecessary to the decision of the case before us, let it be conceded that the complainant was strictly a surety in the note on which the judgment was obtained at law; have any of his rights been impaired, or have any new rights grown up to him, springing from the conduct of the respondent or his agents in reference to that judgment and the proceedings had thereupon? The directions given by the attorney for the plaintiff in the judgment have been set out in extenso. These directions express upon their face no consideration received or promised for the forbearance—no limitation upon the right of the plaintiff at law to proceed upon his execution—no condition or stipulation of any kind; nor is there a title of proof as to the existence of any such consideration, limitation, or agreement, expressed or understood. We see nothing in the case but a voluntary forbearance, which the plaintiff was at perfect liberty to terminate at his pleasure. What say the authorities in relation to a proceeding of this character? In the case of Rees v. Berrington, 2 Ves. Jun., cited and pressed in the argument, the interposition of the Chancellor was founded upon the ground of an actual and substantive change of the relation and responsibility of the surety, and in such a case his lordship very justly observed, that he would not undertake to calculate the degree of injury which might have flowed from it; that if the situation had in fact been changed, that was sufficient to release the surety altogether, for it was an attempt to impose on him a responsibility he had never assumed; but in the case before us was there any such change wrought by a mere voluntary forbearance, creating no obligation anywhere—contracting with nothing, nor with any person? A few of the numerous cases, both at law and in equity, which are applicable to this question will be adduced.

Reynolds v. Ward, 5 Wend. 501. It was ruled, that an agreement without consideration, enlarging the time of payment, was not a discharge of the surety to the note. So held on demurrer to a plea by surety, averring that at the time when the note became due the principal was able to pay, and would have paid had not the *time been extended, and that [*207 after the note fell due the principal became insolvent. Held also, in that case, that a promise to pay interest during the time of forbearance was no consideration for such agreement.

Bank of Utica v. Ives, 17 Wend. 501. Indulgence to the maker of a note, on receiving securities from him, does not discharge the indorser, where there is no valid agreement for giving time of payment for a definite period; and per Nelson, Chief Justice, in this case, "Mere indulgence at the will of the creditor, extended to the debtor, in no way discharges the obligation of the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is a settled rule, that there must be a valid common law agreement to give time, founded of course on a good consideration, to have this effect."

Norris v. Crummie, 2 Randolph, 328. It is ruled, that indulgence granted by a creditor to the principal debtor will not discharge the sureties of such debtor, unless the creditor shall have bound himself in law or in equity not to pursue his remedy against the principal for a definitive length of time.

Hunter's Administrators v. Jett, 4 Randolph, 104. A surety will not be discharged by indulgence granted by the creditor to the princi-

pal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law; nor will the surety be discharged even then, if the indulgence shall have been given with his knowledge and assent.

McKinney's Executors v. Waller, 1 Leigh, 434. A mere indulgence to a principal debtor by a creditor, not binding him to suspend his proceedings for any time, though such indulgence be given at the very time the sheriff is about to levy the execution on the property of the principal, and although in consequence of that indulgence the principal debtor has been enabled to remove his property out of the reach of future process, was not, even in equity, a discharge of the surety.

Alcock v. Hill, 4 Leigh, 622. A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he in no wise binds himself to suspend execution for any definitive time, the principal and all the sureties but one become insolvent; and then the creditors sues out execution against the solvent surety. Held, that the surety is not entitled to relief in equity. The requisites in that case stated as indispensable for absolving the surety are, first, a consideration; second, a promise to indulge; third, the definite nature of such a promise; and, fourth, the absence of assent by the surety.

The last case which will be cited on this point is that of M'Lemore v. Powell et al. 12 Wheaton, 554, in which it was ruled by this court, that an agreement between a creditor and [208*] the principal *debtor for delay, or otherwise changing the nature of the contract, in order to discharge the surety, must be an agreement having a sufficient consideration to support it and be binding upon the parties. There is not one of the authorities above cited which does not more than cover the predicament presented by the case under consideration. Those authorities furnish examples of agreements—arrangements between creditor and debtor—situations from which something like hardship might possibly spring. In the present case, there is neither contract, arrangement, nor even a scintilla of right, on which either law or equity can lay hold. The complainant, after permitting a judgment on the note, without attempting a defense at law, and after execution was levied upon the judgment, voluntarily united in withdrawing the effects of his associate from the operation of that process, and by this very act bound himself with the force of a second judgment for the validity and for the satisfaction of the demand. After this course of conduct, he addresses himself to a court of equity, praying that court to undo all that he has voluntarily and deliberately performed, and in order to accomplish this end, he seeks to stamp his own acts with illegality from their very inception. For such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles. We hold the decree, therefore, of the Circuit Court, dissolving the injunction awarded the complainant below, and dismissing his bill with costs, to be correct; and that decree is accordingly affirmed.

Order.

This cause came on to be heard on the tran-

12 L. ed.

script of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

THE UNITED STATES, Plaintiff,
v.
EPHRAIM BRIGGS.

Jurisdiction—on division of opinion of circuit court judges, certificate must state particular point.

When a case is brought up to this court on a certificate of division in opinion, the point upon which the difference occurs must be distinctly stated.

Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained.

THIS case came up from the Circuit Court of the United States for the District of Michigan, on a certificate of division in opinion.

The circumstances of the case are thus stated by the Chief Justice, as introductory to the opinion of the court:

*This case comes before the court [*209 upon a certificate of division from the Circuit Court of the United States for the District of Michigan.

The defendant was indicted under the Act of Congress of March 2, 1831, ch. 66, 4 Statutes at Large, 472, for unlawfully cutting timber upon certain lands of the United States, called the Wyandotte reserve. He demurred to the indictment upon the following grounds:

First. Because the offense stated and set forth in the indictment is not an offense under the statute of the United States, punishable criminally by indictment.

Second. Because, under the statutes of the United States, trespass on public lands of the United States is in no case an offense punishable criminally by indictment; but it is either a mere trespass, punishable by action of trespass at common law, or by action of debt in the statute.

Third. For that the said indictment is in other respects informal, insufficient, and defective.

The United States joined in demurrer; and the record states, that the demurrer coming on to be heard, and having been argued by counsel on either side, the opinions of the court were opposed as to the point whether said demurrer should be sustained; and thereupon it was ordered that the cause be certified to this court on the indictment, demurrer, and joinder thereto.

The cause was argued by Mr. Clifford (Attorney-General) and Mr. Norvell, on behalf of the United States.

Mr. Chief Justice Taney, after stating the case as above, proceeded to deliver the opinion of the court:

The Act of Congress of April 29, 1802, ch.

31, sec. 6, provides, that whenever a question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point on which the disagreement shall happen, upon the request of either party, shall be stated, aand certified to this court, to be finally decided.

It is this act alone that gives jurisdiction to the Supreme Court in cases of division of opinion in the Circuit Court, and the jurisdiction thus given must of course be exercised in the manner pointed out in the law. Consequently, we are not authorized to decide in such cases, unless the particular point upon which the judges differed is stated and certified. United States v. Bailey, 9 Pet. 272; Adams v. Jones, 12 Pet. 213; White v. Turk et al. 12 Pet. 238.

Now, in the case before us, the question upon which the disagreement took place is not certified. The difference of opinion is indeed stated to have been on the point whether the demurrer should be sustained. But such a question can hardly be called a point in the case, 210*] *within the meaning of the act of Congress; for it does not show whether the difficulty arose upon the construction of the act of Congress on which the indictment was founded, or upon the form of proceeding adopted to inflict the punisument, or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer, and joinder, leaving this court to look into the record, and determine for itself whether any sufficient objection can be made in bar of the prosecution; and without informing us what questions had been raised in the Circuit Court, upon which they differed.

Neither can this omission in the certificate be supplied by the causes of demurrer assigned by the defendant. The judges do not certify that they differed on the points there stated, or on either of them, and indeed the third ground there taken is as vague and indefinite as the certificate itself, and could not therefore help it, even if it could be invoked in its aid.

But we are bound to look to the certificate of the court alone for the question which occurred, and for the point on which they differed, and as this does not appear, we have no jurisdiction in the case, and it must be remanded to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; and it appearing to this court, upon an inspection of the said transcript, that no point in the case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to *the said Circuit Court, to be proceeded in according to law.*

JOHN C. SHEPPARD et al., Plaintiffs in Error,
v.
JOHN WILSON.

Jurisdiction—practice—Territory of Iowa—writ of error.

Where a writ of error was allowed, the citation signed, and the bond approved, by the Chief Justice of the Territorial Court of Iowa, it was a sufficient compliance with the statutes of the United States.

Under the acts of 1789 and 1792, the clerk of the Circuit Court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation and approve the bond.

The Act of 1838, providing that writs of [*211 error, and appeals from the final decision of the Supreme Court of the territory, shall be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gives to the clerk of the Territorial Court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond.

MR. Grant moved to dismiss the writ of error in this case upon two grounds.

1st. Irregularity in the allowance of the writ of error, and the citation.

2d. That since the rendition of the judgment Iowa had become a State, and cited 3 How. 534; 4 How. 590.

Mr. C. Coxe opposed the motion. He stated that the writ of error had been allowed, the citation signed, and bond approved, all by a judge of the Supreme Court of the Territory of Iowa. He then referred to the acts of 1792 and 1838, and contended that there was no irregularity.

Mr. Hastings controverted these views, and sustained the motion to dismiss.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought up by a writ of error to the Supreme Court of the Territory of Iowa.

A motion has been made to dismiss it, upon the ground that the writ of error was allowed, and citation signed, and the bond approved, by the chief justice of the Territorial Court, and not by one of the justices of a circuit court of the United States, or a justice of the Supreme Court, as required by the Act of 1789, ch. 20, sec. 22.

The Act of 1838, ch. 96, sec. 9, under which this writ of error is brought, provides that writs of error and appeals from the final decision of the Supreme Court of the territory shall be allowed and taken to this court in the same manner and under the same regulations as from the circuit courts of the United States, where the value in controversy shall exceed one thousand dollars. And the Act of 1789, which regulates writs of error from the circuit courts, requires the citation to be signed by a judge of the Circuit Court in which the judgment was rendered, or by a justice of the Supreme Court; and that the judge or justice signing the citation shall take good and sufficient security for the prosecution of the writ of error, and the payment of the damages and costs if the plaintiff in error shall fail to make his plea good. And the Act of May 8, 1792, ch. 36, sec. 9, 1 Stat. at Large, 278, authorizes the clerks of the circuit courts to issue writs of error in the same manner as the clerk of the Supreme Court might have issued them under the Act of 1789.

Under these two last mentioned acts of Congress, the judgment of a circuit court may be 212*] brought up for re-examination to the *Supreme Court, by a writ of error, issued by the clerk of the court in which the judgment was rendered, and the citation may be signed and the bond approved by a judge of the said court. And as the district judge is a member of the Circuit Court when sitting for his district, he may sign the citation and approve the bond. The Act of 1838 having declared that writs of error may be prosecuted from the judgments of the Supreme Court of the Territory of Iowa to this court, in the same manner and under the same regulation as from circuit courts of the United States, it would seem to be very clear that the writ of error may be issued by the clerk of the territorial court, and the citation signed and the bond approved by one of the judges. This is the plain import of the words of the law; and we think they cannot justly receive any other interpretation. There is certainly nothing in the object and purpose of the act of Congress calculated to create any doubt upon this subject, or to call for a different construction. For it can hardly be supposed that Congress intended to deny to suitors in the territorial courts the conveniences and facilities which it had provided for suitors in the courts of the United States when sitting in a State, and to require them to apply to the clerk of the Supreme Court for a writ of error, and to a justice of the Supreme Court to sign the citation and approve the bond, when these duties could be more conveniently performed by the clerk and a judge of the court of the territory, and indeed far better and more safely performed, as regards the approval of the bond, since the judge of the Supreme Court would have frequently much difficulty in deciding upon the sufficiency of the sureties in a bond executed in a remote territory. The construction contended for would in its results be very nearly equivalent to an absolute denial of the writ of error. We think it cannot be maintained, and that the writ of error in this case was lawfully issued by the clerk of the Supreme Court of the Territory, and the citation and bond properly signed and approved by the Chief Justice of the court.

Another objection was taken upon the motion to dismiss. It was insisted, that, Iowa having been admitted into the Union as a State since the writ of error was brought, the Act of 1838, regulating its judicial proceedings as a territory, is necessarily abrogated and repealed; and consequently there is no law now in force authorizing this court to re-examine and affirm or reverse a judgment rendered by the Supreme Court of the territory, or giving this court any jurisdiction over it. This difficulty has, however, been removed by an act of Congress, passed during the present session (and since this motion was made), which authorizes the Supreme Court to proceed to hear and determine cases of this description.[1] And as this objection no longer exists, and the writ of error, citation, and bond appear to have been regularly issued, signed, and approved, the case is legally and properly in this court, and the motion to dismiss must be overruled.

*Order. [*213

On consideration of the motion made by Mr. Grant, on a prior day of the present term, to dismiss this writ of error, and of the arguments of counsel thereupon, had as well against as in support of the said motion, it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

MINERS' BANK OF DUBUQUE, Plaintiffs in Error,
v.
THE UNITED STATES ex rel. JAMES GRANT.

Jurisdiction—judgment, when not final.

A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court.

Information in the nature of a quo warranto, calling upon the President, Directors, and Company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise.

Plea, referring to an act of incorporation.

Replication, that the act of incorporation had been repealed.

Rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise.

Demurrer to the rejoinder.

Joinder in demurrer.

Sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment.

The writ of error must, upon motion, be dismissed.

A MOTION was made by Mr. Grant and Mr. Hastings to dismiss the writ of error in this case, upon the same grounds as in the preceding case of Sheppard et al. v. Wilson, and upon the additional ground that the judgment in this case was not a final judgment.

Mr. Webster. If it was not a final judgment, the court below is abolished, and the counsel on the other side may make whatever use they can of the record.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has been brought here by a writ of error to the Supreme Court of the Territory of Iowa. A motion has been made to dismiss the writ upon several grounds, and among others, upon the ground that the judgment of the territorial court is not a final one; and, therefore, under the Act of June 12, 1838, ch.

NOTE.—As to quo warranto, see note to 5 L. ed. U. S. 91.

1.—The court refrained from pronouncing its opinion in this case, and also in one from Florida, until Congress might pass an act to supply the omission of previous legislation in relation to writs of error and appeals from their territorial courts upon judgments and decrees rendered before their admission into the Union as States. An act was *passed, as the court understood, with this view, and then the above opinion was given.* But it appears, that owing, it is supposed, to some misapprehension, the act provides for Florida and Michigan, and Iowa is not included in it. Act of Feb 22, 1847, ch. 17. There is, therefore, no law relating to Iowa.

This note has been shown to and approved by the Chief Justice, who delivered the opinion of the court.

12 L. ed.

96, sec. 9, 5 Statutes at Large, 238, cannot be brought here for revision by writ of error.

It appears that an information in the nature of a quo warranto was filed by the United States in the District Court of Iowa, against certain persons named in the information, who are now the plaintiffs in error, charging them with having used the liberties and franchises 214*] *of President, Directors, and Company of the Miners' Bank of Dubuque, without any lawful authority; and calling upon them to show by what warrant they claim the right to use the liberties and franchises aforesaid.

The plaintiffs in error appeared, and pleaded that the privileges and franchises which they were exercising were conferred on them by a charter of incorporation, duly passed by the proper authority, which is more particularly set forth in the plea, but need not be here stated.

To this plea, the defendant in error replied, that the act of incorporation conferring the privileges in question was repealed by the Legislature of Iowa; and the plaintiffs in error rejoined, averring that the repealing law was passed without any notice to them, or any opportunity afforded them of being heard in their defense, and without any evidence of the abuse and misuse of any of the liberties and franchises in question. To this rejoinder the defendant in error demurred, and the plaintiffs joined in demurrer, and at the trial of the case, the following judgment was given by the court:

"It appears to the court that the said rejoinder, and the matters therein contained, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their aforesaid information thereof against the said defendants, and that said demurrer ought to be sustained.

"Therefore it is ordered by the court here, that the said defendants take nothing by their said rejoinder, and that they have leave to amend or answer over to the said plaintiffs' replication, by Monday morning next, at the meeting of the court."

No amendment, however, appears to have been made, nor any further proceedings to have been had in the District Court; but upon the judgment above stated the case was removed to the Supreme Court of the territory, where the judgment of the District Court was affirmed, and a procedendo awarded.

It is evident that this judgment is not a final one against the plaintiffs in error. It merely decides, that the rejoinder and the matters therein contained are not sufficient to bar the information, and that the demurrer ought to be sustained, and that the plaintiffs in error take nothing by their rejoinder. But there is no judgment of ouster against them, nor anything in the judgment which prevents them from continuing to exercise the liberties and privileges which the information charges them to have usurped. In order to make the decision a final one, the court, under the opinion expressed by them, should have proceeded to adjudge that the plaintiffs in error do not in any manner use the privileges and franchises in question, and that they be forever absolutely forejudged and excluded from exercising or *using the same, or any of* them, in future. *And we presume that the* Supreme Court of the territory awarded the procedendo to the District Court in order to enable it to proceed *to final judgment, the Supreme Court [*215 having no power to give a judgment of ouster, in the shape in which the case came before it.

Inasmuch, therefore, as there has been no final judgment, the writ of error from this court must be dismissed for want of jurisdiction. And being dismissed on this ground, it is unnecessary to examine the other objections which have been taken in support of the motion.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel; on consideration whereof, and it appearing to the court here upon an inspection of said transcript that the judgment of the said Supreme Court is not a final one in the case, it is thereupon now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

WHARTON JONES, Plaintiff,
v.
JOHN VAN ZANDT.

Fugitives from labor—"harboring," what is—penalties for, under statute—constitutionality of.

Under the fourth section of the Act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harboring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

Such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent to the person who harbors or conceals the fugitive; and to charge him under the statute a general notice to the public in a newspaper is not necessary.

Clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such a knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

Receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harboring or concealing of the fugitive within the statute.

A transportation under the above circumstances, though the boy should be recaptured by his master, is a harboring or concealing of him within the statute.

Such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harboring of him within the statute.

A claim of the fugitive from the person harboring or concealing him need not precede or accompany the notice.

Any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harboring of the fugitive within the statute.

In this particular case, the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

215*] *They also contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

The averments in the said counts, that the defendant harbored said Andrew, are sufficient.

Said counts are otherwise sufficient.

The Act of Congress approved February 12, 1793, is not repugnant to the Constitution of the United States.

The said act is not repugnant to the ordinance of Congress adopted July 1787, entitled, "An Ordinance for the Government of the territory of the United States northwest of the River Ohio."

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

It was an action of debt, brought by Jones, a citizen of Kentucky, against Van Zandt, a citizen of Ohio, for a penalty of five hundred dollars, under the Act of Congress passed on the 12th of February, 1793, for concealing and harboring a fugitive slave belonging to the plaintiff. The act is found in 1 Statutes at Large, 302.

The 3d and 4th sections, which were the only ones involved in this case, are as follows:

"Sec. 3. Be it enacted, that when a person held to labor in any of the United States, or in either of the territories, on the northwest or south of the River Ohio, under the laws thereof, shall escape into any other of the said States or territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such arrest or seizure shall be made; and, upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or territory, that the person so seized or arrested doth, under the laws of the State or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive from labor to the State or territory from which he or she fled.

"Sec. 4. That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbor or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of the said offenses, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action 217*] of *debt, in any court proper to try the same; saving, moreover, to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them."

The suit was brought in the Circuit Court of Ohio, in June, 1842. The declaration consisted of four counts, the two last of which were abandoned in the progress of the cause. As the remaining two—viz., the first and the second—are commented upon by the court, it is deemed proper to insert them. They are as follows:

"First Count—Concealing.

"Wharton Jones, a citizen of, and resident in Kentucky, by Charles Fox, his attorney, complains of John Van Zandt, a citizen of, and resident in, Ohio, was summoned to answer unto the plaintiff in a plea of debt; for that, whereas, a certain person, to wit, Andrew, aged about thirty years, Letta, aged about thirty years, on the 23d day of May, in the year eighteen hundred and forty-two, at Boone County, in the State of Kentucky, was the slave of, and in possession of the plaintiff, and his property, and owed service and was held to labor to the plaintiff by the laws of Kentucky, unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, departed and went away from, and out of the service of the plaintiff, at said Boone County, and came to the defendant at Hamilton County, in the State and district of Ohio, and was there a fugitive from labor; and the defendant, well knowing that said Andrew was the slave of the plaintiff, and a fugitive from labor, yet afterwards, to wit, on the day and year aforesaid, at said district, contriving, and unlawfully and unjustly intending to injure the plaintiff, and to deprive him of said slave and of his service, and of the profits, benefits, and advantages, that might and would otherwise have arisen and accrued to him from said slave and his service, did then and there, and there knowingly and willingly, wrongfully, unjustly, and unlawfully receive the said slave of the plaintiff into his service, and knowingly and willingly harbor, detain, conceal, and keep the said slave, in consequence of which the plaintiff lost said slave, and was deprived of his services and of all benefits, profits, and advantages which might and would have arisen and accrued to him from such slave and his service, contrary to the statute of the United States in such case made and provided, whereby the defendant forfeited the sum of five hundred dollars to and for the use of the plaintiff; yet the defendant, though often requested, has not paid the same, nor any part thereof."

"Second—Concealing.

"And also for that, whereas, on the day and year aforesaid, at said Boone County, a certain person, to wit, Andrew, aged about thirty years, was the slave of, and in the possession of the plaintiff, *and his property, and [*218 owed service, and was held to labor to the plaintiff by the laws of the State of Kentucky, did unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, depart and go away from and out of his service, to wit, at Boone County aforesaid, and came to Hamilton County, in the State and District of Ohio, to the defendant; and the defendant had notice that the said Andrew was the slave of the plaintiff, and a fugitive from labor; yet afterwards, to wit, on the day and year aforesaid, at the district aforesaid, contriving, and wrongfully and unjustly intending to injure the plaintiff, and de-

prive him of the said slave, and of his service, then and there, on the day and year aforesaid, at the district aforesaid, [did] knowingly and willingly, unjustly, wrongfully, and unlawfully conceal the said slave from the plaintiff, in consequence of which the plaintiff lost said slave, and was deprived of his service, and of all profits, benefits, and advantages which might and otherwise would have arisen and accrued to the plaintiff from such slave and his service, contrary to the statute of the United States in such cases made and provided, whereby the defendant forfeited the sum of five hundred dollars, to and for the use of the plaintiff. Yet, though often requested, he has not paid the same, nor any part thereof."

The defendant pleaded the general issue, and in July, 1843, the cause came on for trial. The jury found a verdict for the plaintiff. The substance of the evidence given upon the trial was agreed upon by the counsel who argued the cause in this court, as will be seen by the following, viz.:

"The undersigned, of counsel respectively for Jones and Van Zandt, now under submission to the court, agree that the statement of the evidence as contained in the opinion of his honor the Circuit Judge, on the trial below, shall be taken and considered by the court in the same manner as if it were a part of the record, and certified by the Circuit Court.

"J. H. Morehead,
"Of counsel for Jones.
"William H. Seward,
"Of counsel for defendant, Van Zandt.
"26th February, 1847."

The evidence thus adopted by agreement was stated by Mr. Justice McLean, in the trial below, as follows: See 2 McLean's Reports, 507.

"Jones, a witness called by the plaintiff, stated that the plaintiff owed nine negroes (naming them), and resided in Boone County, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 22d of April, 1842, about nine o'clock, he was at the house of the plaintiff, and saw the negroes; the next day, at about 12 o'clock, he saw the same 219*] *negroes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed.

"The plaintiff paid a reward to the persons who returned the negroes, of four hundred and fifty dollars, and other expenses, which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum.

"Several other witnesses corroborated the statements of this witness, as to the ownership of the negroes, the reward paid, and the value of the services of Andrew.

"Hafferman, a witness, stated that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday *morning, a little after daylight,* he saw a wag*on which was rapidly passing* through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness, and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates's, about six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he stopped the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse, which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who, seizing the reins of the horses, drew them up into a corner of a fence. The driver jumped off and ran some distance; Van Zandt, the defendant, then came out of the wagon, and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them, called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington, and lodged in jail.

"Hargrave accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice which directed the colored boy to drive over the witness. That the wagon tongue being driven against the horse of the witness he was thrown, and the wagon horses were driven on the run, until overtaken and stopped. Seeing the defendant in the wagon, with the negroes, the witness asked him if he did not know they were slaves. The defendant replied that he knew they were slaves, but that they were born free. He said he was going to Springboro', a village in Warren County. This witness, and also Hefferman, stated the amount paid as a reward for bringing the negroes to Covington, as above.

"'Hume, very early on Sunday [*220 morning, saw the wagon moving very rapidly, and two men on horseback pursuing it, near Bates's. Looked into the wagon, after it was stopped, and saw the defendant in it with the negroes. He was asked if he did not know that they were slaves, and he replied, that by nature they were as free as anyone. Witness took the negroes to Covington in a wagon. Sometime after this, he saw the defendant who said to him 'If you had left me alone, the negroes would have been free, but now they are in bondage.' And the defendant said it was a Christian act to take slaves and set them at liberty.

"Bates, a witness, states that he went to the wagon, after it had been stopped, looked into it, and saw the defendant with the negroes. The witness said, 'Van Zandt, is that you? Have you a load of runaways?' The defendant replied, 'They are, by nature, as free as you and I.' The witness heard the defendant say that, having been at market in the city of Cincinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did

not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. He afterwards said that he had received the blacks from Mr. Alley.

"McDonald, a witness, stated that he heard the defendant say he received the negroes on Walnut Hill, the same place as Lane Seminary. That, at three o'clock on Sunday morning, he found the negroes standing near his wagon, in the road; they got into it, and he started for home. That he rose early to have the cool of the morning. Defendant said he had done right. That he would at all times help his fellow-men out of bondage; and that what he had done he would do again.

"Thurman, a witness, stated that he saw the defendant in the wagon with the negroes, the cover closed behind and before. The defendant said to Hefferman, the negroes ought to be free, but he knew they were not. The defendant lives at Sharon, and this was six or seven miles beyond, on the road to Lebanon."

After the rendition of the verdict in the court below, the counsel for the defendant filed reasons in support of a motion for a new trial, and also reasons in support of a motion for arrest of judgment, which were, respectively, as follows, viz.:

John Van Zandt ads. Wharton Jones.

Circuit Court of United States, 7th Circuit and District of Ohio—in debt—Verdict $500.

The defendant, John Van Zandt, by his counsel, moves the court for a new trial, and assigns the following reasons:

221*] *1. The court erred in charging the jury that it was not necessary to prove that the defendant intentionally placed the colored persons in question out of view, for the purpose of eluding the search of the master or his agent, in order to establish the fact of concealment, or to prove that he received, sheltered, and placed them out of view for said purpose, in order to establish the fact of harboring; but charged that it was sufficient, if the jury believed, from the evidence, that the defendant received the colored persons into his wagon, and transported them to Bates's from Walnut Hills, with intent to facilitate their escape from their master.

2. The court erred in charging the jury that it was not necessary, in order to establish the plaintiff's right to recover, to prove actual notice to the defendant from the claimant, or some one acting in his behalf, that the persons alleged to be harbored or concealed by him were fugitives from labor, within the meaning of the act of Congress; but charged, that it was sufficient if the jury should be satisfied, from the evidence, that the defendant knew that such persons were fugitives from labor.

3. The verdict is against evidence.

4. The verdict is against law.

Chase & Ball, Attorneys for Def't.

John Van Zandt ads. Wharton Jones.

Circuit Court of United States, 7th Circuit and District of Ohio—In Debt.

The defendant, by his counsel, moves the court to arrest *judgment on the verdict* rendered in this cause for the following reasons:

I. Because the plaintiff's declaration, and the allegations therein contained, are insufficient in law to warrant said judgment.

1. In this, that in no count of said declaration has the plaintiff averred that the person or persons therein described as fugitives from labor were held to service under the laws of the State of Kentucky, and, being so held, escaped from that State into the State of Ohio.

2. In this, that the act of Congress referred to in said declaration is unwarranted by, or repugnant to, the Constitution of the United States, and therefore null and void.

3. That the said act, so far as it applies to the case made in the plaintiff's declaration, is repugnant to the sixth article of the ordinance for the government of the territory of the United States northwest of the River Ohio, and therefore, so far, null and void.

4. In other respects.

II. Because the verdict rendered by the jury is general, whereas it ought to have been confined to the good count, or counts, in said declaration.

Chase & Ball,
Attorneys for Def't.

*In order to bring these questions be- [*222
fore the Supreme Court, the judges below differed pro forma, and a certificate was made out, showing that their opinions were opposed on the following points:

First. Whether, under the 4th section of the Act of 12th February, 1793, "respecting fugitives from justice, and persons escaping from the service of their masters, on a charge for harboring and concealing a fugitive from labor," the notice must be in writing by the claimant, or his agent, stating that such person is a fugitive from labor, under the 3d section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

Second. Whether such notice, if not in writing and served as aforesaid, must be given verbally by the claimant or his agent to the person who harbors or conceals the fugitive; or whether, to charge him under the statute, a general notice to the public in a newspaper is necessary.

Third. Whether clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is not sufficient to charge him with notice.

Fourth. Whether receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is not a harboring or concealing of the fugitive within the statute.

Fifth. Whether a transportation, under the above circumstances, though the boy should be recaptured by his master, is not a harboring or concealing of him within the statute.

Sixth. Whether such a transportation, in an open wagon, whereby the services of the boy

were entirely lost to his master is not a harboring of him within the statute.

Seventh. Whether a claim of the fugitive from the person harboring or concealing him must precede or accompany the notice.

Eighth. Whether any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harboring of the fugitive within the statute.

The cause having progressed, and the jury brought in their verdict, the defendant moved in arrest of judgment, and assigned sundry reasons in support of his motion, on some of which points the opinions of the judges were opposed, to wit:

First. Whether the first and second counts [*223] contain the necessary *averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

Second. Whether said counts contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

Third. Whether the averments in said counts, that the defendant harbored said Andrew, are sufficient.

Fourth. Whether said counts are otherwise sufficient.

Fifth. Whether the act of Congress, approved February, 12th, 1793, be repugnant to the Constitution of the United States.

Sixth. Whether said act be repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the River Ohio."

The case was submitted on printed argument, by Mr. Morehead for the plaintiff, and Mr. Chase and Mr. Seward for the defendant. It is impossible to insert the whole of these arguments, as that of Mr. Chase is upwards of one hundred pages, and that of Mr. Seward forty pages, in length.

The points stated and argued by Mr. Chase were the following:

1. Whether the plaintiff's declaration be sufficient; and, under this head, what are the requisites of notice under the Act of 1793.

2. What acts constitute the offense of harboring or concealing, under the statute?

3. Whether the Act of 1793 be consistent with the provisions of the ordinance of July 13, 1787.

4. Whether the Act of 1793 be not repugnant to the Constitution of the United States.

Mr. Seward stated his points as follows:

1. The declaration is insufficient.

2. The evidence was improper and insufficient.

3. The Act of 1793, so far as the present subject is involved, is void, because it violates the ordinance of 1787.

4. The Act of 1793 conflicts with the Constitution of the United States, and is therefore void.

Mr. Justice Woodbury delivered the opinion of the court:

This case comes here on a division of opinion in the Circuit Court of Ohio.

The subject matter of the original suit was debt for a penalty of $500, under the Act of Congress of February 12th, 1793, for concealing and harboring a fugitive slave belonging to the plaintiff.

The certificate of the division of opinion, as will be seen in the record, relates to various questions, arising under two heads.

*First, on rulings made at the trial, [*224 and, second, on a motion in arrest of judgment.

These questions extend to the unusual number of fourteen. Not, however, that the presiding judge in the circuit and his associate entertained strong doubts concerning the general principles involved in them all, as may be seen in the report of the case (2 McLean, C. C. 615), but because the questions involved could not otherwise be brought here; and they possessed so wide and deep an interest, as to render it desirable they should come under the revision of this court.

For that purpose, in conformity to what is understood to have been the usage in the circuits, they accommodated the parties by letting a division pro forma be entered on all the points presented.

It is not understood that any of them embrace things urged merely as reasons for a new trial. For if they did—as such a trial rests in the discretion of the court, and is not a matter of strict right—a division of opinion in relation to it furnishes no cause for bringing the case here for our decision on questions certified. United States v. Daniel, 6 Wheat. 542; 4 Wheat. 213; 5 Cranch, 11, 187; 4 Wash. C. C. 333.

Before entering on the examination of the points, it will make several of them more intelligible if we advert to the clause in the Constitution bearing on this subject, and the act of Congress under which the action was instituted.

The former is, that "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. Art. IV. sec. 2.

In respect to the statute, it will not be necessary to repeat here any of it, except portions of the 3d and 4th sections:

Sec. 3. "And be it also enacted, That when a person, held to labor in any of the United States or in either of the territories on the northwest or south of the River Ohio, under the laws thereof, shall escape into any other of the said States or territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor."

Sec. 4. "And be it further enacted, that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared, or shall harbor or conceal such person, after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offenses, forfeit and pay the sum of five hundred dollars." 1 Statutes at Large, 303, 305, Act of Feb. 12, 1793.

*The first question at the trial on [*225

which a division arose was, in substance, whether the "notice" referred to in the 4th section must be in writing.

No doubt exists with this court that it may be otherwise than in writing, if it only bring home clearly to the defendant knowledge that the person he concealed was "a fugitive from labor."

The offense consists in continuing to secrete from the owner what the acts of Congress and the Constitution, as well as the laws of several of the States, treat, for certain purposes, as property, after knowing that claims of property exist in respect to the fugitive.

Now, the act of Congress does not, in terms require the notice to be in writing, nor does the reason of the provision, nor the evil to be guarded against, nor any sound analogy.

The reason of the provision is merely, that the party shall have notice or information sufficient to put him on inquiry, whether he is not intermeddling with what belongs to another.

If the information given to him, orally or in writing, is such as ought to satisfy a fair minded man that he is concealing the property of another, it is his duty under the Constitution and laws to cease to do it longer. Eades v. Vandeput, 5 East, 39, note; Blake v. Lanyon, 6 D. & E. 221.

Such a notice is sufficient also by way of analogy; as, for instance, notice in relation to a prior claim on property purchased. The Ploughboy, 1 Gall. 41; 9 Jurist, 649; 1 Sumner, C. C. 173; 1 Cranch, 45. Or of a prior defense or set-off against a demand assigned to him. Humphries v. Blight's Assignees, 4 Dall. 370. Or even in crimes, that the notes or coin one is passing away are counterfeit.

Any other construction would go, likewise, beyond the evil to be avoided by the notice, which was the punishment of an individual for harboring or concealing a person, without having reasonable grounds to believe he was thereby injuring another.

Any other construction, too, would be suicidal to the law itself, as before a notice in writing would be prepared and served on the defendant, the fugitives would be carried beyond the reach of recovery in many cases, and in others would have passed into unknown hands.

This is not a case like some cited in the argument, where the party prosecuted was not concerned in getting away the apprentice or person harbored, but merely entertained him afterwards from hospitality, or in ignorance of his true character and condition.

Then a more formal notice and demand of restoration may be proper, before suit, in order to remove any doubts as to the condition of the fugitive who is thus entertained, or the intent of the master to enforce his rights and reclaim his property. 1 Chit. Gen. Prac. 449. But verbal notice is enough then. See the cases in East, and Durnford & East, just cited.

226*] *Besides this, the present is a case where the defendant was a partaker in accomplishing the escape itself, like a particeps criminis, and where the concealment and harboring were not after the escape was over, but during its progress, while the slaves were in transitu; and where the notice is not exclusively *with a view to procure their restoration*, but is also an element in the case to show whether the party was, knowingly or ignorantly as to their condition, rendering them assistance to escape by temporarily harboring or secreting them. So far as regards this point, it is a question merely of scienter. No matter how or whence the knowledge came, if it only existed. The concealment here was practised during fresh pursuit to retake the slaves; and hence, without any formal notice or demand, no doubt could exist as to the wish to reclaim them, as well as the fact of their being slaves. See Hart v. Aldridge, Cowp. 54.

Furthermore, that the defendant has not suffered by the charge to the jury on this point is manifest from his own declarations at the time, that he knew the fugitives to be slaves, Jones v. Van Zandt, 2 McLean, C. C. 599, and from the instruction to the jury that this fact must be clearly proved before they ought to convict him. p. 607.

This view of the subject disposes of several other points of division connected with it. Because every purpose contemplated by the notice is accomplished, without a publication of it previously in a newspaper, which is the second question.

To require such a publication would be entirely arbitrary, and would still more surely defeat the whole law than to hold the notice must be in writing, and served on the defendant, before he is liable.

So, as to the third question, whether the information be sufficient if acquired from the slave himself, it is manifest that such a source of information for that fact is one of the most satisfactory, as he has good means of knowing it, and is not likely to admit his want of freedom, unless it actually exists.

The next question relates to what constitutes concealment or harboring of a slave, within the meaning of this statute.

It seems from the facts, which by agreement are all those reported in the printed case as tried in the court below (2 McLean, 596), as well as those inserted in this record, that several slaves, owned by the plaintiff in Kentucky, escaped from him and fled to Ohio, adjoining, and, aided by some person not named, and when about twelve miles distant from their master's residence, were taken into a covered wagon by the defendant in the night, and driven with speed twelve or fourteen miles, so that one was never retaken, though fresh suit was made for the whole.

Now, whatever technical definition may exist of the word "conceal" or "harbor," as applied to apprentices or other subjects, no doubt *can exist that these words and their [*227 derivatives must here be construed in reference to the matter of the statute, and the nature of the offense to be punished.

These show this offense to consist often in assistance to escape, and reach speedily some distant place, where the master cannot find or reclaim such fugitives, rather than in detaining them long in the neighborhood, or secreting them about one's premises.

We see nothing, then, in the facts here, or in the instruction of the judge on them, secundum subjectam materiam, which shows this case not to have been, as the jury found it to be, one within the manifest design of the stat-

ute against harboring and concealing persons who were fugitives from labor, after notice, or full knowledge of their character.

Indeed, the general definition of the word "harbor" in 1 Bouvier, 460, as quoted by the defendant's counsel—say nothing as to the authority of that work—is such as to be fully covered by the facts in this case, as stated in the record, and as found by the jury. It is, "to receive clandestinely, and without lawful authority, a person for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same."

There was a clandestine reception of the slaves, and without lawful authority, and a concealment of them in a covered wagon, and carrying them onward and away, so as to deprive the owner of their custody. "To harbor" is also admitted in the argument often to mean "to secrete." Such is one of the best established definitions by the best lexicographers. Yet here they were secreted, not only, as just stated, by being placed in a covered wagon, and carried to a greater distance from their master, but it was done rapidly, and in part under the shades of night.

That no mistake on this point occurred at the trial is likewise manifest from the fact that the judge charged the jury, the defendant must not be considered as harboring or concealing the slaves, unless his conduct was such "as not only to show an intention to elude the vigilance of the master, but such as is calculated to attain that object. 2 McLean, C. C. 615.

Nor can the recovery of one of the slaves afterwards, who was thus concealed and transported, vary the previous fact of secreting and harboring him. That is the fifth inquiry. The answer to the sixth is involved in that to the fourth and fifth; as is an answer to the seventh in that to the first question. Because, if the notice need not come from the claimant himself, nor be in writing, it need not be preceded or accompanied by a claim, which is the seventh inquiry. A claim subsequently made must be equally valid with one before the notice, whether looking to the reason of the case or the language of the statute.

The gist of the offense consists in the con-
228*] cealment of another's *property, under knowledge that it belongs to another, and not in a claim being previously made and refused. That refusal might constitute a separate wrong, or be another species of evidence to prove a harboring of the slave, but it is not the offense itself, for which the penalty now sued for is imposed.

The eighth and last question under this head seems to be an abstract proposition, and does not refer to any particular facts in the case. But if it was laid down in relation to some of them, as it must be presumed to have been in order to make it a proper subject for a division of opinion, to be reconsidered here, we are not aware of anything objectionable in it. The "overt act" spoken of was required to be one both intended and calculated to elude the master's vigilance. If so, it showed acts and designs of the defendant, which in the words and spirit of the statute amount or tend directly to "harbor or conceal" the fugitive from labor.

We shall now proceed to the points of division in respect to the motion in arrest. They are, first, whether the counts contain the necessary averments, that the slave Andrew escaped from Kentucky to Ohio.

It is admitted that, this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit. Dwarris on Statutes, 736; 5 Dane's Abr. 244, sec. 8; Simmons' case, 4 Wash. C. C. 397. It is not necessary to multiply authorities on so elementary a proposition.

On turning to the counts, however, it will be seen that they allege the residence of the plaintiff in Kentucky, the ownership by him of these slaves, held to labor there, and their "unlawfully," and "without his consent," going from that place to Ohio, as "fugitives from labor." All these allegations combined, and not merely the going away, are a clear and sufficient averment of an escape of the slave Andrew under the first objection in arrest. If they contain sufficient matter to show an escape, it need not be alleged in the very words, ipsissimis verbis, of the statute. 1 Chit. Pl. 357; The King v. Stevens et al. 5 East, 244.

The ungrammatical use of the word "was" for "were," in speaking of both slaves, is urged as an uncertainty which vitiates this part of the declaration. But no one can doubt that both are referred to, and the more especially after a verdict. As to what is thus covered by a verdict, see Garland v. Davies, 4 How. 131, and the cases there cited, and 11 Wend. 374.

The second point certified under the motion in arrest is, whether the "counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress."

We cannot doubt that they do, when the first count alleges that said Andrew was in Ohio, "a fugitive from labor, and the defendant, well knowing that said Andrew was the slave of the plaintiff, and a fugitive from labor," etc., did harbor and conceal him.

*So in respect to the third question [*229 connected with the arrest of judgment, which is, whether the averments are sufficient under the statute as to harboring the slave Andrew, the answer can be but one way. However strict the construction should be, yet the count alleges, in so many words, that the defendant did "knowingly and willfully harbor, detain, conceal, and keep said slave."

Under the fourth general objection of insufficiency in the declaration, no specific point, not otherwise designated, has been called to our attention, except that all the acts alleged in the declaration are not said to be "contrary to the statute." This last expression follows the concluding portion of the count, and this expression may be necessary in a penal declaration. Lee v. Clark, 2 East, 333; 1 Gall. 259, 265, 271; 1 Chit. Pl. 358.

But all know, that where it is inserted at the end of a declaration or indictment, it does not, as a general rule, relate to the last preceding averments alone, but the whole subject matter before alleged to constitute an offense. It is all that misconduct which is contrary to the statute, and not the concluding part of it only.

It remains to consider the fifth and sixth

divisions of opinion under this head. They are, whether the act of Congress under which the action is brought is repugnant either to the Constitution or the ordinance "for the government of the territory northwest of the River Ohio."

This court has already, after much deliberation, decided that the Act of February 12th, 1793, was not repugnant to the Constitution. The reasons for their opinion are fully explained by Justice Story in Prigg v. Pennsylvania, 16 Peters, 611.

In coming to that conclusion they were fortified by the idea that the Constitution itself, in the clause before cited, flung its shield, for security, over such property as is in controversy in the present case, and the right to pursue and reclaim it within the limits of another State.

This was only carrying out, in our confederate form of government, the clear right of every man at common law to make fresh suit and recapture of his own property within the realm. 3 Black. Com. 4.

But the power by national law to pursue and regain most kinds of property, in the limits of a foreign government, is rather an act of comity than strict right; and hence, as the property in persons might not thus be recognized in some of the States in the Union, and its reclamation not be allowed through either courtesy or right, this clause was undoubtedly introduced into the Constitution, as one of its compromises, for the safety of that portion of the Union which did permit such property, and which otherwise might often be deprived of it entirely by its merely crossing the line of an adjoining State. 3 Madison Papers, 1569, 1589.

This was thought to be too harsh a doctrine 230*] in respect to any *title to property—of a friendly neighbor, not brought nor placed in another State, under its laws, by the owner himself, but escaping there against his consent, and often forthwith pursued in order to be reclaimed.

The act of Congress, passed only four years after the Constitution was adopted, was therefore designed merely to render effective the guaranty of the Constitution itself; and a course of decisions since, in the courts of the States and general government, has for half a century exhibited great uniformity in favor of the validity as well as expediency of the act. 5 Serg. & R. 62; 9 Johns. 67; 12 Wend. 311, 507; 2 Pick. 11; Baldw. C. C. 326; 4 Wash. C. C. 326; 18 Pick. 215.

While the compromises of the Constitution exist, it is impossible to do justice to their requirements, or fulfill the duty incumbent on us towards all the members of the Union, under its provisions, without sustaining such enactments as those of the statute of 1793.

We do not now propose to review at length the reasoning on which this act has been pronounced constitutional. All of its provisions have been found necessary to protect private rights, under the clause in the Constitution relating to this subject, and to execute the duties imposed on the general government to aid by legislation in enforcing every constitutional provision, whether in favor of itself or others. This grows out *of the position and nature of such a government, and is as imperative on it* in cases not enumerated specially, in respect to such legislation, as in others.

That this act of Congress, then, is not repugnant to the Constitution, must be considered as among the settled adjudications of this court.

The last question on which a division is certified relates to the ordinance of 1787, and the supposed repugnancy to it of the Act of Congress of 1793.

The ordinance prohibited the existence of slavery in the territory northwest of the River Ohio, among only its own people. Similar prohibitions have from time to time been introduced into many of the old States. But this circumstance does not affect the domestic institution of slavery, as other States may choose to allow it among their people, nor impair their rights of property under it, when their slaves happen to escape to other States. These other States, whether northwest of the River Ohio or on the eastern side of the Alleghanies, if out of the Union, would not be bound to surrender fugitives, even for crimes, it being, as before remarked, an act of comity, or imperfect obligation. Holmes v. Dennison et al. 14 Pet. 540. But while within the Union, and under the obligations of the Constitution and laws of the Union, requiring that this kind of property in citizens of other States—the right to "service or labor"—be not discharged or destroyed, they must not interfere to impair or destroy it, but, if one so held to labor escape into their *limits, should allow him to be retaken [*231 and returned to the place where he belongs. In all this there is no repugnance to the ordinance. Wherever that existed, States still maintain their own laws, as well as the ordinance, by not allowing slavery to exist among their own citizens. 4 Martin's R. 385. But in relation to inhabitants of other States, if they escape into the limits of States within the ordinance, and if the Constitution allow them, when fugitives from labor, to be reclaimed, this does not interfere with their own laws as to their own people, nor do acts of Congress interfere with them, which are rightfully passed to carry these constitutional rights into effect there, as fully as in other portions of the Union.

Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the Constitution and the act of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the Constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule.

Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the Constitution and laws with fidelity to their duties and their oaths. Their path is a straight and narrow one, to go where that Constitution and the laws lead, and not to

break both, by traveling without or beyond them.

Let our opinion on the several points raised be certified to the Circuit Court of Ohio in conformity to these views.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1st. That, under the fourth section of the Act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harboring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor, under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

232*] *2d. That such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent, to the person who harbors or conceals the fugitive, and that to charge him under the statute, a general notice to the public in a newspaper is not necessary.

3d. That clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

4th. That receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio, about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harboring or concealing of the fugitive within the statute.

5th. That a transportation under the above circumstances, though the boy should be recaptured by his master, is a harboring or concealing of him within the statute.

6th. That such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harboring of him within the statute.

7th. That a claim of the fugitive from the person harboring or concealing him need not precede or accompany the notice.

8th. That any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harboring of the fugitive within the statute.

9th. That the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

10th. That said counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress.

11th. That the averments in said counts, that the defendant harbored said Andrew, are sufficient.

12th. That said counts are otherwise sufficient.

13th. That the Act of Congress approved February 12th, 1793, is not repugnant to the Constitution of the United States. And,

Last. That the said act is not repugnant to the ordinance of Congress adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the River Ohio."

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court of the United States for the District of Ohio.

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*WILLIAM TAYLOR, George Taylor, [*233 William Primrose, and Eliza, his Wife, George Porter, and Elspet, his Wife, William Rainey, Alexander Rainey, and Elizabeth Rainey, Complainants and Appellants,

v.

VINCENT M. BENHAM, Administrator de bonis non, With the Will Annexed, of Samuel Savage, Deceased, Respondent and Appellee.

VINCENT M. BENHAM, etc.,

v.

GEORGE TAYLOR, etc.

Alabama law—administrator de bonis non not responsible for assets in hands of deceased as executor—settlement of executor's account not opened after lapse of twenty years by proof of mistake in computing interest—direction in will to sell land, powers and duties of executor—damages for neglect—money in executor's hands—statute of limitations—devise to alien.

By the laws of Alabama, an administrator de bonis non, with the will annexed, is liable for assets in the hands of a former executor.

Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such settlement, or of clear accident or mistake, to make it just to re-open and revise the account after the lapse of twenty years and the death of the parties concerned.

Where a person who held land as trustee directed by his will that the whole of the property that he may die seized and possessed of, or may be in any wise belonging to him, should be sold, the executors had power to sell the land held in trust, as well as that belonging to the testator in his own right.

The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for the original cestui que trust.

NOTE.—As to effect of alienage on title to real estate, see notes to 6 L. ed. U. S. 488, 28 L. ed. U. S. 934.

Executors and administrators, when personally liable.

An administrator cannot be made responsible for the loss of property of his intestate, occasioned by his not bringing suit until the Act of Limita-

The power in the executors to sell was a power coupled with a trust.

It might also be considered as a power coupled with an interest.

The distinction between these powers adverted to.

In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the cestui que trust.

Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise and not by descent, although they were supposed to be also the cestuis que trust.

If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does.

The testator, who held the lands as trustee, having died in South Carolina, the executor took out letters testamentary in that State, sold the lands which were in Kentucky, and then removed his residence to Alabama. He can be sued in Alabama for the proceeds of the lands, because his transactions in reference to them were not necessarily connected with the settlement of the estate under his letters testamentary.

Having sold the lands and received the consideration, he must be responsible to the residuary legatees.

An objection that only one executor sold (there having originally been four) cannot be sustained. Where a power is coupled with a trust, it is only necessary to show such a case, as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust.

A power to sell, coupled either with an interest or trust, survives to the surviving executor. So, also, if all the trustees or executors in such case decline to act, except one.

When a sale is made under a will, the omission to record the will does not vitiate the sale, unless recording is made necessary by a local statute.

The land being in fact sold by the executor, claiming a right to do so under the will, and the purchase money being received by him, he is responsible to the cestuis que trust for the money thus received. The reception of an additional sum, as purchase money, by them, with a reservation of the right to sue the executor, is not an avoidance of the first sale by the executor.

But the executor is not responsible for more money than he received, with interest, unless in case of very supine negligence or wilful default. A claim for damages would also be subject to the operation of the statute of limitations.

234*] *If the executor himself did not set up a claim, as an offset, for his personal expenses, his representative cannot do it, under the circumstances of this case.

The cestuis que trust residing in a foreign country, the statute of limitations did not begin to run until a demand was made upon the executor for the money. His retaining it during that time is no evidence that he did not intend to account for it.

Although the bill made no distinction between the two characters in which the executor acted, namely, as executor proper, and as executor having a power coupled with a trust, yet as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged upon which the claim rests.

THESE cases were twice before partially brought to the notice of the court, and are reported in 1 How. 282, and 2 How. 395.

They were cross appeals from the District Court of the United States for the Northern District of Alabama, sitting as a court of equity.

The bill was originally filed by Samuel Taylor, the father of William, George, Eliza, and Elspet, together with his nephews, William Rainey, Alexander Rainey, and his niece, Elizabeth Rainey, against George M. Savage, executor of Samuel Savage, deceased. The object of the bill was to hold the estate of Samuel Savage responsible for certain moneys which, it was alleged, he had received during his lifetime, in his capacity of executor of William F. Taylor, a citizen of the State of South Carolina, and also for his alleged neglect of lands in Kentucky, by which they were lost.

The record was very voluminous, as a great mass of evidence was filed in the court below, all of which was brought up to this court.

The claim divided itself into two distinct branches, one arising from transactions in South Carolina, where William F. Taylor, the testator, died, and where letters testamentary were taken out by Samuel Savage; and the other from transactions in the State of Kentucky. Each of these branches will be stated separately.

William F. Taylor resided in South Carolina, where he had been naturalized in 1796. Savage lived with him for some time, and afterwards continued to reside in the vicinity. In 1811, Taylor died, leaving a will, which was admitted to probate on the 11th of August, 1811.

At the time of his death, the brother and sister of the testator, namely, Samuel Taylor and Mary Taylor, were both alive, married, and had issue. Their children ultimately became parties to this suit, and their names are in the title of the case. Samuel Taylor had two sons, namely, William and George, and two daugh-

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tions opposed a bar to recovery, unless he acted in bad faith, was guilty of fraud, wilful default or gross negligence. Thomas v. White, 3 Litt. 177.

Executor's estate made liable for the value of the estate of testator, sold by him without authority; and also made liable for the securities which might prove defective. Smith v. Ex'rs of Smith, 1 Desaus, 304.

An executor is not liable for the acts or omissions of the master, in not taking securities, or collecting the funds, where the master has been ordered to sell the estate, collect the money and pay over to the executor. Thompson v. Wagner, 3 Desaus. 94.

Executor made liable for gross neglect, in not recovering a debt, where the party became insolvent. Witherspoon v. M'Calla, 3 Desaus. 245.

An administrator, paying debts out of the original order or proportion, is liable to creditors, and he is not allowed to retain, for debts due to himself, more than his proportion. Lenoir v. Winn, 4 Desaus. 65.

An executor, selling on a credit the personal estate of the deceased, and not taking personal security from the purchaser, *as prescribed by the order of the court of ordinary, is liable for the* debt, in case of the insolvency of the purchaser; but such insolvency must be established, before the executor's estate is made absolutely liable. Stukes v. Collins, 4 Desaus. 207.

An executor or trustee cannot purchase the trust property from his co-executor or trustee without being liable for the profits arising from the property purchased. Case v. Abeel, 1 Paige, 393.

An executor, having given his own note for a debt due by the estate, does not exempt the estate from the liability; and he may be sued in equity as executor for it. Douglas v. Fraser, 2 McCord's Ch. 111.

If the administrator, on the sale of his intestate's property, take any other security than that required by the terms of the order for sale, he becomes personally responsible; and if a loss ensue, it must fall upon him. Peay v. Fleming, 2 Hill, 98.

If an administrator sells leasehold property, and takes the notes of the purchaser, without other security, the administrator is liable to the next of kin, for the amount not paid by the purchaser, who has become insolvent. King v. King, 3 Johns. Ch. 552.

The estate of a deceased executor, who obtained

ters, namely, Eliza, who intermarried with William Primrose, and Elspet, who intermarried with George Porter. Mary Taylor intermarried with William Rainey, and her issue were two sons and a daughter, namely, William, Alexander, and Elizabeth.

The first section of William F. Taylor's will was as follows, namely:

235*] "'First. I do hereby order, will, and direct, that [on] the first day of January, first after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or may in any wise belong to me, be sold on the following terms and conditions, that is to say: All the personal property on a credit of twelve months from the day of sale, purchasers giving notes of hand or bonds, with security, to the satisfaction of my executors; and all landed or real property belonging, or in any wise appertaining to me, shall be sold on a credit of one, two, and three years, by equal installments, purchasers to give bond, bearing interest from the date, with securities to the satisfaction of my executors, and, moreover, a mortgage on the premises."

The second section gave a legacy to his negro woman Sylvia.

The third and fourth sections also bequeathed legacies to particular individuals.

The fifth and sixth sections were as follows:

"Fifthly. I do hereby will, order, give, grant, and devise all the remainder or residue of my estate which shall be remaining, after paying the before mentioned legacies, to my dearly beloved brother, Samuel Taylor, of the parish of Drumblait and shire of Aberdeen, in Scotland, and to my beloved sister, Mary Taylor, of the same place, share and share alike, provided they shall both be alive at the time of my decease, and have issue, which issue, after their respective deaths, shall share the same equally; but if either the said Samuel Taylor or said Mary Taylor shall die without issue, then the survivor, or, if both shall be dead, the issue of the said Samuel Taylor, or Mary Taylor, whichsoever shall leave the same, shall be entitled to the whole of the said remainder or residue of my said estate, share and share alike.

"And sixthly and lastly. I do hereby nominate, constitute, and appoint my friends, Samuel Savage, Esquire, of the district of Abbeville and State of South Carolina; Patrick McDowell, of the city of Savannah and State of Georgia, merchant, Duncan Matheson and William Ross, of the city of Augusta and State of Georgia, merchants, executors of this my last will and testament; hereby revoking and making void all former wills and testaments, at any time by me heretofore made, and do declare this to be my last will and testament."

The executors all qualified as such. No bond was given, as neither the laws of the State nor the practice of the court required a bond from an executor under a will. This narrative will treat,

1st. Of the transactions in South Carolina where all the executors acted.

2d. Of the Kentucky lands, where Savage acted alone.

1. With respect to what was done in South Carolina.

On the 30th of September, 1811, an inventory and appraisement were made of the goods and chattels of the deceased. But as the amount *was not added up, it cannot properly [*236 be stated; and on the 18th of January, 1812, an additional inventory and appraisement were made, which latter amounted to $808.12. A list of notes and accounts due to the estate was also handed in by Savage, as one of the executors. Ross also filed a list of notes, bonds, and open accounts belonging to the estate, in his possession.

In January, 1812, the four executors made sales of the real and personal property, amounting to $24,011.46, and returned a list thereof to the Court of Ordinary. The law at that time did not require an account of sales to be recorded. After this, McDowell did not appear, by the record, to have any further participation in the settlement of the estate.

Savage, Matheson, and Ross, each filed separate accounts. Those of Matheson and Ross will be disposed of before taking up those of Savage.

Matheson filed but one account, namely, on the 30th March, 1813, by which a balance was due to the executor of $281.76.

Ross filed three accounts, namely:

1813, March 30th. Balance due the estate,	$4,034 80
1814, April 4th. Balance due the estate,	6,093 63
1815, April 4th. Balance due the estate,	6,299 77

judgments for debts due to his testator's estate, and afterwards gave credit to the debtors, who were perfectly solvent during his lifetime, but became insolvent after his death, was held not liable to the legatee for the loss so incurred. Doud v. Sanders, Harp. Eq. 277.

An executor named in a will, and who never qualified as such, but who took possession of some part of the personal property of the testator, was held, by these acts, to have elected to act as an executor, and was chargeable as executor. Van Horne v. Fonda, 5 Johns. Ch. 403.

Administrator in the third degree, cannot be called to an account for the estate of the first intestate, without proof that it, in fact, came to his hands. Barbour v. Robertson, 1 Litt. 96.

If an executor suffers the family of his testator to take possession of the property, and to convert any part improperly to their own use, he is liable for it, they being regarded as his agents. Wright v. Wright, 2 McCord, Ch. 199.

An executor is not to be charged with the debts due to the estate of his testator, at the time when *they became due, but only at* the time when he

actually received them; except such debts as are lost by his negligence or improper conduct. Cavendish v. Fleming, 3 Munf. 198.

If, owing to the conduct of the administrator, any uncertainty exist as to the amount of the profits made by him on the purchase, he will be chargeable with the largest amount which, from the circumstances, he can be presumed to have realized. Brackenbridge v. Holland, 2 Blackf. 377.

Executors de son tort are only chargeable with assets which come to their hands; they have no right, as lawful executors have, to reduce the other assets, and, therefore, are not liable for not reducing and administering them. Kinard v. Young, 2 Richardson's Eq. R. 247.

If an executor or administrator brings a suit in chancery, which, from papers in his possession, he had good reason to believe was unfounded; or where, by ordinary care and diligence in ascertaining the facts, he would have ascertained the suit to be unfounded, the court, in its discretion, may charge him with costs personally, if the estate in his hands is insufficient to pay such costs. Roosevelt v. Ellithorp, 10 Paige, 415.

Ross does not appear to have filed any further accounts, and what became of this balance the record does not show. It does not appear to have been paid over to Savage; but the complainants, in their bill, disavowed all claim against Ross.

Savage filed ten accounts, one in each year till 1818. April 22.

The last mentioned account was as follows:

Dr. The Estate of Wm. F. Taylor, deceased, with Samuel Savage, Executor. Cr.

1818.				
March 11,	V	To cash paid ordinary, ...	$ 1 75	
	V	To cash paid Butler & Brooks, ...	23 62½	
	V	To cash paid Butler & Hammond, ...	16 00	
14,	V	To cash paid James Day, ...	2 50	
		To expenses to Edgefield Court-house, and to Augusta,	25 25	
22,	V	To cash paid M. Mims, clerk, etc., for cost,.....	17 18¾	
	V	To cash paid the clerk, ...	1 56¼	
			87 87½	
		My commissions on $10,303.42½, at 2½, ...	259 82	
		My commissions on $87.87½, ...	2 18	
			$349 87½	
237*]				
*March 22,	V	Cash paid the ordinary, ...	$ 1 18¾	
		Expenses at Edgefield Court-house,	5 00	
April 22,	V	Cash paid Adam Hutchinson, attorney for the parties interested,	10,037 36¼	
			$10,043 55	
1818.				
March 14,		By balance due the estate, as per last return, ...	$ 9,966 97½	
		By cash received of adm'r L. Hammond, ...	180 00	
		By cash received of adm'r Wm. Hall, it being the balance of his bond and interest, after deducting $200, under a compromise of a land case, ...	246 45	
			$10,393 42½	
		Deduct am't from the other side,	349 87½	
			$10,043 55	
		Amount balanced,	*$10,043 55*	

The account current, received in the ordinary's office on the oath of Samuel Savage, executor, the 22d April, 1818, and find vouchers for every item marked with the letter V on the left hand margin. Jno. Simkins, O. E. D.

At the time of filing this account, there was filed also the following receipt:

"Received of Samuel Savage, executor of the estate of Wm. F. Taylor, deceased, the sum of ten thousand and thirty-seven dollars and thirty-six and one quarter cents, in full of his actings and doings on the said estate up to this date, as per his account current this day rendered to the ordinary of Edgefield district. I say, received by me this twenty-second of April, Anno Domini 1818.

"Samuel Taylor,
"William Rainey, and
"Mary Rainey, his wife.
"Per Adam Hutchison,
"Their Attorney."

These accounts of Savage have been stated together, in order not to make a break in the narrative. It will be necessary now to go back in the order of time.

On the 14th of February, 1815, Savage applied, by petition, to one of the judges of the Court of Equity in South Carolina for authority to loan out the funds of the estate, praying the court to make such order as might seem equitable and just. Whereupon the court *passed an order that the petitioner [*238 should lend out the money on a credit of twelve months, on such good security as he might approve of.

At some time in the year 1815, Samuel Taylor came to the United States.

On the 9th of February, 1816, he executed the following paper:

"Georgia, City of Augusta.

"Whereas, Samuel Savage, one of the executors of the last will and testament of William F. Taylor, late of Edgefield district, South Carolina, deceased, and Samuel Taylor, brother of the said William F. Taylor, deceased, for himself, and in behalf of his sister, Mary Rainey, and her husband William Rainey, of Scotland, being desirous of adjusting the affairs of said estate, so far as have come to the hands of the said Samuel Savage, consent and agree that the said executor shall pay over to the said Samuel Taylor, at this time, as much money as he can spare, and on or before the first of April ensuing, to pay over all the money that may be collected on account of said estate. The said Samuel Taylor, for himself, and in behalf of his said sister Mary and her said husband, doth hereby consent and agree, on receiving from the said executor all the moneys that can be collected by the first of April next, to allow the said executor two years from this time to close the remaining business of said estate; and for the money hereto deposited in the Bank of Augusta, and which has since been put out at interest, no interest will be required of the said executor for said money during the time the same remained in bank; and [on] all moneys which may be collected hereafter by the said executor, no interest will be required, provided the same shall be paid over to the said Samuel Taylor, or his lawful agent, in a reasonable time after the same shall have been collected. The said executor hath permission to com-

promise all doubtful claims or debts due to the said William F. Taylor in his lifetime, or any litigated cases relating to the recovery of lands in South Carolina.

"Given under my hand, this 9th of February, 1816.

"Samuel Taylor,
"For himself, and for my sister,
"Mary Rainey, and
"William Rainey, her husband.

"Test: Nicholas Ware."

On the day of the execution of the above, namely, the 9th of February, 1816, Savage paid to Taylor $5,300, and on the 26th of March following, the further sum of $4,700, both of which are entered in the account settled on the 3d of February, 1817, with the Court of Ordinary.

On the 2d of April, 1816, Samuel Taylor, execu- 239* ted a power of *attorney to Adam Hutchinson and Peter Bennock, or either of them, authorizing them to receive on behalf of his sister, Mary Rainey, and her husband, William Rainey; all sums of money which were, are, or may become due and owing to the estate of the late William F. Taylor, and to sue for or prosecute all actions necessary for the recovery of a real estate in the State of Kentucky belonging to him, the said Taylor, and his sister.

On the 26th of September, 1817, Savage addressed a letter to Taylor, representing that there was great difficulty in collecting money due to the estate, his anxiety to bring the matter to a settlement, that during the winter he would be able to pay three or four thousand dollars, but that he must advance it out of money arising from the sale of a tract of land of his own, etc., etc., etc.

On the 22d of April, 1818, Savage paid to Hutchinson the sum of $10,037.36, as already mentioned.

In 1818, Savage went to Kentucky, and we pass on to the other branch of the complainants' claim, namely,

2. Transactions respecting Kentucky lands.

In order to understand the position of William Forbes Taylor, the testator, with regard to these lands, it will be necessary to recur to the original and subsequent titles.

On the 25th of May, 1786, Patrick Henry, Governor of Virginia, in consideration of six land office treasury warrants, as well as by virtue and in consideration of a military warrant under the King of Great Britain's proclamation of 1763, granted to Daniel Broadhead, Junior, a tract of land containing four thousand four hundred acres, beginning, etc., etc., etc.

On the 30th of September, 1786, Broadhead conveyed the land to William Forbes, of the city of Philadelphia, in consideration of the sum of £183, Pennsylvania currency.

On the 19th of February, 1794, Forbes conveyed the land to John Phillips, for the consideration of £37 10s.

On the 3d of June, 1802, John Phillips conveyed the same land to Mary Forbes, widow and administratrix of William Forbes, deceased, in trust for the right heir or heirs of the above named William Forbes. The consideration was one dollar.

On the 17th of September, 1805, Mary Forbes, *widow and administratrix,* conveyed the land *to William Forbes Taylor, of South* Carolina, in trust for the right heir of William Forbes, deceased. The consideration was one dollar.

In 1808 Taylor went to Kentucky and caused about thirty ejectments to be brought against the occupants of the land.

In 1811 William F. Taylor died.

On the 14th of September, 1815, Mary Taylor, otherwise Rainey, and her husband William Rainey, executed a power of attorney to Patrick McDowell and Samuel Taylor, authorizing them to sue for, &c., all houses and lands which belonged to William *Forbes. [*240 The power contained the recital of a pedigree, by which Mary Taylor claimed to be the niece and one of the heirs of William Forbes, deceased, and of his intestate son, Nathaniel Forbes.

In 1818 Samuel Savage, the executor of Taylor, went to Kentucky, and whilst there executed two deeds, one to Alexander McDonald and others, and one to Zachariah Peters and others, for portions of the land in question. The sums which he is stated in the deeds to have received are $800 in one case, and $1,318 in the other.

In 1818 Savage removed from South Carolina to Tennessee, and afterwards to Alabama.

In 1836 William Primrose, who had married Eliza Taylor, the daughter of Samuel Taylor, went to Kentucky, and made a compromise with many of the settlers on the land.

In June, 1837, Primrose visited Savage in Alabama and inquired what had become of the Kentucky lands, to which Savage replied that they had never been sold; but upon the production of the two deeds above mentioned, admitted that he had executed them, but denied that he ever received any money for them.

In December, 1837, Savage died, and George M. Savage became his executor.

On the 1st September, 1838, the bill in this case was filed by Samuel Taylor, William Rainey, Alexander Rainey, and Elizabeth Rainey (all of whom were aliens, residing in Scotland), against George M. Savage, the executor of Samuel Savage, deceased.

The bill states that William F. Taylor, who was a native of Scotland, but a naturalized citizen of the United States, died in the Edgefield district, in South Carolina, about the year 1811, having first made his last will, which was duly proved and admitted to record before the Court of Ordinary in the Edgefield district, on the 11th day of August, 1811, and appointed Patrick McDowell, Duncan Matheson, William Ross, and Samuel Savage his executors, who, on the said 11th August, 1811, were duly qualified as such, and took upon themselves the trust reposed in them.

By the provisions of the will, the bill further states, after the payment of sundry legacies, all of which it is suggested were paid, the testator gave, granted, and devised all the remainder or residue of his estate, remaining after the payment of said legacies, to his brother, Samuel Taylor, of the parish of Drumblait, and shire of Aberdeen, in Scotland, and to his sister, Mary Taylor, of the same place, share and, share alike; provided, that both of them were alive at the time of the testator's death, and have issue, which issue, after the respective deaths of his brother and sister, were to share the same equally; but if either of them should

die without issue, then the survivor, or, if both should be dead, the issue of said Samuel and Mary, were to be entitled to the whole of the remainder or residue of said estate, share and share alike.

241*] *The bill further states that the residuary legatees were alive at the time of the testator's death; that they were both legally married, and respectively had issue; that the sister, Mary Taylor, is dead, and that the complainants, William, Alexander, and Elizabeth Rainey, are her issue.

The bill further states that the executors executed their trusts severally; that Matheson and Ross departed this life, the first in 1812, and the last in 1816; that the principal part of the business appertaining to the estate in Georgia was under the management of McDowell, and that in South Carolina under that of Savage; that Matheson and Ross fully settled their accounts in their lifetime, and that the balances due from them have been fully paid to the complainants.

The bill further states that the bulk of the testator's estate was in South Carolina, and was managed, as before mentioned, by Savage, and that an amount of property belonging to the estate, equal in value to $100,000, went into Savage's hands, of which the sum of fifty thousand dollars has never been accounted for.

The bill further states that, at the time of the testator's death, Savage was justly indebted to him, on open account, as stated on the testator's books, in the sum of $789.70, which was never noticed in the inventory of Savage as returned to the ordinary; that he received, in cash on hand at the time of the testator's death, the sum of $681.75, of which no return was ever made by Savage; and that Savage fraudulently concealed his indebtedness, and the receipt of the last mentioned sum of money. In proof of these statements, an inventory and appraisement of the effects of the testator in South Carolina are exhibited, from which, it is alleged, it will appear that no returns were made of the last mentioned liabilities, and from which it will also appear, as it is further alleged, no returns were made of debts due to the estate, although a large amount of debts due by bond, note, and account came to Savage's hands.

The complainants charge that there is no account of sales returned to the Court of Ordinary by Savage; that a large quantity of valuable land in South Carolina was sold by the executors, the proceeds of which, to the amount of several thousand dollars, went into Savage's hands, and have never been accounted for; that they have examined the records of the said Court of Ordinary, and cannot find that any final settlement was ever made therein by Savage; that only partial accounts were rendered by him, of which they file transcripts as exhibits, marked from 1 to 10; that an item of $10,037.55, in exhibit 10, which is alleged to have been paid to the attorney in fact of the complainants, is untrue; and they require proof, not only of the payment, but of the authority of Hutchinson (the person to whom it purports to have been paid) to receive it; that the exhibit 10 appears to be the last attempt, on the part

242*] of *Savage, to render an account; and they charge the fact to be, that Savage retained $3,232.31, for commissions and traveling expenses, without charging himself with any interest on the amount of money received by him, which alone would amount to the sum of $5,000, up to the time that Savage alleges it to have been paid over by him to the legatees; and that amount, at least, with interest to the time of filing the bill, the complainants claim as their undisputed right.

The complainants further charge, that in the year 1818 Savage removed to Tennessee; that, in the same year, he went to Kentucky, where the testator had lands to a large amount and of great value; that he then fraudulently represented himself to be the only surviving executor of the said estate, although McDowell was still living; and that, regardless of the provisions of the will requiring the lands to be sold on a credit of one, two, and three years, with securities and a mortgage on the premises sold, Savage sold for cash 1,059 acres of the land for the sum of $2,118; in proof of which they refer to exhibits D and C, which are copies of deeds executed by Savage to Alexander McDonald and others, to Zachariah Peters and others, of record in Kentucky.

They charge these lands to have been then worth eight dollars per acre, and would have sold for that if the terms of the will had been complied with; and that the lands were worth at the time of filing the bill forty dollars an acre.

They further state that Savage, shortly after these sales, removed to Lauderdale County, Alabama, where he resided until his death, which occurred about the month of December, 1837; that he never made any return of said sales, but fraudulently concealed them from the complainants; that Primrose, the attorney in fact of the complainants, inquired of Savage, a few months before his death, if anything had ever been done with the Kentucky lands, and that he fraudulently answered that they were unavailable, and had never been sold; which statement he continued to make until the deeds were shown to him, and he then acknowledged he had sold them.

They further state that the quantity of lands actually embraced in the deeds C and D was at least two hundred acres more than the quantity mentioned therein; that besides the lands above referred to, the testator had, in Kentucky, other lands to the amount of thirty thousand acres, more or less, of the value of $500,000, all of which could have been sold by Savage, or by proper diligence secured to the estate that he neglected to attend to the last mentioned lands; that after they were secured to the testator by judgments at law, bills in chancery were filed by the settlers thereon, in the Kentucky courts, and through the gross neglect of Savage, decrees were permitted to go in their favor, and the lands were lost.

They further state that George M. Savage had become the personal representative of Samuel Savage, and they make him a defendant to the bill.

*Finally. They pray for an account, [*243 and that the defendant, the executor, be decreed to pay the amount due from Samuel Savage; that he be decreed to pay either the actual value of the Kentucky lands sold by Samuel Savage, or their present value, with interest; together with the value of the lands lost by Samuel Savage's negligence.

On the 25th March, 1839, George M. Savage, the defendant, filed his answer.

The answer denies that Samuel Savage undertook the execution of the will or the trusts therein, as regarded any property or effects whatever of the testator, or other duty, beyond the limits of South Carolina. On the contrary, as far as he had knowledge or belief, the will was never admitted to record or proven in any other State than South Carolina, nor did the executors qualify in any other State; and he expressly states, that they did not qualify, nor was the will ever proven or recorded, in Kentucky, to the defendant's knowledge; nor was it the right or duty of the executors to interfere with the testator's property situated in any foreign jurisdiction, beyond the limits of South Carolina, where the testator was domiciled at the time of his death.

The answer declines admitting that Samuel or Mary Taylor, or either, took any estate or interest in the property of the testator under the will, or that they are in any manner entitled under the same. On the contrary, he charges that the bequests in the will are void, and vest no interest or estate either in the said Samuel or Mary, either as legatees or otherwise, or in the complainants. Nor is it admitted that the complainants are the next of kin, having right to prosecute this suit; but, on the contrary, the supposed claim of Mary Taylor could only be prosecuted through the authority of her personal representative, legally appointed in the courts of the United States.

The defendant further states that it is not true that the principal part of the business of the estate in South Carolina was under the management of Samuel Savage, exclusively; on the contrary, the four executors jointly executed and filed in the Court of Ordinary of the Edgefield district a true and perfect inventory of the estate, together with an account of sales of both real and personal estate, as appears by the exhibits L and M.

The defendant further states that Samuel Savage had nothing to do with the estate in Georgia; that the property, both real and personal, in South Carolina, which came or ought to have come to the hands of the said Savage, was truly accounted for, as also appears by exhibits L and M, and the various settlements made by Savage from time to time in the Court of Ordinary, which are contained in exhibit N.

The defendant denies that there was any property or estate, or other effects of the testator, in South Carolina, which was not accounted for in the said court.

244*] *The defendant denies that $100,000 of the testator's estate went into Savage's hands, full fifty thousand of which was never accounted for. On the contrary, the before mentioned records exhibit a full and complete account of all property or effects which came or ought to have come into Savage's hands; all of which has been truly accounted for, and paid over to Samuel and Mary Taylor, or their agent.

The defendant denies the indebtedness of Savage for the account of $789.70.

The defendant also denies the allegation in the bill, that Savage received $681.75, cash on *hand, at the testator's death.*

The defendant also denies the charge of fraudulently concealing the before mentioned items of indebtedness from complainants.

The defendant, further answering, states that the exhibit L corresponds with exhibit B in the complainant's bill, and denies that no return of debts due to the estate was made to the court by the executors; on the contrary, he avers that Samuel Savage and Ross, in January and February, 1812, severally returned and filed in the said court an inventory of the bonds, notes, accounts, and other claims due to the estate, as appears by exhibits O and P in the answer, which include all that was due from all sources, as far as the defendant has heard, knows, or believes.

The defendant, further answering, denies the allegation in the bill, that no account of sales was even returned to the ordinary by Samuel Savage; on the contrary, the records show a complete and full return of sales, of both real and personal estate, made by Savage and the other executors.

The defendant also denies that a large quantity of valuable land in South Carolina was sold by the executors, and that the proceeds, to the amount of several thousand dollars, went into the hands of Samuel Savage; on the contrary, the executors sold no lands in South Carolina but what are fully accounted for to the said court.

The defendant insists that Samuel Savage, as the executor in South Carolina, on the 22d April, 1818, made a full, fair, and final settlement of all his transactions with said estate in the said Court of Ordinary, in presence of Adam Hutchinson, the attorney of the said Samuel and Mary Taylor; the accounts of the said Samuel Savage were then balanced, and the sum due from him paid over in said court to the said Hutchinson, as the attorney and agent aforesaid, as will appear by the exhibit N; and also by a copy of a receipt of Samuel Taylor and William Rainey and wife, by the said Hutchinson, as their attorney, executed in their name to Samuel Savage, on the 22d April, 1818, for the sum of $10,037.36¼, filed as exhibit T.

The defendant denies that Samuel Savage ever applied the money of the estate to his private use.

*The defendant alleges that the said [*245 Samuel Savage stated to him that he had never made any interest out of the funds of the estate; and the defendant asserts that he believes the statement to be true.

The defendant further states that the complainants can set up no claim for interest, because, on the 9th of February, 1818, Samuel Taylor, for himself and his sister, the said Mary Rainey, and her husband, William Rainey, executed the exhibit S to the said Samuel Savage, which is an agreement, made under circumstances mentioned in detail by the defendant, in substance as follows: The said Samuel Taylor, and the said William and Mary, agreed that Samuel Savage should pay over to the said Samuel Taylor, at that time, as much money as he could spare, and in the ensuing April to pay over such other moneys as might be collected on account of the estate; and the said parties agreed, on receiving all moneys that could be collected by the first of April ensuing, to allow the said Samuel Savage two years from

that date to close the remaining business of the estate; that for the money theretofore deposited in the Augusta Bank, no interest was to be required for the time the same remained in bank; and that, on all moneys that might be collected by the said Samuel Savage, no interest was to be required, provided the same should be paid over to the said Samuel Taylor, or his agent, in a reasonable time after it was collected.

The defendant further states, that on the very day of the agreement, Samuel Savage paid to Taylor, for himself and his sister, the sum of $5,300, as appears by Taylor's receipt. And on the 26th March, 1816, he again paid the sum of $4,700, as per Taylor's receipt; that Samuel Savage proceeded with all despatch to close the remaining business, and in April, 1818, as before stated, made the final settlement of the estate; all which, it is insisted, is a complete bar to interest.

The defendant further states that Samuel Savage did not retain the sum of $3,232.31 for commission and traveling expenses; but the exhibit N will show what he did retain, which the defendant insists was a reasonable sum, and came before the ordinary for examination.

The defendant further states that as late as March, 1816, Samuel Taylor was satisfied with the manner in which Savage conducted the business of the estate, as appears by a copy of a letter dated 26th March, 1816, exhibit Z; that, shortly after the date of this letter, Taylor left the United States, having first constituted the said Adam Hutchinson the agent of the legatees to supervise the management of the estate, and finally to settle it, and receive the moneys. And a copy of the power of attorney to Hutchinson is exhibited, G, the original being destroyed.

From that time no further claim is set up, and the whole business sleeps for more than twenty years, when this attempt is made to overhaul the accounts and settlements before the ordinary.

246*] *The defendant, therefore, insists—

1. That the settlements are absolutely conclusive, and that it is not competent for any other court to open and inquire into the correctness or regularity of the proceedings before the ordinary.

2. That if not conclusive, they are prima facie evidence of the correctness of the settlements.

3. Upon the statute of limitations and lapse of time, as evidence that the estate has been settled, and all the moneys paid over.

As to the Kentucky lands, the defendant states he is informed, and believes, that the testator was not the owner of any lands in that State at the time of his death, or since; that a suit was there pending many years before his death for 4,000 or 5,000 acres of land, and prosecuted till the 8th of January, 1818, when judgments were recovered, etc., is not denied; and the defendant has been informed that Primrose, the pretended agent of the complainants, in the year 1836, made a compromise with the tenants in possession of the said lands, by which, for an inconsiderable sum, he agreed to release the claims of the complainants. But if, on investigation, it should be that the testator had title, then the defendant insists—

1. That that title, upon his death, escheated to Kentucky; and that if the lands were ever subject to trusts, such as those in the will, the same were lost when the lands escheated, and could not be enforced, either in law or equity.

2. That the power to sell being a naked power, and having been conferred on four executors, could not be executed by one, so as to convey the title.

The defendant admits that Samuel Savage, in the year 1818, did go to Kentucky, and that he executed the papers D and C, exhibited in the bill; but he denies that he fraudulently represented himself as the only surviving executor; and he also denies that the execution of the deeds violated the provisions of the will, or that he had authority, however he may have thought so himself, to convey the lands under the will.

The defendant further insists that the sales were merely void, and did not affect the rights of the complainants, on another ground—that McDowell, another executor, was alive at the date of the deeds, and did not join in the conveyance.

The defendant further denies that the lands in Kentucky were sold for cash, but for an inconsiderable amount of property.

And, if it shall be material, he pleads, as to the consideration for the sale of those lands, the statute of limitation and lapse of time.

The defendant admits that Samuel Savage died in November, 1837, in Lauderdale County, Alabama, where he was domiciled; that the defendant is the executor of his will, and is a citizen of Alabama.

Finally, the defendant pleads to the jurisdiction of the court.

On the 31st May, 1839, the complainants filed an amended bill.

*They admit therein, that the domi- [*247

cil of the testator was in South Carolina.

That his father and mother died before his death.

That Samuel Taylor was his only brother, and Mary Taylor his only sister.

That she intermarried with William Rainey, and had issue the three other complainants.

That the testator had no kindred in the United States at the time of his death.

And that the said Samuel and Mary were, at that time, his only heirs-at-law.

The complainants further state that Samuel Taylor visited South Carolina in 1815, for the purpose of settling with the executors; and that he received, in February and March, 1816, from Samuel Savage, the sum of $10,000, as part of the estate; but no interest was paid, for the reasons assigned by him.

That Savage wrote to Taylor, in September, 1817, a letter, which is exhibited, and the substance of which is set forth. (Exhibit I.)

That the legatees never received any moneys afterwards.

That Savage never made a final settlement of his accounts.

That, after his removal from South Carolina, he received at least $10,000 of the money of the estate.

That, since filing their bill, they have received the testator's cash book, from which it appears that Savage was indebted, as is alleged in the original bill, at the time of the testator's death.

That the executors did not execute any bond for the faithful execution of their trusts, etc.

The answer of the defendants was filed on the 19th day of September, 1839, and in almost every particular traverses the allegations of the amended bill. It need not, therefore, be set forth at length.

These were the issues between the parties.

The District Court, after a careful review of all the points in the cause, decreed that the complainants recover of the defendant the sum of $5,212.92, to be levied of the goods and chattels, lands and tenements, of the said Samuel Savage; and that the defendant pay the costs of the suit.

The above sum of $5,212.92 was made up of the principal sum of $2,118 received by Savage on the 21st July, 1818, from the sale of the Kentucky lands, and interest on that amount from the said 21st July, 1818, to the commencement of the term of the court when the decree was rendered, amounting to the sum of $3,094.92.

On the day before the decree was rendered, George M. Savage, the executor of the last will of Samuel Savage, was removed from his office of executor by the court in Alabama having jurisdiction to make the removal, and Vincent 248*] M. Benham was appointed the *administrator de bonis non, with the will annexed, of the said Samuel Savage.

The complainants appealed from the decree, and executed bond to prosecute the appeal. They complained that the District Court erred in not decreeing the whole amount claimed by them in their bill and amended bills. But they ordered execution to issue for the amount for which the decree was rendered, which was levied on a large number of slaves, which were claimed as belonging to the estate of Samuel Savage.

An order granting an appeal to the defendant George M. Savage was also made by the court, and bond was ordered to be given within a stipulated time; but in consequence of the removal of George M. Savage the order could not be executed, and no bond was executed in conformity with the order.

Upon a motion made to this court by Benham, at the January Term, 1843, the execution that issued on the decree was held to be a nullity, and an intimation given that the decree was not rendered against the proper party in the District Court.

On the 4th October, 1844, a bill of revivor was filed by the complainants against Vincent M. Benham, the administrator de bonis non of Samuel Savage, and he was brought before the court by process.

In November following, Benham filed his answer to the bill of revivor, and a demurrer at the same time.

The causes of the demurrer were:

1. That the bill of revivor did not state the proceedings and relief prayed by the original bill.

2. That it did not show or allege that the defendant ever had any assets belonging to the estate of Samuel Savage.

3. That the defendant, as administrator de bonis non, with the will annexed, of Samuel Savage, could not be made a party to the original bill by bill of revivor.

4. That the defendant, as such administrator, was not in privity with George M. Savage, against whom the decree was rendered; and for want of that privity, a bill of revivor would not lie.

5. That the bill of revivor did not show whether the decree was rendered before the removal of George M. Savage as executor.

The court overruled the demurrer.

The answer stated that the defendant had no personal knowledge of the original suit, or of the proceedings and decree therein. It admitted the removal of George M. Savage from his office of executor, on the 28th of November, 1842; and that the defendant, on the same day, within a few hours afterwards, was appointed administrator de bonis non, with the will annexed, of Samuel Savage, by the same court. It alleged that at the time the original decree was rendered against George M. Savage, the defendant Benham was the administrator de bonis non.

*On the 29th November, of the same [*249 term, the defendant Benham moved the court to dismiss the suit for want of prosecution; which motion was overruled.

The District Court, notwithstanding the defendant's answer, ordered that the decree against George M. Savage, as executor of Samuel Savage, be revived against said Benham, administrator de bonis non, with the will annexed, of Samuel Savage, and the defendant Benham prayed an appeal.

Upon these cross appeals the cause came up to this court.

It was argued by Mr. **Morehead** and Mr. **Sergeant** for Savage's administrator, and by Mr. **Crittenden** and Mr. **Berrien** for Taylor, etc.

Mr. **Morehead**. I. For the reasons alleged in the defendant's demurrer to the complainants' bill of revivor, the demurrer ought to have been sustained, particularly because it was erroneous to revive a decree against the administrator de bonis non, which had been rendered against the executor of Samuel Savage. Grout v. Chamberlin, 4 Mass. 611; Allen v. Irwin, 1 Serg. & Rawle, 554; Alsop v. Mather, 8 Conn. 584; Carrol v. Connett, 2 J. J. Marsh. 199, 206; Bradshaw v. Commonwealth, 3 J. J. Marsh. 133; Graves v. Downey, 3 Mon. 353; Slaughter v. Froman, 5 Mon. 20; Potts v. Smith, 3 Rawle, 361; Bank of Pennsylvania v. Haldeman, 1 Penn. 161; Kendall v. Lee, 2 Ib. 482; Hagthorp v. Hook's Administrators, 1 Gill & Johns. 270.

On the merits. 1. The bill having been filed with the obvious design of making the executor of Samuel Savage liable for the fiduciary delinquencies of the said Samuel, as one of the executors of Taylor, it was erroneous to decree against him for the personal acts and misconduct of the said Samuel. Dance v. McGregor, 5 Humph. 428.

2. The letters testamentary granted in South Carolina conferred no power or authority on the executors of Taylor to act without the jurisdiction of that State. Carmichael v. Ray, 1 Richardson's S. C. R. 116; Kerr v. Moon, 9 Wheat. 565; Doolittle v. Lewis, 7 Johns. Ch. R. 45, 47; Attorney-General v. Bouwers, 4 Mees. & Welsby, 171, 190, 191, 192; Story on Conflict of Laws, p. 425, sec. 514.

3. The sale of the Kentucky lands, therefore, by Samuel Savage, did not devest the residuary legatees of Taylor of any title they may have had to those lands, or of any interest in the same.

First. Because the authority conferred by the will on the executors to sell the real estate must have been strictly pursued. Williams v. Peyton's Lessee, 4 Wheat. 77; Wiley v. White, 3 Stewart & Porter, 355; 4 Johns. Ch. R. 368; 6 Conn. 387; 2 Swinburne, 730, note; 10 Pet. 161.

Second. Because the authority, being joint, 250*] could not be executed *and performed by one only. Halbert v. Grant, 4 Mon. 582; Smith v. Shackelford, 9 Dana, 472; Johnston v. Thompson, 5 Call, 248; Carmichael v. Elmendorff, 4 Bibb, 484; 14 Johns. 553; Co. Litt. 112. b.

4. The devise of the testator's real estate to be sold conferred an authority by implication on the executors to sell. Anderson v. Turner, 3 A. K. Marsh. 131. But it was a naked authority, uncoupled with an interest; and the lands, until the sale was made, descended to the heir-at-law of the testator. Ferebee v. Procter, 2 Dev. & Bat. 439; King v. Ferguson, 2 Nott & McCord, 588; Shaw v. Clements, 1 Call. 429; Warneford v. Thompson, 3 Ves. Jun. 513; Hilton v. Kenworthy, 3 East, 557; Co. Litt. 236, 112, 113, 181, 2 Sugden on Powers, 173, 174.

5. The will of William F. Taylor was never offered for probate, or proven in Kentucky by Samuel Savage, or by either of the executors. As to the real estate, therefore, which was in Kentucky, William F. Taylor died intestate. Kerr v. Moon, 9 Wheat. 565; McCormick v. Sullivant, 10 Wheat. 202; Carmichael v. Ray, 1 Rich. S. C. R. 116; Smith v. Shackelford, 9 Dana, 472. And the lands descended, of course, to his heirs-at-law.

The complainants were his heirs-at-law, as well as residuary legatees, and they were, at the time of the testator's death, aliens. It follows that they could not take the Kentucky lands, which fell by escheat to that Commonwealth without office found. Montgomery v. Dorion, 7 N. H. 475; Mooers v. White, 6 Johns, Ch. R. 360; Doe v. Jones, 4 T. R. 300; Doe v. Acklam, 2 Barn. & Cress. 779; Doe v. Mulcaster, 5 Barn. & Cress. 771; Sutliff v. Forgey, 1 Cow. 89; Dawson's Lessee v. Godfrey, 4 Cranch, 321; Co. Litt. 2 b.

6. That the complainants have disaffirmed the sale made by Samuel Savage of the Kentucky lands, by having since sold and conveyed the same lands. This they could not do and still insist on Savage's liability for the sale made by him. If he sold the lands in Kentucky in violation of his trust, the beneficiaries of Taylor cannot demand to have the lands and also the purchase money received for them. By following the title to the lands they repudiate the sale made by Savage. Murray v. Ballou, 1 Johns. Ch. R. 581; 2 Johns. Ch. R. 445; Story on Eq. Jurisp. 505-507; 5 Ves. Jun. 800.

7. That in April, 1818, a final settlement was made in the proper court in South Carolina of all the official transactions of Samuel Savage, as executor of Taylor, and that such settlement could only be impeached or disturbed by surcharging and falsifying the same by specific allegations and proofs of error or omission. Wooldridge's Heirs v. Watkins Executor, 3 Bibb, 352; Quinn v. Stockton, 2 Litt. R. 346; Vance's Administrators v. Vance's Distributees, 5 Mon. 521; Preston, Executor, v Gressom's Distributees, 4 Munford, [*251 110; Owens v. Collinson, 3 Gill & Johnson, 25.

8. That William F. Taylor had no title which he could transmit by will to the lands devised to be sold, he being a trustee only, holding the legal title for the use and benefit of others, not parties to this suit.

9. That the District Court of Alabama had no jurisdiction to adjudicate upon the matters contained in the bill and amended bill of the complainants. It was manifestly a suit against the executor of Samuel Savage, for a final settlement of the fiduciary accounts and transactions of the latter as executor of Taylor. The courts of South Carolina alone had jurisdiction of the matters in controversy between the parties, and the District Court ought to have dismissed the complainant's suit. Vaughan v. Northup's Administrators, 15 Pet. 1; Story on Conflict of Laws, secs. 513, 514, to the end, pp. 422-426.

Mr. Crittenden, for Taylor, etc., relied upon the following points and authorities:

1. That the peremptory direction given in the will of William F. Taylor, to sell his lands, etc., is equivalent, in every equitable sense, to a devise to his executors and the survivor of them, with authority to sell, and will equally prevent an escheating of the land. 7 Dana, 1-12, etc.

2. That although it was a prerequisite to his legal authority to sell the Kentucky lands, that he (Samuel Savage) should have obtained letters testamentary in Kentucky; yet, if without he took upon himself to act under the will of his testator, to make sales and receive money on them, as executor, he cannot, because of that irregularity, excuse himself from his responsibility to the complainants, the legatees, for that money so received; as executor he received it, and as executor he must account for it. 7 Dana, 349. Their authority was from the will. 7 Dana. 351-355.

3. That the least measure of his responsibility is the amount of money he received, as executor, on the sales of Kentucky lands made by him as executor, and that he cannot be allowed to evade that by any impeachment of the sales made by himself.

4. That having undertaken to act in reference to said lands in Kentucky, he was bound to fulfill his undertaking and the trust assumed by him, and is responsible for the damage or loss of land occasioned by his failure to do so, and by his inattention and negligence. 7 Dana, 349.

5. That, in respect to the land in Kentucky which he did sell, he is liable for the fair value of it, or the price at which he could have sold it at the time, which was much greater than the price at which he did sell.

6. That the removal of Samuel Savage from the State of South *Carolina; the resi- [*252 dence of the complainants in a foreign and distant land, and the coverture and infancy of some of them; the misstatements, equivocations, and fraud of the said Savage, and his

concealments from the complainants of his transactions in respect to said lands, especially, exclude him from all benefit or advantage from lapse of time or the statute of limitations. 1 Madd. Chan. 98, 99; 2 Ibid. 308–310; 10 Wheat. 152; 1 Sch. & Lef. 309, 310, 428–431, 413–442; 2 Ibid. 629, etc.

The money received by Savage, as executor of Taylor, for land sold by him, as executor, ought to be accounted for by him as other moneys arising from the estate of his testator. He did so account for the proceeds of the land sold in Carolina. And why should he not for the proceeds of the Kentucky lands? He charged the estate for going to Kentucky to attend to those lands, etc. He did give some attention to, and did sell a portion of, them. And what, now, are the objections made to his responsibility? They are, in substance.

1st. That he was not bound to attend to them, as executor only in South Carolina.

2d. That complainants were aliens, and that the land escheated on the death of the testator, Taylor.

3d. That complainants have lost or waived all right by the statute of limitations and lapse of time.

4th. That they have lost or waived all right of recovery against him by the compromises and sales made by their agent, Primrose.

To the first, it is deemed a sufficient answer to say that he did assume and undertake to attend to those lands, and was paid for it. And that was enough to charge him for a due responsibility for his performance of his undertaking—to charge him as agent or executor de son tort, if not otherwise. 7 Dana, 349, 351–355.

But, moreover, he was in the nature of a trustee under the will, and having undertaken the trust by assuming the office of executor in South Carolina, he was bound to fulfill the whole trust by proving the will in Kentucky, or by doing whatever else was necessary to a completed and faithful performance of it.

The testator contemplated this, as is clearly inferable from his will. Savage was not merely an executor, in the ordinary sense, but as to the lands of the testator he was in the condition of a trustee. And, accepting the trust, he must perform the whole of it, as much as if he had accepted the same trust created by deed instead of will. The power given by the will, in respect to the lands, is different from and collateral to the mere official power of an executor, and constitutes him in effect a trustee whose powers and duties are not governed by the rules or laws which regulate more executorial duties. His duties in the one case depend on the laws which regulate his office; in the other, on the nature of his contract or undertaking.

253*] *As to the second objection, that the lands escheated, etc., the answer is, that it is too late to urge that defense against his own act in selling them and receiving money for them.

But it is, moreover, insisted that the lands did not escheat. It is settled that lands devised to be sold and the money paid to aliens *do not* escheat. Craig v. Leslie, 3 Wheat. 563; *Craig v. Radford, 3 Wheat. 594.*

The direction given in this case to sell is a

trust in the contemplation of a court of equity and will be enforced as such, just as if the land had been devised on trust for the same purposes. 1 Madd. Chan. 55 [56]; Harding v Glyn, 1 Atk. 469; Clay & Craig v. Hart, 1 Dana, 1, 12, etc.; Co. Litt. 113 a, and note [2] which see; 3 Co. Litt. 146, note, 113 a; 2 Sugden, 173.

And even the non-execution of the power would not defeat the trust; the general rule in equity is, "that a trust shall never fail of execution for want of a trustee," etc. 1 Madd. Chan. 455–458; Co. Litt., and note, as above referred to; 2 Atk. 223.

As to the third objection, neither the statute of limitations nor lapse of time apply to this case. The circumstances of the case, and the fraud and concealment, exclude them from any operation on the case. The suit was brought immediately on the discovery of the cause of action. 1 Madd. Chan. 98, 99; 2 Ibid. 308, 310; Elmendorf v. Taylor, 10 Wheat. 152; 1 Sch. & Lef. 309, 310, 428, 431, 413–442; 2 Ibid. 629, etc.

Fourth objection. The facts answer this, and it seems but a mockery to insist on the last desperate effort at compromise as releasing defendant.

Mr. Berrien, on the same side with Mr. Crittenden:

It is objected by the opposing counsel, that this decree cannot be revived against defendant, because, as administrator de bonis non, he has no privity with George M. Savage, the executor of Samuel. But what are the facts in the case?

Mr. Berrien here reviewed the facts, and then proceeded:

The privity which is necessary in this case is privity with Samuel Savage, against whose estate the decree was rendered, and out of whose assets it was payable.

If a decree is obtained against an executor, for the payment of a debt of his testator, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets may be pursued in his hands, without reviving against the representative of the original defendant.

If George M. Savage had died intestate, his administrator would not have been the representative of Samuel Taylor. In this event this suit might have been revived against the administrator de bonis non *of Samuel [*254 Taylor. Story's Eq. Pl. sec. 370; Mitf. Eq. Pl., by Jeremy, 78; Johnson v. Peek, 2 Ves. 465.

Then having been removed from office, under the statute of Alabama—having no representative who can represent the estate of Samuel Savage—it is only against his administrator de bonis non that this proceeding can be had; or there is a right judicially ascertained, without a remedy.

As to the Kentucky lands.

The first objection is, that the District Court of Alabama, acting as a circuit court, had not jurisdiction of this case. When I encounter an argument, leading to a conclusion from which the intelligence of professional men must, in my judgment, revolt, however it may seem to be supported by authority, I am dis-

posed rather to distrust my own capacity to detect its fallacy than to yield to the conclusion to which it would lead me. I am sure I am not singular in this feeling. Let us examine the conclusion to which the argument would lead.

Samuel Savage left the State of South Carolina in 1818, removed first to Tennessee, and afterwards to Alabama, where he settled permanently, and died.

After 1818 he was not suable in South Carolina.

Not in the State courts. It does not appear that he was ever there after that time; and if he had been transiently there, complainants, aliens, residents in a foreign country, were not required to be on the watch to catch him there. No original process issued by the State courts of South Carolina, which was not personally served, could have rendered a citizen of Alabama amenable to their jurisdiction.

Not in the courts of the United States in the District of South Carolina, for the words of the Judiciary Act of 1789 are: "No civil suit shall be brought in the courts of the United States against a defendant, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The conclusion, from the proposition of defendants, then, is this: that until Samuel Savage chose to go to South Carolina, and subject himself to the service of process, he was not liable to suit anywhere; that complainants were remediless, or that their right to a remedy depended upon the will of their adversary. Is the jurisprudence of the United States subject to this reproach? Has this court pronounced any decision which may, by fair construction, lead to such a consequence? This is said to be the age of progress; but is it a progress in intelligence, or its opposite? What is the reference to authority on this point?

[Mr. Berrien here examined and commented on 14 Peters, 166; Story's Conflict of Laws, secs. 513, 514; 15 Peters, 1.]

We are seeking to obtain from this defend- 255*] ant, as administrator de *bonis non, the balance which was in the hands of Samuel Savage of the estate of W. F. Taylor, of which we are legatees. We charge him, and we prove our charges, with fraudulent concealment of the assets which came to his hands; and we seek to make his estate, in the hands of defendant, liable for his individual personal default; and this right, with the aid of a court of equity, we can enforce wherever we find him.

If he had remained in South Carolina, we would of course have sought redress there, and in its courts. But he voluntarily withdrew from the protection of those courts. He was a fugitive from justice, liable to arrest wherever he was found.

The bill, it is said, seeks an account; but not that merely. It alleges fraud and concealment; it charges Samuel Savage with official misconduct, for which it holds him to individual responsibility; it does not ask him to pay for these frauds out of the assets of W. F. Taylor, which he has wasted, but out of his own estate, into which those assets have been converted.

The proposition, that the courts of South Carolina have exclusive jurisdiction, cannot be urged as an objection to the jurisdiction of the Circuit Court of Alabama. Their exclusive jurisdiction is over the subject matter—the administration. The executor is personally amenable to the forum of his domicil. There he may rely on a settlement and discharge by the courts of South Carolina, as having exclusive jurisdiction of the subject matter, and the acts of the court of South Carolina should have like effect in the court of Alabama as they would have had in the State in which they were rendered; but this is the extent of the exclusive jurisdiction which can be claimed for them, in behalf of an executor who is a fugitive from their borders.

The third, fourth, and fifth points of the respondent's statements will be considered jointly.

1. The order of testator, that his lands should be sold—especially that they should be sold on "securities to the satisfaction of his executors"—gave to them a power, an authority to sell, by implication, but as ample as if it had been given by express words.

The appointment of his executors, and the appropriation of the proceeds of the sales, so to be made by them, to purposes within the scope of their duties as executors, which he did by the devise of all the remainder or residue of his estate, after payment of certain legacies, imposed upon them an obligation, and charged them with a trust—that of so appropriating them.

The executors were the agents of the testator, his attorneys, if you will, but more properly donees of the power conferred on them by him for the sale of these lands. But they were also trustees of the devisees, in relation to the fund thus acquired. They had no interest in that fund; but the authority conferred on them was not, therefore, a mere naked power. It was a power coupled with a *trust, which it [*256 is the peculiar province of a court of equity to guard and to enforce. 2 Story's Eq. Jurisp. secs. 1059-1061. And a court of equity will construe the will to give them such an interest as is necessary to the execution of the trust.

But we are seeking to make Samuel Savage, who was only one of these trustees, alone liable for the faithless execution of his trust, and we are met with the objection—

1. That the authority and the trust, being joint, could not be executed by one only. There are numerous decisions on this question. 2 Story's Eq. Jurisp. sec. 1062. The whole doctrine is summed up by Mr. Sugden. Sugden on Powers, ch. 3, sec. 2, art. 1, pp. 165, 166, 3d edit.; 2 Story's Eq. Jurisp. p. 399, in note.

A power coupled with a trust will survive, and may be executed by a surviving trustee. Osgood v. Franklin, 2 Johns. Ch. R. 1-21.

Power to executors to sell, not by name, but as executors, may be executed by one. Clay & Craig v. Hart, 7 Dana, 1.

Where one of several trustees refuses to accept, the power vests in the others. King v. Donnelly, 5 Paige, 46.

2. It is objected, that as this was a naked power (that is, as there was no express devise to trustees), the land must have descended to the heirs, to await the exercise of the power;

that as the will was not proved in Kentucky, and therefore quoad testator's property in that State, he died intestate, it must for that cause also have descended to the heirs; and as these heirs were aliens, it vested by escheat in the State of Kentucky.

The answer is, that a court of equity will carry out the manifest intention of a testator, will see that this trust is executed according to such intention, and will raise such an estate by implication in the trustee as is necessary to accomplish this object. The court will imply a power to sell in executors not expressly designated for this purpose. 2 Story's Eq. Jurisp. sec. 1060. They will imply such a power, from an authority to "raise money" out of lands. Ibid. sec. 1063. Nay, they will imply a power to sell, from a power to raise money out of "rents and profits." Ibid. sec. 1064. As a power to sell will be raised by implication, not only without but against the words of the will, as in the case cited, "rents and profits." As a trust to appropriate proceeds will in like manner be implied, in both cases, to effectuate the intention of testator, so also where there is no express devise, implication will not stop short of a fee where there are trusts to be executed which require it. Markham v. Cooke, 3 Burr. 1686. In Trent v. Henning, 4 Bos. & Pull. 116, the devise to trustees, as well as the trust for sale, was implied, and yet they took a fee. Fletcher on Est. Trust. 1–4, 19.

I am aware of the cases which decide that a mere naked power to executors to sell will not give an interest; but,

1. This is not a mere naked power; taken in connection with the devise of the residue, it is a power coupled with a trust.

257*] *2. It is indispensable, to effectuate the intention of the testator, that such an interest should pass.

In the cases referred to, the question was between heir and distributee, or devisee, or creditors. The land descended to the heir, subject to the exercise of the power, and the intention of the testator was accomplished. According to the argument of respondent's counsel, that cannot be in this case, unless such an interest is held to pass.

Yes, there is another mode. Land directed to be sold and converted into money loses the quality of real, and is converted into personal estate, and e converso of money directed to be laid out in land. 2 Story's Eq. Jurisp. sec. 790. In this latter case, anterior to the sale, and by the mere force of the will, and the money so fully becomes land as, (1) not to be personal assets; (2) nor to be subject to the courtesy of the husband; (3) nor to pass as land by will, and other consequences. So of land directed to be sold. 2 Story's Eq. Jurisp. sec. 109, in note; Hawley v. James, 5 Paige, 318.

As to the time when the conversion shall be supposed, Hutcheon v. Mannington, 1 Ves. Jun. 365; Clay & Craig v. Hart, 7 Dana, 1.

It is objected, that the will was not proved in Kentucky. But probate was not necessary to the execution of the power, and adds no force to it, for the probate has no concern with the power, and relates only to the jurisdiction over the goods and chattels. Doolittle v. Lewis, 7 *Johns. Ch. R. 48; Lessee of* Lewis and wife v. *M'Farland et al. 9 Cranch, 151.*

The intention of the testator can be effected then, in one of two ways:

By construing the will so as to imply a devise to the executors for the purpose of effectuating the trust.

2. By considering the land as money from the death of the testator, when his will became operative.

The testator was a naturalized citizen. All his relatives were aliens, and incapable of holding real estate. Aware of this disability, he directs his property, real and personal, to be converted into money, and bequeathes it to them. There can be no doubt of his intention to give to his executors such power as was necessary to effectuate his will. That will became operative upon his death, and did not depend upon the probate. The court will imply a power to sell. They will imply a trust to distribute. Will they not consummate the intention of the testator, either by considering the land as money at the time of his death, or by giving to the trustees such an estate as is necessary to protect the land from escheat? Craig v. Leslie, 3 Wheat. 577. The lands in the possession of the heir are held subject to the exercise of the power. Why should it not be in the hands of the State? Or is the lord, who takes by escheat, *more favored than [*258 the heir, who takes by inheritance? Pawlett v. Attorney-General, Hardres, 465, 469; 2 Atk. 223.

But however these questions may be decided defendant cannot evade the equitable demand of complainants. Whether this power was capable of being executed separately by Samuel Savage, or whether, for want of an express devisee, it was incapable of being executed at all, the defendant cannot escape.

An affirmance of the positions for which we contend will increase the amount for which he is answerable; a denial of them will not release him from responsibility. He can only escape by maintaining, that the fraudulent assumption of the character of the trustee of these complainants, the concealment from them of his actings and doings while professing to act as their trustee, the receipt of money in that character, the denial of such receipt, and the conversion of it to his own use, are wrongs which a court of equity is incompetent to redress.

[Mr. Berrien here stated and commented on the facts respecting the Kentucky lands.]

In every event, complainants are entitled to a decree for the amount actually received by Samuel Savage, and that with compound interest. It may be admitted that complainants had no title to the land which they could have enforced, that they have obtained by compromise what they could for the land; still, the money received by him was their money; it diminishes the amount which they obtained by the compromise, it was paid by the tenants of the land to him, professing to act as their trustee; it was received by him in that character, and has been converted by him to his own use, and fraudulently withheld from them. A court of equity will not permit him thus to abuse the trust which he assumed.

An executor is liable for the value of an estate sold by him without authority. Smith et al. v. Smith's Executor, 1 Desaus. 304; 1 Paige's R. 147; 6 Ibid. 355; He is liable to compound

interest in the case of fraud or willful neglect. Schiefflin v. Stewart, 1 Johns. Ch. R. 620; Myers v. Myers, 2 McCord's Ch. R. 266; 1 Hopk. R. 423; 2 Johns. Ch. R. 1.

Defendant cannot be protected by the statute of limitations from a decree for this amount. The bill charges, and the evidence proves, that this transaction was fraudulently concealed from complainants, and there is evidence to sustain it. Fraud and trust are not within the statute of limitations, as it does not begin to run until the fraud is discovered. Kane v. Bloodgood, 7 Johns. Ch. R. 122. There is an express allegation of the bill, as to the time when the fraud was discovered.

Nor can the question of jurisdiction ever arise, as to this part of the case. Savage never acted under the authority of any court of Kentucky, which may be supposed to have had exclusive jurisdiction of this matter.

259*] *It is submitted, then, that on this part of the case we are entitled at least to $2,118.00, with interest thereon at six per cent. from 21st July, 1818, compounding the same.

As to the estate in South Carolina.

[Mr. Berrien here went into a minute examination of the accounts, which is omitted, as the opinion of the court did not consider the question open.]

To protect himself from this claim, defendant relies on several grounds:

1. That he was not liable to suit in Alabama.

2. That he made a final settlement.

3. The statute of limitations, and lapse of time.

The argument against the jurisdiction of the Circuit Court of Alabama has been already considered.

The final settlement. A bare inspection of the accounts will show that it was not final. It was not so recognized by the ordinary, but styled an "account current," and so recorded by the ordinary. The payment of the balance due to Hutchinson, if he had power to receive it, would not make a final settlement. Hutchinson did not so receive it. His receipt is merely for the actings and doings of Savage up to the date, as per his "account current," not "final settlement." To make it a final settlement he should have charged himself with the amount of sales, and interest on each note until it was paid, for the notes given at the sale bore interest.

2. The amount of the notes and open accounts found at the time of Taylor's death, and interest on the former, which came to Savage's possession.

3. If any of these were desperate, this should have been stated.

4. He should have charged himself with interest on the annual balances remaining in his hands.

Instead of this, it was a mere annual account current, crediting such receipts as Savage chose to acknowledge, and charging such payments as he alleged to have made. All that the ordinary did was to examine the vouchers for the payments. He could make no final settlement, because there was no exhibit of the assets.

As to the statute of limitations. Fraud and trust are not within the statute; it does not begin to run until the fraud is discovered. Kane v. Bloodgood, 7 Johns. Ch. R. 122; 3 P. Wms. 144, 145; 2 Story's Eq. Jurisp. sec. 1521. The circumstances must be forcible to induce the court to make lapse of time a bar to the claims of heirs and legatees for an account and settlement of the estate. Gist v. Cattel, 2 Desaus. 53. Infancy and coverture will prevent the statute from running. The children of Samuel Taylor were infants; Mary Taylor (Rainey) was a feme covert. Respondents urge, that complainants are barred by the statute of limitations of Alabama, because they did not sue there within six years, and deny the right to sue there at all. Specific allegations [*260 in the bill of fraud, showing when they were discovered, are equivalent to a general allegation that they were only discovered within six years.

As to interest. An executor is chargeable with interest on the annual balances kept in his hands, unless they are necessarily kept for the purposes of the estate. David v. Eden, 3 Desaus. 241; Benson v. Bruce, 4 Ibid. 463; Walker v. Bynum, 4 Ibid. 555; Jenkins v. Ficklin, 4 Ibid. 369; 2 Hill, 561, in note.

Mr. Sergeant, for Savage's administrator, replied to Mr. Berrien. He commented upon the long time that had elapsed since the final settlement of the estate, upon the cases before referred to in 14 and 15 Peters, and contended that before the complainants below could recover anything on account of the Kentucky lands, they must establish three propositions—1st. That Taylor owned the land; 2d. That he devised it; and, 3d. That the executors had power to sell, and did sell. Each one of these propositions he denied, and argued upon at great length. The deed to Taylor, he contended, contained a use which was immediately executed and vested the title in the heir of Forbes, who was some person in Germantown. The land must therefore have escheated. 2. Taylor did not devise the land. He might have done so specifically, but did not. 3. The executor had no power to sell. The case of Northup, in 15 Peters, is an exposition of the law upon this subject. The court in Alabama had no jurisdiction over a foreign executor. An executor can neither sue nor be sued in another State.

Mr. Justice **Woodbury** delivered the opinion of the court:

The original proceeding in this case was a bill in equity. The complainants are heirs and devisees of William F. Taylor, being aliens and resident in Scotland. He was a naturalized citizen of South Carolina. The respondent was George M. Savage, of Alabama, prosecuted there as executor of Samuel Savage, of that State. The claim set up in the bill was, that William F. Taylor, before his death in A. D. 1811, made a will, devising the residue of his estate, after the payment of a few legacies, to the complainants, directing all his property to be first sold and converted into money, and making the said Samuel Savage one of his executors, associated with three others. It was further alleged, that the business was divided between them, and each had settled for what he took in charge, except Savage, who had not accounted fully for the property received by him in South Carolina, or the proceeds of certain lands of William F. Taylor in Kentucky

sold by Savage, and that by his negligence large quantities of other lands situated there had been lost.

The original answer denied that the executors took out letters testamentary, except in South Carolina, or assumed any trusts as to the 261*] *property of the testator beyond the limits of that State, or ever proved the will in Kentucky. It also denied that any part of William F. Taylor's property in South Carolina had not been duly accounted for. As to lands in Kentucky, it averred that the testator owned none, and, though he set up some title to about 4,400 acres, that it was invalid, and was compromised and released by an agent of the complainants in A. D. 1836. That, as the latter were aliens, the title in the mean time had escheated to the State; the executors having, as alleged, only a bare power to sell, and some of them dying before A. D. 1818, this power could not be exercised by the others. And though it admitted that Samuel Savage in that year executed deeds of about one fourth of the land claimed by the testator, receiving a small consideration therefor, yet it contended that no title passed thereby, and that no court out of the State of South Carolina had any jurisdiction over the matter. The statute of limitations was also pleaded to all the claims.

Some other particulars, and some amendments of the answer, which may be found material in the progress of the inquiry, will be noticed as occasion shall require.

A preliminary question has been raised in this court, in consequence of what had taken place in the progress of the cause, which it may be proper to dispose of first. After judgment had been rendered in the Circuit Court in favor of the complainants for a portion of their claims, and before an appeal was taken, George M. Savage, the executor of Samuel, was removed, and Vincent M. Benham appointed administrator de bonis non of Samuel Savage, with the will annexed. The cause was then entered in this court, and attempted to be proceeded in, but was directed to be remitted to the Circuit Court in order first to make Benham a party. 1 Howard, 282, and 2 Howard, 395. This having been done, the case came here again, and now it is objected, at the threshold, to any examination of the original questions in the case, that an administrator de bonis non is not liable for assets in the hands of the deceased executor. See Grant v. Chambers, 4 Mass. R. 611; Alsop v. Marrow, 8 Conn. R. 584; 1 Serg. & R. 549; 1 Gill & Johns. 207; and other cases cited.

But if the correctness of these decisions be not doubtful at law, they may require several exceptions and limitations in equity. See Blower v. Massetts, 3 Atkins, 773; 2 Ves. Sen. 465; Mitford's Pleadings, 64, 78; 2 Vern. 237; Fletcher's Administrator v. Wise, 7 Dana, 347; 1 Howard, S. C. 284, in this case. And it is clear, that under the statute of Alabama, which must, by the thirty-fourth section of the Judiciary Act, govern this case, the objection cannot be sustained. This statute provides, that "where any suit may have been commenced, on behalf of, or against the personal representative *or representatives* of any testator or intestate, *the same may be prosecuted by* or against any 262*] *person or persons who* *may afterward succeed to the administration or executorship; such person or persons may at any time be made parties, on motion, and the cause shall proceed in the same manner, and judgment therein be in all respects as effectual, as if the same were prosecuted by or against the parties originally named." Passed September 4th, 1821; see Clay's Digest, 227.

The grounds or causes for relief presented in the bill are next to be examined, and are two. One is the claim on account of an alleged failure by Samuel Savage to settle, as executor in South Carolina, for a debt due from himself to William F. Taylor, and some other debts collected there, with proper interest thereon. This is the first ground on the merits; and it may be better considered separate from the second one, which is the amount demanded for alleged neglects and receipts of money by Savage in relation to the lands situated in Kentucky. The property left by the testator in South Carolina was held in his own right, and the proceeds of it were collected by the executor by virtue of his letters testamentary. The first objection interposed to the claim respecting that is, that in point of fact nothing is shown to have been due or collected there which the executor did not account for, and finally settle and pay over the balance, April 22d, 1818. Another is, that if anything collected there and then omitted, or not since paid over, should now be accounted for, it ought to be in the State of South Carolina, where the letters issued, and not in Alabama. Or, at all events, that some action must first be had in South Carolina, and the account re-opened, and the new matters examined and charged there upon Samuel Savage, one of the original executors, before he or George M. Savage, his executor, can be prosecuted elsewhere for the amount. The following cases may be referred to in support of such a position: Vaughan et al. v. Northup et al. 15 Peters, 1; 14 Peters, 33; Story's Confl. of Laws, 513; Aspden et al. v. Nixon, 4 Howard, 467; Carmichael v. Ray, 1 Richardson, 116. While others may be seen against it in 14 Peters, 116; 15 Peters, 119; 2 Wash. C. C. 338.

But it is to be recollected that the statute of limitations is pleaded against this no less than the other claim; and hence, if, on examination, that statute, or the great length of time which has elapsed since 1818, should be found, under all the circumstances of the case, to render a recovery of any part of this claim illegal or inequitable, a decisive opinion on the other points just mentioned will become unnecessary.

We therefore proceed to inquire into this first.

The settlement in 1818 seems to have been a final one; the balance was paid over to an agent of the plaintiff then present; and the executor, Samuel Savage, soon after left the State, and, for aught which appears, never returned again. The statute, if running at all as to the matters in South Carolina, should, therefore, as a general *principle, begin in 1818; and any [*263 special excuse for not suing the executor within six years for anything not then accounted for, such as coverture, minority, or residence abroad, ought in equity as well as law to have been set up in the bill originally (7 Johns. Ch. R. 74); or by an amendment of it, allowed after the answer, instead of a special replication, as provided by the 45th rule of this court. See

Marsteller et al. v. M'Clean, 7 Cranch, 156, and Miller v. McIntyre, 6 Peters, 64.

But, notwithstanding this omission, as some doubts exist whether the statute of limitations can technically apply to a claim situated like this, we have looked further—to the circumstances of laches and long neglect by the complainants, independent of the statute. And they seem to us to operate in equity very conclusively against going back on an executor's account, thus formally and finally settled, after the lapse of twenty years and the death of the parties concerned. Gardner v. Wagner, 1 Baldwin, 394, 454. It must be a very strong case of fraud, proved in such a settlement, or of clear accident or mistake, which could ever make it just, under such circumstances, to reopen and revise it. 9 Leigh, 393.

Considering, then, that the agent of the complainants, present at the final settlement of the account and receiving the balance, had, for aught which appears, a full opportunity to know all the circumstances, and make objections if he pleased, and that no fraud or mistake is shown in the settlement, whatever error in law may have happened in computing interest, we consider it as a very proper case for length of time to bring repose. In support of this may be seen the following cases: 1 Sch. & Lef. 428; 2 Ibid. 309; 10 Wheat. 152; 1 Madd. Ch. R. 99; 2 Ibid. 308; Miller v. McIntyre, 6 Peters, 66, 67; Cholmondely v. Clinton, 2 Jac. & Walk. 1; 9 Peters, 62; 6 Johns. Ch. R. 266; 7 Ibid. 90.

The other claim for the money received by Samuel Savage, on account of his conveyance of a portion of the lands situated in Kentucky, and to which William F. Taylor set up an interest, rests on principles entirely different, both as regards the title of Taylor and the responsibility of Savage. It does not seem to have been considered fully, heretofore, that those lands did not belong to William F. Taylor, like the rest of his property in South Carolina, absolutely as his own in fee. They came to him by a deed in trust for others, from Mary Forbes, administratrix of William Forbes, who was uncle of William Forbes Taylor, and a naturalized citizen of Pennsylvania, dying without issue except a son, Nathaniel, who also died without issue after William F. Taylor's death in A. D. 1811, and before September, 1815. The facts in the case do not seem to fix the time with any greater certainty. These lands, amounting to about 4,400 acres, had been conveyed to William Forbes in fee, in A. D. 1786, by one Daniel Broadhead, and by Forbes to John Philips, in A. D. 1794. They seem to 264*] have remained in Philips's *hands till June 3d, A. D. 1802, when he conveyed them to the said Mary, the administratrix of William Forbes, with the following limitation in the deed, viz.: "in trust, nevertheless, to and for the only proper use and behoof of the right heir or heirs of the above named William Forbes, deceased, in such way and manner as such heir or heirs may order, direct, and appoint."

On the 17th day of September, 1805, she, as before mentioned, conveyed them to William Forbes Taylor, the nephew of her husband, and his only heir or relative naturalized in this country, *except the son Nathaniel, the rest be-*

ing aliens in Scotland, and the son in such health as not likely long to survive. The lands were, therefore, in danger of escheating to the State of Kentucky, or a part of them at least, unless so conveyed as to pass an interest to some person here, which could be held in behalf of those heirs who might reside abroad, so that their shares might not be lost or forfeited The limitation in the deed to William F. Taylor from Mary Forbes was the same in form as that in the conveyance to her, except the clause creating the trust begins "in witness, nevertheless," instead of "in trust, nevertheless." Whether this is an error of the press, or in copying, or an intended alteration, is not stated, but it seems not to have been contended in argument that any different meaning was designed to be attached to the expression. After receiving such a conveyance for such a purpose, it appears that in 1808 William F. Taylor instituted thirty-three suits in ejectment in the State of Kentucky against settlers on these lands, which were pending at his death in A. D. 1811. But, as the actions were in the name of nominal lessees, they did not abate by his death, but continued on the docket until a recovery was had in all of them, in January, 1818.

Prior to this recovery, and subsequent to the death of William F. Taylor in 1811, it does not appear that any of his executors, or any of the heirs of William Forbes, or any of the devisees of William F. Taylor, did anything respecting these lands, except this. Samuel Savage, in his administration account rendered in December, 1812, charged for a journey to Kentucky in relation to them. And on the 14th of September, 1815, Mary Taylor and her husband gave a power of attorney to Patrick McDowell and Samuel Taylor, to collect her share, not only in the estate of William F. Taylor, but in the lands in Kentucky of which she claimed to be one of the heirs, in conjunction with Samuel Taylor, from Nathaniel, the son of William Forbes, and their mother Elizabeth. Samuel Taylor, soon after, in 1816, visited this country, and on the 2d of April in that year appointed Adam Hutchinson and Peter Bennock attorneys for himself and sister, not only to collect and receive what was due to them from the estate of William F. Taylor, but to prosecute all actions necessary to recover the real estate in Kentucky belonging to him and his sister. But notwithstanding this, and not exactly *in keeping with it, on the 26th [*265 of September, 1817, Samuel Savage, rather than these attorneys, writes a letter to Samuel Taylor about the Kentucky lands, as well as the estate of William F. Taylor in South Carolina, then unsettled. And to show the further progress as to these lands after the recoveries in 1818, it does not appear that any of the heirs or their agents took possession of them under the judgments, or did anything in respect to them till 1837. But, on the contrary, Samuel Savage visited Kentucky in July, 1818, having removed from South Carolina to Tennessee in May previous, and sold about one fourth of the lands to the occupants for $2,118, calling himself, in the deeds, "surviving executor of the last will and testament of William Taylor," and "authorized" to sell by the will. The other occupants, who did not buy of him, took out soon afterwards injunctions against

the judgments recovered, and continued to possess the lands peaceably till William Primrose, an attorney of the complainants, visited Kentucky in 1837 to look after their interests.

The previous special attorneys had not interfered, as Hutchinson, one of them, soon died, and Bennock, the other, declined to act. And Samuel Taylor, in letters to him in 1824 and 1825, inquiring, among other things, if Savage had returned to South Carolina and exhibited any further account of his doings in the ordinary's court, makes no mention of the Kentucky lands.

Primrose, soon ascertaining that, in 1818, Savage had sold about eleven hundred acres of them, and the rest had been suffered to remain in the possession of the former occupants, persuaded the latter to give him something more for a relase or quitclaim, but a sum, including what had been paid to Savage, not at all equal to their full value.

It is a very important fact, in connection with this arrangement, that Primrose, though at first denying the validity of Savage's doings, was compelled, in order to effect a compromise with the occupants and obtain something more on a settlement, finally to agree, under his hand and seal, in behalf of the plaintiffs, "as far as it is in their power to do so, to ratify and confirm the deed made as aforesaid by the said Savage," but "reserve to themselves the benefit of all claims they may have against the said Savage or his representatives for the consideration which the said Savage received for the sale of the land aforesaid." After executing the releases, he visited Samuel Savage, in Alabama, and demanded of him the money he had received in behalf of the heirs, and indemnity for injuries they had sustained by his alleged neglect in respect to all the lands.

Another material circumstance is very imperfectly stated in the record; but it is probably thus: When William F. Taylor died, in 1811, both Nathaniel, the son of William Forbes, 266*] and Elizabeth, *the sister of William Forbes, being the mother of Taylor, were aliens.

On these facts, it is next to be decided, whether the interests of the complainants were such in the lands in Kentucky, when Samuel Savage sold a part of them, in 1818, as to make him liable to the complainants for his conduct, wherever he might reside; and, if so, to what extent. It is first manifest, from a part of the statement, that the interest of William F. Taylor, at the time of his death, was only that of a trustee in these lands, and not as the owner of any portion of them in his own rights. But still, in that capacity, he had power by his will to direct the sale of them by his executors, and into whose hands the proceeds should afterwards be placed, to be held, of course, for the benefit of the true cestuis que trust.

The clause in his will, bearing on the sale, is: "I do hereby order, will, and direct, that on the first day of January next after my decease, or as near that day as can conveniently be, that the whole of the property that I may die seized and possessed of, or may be any wise belonging to me, be sold."

This undoubtedly meant to empower the *executors to sell the land he held in* trust, as *well as that in fee, by including* any property that may be "any wise belonging to me." But what interest was thus vested in the executors concerning it? A mere naked power to sell? or a power coupled with a trust? or merely a power coupled with an interest? These are necessary inquiries as to the question made in the case, that these lands have escheated to the State of Kentucky, and also are useful, if not necessary, towards settling the validity of the sale by Savage, and the place where, if liable at all, he can be made to account for the proceeds. To determine these inquiries, it will be necessary to look further into the will.

In that, after directing the payment of a few small legacies out of the proceeds of his property, he proceeds: "I do hereby order, give, grant, and devise all the remainder or residue of my estate which shall remain after paying the before mentioned legacies to my dearly beloved brother, Samuel Taylor," etc., "and to my beloved sister, of the same place, share and share alike, provided they shall be both alive at the time of my decease and have issue, which issue, after their respective deaths, shall share the same equally," etc. On this and the previous provision in the will, coupled with the facts which have been mentioned, we consider the law to be, that William F. Taylor, taking this property by a deed which made it an express trust in his hands for the heirs of William Forbes, held it as trustee for them till his death. He then virtually devised the trust and the lands to the complainants, by directing that the lands be sold, and, after discharging some special legacies, the proceeds be paid over to the complainants, as his residuary legatees. *The executors were thus invested with [*267 a power to sell, coupled with a trust; and the residuary legatees thus became trustees to the heirs is William Forbes. To identify those heirs is somewhat difficult, but is very important to a true construction of the will. Probably, in 1810, they were his son Nathaniel, who, dying between that period and 1815 without issue, his grandmother, Elizabeth Forbes, succeeded to him; and, on her death about that time, the complainants, her only surviving children, succeeded to her. As all these, except Nathaniel, were aliens, and he was in feeble health in 1811, the paramount intention of the testator doubtless was to prevent an escheat of this and his own property. From considerations of affection, as well as duty, he must have desired to secure both that and his own estate free from escheat in the hands of those near relatives likely soon to be the heirs both of William Forbes and himself.

Either of two constructions of his will would accomplish this object. The one we have just adopted, considering him as devising the proceeds of the lands, and hence their title, to his brother and sister, subject to a power in the executors, coupled with a trust to sell them and pay certain legacies; or another, which would consider the power of the executors as one coupled with an interest, and vest the title at once in them for the purpose of selling the lands and discharging the small legacies and debts, if any, but holding the proceeds in trust to be paid over to his brother and sister, for the benefit of the heirs of William Forbes, whomsoever they might then happen to be. See 2 P. Wms. 198; 8 Ves. 431; Lewin on

146

Howard S.

Trusts, 234; Peter v. Beverly, 10 Peters, 533. One of these seems also to have been the construction put on the will by Samuel Savage himself, as he proceeded to visit Kentucky twice to discharge his trust in relation to these lands, and finally sold about a fourth of them as surviving executor, which he could not have done honestly, unless deeming himself possessed of more than the naked power which his executor in his answer now sets up. In order to survive to him, it must have been a power coupled either with a trust or an interest. See cases post. To show that the executors, by such a devise, became possessed of a power coupled with a trust at least, reference may be had to the following cases beside those already cited: 1 Atk. 420, 469; 2 Johns. Ch. 254; Clay et al. v. Hart, 7 Dana, 1; Sugden on Powers, 95, 167; 3 Co. Litt. 113, note, 146, 181, a; 2 Story's Eq. Jurisp. sec. 790; 5 Paige, 318; Zebach v. Smith, 3 Binney, 69. One of the tests on this subject is, that a naked power to sell may be exercised or not by the executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust. 7 Dana, 1; 10 Peters, 533; 12 Wend. 554; 2 Story's Eq. Jurisp. sec. 1070; 10 Ves. 536.

268*] *There are some conflicting cases on this subject; but it is not necessary to review them again, it having been so ably performed by Thompson, J., for this court in Peters v. Beverly, 10 Peters, 565. There, as here, the executors were not expressly named as the persons who were to sell the land, yet, say the court, "it is a power vested in them by necessary implication." See, also, 2 Sim. & Stu. 238; 2 Story's Eq. Jurisp. sec. 1060; 1 Atk. 420; 15 Johns. 346; 4 Kent's Com. 326; 2 Johns. Ch. 254; 4 Hill, 492. There, as here, it was also contended, that if they had the power to sell it was a naked one, and could not survive; but the court say, if they had another duty to perform under the will, with the proceeds, it was a power coupled with a trust or an interest, and survived. 10 Peters, 567; 15 Johns. 349. And the only difference is, that the subsequent duty to be performed there was the payment of debts, and here it was to pay over the money as legacies, and of course after the payment of any existing debts out of it.

If William F. Taylor, when making his will, supposed that he, as trustee of this land, could direct the proceeds to be paid over to others than the heirs of William or Nathaniel F., the devise would none the less show his intent to pass to the executors a power to sell coupled with a trust; and they would none the less take it coupled with a trust. Indeed, if it was necessary, in a case like this, to carry into effect the leading object of the testator in the will, to consider him as granting to the executors a power coupled with an interest, rather than one coupled with a trust, it would not be difficult to sustain such a construction in a court of equity, as we have before intimated. Courts, in carrying out the wishes of testators, the pole star in wills, are much inclined, especially in equity to vest, all the power or interest in executors *which are necessary to effectuate those wishes, if the language can fairly admit it.* 4 Kent's Com. 304, 319; 10 Peters, 535; Schauber v. Jackson, 2 Wend. 34; Bradstreet v. Clarke, 12 Ibid. 663; Bloomer v. Waldron, 3 Hill, 365; Oates v. Cooke, 3 Burr. 1684; Jackson v. Martin, 18 Johns. 31; 1 Ves. Sen. 485; Coster v. Lorillard, 14 Wend. 299. They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished. Shelly v. Edlin, 4 Adol. & El. 585; White v. Simpson, 5 East, 164; 1 Barn. & Cress. 342; 5 Taunt. 385. Though the distinctions between these different powers are not always well preserved, no doubt exists that a power coupled with an interest may be inferred by obvious implication from the whole will, as the fee not being at once vested elsewhere, and it being necessary to have it in the executors to effect the general design (Jackson v. Schauber, 2 Wend. 1, 54, 55, overruling S. C. 7 Cowen, 193), as well as from the usual course, which is by an express devise to the executors. Bradstreet v. Clarke, 12 Wend. *665, 667. Nor is [*269 it of any consequence how small the interest be. Osgood v. Franklin, 2 Johns. Ch. 20; Bergen v. Bennett, 1 Caines' Cas. in Err. 16; 2 P. Wms. 102. It is enough if only to distribute the proceeds as here, or to take the rents or use for the benefit of others. Same cases, and 14 Johns. 555; Zebach v. Smith, 3 Binney, 69. The interest, too, may be equitable or legal. Hearle v. Greenbank, 3 Atk. 714; 2 Johns. Ch. 20. And it is an interest not required to yield a profit or gain, but any title in the estate itself, the thing to be sold. Hunt v. Rousmanier, 8 Wheat. 174, 206. Being given by the will, when it is a power coupled with an interest, and the conveyance under it being by and through the will, it is of course for the use of the person designated in the will, as if it was a devise over to him. And if the whole scope and design of the will could not otherwise be accomplished. it might not therefore be unjustifiable in a court of equity, in a case like this, to let the title vest in the executors first, for the purpose of being sold and turned into personal estate, for the alien legatees, in order to avoid the very escheat now set up by the respondent. Craig v. Leslie, 3 Wheat. 376, 377; 1 Ves. Sen. 144, 485; 4 Kent's Com. 304, 310, note; 14 Wend. 268. Indeed, a court of equity, if it should appear necessary, in order to avoid an escheat, and to enforce any apparent devise of the testator when trustee, directing land to be turned into money and to go to certain legatees, or cestuis que trust, and look to substance rather than form, will consider the act as done at once, which is directed to be done, and the land as money, and thus to be passed to those entitled to it. Peter v. Beverly, 10 Peters, 533, 563; 3 Wheat. 563; 5 Paige, 318; Bogert v. Hertell, 4 Hill, 495; 2 Story's Eq. Jurisp. sec. 790; Newland on Contr. 48 to 64, and authorities cited.

But as the title here can be considered as passing to the complainants at once, leaving only a power coupled with a trust in the executors, and still accomplish the object of the testator in preventing an escheat, we are inclined to adopt that construction of the will as the safer one, amidst several conflicting au-

thorities and opinions in relation to this question. See some of them in 4 Kent's Com. 321, note, 5th ed. In such cases, till the sale is made, the title usually vests in the heirs, if no other intent is manifest. Jackson v. Burr, 9 Johns. 105, 106; Denn v. Gaskin, Cowp. 661. But where it is given by devise, as here, and the devisees were not the cestuis que trust and heirs as to those lands when he died, it is proper that the title should be considered as passing by devise, and as being in the compiainants by devise rather than descent. Jackson v. Schauber, 7 Cowen, 197; Cowp. 661; 8 Wheat. 206, 207; 2 Wend. 34; Coster v. Lorillard, 14 Wend. 326. And the more especially is it so, when, if the heirs took it as heirs, it might escheat.

The case of Jackson v. De Lancy, 13 Johns. 555, reviews most of the cases connected with this question, and comes to the conclusion, 270*] *substantially, that the title to the trust estate would pass in a case like this to the residuary legatees, and be held by them for the cestuis que trust. See the cases there cited, among them Braybroke v. Inskip, 8 Ves. 417; 2 P. Wms. 198; Ex-parte Sergison, 4 Ves. 147; 1 Merivale, 450; 5 Pick. 112; see, also, Dexter v. Stewart, 7 Johns. Ch. 55. The better opinion is, that a trust estate always passes in a general devise like this to the residuary legatees, if no circumstances appear to indicate a contrary intent. Braybroke v. Inskip, 8 Ves. 417, 436; 3 Ibid. 348; 4 Ibid. 147; 13 Johns. 537; Ballard et al. v. Carter, 5 Pick. 115; Marlow v. Smith, 2 P. Wms. 198, 201. Here, the circumstances fortify the idea, rather than impair it, that the trust estate was intended, in the end, to pass to the residuary legatees, as they were then probably supposed to be the cestuis que trust, and in fact became so before the devise took effect.

Another reason is, that the devisee would, if not cestuis que trust, hold the estate for them, and be bound to account for it to them, so as to make it safe. Marlow v. Smith, 2 P. Wms. 201.

This view of the case disposes first of the point made, that these lands had, before the sale by Savage, escheated to the State of Kentucky. It was hence argued that they could not be sold by him, though no office had been found, the respondent considering an escheat good without any office found. Montgomery v. Dorion, 7 N. H. Rep. 480; 6 Johns. Ch. 365. But that is correct only as to land cast by descent on an alien. 7 Cranch, 629. For, as to land taken by devise or purchase, an alien can always hold it till office found. Knight v. Duplessis, 2 Ves. Sen. 360; Co. Litt. 2, 6; Powell on Devises, 316; Hubbard v. Goodwin, 3 Leigh, 512; 3 Wheat. 589; Governeur's Heirs v. Robertson, 11 Ib. 332, 355; Fairfax v. Hunter's Lessee, 7 Cranch, 618.

It will be seen, on a very brief examination, that the idea of a descent cast upon aliens of these lands, on the death of William F. Taylor or Nathaniel Forbes, cannot be sustained under the opinions we have just expressed. The aliens took them by devise, and not by descent, in either of the two constructions of the will which can be at all vindicated. As a general principle, too, in all cases, a court of chancery will not raise a use "by implication," in an alien, so as to endanger the estate, but will rather pass a title to the executors in trust. 2 Wash. C. C. 447. So it has been held that, if it can be avoided, a court will not vest the estate in an alien by construction, in order to have it escheat, when otherwise it would not. 3 Leigh, 513, and cases cited.

We are prepared next to see whether Samuel Savage or his representatives are liable to account for this property in Alabama, provided he is chargeable anywhere. Because, if not so liable in Alabama, this part of the case must fail for want of jurisdiction in the State in which the proceedings were instituted; and the further questions as to his liability need not be examined.

*First, then, it happens, that though [*271 the heirs of Nathaniel Forbes and Elizabeth are the same persons here as the residuary legatees of William F. Taylor, yet they take an interest in the Kentucky lands and their proceeds, in a different right and for a different purpose from what they do in the property of William F. Taylor held in his own right. It happens, too, that the interest they thus take is derived from the deed by Mary Forbes to William F. Taylor, and not through the will of the latter, except as directing the trust property to be sold by his executors and paid over to them. It is important to observe also, in this connection, that their taking of this property and the sale of it are neither of them by virtue of any letters testamentary issued in South Carolina; that the property is not assets of William F. Taylor collected or to be accounted for there; and as the sale made by Samuel Savage of a part of these lands was made in a different State, and of property situated in a different State, and the proceeds of it never carried into South Carolina, and the sale made after he had removed therefrom and closed up his administration there, no reason exists for making him account in that State for the sale. See 1 Rich. S. C. Rep. 116; 2 Wend. 471; 6 Pick. 481; 3 Mon. 514; Story's Conflict of Laws, sec. 523. So, not having taken out letters testamentary in Kentucky, or even proved the will there, and residing elsewhere, he could not be sued in that State. Fletcher's Administrators v. Wier, 7 Dana, 348. It follows, then, that if liable at all for the proceeds of the sale of this trust property, being not that owned by the testator in his own right, and the sale made by virtue of a power in the will, and not of letters testamentary, he was liable in Alabama, the State where he had his domicil; the State whither he carried his proceeds—where the demand was made on him by the complainants; where George M. Savage, his executor, took out letters on his estate, and where alone George M. Savage could be proceeded against for any claim against his testator. Bryan et al. v. McGee, 2 Wash. C. C. 338; Trecothick v. Austin et al. 4 Mason, C. C. 29.

Being liable, then, in Alabama, if at all, for the acts done in respect to these lands, it is next to be considered whether Samuel Savage or his representatives are responsible for them to the complainants at all, and if so, to what extent. When applied to in 1838, by Primrose, the attorney of the complainants, to pay over the proceeds of his sale, Savage admitted that in 1818 he executed releases of about one fourth

of these lands, in which he acknowledged a consideration received by him of more than two thousand dollars; that he professed to make the sale and receive the consideration as surviving executor of William F. Taylor, and by virtue of a power in his will, and that he never had accounted for the proceeds since, but contended that the sum actually realized by him was much smaller than that named in the deeds, and objected to pay over anything, though 272*] *not assigning particularly his reasons for the refusal. But the counsel for the respondent now interpose various specific reasons against accounting for those proceeds beside that already disposed of, which questioned the jurisdiction over the matter in Alabama. One of their objections is the want of interest in the complainants as legatees or cestuis que trust to recover. Another is the irregularity, and indeed illegality, of his sale. Another is the small amount received, not exceeding his expenses. And another, still, is the statute of limitations.

But we have already shown that the complainants, as residuary legatees, were entitled to the trust estate under the devise immediately, and, in any permissible view, as soon as it was converted into money, and would be bound to manage and account for it to the true cestuis que trust, if they were not so themselves. See before, 13 Johns. 555, and 8 Ves. 417, 436, and other cases. Being now, however, cestuis que trust themselves, as well as devisees, their interest in the proceeds of the sale is beyond controversy, there having been, as already shown, no previous escheat of the lands.

In respect to the informality and illegality of the sale, they are insisted on from its not appearing that all the executors except Savage were then dead, from his not recording the will in Kentucky, and from the verbal denial at first of the validity of his sale by Primrose. But it is to be remembered that this is a bill in equity, that the executors had a power under the will to sell this property, which was a power coupled with a trust. That is not a title to be made out at law under a special statute, where much strictness is required. 6 Mass. R. 40; 14 Ibid. 286.

Nor is it only a naked power, not coupled with any trust or interest, where much strictness is also requisite. Williams et al. v. Peyton's Lessee, 4 Wheat. 79; 10 Peters, 161, and others cases cited. But it is merely a case to show such a sale as may make, in a court of equity, an agent or trustee liable to those for whom he acts. Minuse v. Cox, 5 Johns. Ch. 441, and Rodriguez v. Hefferman, Ibid. 429.

Now, it appears that Savage, in his deeds of this land, averred himself to be surviving executor of Taylor's will. And the case discloses the death of two of them, but says nothing of the other, except, in 1824 and 1825 he is referred to as dead "some time ago." Considering him also as then dead, which is the probable inference from these facts, the right of Savage alone to sell under the will would be good. A power to sell, not merely a naked one, but coupled either with an interest or a trust, survives to the surviving executor. Peter v. Beverly, 10 Peters, 533; Co. Litt. 113 a, 181 b; Lewin on Trusts, 266; Sugden on Powers, 165, 166; 2 Johns. Ch. R. 1; 7 Dana, 1; 5 Paige, 46; 2 *Story's Eq. Jurisp. sec. 1062; 10 Johns.* 562; 8 Wheat. 203; Jackson v. Ferris, 15 Johns. 346. Several of the States have positive statutes regulating this matter, and usually in this way.

*Again, if all of several trustees de- [*273 cline the trust except one, the estate vests in him, and he is authorized to sell alone. 3 Paige, 420; 4 Kent's Com. 326, note; King v. Donelly et al. 5 Paige, 46; In re Van Schoonhoven, 560; Cro. Eliz. 80; 7 Dana, 1; Zebach v. Smith, 3 Binney, 69.

All the executors in this case, except Savage, declined to have any concern with these lands, and do not appear ever to have done anything concerning them. It is obvious, likewise, on principle, that where a sale is made under a will, which is merely the evidence of authority or power to do it, the omission to record it will not vitiate the sale, unless recording is in such case required by a local statute. If so required, the statute must of course govern. 9 Wheat. 565; 10 Wheat. 202. Probably the necessity for this must depend entirely on the local laws applicable to the transaction—the lex rei sitæ, 2 Hann. 124; Kerr v. Moon, 9 Wheat. 570; 7 Cranch, 115,—and not on any general principles of international law applicable to immovable property. If not necessary by those laws, the omission to do it would not be taken advantage of by anyone in any case; and if necessary, it would not seem very equitable to let the executor take advantage of it, who himself had been guilty of the omission.

But however this should be decided, looking to the laws of Kentucky, and how far it may be cured by the subsequent proof and recording of the will by Primrose for the complainants (11 Peters, 211), and whether it is necessary to take out letters testamentary in Kentucky to make such a sale, Lewis v. MacFarland, 9 Cranch, 151, we need not give any decisive opinion; since this branch of the inquiry, as to the liability of Savage, can be disposed of under a different aspect of the case.

If the land was sold informally by Savage, still it was sold in fact; it was conveyed in the character of surviving executor; the authority for doing it was claimed under the will; the money for it was received in this way; the lands were occupied quietly under his deed for near twenty years; the consideration was never paid back to the grantees, nor by law liable to be, as his deed was without warranty except against those claiming under W. F. Taylor, and, as regards them, was in the end expressly confirmed by his heirs and devisees under the compromise before detailed.

It is true that their agent at first denied the legality of the sale by Savage, but from its having actually taken place, money been received under it, and the lands occupied in conformity to it so long, he was in the end obliged to compromise and confirm it for much less than the real value of the lands, and expressly reserved the right to resort to Savage for the amount he had received.

On a consideration of these facts, can there be a doubt that it is equitable to make Samuel Savage and his representatives pay over to the cestuis que trust the money he thus received on their account? *Can they be allowed [*274 to set up his own imperfect doings or neglect as a justification for not paying over what he

actually received for them, and still holds? Is he not estopped in equity to deny his liability to the complainants? Have they not suffered in their interests to this extent by his conduct? Have not he and his estate profited to this extent by his sale of their property? These questions can be answered only in one way, and the replies must give a stamp and character to the whole transaction in a court of conscience unfavorable to Savage. Consequently, in this bill in equity between the parties as to a trust, we think it manifestly just that the complainants, as against Savage's estate, are entitled to this money; at least, to the amount adjudged in the court below. 1 Johns Ch. R. 620; 1 Paige's Ch. R. 147, 151; 6 Paige, 355; 2 Johns. Ch. R. 1; 7 Ibid. 122. Simple interest in such cases seems proper, and was allowed. 4 Ves. 101; 5 Ibid. 794; 16 Ibid. 410. As an analogy for estopping Savage to deny what he has said in his own deed, see Speake et al. v. The United States, 9 Cranch, 28, and cases in Com. Dig. Estoppel, a, 2. So, "it is a settled principle of equity, that when a person undertakes to act as an agent for another, he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit." Sweet v. Jacocks, 6 Paige, 365.

So, "every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust." Kane v. Bloodgood, 7 Johns. Ch. 110; Scott v. Surman, Willes, 404; Shakeshaft's case, 3 Bro. Ch. Cas. 198.

He is liable, then, first, on the ground that the cestuis que trust might confirm the sale and resort to the proceeds, as they finally did in this case. Story's Eq. Jurisp. sec. 1262; 2 Johns. Ch. 442; 1 Ibid. 581. It is true that such a confirmation must be full and distinct; whereas here a disavowal of it was at first made by their agent, and when it was in the end agreed to be ratified, the act was done on the receipt of additional money.

This, however, would not seem to vitiate it under the reservation made of a right to proceed against Savage for what he had received. The complainants, then, fully confirmed Savage's acts as a sale, just as much as if no further money had been paid. Though they asked for this additional sum, this was no injury to Savage, and should constitute no objection to his paying over to them what his vendees agreed he should, and what he virtually promised to do, when taking the money for their property.

But if this view of the matter was at all doubtful, another ground exists on which he might be made liable to a like extent, and on which the complainants seek to charge him for a much larger amount. The sale by Savage, if 275*] not valid and not confirmed, was *still injurious to the complainants. It gave such a color of title to the tenants as to prevent the complainants from obtaining anything more for their lands, but by way of compromise, and then a price in all, including what was paid to Savage, far less than their true value.

A trustee is liable for misconduct or breach of trust or negligence, as well as for money *actually received. Jacobs'* R. 120. And if *in these ways he injures the* cestui que trust, he is liable, whether he himself gains by his misbehavior or not. Lewin on Trusts, 634; 3 Bro. Ch. Cas. 198. But when we come to inquire, as the complainants insist, whether Savage was not liable for a much larger sum on this ground than what was allowed in the court below, we are met by several difficulties. The amount, beyond the money received and interest thereon, rests on estimates somewhat conjectural after so long a lapse of time; and the neglect itself is not so easily fixed with much certainty, from a like cause, and the death of parties preventing explanations, and an extraordinary omission for almost a whole generation by the complainants themselves to bring this business to a close. Savage, also, may have proceeded no further in subsequent years to sell the rest of the lands, and take charge of the judgments which had been recovered, because discovering that Samuel and Mary Taylor, the heirs, had appointed Hutchinson and Bennock special agents instead of himself to manage the Kentucky property. The degree of neglect to be made out for any sum beyond that actually received is also different and greater. When the trustee is made liable for more, it must be, in the language of the books, "in cases of very supine negligence or willful default." 14 Johns. 527; Ibid. 634; Pybus v. Smith, 1 Ves. Jun. 193; Palmer v. Jones, 1 Vern. 144; Osgood v. Franklin, 2 Johns. Ch. 27; 3 Bro. Ch. R. 340; 1 Madd. 290; Caffrey v. Darby, 6 Ves. 497. It would hardly be justifiable to find the existence of either of those after such a length of time, obscuring so much by its mists and obliterating so much by death.

Damages, likewise, for mere neglect would stand in a different attitude as to the statute of limitations from what we shall soon see it does as to money held in trust; and if the claim was on account of a breach of trust committed and perfected when the neglect first occurred, it would be difficult to overcome the bar occasioned by nineteen or twenty years since.

As to the remaining objection, under this head, that the sum received did not exceed Savage's expenses, this is not in the first answer, and comes from an executor who could not possess full means of knowing the facts, and is not entitled to so much weight as if it had been put in and sworn to by Samuel Savage himself. Carpenter v. The Providence Insurance Company, 4 How. 185, and cases cited there.

Besides this, there is no evidence to support the denial. It is *not accompanied with [*276 any exhibit of expenses; and no account for them seems to have been offered in evidence in the court below. To overcome this denial stands the admission in the first answer of receipts, to the extent of three or four hundred dollars, and no set-off claimed; next, the acknowledgment to Primrose of something received; next, the recorded confession in the deed that $2,118 was paid to him; and, finally, the testimony of several witnesses to actual payments, and the solvency of all the purchasers. But if any doubt existed as to this amount being the proper one, with interest, it would be removed by the proceedings in the District Court, where the account was stated in this manner after an examination by agreement be-

fore the judge, and with liberty to except to the account, and no exception taken.

The last objection to the recovery of the amount actually received, with interest thereon, is the statute of limitations. As before intimated, this statute, in respect to money taken in express trust, rests on principles very different from what it might as to damages claimed for a mere neglect of duty, which happened, if at all, near twenty years before any demand or suit. Let it be remembered, that though this money was received by Savage, as trustee of the plaintiffs, in 1818, yet he never was requested to pay it over till 1837, and that then he first became in default for not accounting for it. Till then he lived remote from the complainants, they being residents in a foreign country, and was not obliged to settle for their money in South Carolina as assets belonging to William F. Taylor, in his own right, as has before been shown.

Retaining it, under all the circumstances, till called on by the complainants or their agent, is therefore by no means decisive evidence of any neglect or intention not to account for it, till the demand made by Primrose, in A. D. 1837. Consequently, the statute in relation to this would not begin to run till then, and hence could have created no bar in September, 1838, when this bill in equity was filed. 1 Jac. & Walk. 87; Attorney-General v. Mayor of Exeter, Jac. 448; 10 Peters, 177; Michoud v. Girod, 4 How. 503; Zeller's Lessee v. Eckert et al. Ibid. 289; 3 Johns. Ch. 90, 216; Kane v. Bloodgood, 7 Johns. Ch. 90; Gist et al. v. Cattell, 2 Desaus. 55. The case of Trecothick v. Austin, 4 Mason, C. C. 29, was in this, and some other respects, such as to involve and settle principles similar to what have been laid down in this opinion.

The question of fraud and concealment has also been raised at the bar, not only to aid in charging the respondent, but in obviating the operation of the statute of limitations, as it would if existing. 3 Atk. 130; Hardw. 184; 7 Johns. Ch. 122; 20 Johns. 576; 6 Wheat. 181. But as it is not necessary to decide on these, we waive an opinion as to imputations, so difficult to settle correctly after the death of most of the parties and the lapse of a quarter of a century.

There are some exceptions as to the form of the claim and of the bill, that deserve a moment's notice before closing.

277*] *Though the plaintiffs make their claim in both cases against Savage, and would be entitled in the end, in one as legatees, if at all, and in the other as cestuis que trust rather than legatees; yet the views already expressed would allow them to recover in both cases as residuary legatees, because the trust passes properly to them under the devise, though accompanied by an obligation to account for the property to the cestuis que trust, if they should happen to be persons other than themselves.

The description of the complainants, and of their rights, then, in the bill, is not exceptionable; but the description of the liability of Samuel Savage, which is also objected to, is not so free from imperfection. He acted under William F. Taylor's will in a fiduciary capacity *in two respects not exactly the same, but not discriminated from each other in the bill. One*

12 L. ed.

was, to sell the lands his testator held in Kentucky in trust, and the other, to sell the lands and the other property, held in his own right, in South Carolina. Notwithstanding this, the variance does not seem to us to be such as, in this stage of the cause, and in a court of equity, imperatively to require an amendment.

The claim in both respects is for the acts of Samuel Savage alone, and is to be recovered from his executor alone, and belongs to the complainants alone. The material facts are alleged, upon which it rests in both respects; and hence, as no objection was taken to this in the answer or other pleadings, it may be regarded as cured now, and more especially in a proceeding in chancery, and where there is enough alleged to indicate with distinctness the subject matter in dispute between the parties. See 32d section of Act of Sept. 24, 1789, 1 Statutes at Large, 91; Garland v. Davis, 4 How. 131.

It will be seen, that by the course of reasoning we have adopted, and by the points on which our opinions have been formed, it has become unnecessary to decide some other questions presented in this cause in the able arguments of the counsel on both sides. But having decided enough to dispose of the case, and being satisfied that the judgment of the court below was right, however we differ as to some of the reasons assigned in its support, we do not propose to go further into the questions raised, and direct, that in this case the judgment below be affirmed.

The other appeal, relating to this matter and argued with it, must consequently be dismissed.

Order.

Vincent M. Benham, administrator de bonis non, with the will annexed, of Samuel Savage, deceased, Appellant, v. William Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey.

This cause came on to be heard on the transcript of the record *from the District [*278 Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

William Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey, Appellants, v. Vincent M. Benham, administrator de bonis non, with the will annexed, of Samuel Savage, deceased.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel; on consideration whereof, this court having affirmed the decree of the said District Court in this cause, on the appeal of the respondents at the present term, it is now here ordered and decreed by this court, that this appeal of the

complainants be, and the same is hereby dismissed, with costs.

GEORGE W. PHILLIPS, Plaintiff in Error,
v.
JOHN S. PRESTON, Defendant in Error.

Louisiana practice—one "peremptory exception" —no error that when first tendered it was not allowed—refusal to allow clerk to take down oral and documentary evidence—in agreement between indorsers to share loss equally, consideration is mutual promises.

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them.

Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not the cases which are carried to an appellate court by writ of error.

Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.

In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their nonpayment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes.

But not where the suit is brought upon a collateral contract.

A contract between two indorsers, that they will divide the loss between them, is a good contract, and founded on a sufficient consideration.

Being a collateral contract, by parol, parol evidence can be given to prove it. The payee is a competent witness, and so is the notary, bringing with him the act of sale.

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

279*] *It was a claim advanced by Preston, the first indorser upon certain promissory notes, that Phillips, the second indorser, should pay one half thereof, by virtue of a special agreement between them.

The facts in the case were these:

On the 15th of March, 1836, Sosthain Allain sold to Robert R. Barrow sundry species of property in Louisiana, for the sum of $110,700, payable as follows, viz.:

1837, March 1, ...	$16,921 27
1838, March 1, ...	18,028 26
1839, March 1, ...	19,135 25
1840, March 1, ...	20,242 20
1841, March 1, ...	21,349 23
1842, March 1, ...	22,456 22
1843, March 1, ...	23,563 21

For the security of the notes given for the above payments, the property was mortgaged.

NOTE.—That a party to a bill or note cannot vary his contract by parol, see note to 8 L. ed. U. S. 316.

On the 17th of March, 1837, Barrow sold the above property (with a slight addition) to Samuel John Carr, for $141,695.68, payable as follows:

Cash, ...	$16,921 27
1838, March 1, ...	18,028 26
1839, March 1, ...	19,135 25
1840, March 1, ...	20,242 24
1841, March 1, ...	21,349 23
1842, March 1, ...	22,456 22
1843, March 1, ...	23,563 21
	$141,695 68

The act of sale, which was signed by Barrow and Carr, and executed before Louis T. Caire, a notary public, contained, amongst other things the following provisions, viz:

1. After reciting the cash payment, it proceeded thus: "And in payment of the balance, the said purchaser handed over to me, the undersigned notary, six promissory notes, bearing even date herewith, subscribed by him, to the order [of] John S. Preston, indorsed by him, the said John S. Preston, domiciliated in the parish of Ascension, as first indorser, and by George W. Phillips, domiciliated in the parish of Assumption, as second indorser, it being understood that, although each of the indorsers is responsible for the whole amount of said notes, they are between themselves equally responsible; said notes have been made payable at the domicil of the Union Bank of Louisiana, and their amount and terms of payment are as follows, viz." (then followed an enumeration of the notes as above).

2. An agreement that the property should stand mortgaged.

3. An agreement that the last mentioned notes should be substituted, if possible, for those given by Barrow to Allain, and if it *should not be possible to do so, then [*280 that payments made upon the last set of notes should be applied to the first set, as they became due.

The notes given by Carr to Barrow were indorsed by John S. Preston, as the first indorser, and by George W. Phillips, as the second indorser.

On the 1st of March, 1838, the first note became due, and was not paid by Carr. But it appeared by the record not to have been protested until the 30th of March, 1839.

On the 1st of March, 1839, another note became due, which appears to have been protested in proper time.

On the 5th of April, 1839, Barrow filed a petition in the District Court of the Fourth Judicial District of the State of Louisiana (a State court), representing the above mentioned facts, and stating further, that he had made the necessary payments and arrangements with Allain, respecting the notes due in 1837, 1838, and 1839, and praying for a sale of the property.

On the 1st of March, 1840, another note fell due, which was not paid, and was protested.

On the 5th of August, 1840, the property was sold in block by the sheriff to Isaac T. Preston, for his brother, John S. Preston, for the sum of $67,500, the purchaser assuming the payment of the notes due in 1841, 1842, and 1843.

On the 20th of August, 1840, the sheriff exe-

cuted a deed for the property to John S. Preston.

On the 17th of February, 1841, Preston, calling himself a citizen of South Carolina, filed a petition in the Circuit Court of the United States against Phillips, a citizen of Louisiana, alleging that, by virtue of the agreement between them, Phillips was bound to pay to him the one half of all that he had paid, being $28,702.87, with legal interest on $9,014.13, from the 4th day of March, 1838, and like interest on $9,567.62½ from the 4th day of March, 1839. And on $10,121, from the 4th day of March, 1840, with half the costs of protests.

On the 26th of February, 1841, the counsel of Phillips filed an exception, being a plea to the jurisdiction of the court, upon the ground that Barrow was the assignor of the notes to Preston, and that Barrow, being a citizen of the same State with Phillips, was incapable of suing him in the United States Court.

On the 20th of April, 1841, the court overruled this exception, and Phillips filed an answer, denying "all and singular the allegations contained in the plaintiff's petition, and particularly that he ever promised or undertook to be responsible on the notes described in said petition, in any other capacity except as second indorser, and after and in default of the plaintiff, or that the said notes ever were duly protested, and notice given to this defendant."

In April, 1841, the cause came up for hearing. On the trial the following testimony was filed:

281*] *Testimony taken by Consent, this April 23d, 1841.

John S. Preston v. George W. Phillips.

The testimony of Robert R. Barrow, a witness for the plaintiff, who, being duly sworn, deposeth and saith, being asked by the plaintiff what he knows in relation to an agreement between John S. Preston and George W. Phillips, in relation to their indorsement of certain notes given by Samuel J. Carr to him, on payment of a plantation and slaves in Point Coupee, purchased from him by said Carr, about the 17th of March, 1837.

(The counsel of the defendant, Seth Barton, Esq., objecting to the above question, and reserving all legal exceptions.)

The witness says that he was present at the time the notes were signed, about the 17th of March, 1837. Samuel J. Carr, the plaintiff, and defendant, with deponent, met by appointment at the time of the sale, at Caire's office, before whom the act was passed; the act was already prepared when the aforesaid parties met, it having been prepared by the notary, under the directions of witness and said Carr; the notes were also drawn up and ready to be signed, under Carr and witness' directions and instructions; the notes were then handed to the plaintiff to indorse; when about to sign, Mr. Preston observed that he thought those notes were to have been drawn to the order of Phillips, the defendant. Mr. Carr replied that he did not know that it would make any difference. And thereupon Colonel Preston turned round, and, addressing himself to Colonel Phillips, the defendant, said he supposed it made no difference, and said he *wished it particularly understood between them, that in case Carr should* fail to pay the notes, and the indorsers compelled to pay them, that he (Phillips) and Preston should be equally bound, and share alike in the loss, and that he, Preston, wished it so stated in the act. After this conversation, Colonel Preston turned to Mr. Caire, the notary, and remarked that he wished it noted in the act that the indorsers should be bound alike on failure of Carr. The notary then put down on paper the exact words that Colonel Preston dictated; all the parties were near each other, and participating more or less in the conversation. After this, Colonel Preston and Colonel Phillips indorsed the notes and handed them over to the notary; Colonel Preston indorsed first, and Colonel Phillips next; and instructions were given to the notary, Caire, to draw up a new act, inserting the clause aforesaid, as regards the equal liability of the indorsers; and then, to identify the notes with the act, the clause was added in the new act, and witness, when his attention was called to it by Mr. Caire, objected to its insertion, because, as he then thought, it made the indorsers liable to him for only their half. Mr. Caire called upon an attorney at law, whose name witness does not remember, to explain it, and thereupon witness was satisfied that it did not affect him, but only *related to the respective liabili-[*282 ties of the indorsers. The act was not signed at the time the notes were given, but was signed at a different time on that day, or the day next, but he cannot remember. Witness recollects the conversation very distinctly, as it was impressed on his mind at the time, and has frequently thought of it since.

Being shown the copy of the act annexed to the petition, and the clause at the top of the page, says, they are the same referred to by him. The three notes marked A, B, and C, filed with this deposition, are part of the consideration of the sale; Colonel Preston took up three of the notes, A, B, and C, and paid them after protest, interest and all charges, which payment was made before this suit was instituted. The tract of land in West Feliciana, mortgaged to secure the payment of these notes, was seized and sold to pay prior mortgages of said Carr, and consequently there was nothing to come from that land to pay this debt of Carr's, for the plantation sold as aforesaid; this tract was woodland; Colonel Preston has paid the notes which have matured, and has assumed the balance due, he having purchased in the property mortgaged, to secure the payment of the notes aforesaid.

The defendant, by S. Barton, his attorney, objects to the whole of the foregoing deposition of the witness, as illegal and incompetent; and specially to all such parts of it as are hearsay or secondary proof; and specially, also, to all such parts of it as go to vary, or contradict, or explain the written testimony to which the witness refers; and particularly such parts as tend to prove anything against or beyond the authentic act of sale, on file in this cause, and insisting on such objections (to be urged on trial), and waiving no part thereof, cross-examines the witness, under the above reservations.

Witness never had the act of sale referred to recorded in West Feliciana; that the property in Feliciana was sold for judgments of younger date than the sale aforesaid; the first note of

$18,000 was paid by a renewal of note payable to the Union Bank; the other two were paid by drafts; the note given on renewal was not indorsed by Colonel Phillips; Colonel Phillips was no party to the drafts referred to; the drafts were on time and suited witness; witness thought from appearances that Preston and Phillips were just introduced to each other, or not long acquainted, when they met at the notary's, as above related; some short time before the act was passed, witness met Colonel Phillips at the theatre, and had some conversation about his indorsing for Carr; said he, Phillips, had promised to indorse for Carr, but Carr said it would only be temporarily, as he had made arrangements to change the indorsements, by substituting Colonel Isaac T. Preston in the place; witness thinks that Colonel Phillips must have heard the conversation related to above, as it took place at the notary's; does not 283*] recollect *that Phillips made any reply to Colonel Preston; Phillips must have heard it, as the conversation was made direct by Preston to him; and Phillips must have heard the direction of Preston to the notary, to insert the clause; thinks they met at the notary's at ten or eleven in the morning; neither the plaintiff or defendant attended at any other time at the notary's than that mentioned, nor were they present when he and Carr executed the Act, nor can he say that Phillips has seen the act; there was no arrangement between him and Preston, in relation to the sale of the property. It is admitted that the property was purchased by Colonel Preston, plaintiff, for $67,500; that the third note was paid by draft prior to the sale under the seizure and sale; the three last notes assumed by Preston are in the hands of witness; witness has never had the mortgage raised, to secure the last three notes.

(Signed) R. R. Barrow.

Sworn to and subscribed before me, this 23d April, 1841.

Duncan N. Hennen, Clerk.

Upon the trial, the counsel for Phillips, the defendant, filed the following bill of exceptions:

1st. The defendant, by his attorney, offered to file document A as his peremptory exceptions founded in law; to the filing whereof the plaintiff's counsel objected, and their objection was sustained by the court; to which decision the defendant excepts.

This document was offered after the pleadings were read:

2d. Before any evidence was offered by either of the parties in support of the several issues, on their respective parts to be maintained, the defendant's counsel moved the court that the clerk be directed to take down the testimony of all the witnesses whom either party should adduce on the trial, and to file all documentary proof received in evidence, and keep minutes thereof; but the court overruled the motion, and witnesses were examined without their testimony being taken down, and documentary proof received without being marked as filed, or minutes taken thereof; to which decision the defendant excepts.

3d. The plaintiff offered in evidence the deposition of Robert R. Barrow, marked B, to *the reception whereof* the defendant objected; *but the objection was overruled* by the court, *and the deposition was admitted in evidence;* to which decision of the court the defendant excepts.

4th. The plaintiff offered in evidence the first, second, and third of the promissory notes described in the petition, together with the protests thereof, and the several certificates of the notary in relation to the manner and times in which he notified the plaintiff and defendant of the dishonor of the notes as they respectively matured. Whereupon the defendant objected to the admission of the said certificates, or any proof adduced for the purpose of, and leaving notice to the indorsers of, protest, as no such notices were alleged *in the petition; [*284 the court overruled the objection, and admitted the evidence; and to its decision therein the defendant excepts.

5th. The plaintiff offered Louis T. Caire (the notary before whom the act of sale was passed that is described in the petition) as a witness to prove the allegations of the petition, and a verbal agreement between the plaintiff and the defendant, made before the passing of the act of sale, that, as between themselves, they would be equally liable as indorsers, as stated in the petition. And also to prove by him that the clause in the act of sale, setting forth said agreement, was inserted therein by the instruction of the plaintiff, in the presence of the defendant, and without any objection thereto on his part. Whereupon the defendant objected to the admission of such evidence; but the court overruled the objection, and admitted the evidence; and to its decision therein the defendant excepts.

6th. The plaintiff offered in evidence the copy of the act of sale described in the petition, and marked C, to the admission of which, and such parts thereof as were adduced for the purpose, and tended to prove any agreement between the plaintiff and the defendant, as to their equal liability between themselves, upon their several indorsements upon the promissory notes described in the petition, and to charge the defendant with any liability resulting therefrom, the defendant objected; but the court overruled the objection, and admitted the evidence; and to such, its decision, the defendant excepts.

7th. The plaintiff offered in evidence the record of the suit of Robert R. Barrow v. S. John Carr, being the order of seizure and sale, and proceedings therein, relating to the seizure and sale of such of the property described in the petition and act of sale, as was situated and located in the parish of Point Coupee, Louisiana. The said record is marked D; to the admission of which record and proceedings the defendant objected, but the objection was overruled by the court; and to such, its decision, the defendant excepts.

8th. The plaintiff offered in evidence document marked D, purporting to be an act of sale from the sheriff of Point Coupee, adjudicating the property last mentioned to the plaintiff, as the purchaser at public sale; to the admission whereof the defendant objected, but the court overruled the objection; to which decision of the court the defendant excepts.

The defendant, by his attorney, having reserved the foregoing several exceptions, as the occasions thereof severally arose in the course of the trial, and at the suggestion of the court,

Howard S.

the drafting of separate bills of exceptions were dispensed with, and the general bill for the whole postponed, till the plaintiff's testimony was closed.

He now respectfully presents to the court this his bill of exceptions, embracing all the several points reserved, and prays the court to sign and seal the same, which is done accordingly.

(Signed) J. McKinley, [Seal.]
P. K. Lawrence. [Seal.]

April 28th, 1841.

285*] *Peremptory exceptions referred to in bill of exceptions, marked as filed, same day.

United States of America:—Circuit Court of the United States, being the Ninth Circuit thereof, and holden at New Orleans, in and for the Eastern District of Louisiana.

John S. Preston
v.
George W. Phillips. } April Term, 1841.

And now at said term came the defendant, George W. Phillips, by his attorney, and (not waiving, but insisting on his answer heretofore filed in this cause) availing himself of the provisions of the Louisiana code of practice in that behalf, and as the same has been adopted by this honorable court, he here presents his peremptory exceptions, founded in law, to the further maintenance of this suit.

And for causes of peremptory exception, he sets forth and assigns the following, to wit:

1st. The agreement stated in the petition to have been entered into by the plaintiff and defendant is nowhere alleged to have been in writing, or signed by the parties, or embodied in any instrument of writing to which they were parties, or to which they, or either of them, assented, by their presence or otherwise, at the time of the execution of any such instrument of writing, by those who may have been parties thereto.

2d. The petition in no part alleges any, or a sufficient, consideration for the said supposed agreement, nor does it allege or show that the said agreement imported in itself any, or a sufficient, consideration.

3d. The said supposed agreement is at variance with, and in contradiction of, and seeks to change, the liabilities and relations of the plaintiff and defendant to each other, in relation to certain contracts in writing, to which the petition alleges they are parties, by respectively signing their names on the backs of six several promissory notes, as first and second indorsers thereof.

4th. The petition in no part of it alleges that either the plaintiff or the defendant were duly notified of the dishonor of any of the said promissory notes, which it alleges to have been protested for nonpayment, as they severally matured, nor does the petition show in what manner the plaintiff was, or could have been, coerced to make the several payments he alleges he has made.

5th. All the statements and allegations of the petitions in reference to any agreement or circumstance, out of which any liability of the defendant to the plaintiff is supposed to arise, are loose, vague, and indefinite, and insufficient in law to put the parties to their proofs upon *the several issues of fact which the pleadings present.*

Wherefore, and for divers other good reasons in this behalf, the defendant prays judgment of this honorable court upon the said petition, *and the dismissal thereof, with a fur- [*286 ther judgment for costs in this behalf most unjustly sustained.

(Signed) Janin & Barton,
Defendant's attorneys.

And afterwards, to wit, on the 29th day of April, 1841, the following motion in arrest of judgment was filed:

United States of America:—Circuit Court of the United States, holden at New Orleans, in and for the Eastern District of Louisiana.

John S. Preston
v.
George W. Phillips. } April Term, 1841.

And now comes the defendant, by his attorney, and prays the court to arrest the judgment in this case, and sets forth and assigns as grounds for the motion—

1st. That the plaintiff's petition does not allege that the agreement described therein, and out of which the defendant's liability is supposed to arise, was signed by either plaintiff or defendant, or that the same was in writing.

2d. The petition does not allege any, or a sufficient, consideration for the agreement which it states to have been entered into by the defendant, to and with the plaintiff.

3d. The agreement stated in the petition is at variance with, and in contradiction of, the contract of indorsements, which arises from the signatures of plaintiff and defendant as first and second indorsers, upon several promissory notes, which the petition alleges they signed as such.

4th. There is no allegation in the petition of notice or notices being given, either to plantiff or defendant, of the dishonor or protest of any one of the said promissory notes, as they respectively matured.

5th. The evidence adduced at the trial, as shown by the statement of facts, and the several documentary proofs to which it makes reference, is not sufficient in law to support the issues on the plaintiff's behalf to be maintained, or to authorize any judgment in favor of the plaintiff, and against the defendant.

6th. A trial of this cause by the court, and without the intervention of a jury, unless there had been an express waiver of record, is not authorized by the law regulating the practice of this court.

Wherefore, the defendant prays that the judgment be arrested, that the plaintiff take nothing by his plaint, that his petition be dismissed, and that the defendant may go hence without day, and recover of the plaintiff his costs in this behalf most wrongfully sustained.

(Signed) S. Barton, Defendant's attorney.

On the 29th of April, 1841, the court entered up judgment in favor of the plaintiff, John S. Preston, and against the defendant, George W. *Phillips, for the sum of $19,688.74, [*287 with interest of five per centum per annum upon $9,567.62 thereof, from the 4th day of March, 1839; and upon $10,121.12, from the 4th day of March, 1840, till paid; for $5.25, cost of protest, and costs of this suit.

This judgment was for one half of the note

due March 1, 1839, and one half of the note due March 1, 1840, viz.:

Amount of judgment, ...	$19,688 74
Note due 1-4th March, 1839, $19,135.25,	
One half of which is	9,567 62
Note due 1-4th March, 1840, $20,242.24,	
One half of which is	10,121 12
	$19,688 74

The defendant's counsel moved an arrest of judgment, upon the grounds just stated, which motion was overruled.

To review all these opinions of the court, the case was brought up to this court.

The cause was argued by Mr. Barton for the plaintiff in error, who contended, that if Preston obtained the notes from Barrow by substitution, then the plea to the jurisdiction of the court must be sustained, because Barrow and the original defendant, Phillips, were both citizens of Louisiana. 4 Dall. 8, 10, 11.

Until payment of the note, there is no claim against the present indorser. 4 Cranch, 46.

By the law of Louisiana, peremptory exceptions are taken to matters of fact or matters of law, by way of demurrer. Code of Practice, art. 343-346.

The court was wrong in refusing them. Act of 1824, 4 Statutes at Large, 62.

An appellate court may admit the exceptions, and go on to decide the case. Code of Practice, 902; 1 Louisiana R. 315; 4 Martin, N. S. 437.

Barrow did not record the deed, and therefore a younger judgment came in. It was sold when three notes only were paid. When Preston got it, there was nothing due upon it.

Parol evidence cannot be introduced to vary a written contract. Civil Code, 2256; 1 Martin, N. S. 641.

The first indorser is always supposed to assign to the second for a valuable consideration. 2 N. S. 361, 367; 3 Ibid. 692; 5 Ibid. 3; 2 Louisiana Rep. 48, 447, 448; 3 Ibid. 692; 4 Ibid. 469; 6 Martin, N. S. 517.

In order to be bound by an act before a notary, the party concerned must sign. 11 Martin, 453.

The first indorser is liable, and must pay notwithstanding the existence of an understanding. 4 Wheat. 174; 1 Peter's C. C. R. 85; 6 Peters, 59.

288*] *Preston took renewed notes, and thereby extinguished Phillip's liability. For the doctrine of novation, see New Civil Code, art. 2181, 2187, 2194; 2 Martin, N. S. 144; 1 Louisiana R. 527; 4 Ibid. 511, 512; 1 Robinson, 302, 303; Code of Practice, 642, 680, 732, 745.

Mr. Justice Woodbury delivered the opinion of the court:

The points which have been argued in this case are in part connected with matters of form, and in part with what is substance. We shall dispose of the first before proceeding to examine the last.

The principal objection in respect to form *is, that the court below refused* to receive what *are called in the practice of the State* of Louisiana "peremptory exceptions." These are of two kinds, one as to form, and one as to law. Those in this case were offered as "peremptory exceptions, founded in law." By the Code of Practice of Louisiana, art. 345, such exceptions "may be pleaded in every stage of the action previous to the definitive judgment." 1 Louisiana R. 315; 4 Martin, N. S. 437.

Hence, though offered here after the pleadings were read, they are admissible, while peremptory exceptions relating to form would not be then admissible. See art. 344. The only doubt as to their being duly offered arises from the provision in the 346th article, which requires them to "be pleaded specially," and they are not here in the precise form of a special plea at common law. But, in the absence of any adjudged cases to the contrary, we are inclined to think that, under the liberal and general pleading in use in Louisiana, these exceptions must be considered as "specially pleaded," when set forth as they were here in writing, and in a specific or detailed form, and judgment prayed on them in favor of the present plaintiff. Has he then been deprived of the advantage attached to them? That is the important inquiry. On examination of the record it will be seen that he had the benefit of all those exceptions, first in a motion in arrest of judgment.

Again, he had the benefit of all the important matter in those exceptions by the bill which was afterwards filed and allowed, and upon which this writ of error has been brought. We cannot, therefore, perceive that he has suffered any by the refusal of the court to receive these peremptory exceptions when first offered.

The case in this respect is like one at common law, where the defendant should propose to demur generally to the declaration, but, being refused, objects to the sufficiency of it to cover various portions of the evidence as it is offered, and also objects to the sufficiency of the declaration in arrest of judgment. He thus, by a subsequent bill of exceptions to the rulings on the testimony and on the sufficiency of the declaration, obtains every advantage that he could have had under his general demurrer, and thus suffers nothing which requires a reversal of the judgment and a new trial for his relief.

*The next objection of a formal [*289 character is, that the court below refused, though requested by the original defendant, to have the clerk take down in writing and file the testimony of the witnesses and the documentary evidence.

It is true, that by a statute of Louisiana, passed July 20th, 1817, their courts are directed to have the testimony taken down "in all cases where an appeal lies to the Supreme Court, if either party require it." It is also true, that an act of Congress, passed May 26th, 1824 (4 Statutes at Large, 63), has made the practice existing in Louisiana the guide to that in the courts of the United States, when sitting in that State, except as it may be modified by rules of the judge of the United States Court.

And it is further shown in this record, that the district judge there, November 20th, 1837, adopted the practice of Louisiana, as then existing, in all cases not of admiralty jurisdiction.

In a cause once decided by this court, which

was connected with this point, Wilcox et al. v. Hunt, 13 Peters, 378, it was remarked, that the plea put in there as a part of the State practice, as the latter had not been adopted, was not received. But the practice there standing differently from that which is urged in this case, that decision does not control the present one.

In considering, then, the propriety of the ruling of the court here, it is first to be noticed, that, by the words of the statute, this testimony is to be taken down and filed only in those cases "where an appeal lies." That means, of course, a technical appeal, where the facts are to be reviewed and reconsidered, for in such an one only is there any use in taking them down. But in the present case no appeal of that character lay to this court, but merely a writ of error to bring the law and not the facts here for re-examination. To construe the Act of 1824 as if meaning to devolve on this court such a re-examination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give it to an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. Parsons v. Bedford et al. 3 Peters, 448.

In a case of chancery or admiralty jurisdiction it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. Livingston v. Story, 9 Peters, 632; McCollum v. Eager, 2 Howard, 64.

In this case, likewise, it would be totally useless to have all the facts taken down in that manner, because, if so taken and sent up here, it would be irrelevant and improperly burdening the record, as much as the whole charge and opinion of the judge, instead of the naked points excepted to. See 28th rule of this court, and Zeller's Lessee v. Eckert et al. 4 How. 297, 298. If a case comes up in that manner, this court never reconsiders or re-examines all the facts, but merely the law arising on them, as if 290*] a bill of exceptions *had been properly filed. This has been decided already in Parsons v. Armor et al. 3 Peters, 425; Minor v. Tillotson 2 How. 394.

Beside these considerations, showing that neither the words of the statute, nor the reasons for it, reach a case like this, there is another in the practice and laws of Louisiana which shows that this provision does not extend to a cause like the present in this court. There the court of appeal, even in cases at law, often decides on all the facts as well as the law; but not so here. The court there may be substituted for a jury by consent of the parties in a trial at law, and were in this case below. But no such power can be conferred on this Supreme Court by parties in cases at law; and, as before shown, it exists under acts of Congress merely in cases in equity and admiralty.

To conclude on this point, then, it will be seen that the plaintiff in error, notwithstanding the refusal to have the clerk take down this evidence, has enjoyed all the benefit of it under his bill of exceptions, where it was material and he wished to raise any question of law on it, and has enjoyed it as fully as if the whole *had been taken down and filed. And thus he loses nothing and suffers nothing by the court* refusing to do what we think neither the language nor spirit of the law requires in a case like this. Parsons v. Bedford, 3 Peters, 433.

There are two other objections of form, which appear on the record and may well be noticed, though they are not embodied in the bill of exceptions. One is as to the waiver of a trial by jury in this case in the court below. After a hearing there, it was urged, that, the waiver not having been entered on the record, the court was not authorized to proceed without a jury.

But it would hardly be permissible for a party to proceed without objection in a trial of facts before the court, in a case at law in a State where the statutes permitted it, and the habits of the people under the civil law inclined them to favor it, and then, after a decision might be announced which was not satisfactory, to offer such an objection as this. From its not being incorporated into the bill of exceptions, or argued at the hearing before us, a strong presumption arises that it has been abandoned.

The other objection is spread upon the early part of the record, and was a proper one for the consideration of the court in that stage of the case, as it went to its jurisdiction. This was urged on the ground that the notes mentioned in the petition of the plaintiff below belonged or ran originally to R. Barrow, a resident of Louisiana, in the same State with the defendant, and that his title was assigned to the plaintiff, and thus the latter cannot sue the dedendant in this court, if Barrow could not. This position would be well taken under the provision in the 11th section of the Judiciary Act of 1789, if the original plaintiff had instituted his suit upon the notes as assignee of them. See Towne v. Smith, 1 Wood. & Min. 115; Bean v. Smith *et al. 2 Mason, [*291 252; 16 Peters 315; Stanley v. Bank of North America, 4 Dall. 8–11; Montalet v. Murray, 4 Cranch, 46. But so far from that, he does not declare at all on the notes. He sets out a separate and different contract as his ground for recovery, resting on an original agreement between him and the defendant; and does not set out any assignment of those notes to himself by Barrow. Even if he counted on the notes, but not on or through an assignment of them, this court would have jurisdiction. 6 Wheat. 146; 9 Ibid. 537; 2 Peters, 326; 11 Ibid. 801; 3 Howard, 576, 577; 1 Mason, C. C. 251; 1 McLane, C. C. 132. The judge below, then, properly overruled this objection.

We come next to the only remaining question in this case, which branches into five or six different exceptions. It is a question of substance, and in some respects is not without difficulty. It is whether the ground upon which the objection going to the jurisdiction was overruled is well founded in the declaration and the facts, by showing a separate and independant contract, and one which had a good consideration in law.

On looking to the petition, it will be seen that it sets out a sale of land between other parties; the mode of payment stipulated; the agreement between the plaintiff and defendant to become indorsers of certain notes, and divide between them any loss; the subsequent failure of the purchaser to pay the notes; the settle-

ment of them by the plaintiff, and his right under the agreement and facts to recover of the defendant one half of the amount. The whole claim proceeds on the collateral agreement, and there is no pretense of grounding the suit, as holder or indorsee, on any premises contained in the notes, or in the indorsements on them.

There is also a good consideration for this collateral agreement. It is the promise of the plaintiff before hand to lose one half, if the defendant would become a surety with him and lose the other half, and the actual payment afterwards of the whole by the plaintiff. Being then a collateral agreement by parol, which is sued, it stands free from the objection to the parol evidence offered to prove it. Were the action on the notes, and this evidence offered to contradict them, it would be entirely different; because, in an action on a note, parol testimony is not competent to vary its written terms and probably not to vary a blank indorsement by the payee from what the law imports. Civil Code of Louisiana, art. 2256; Stone et al. v. Vincent, 6 Martin, N. S. 517; 15 La. R. 539; 10 Ibid. 205; 1 Peters's C. C. R. 84; Bank of the United States v. Deane, 6 Peters, 59; 3 Camp. N. P. 56, 57; 9 Wheat. 587; 1 Martin, N. S. 641; Chitty on Bills, 541; 12 East, 4; 4 Barn. & Ald. 454. So, between the contracting parties, likewise, all prior conversation is supposed, as far as binding, to be embodied into the written contract. 4 Louisiana R. 269; Taylor v. Riggs, 1 Peters, 591; 8 Wheat. 211. But the parol evidence here is [*292] not offered *in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note, or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires in such cases, and this evidence is plenary and entirely satisfactory to substantiate the separate contract. It is true, at the same time, that, after a prior indorser has paid a note, he cannot recover, even in an action, not on it, but for contribution of one half from a second indorser, if they were not in fact joint sureties, nor in fact made any collateral contract whatever, nor in fact had any communication whatever as to their liability. McDonald v. Magruder, 3 Peters, 474; 3 Harris & Johns. 125; 7 Johns. 367.

But the present is a case differing, toto cœlo, from that. Here, by a deliberate arrangement before a public notary, and by the positive evidence of two witnesses, the two indorsers were co-sureties, and specially agreed to bear any loss equally between them; and the right to recover is therefore entirely clear. 3 Peters, 477; Douglass v. Waddle, 1 Hammond, 413, 420; Deering v. The Earl of Winchelsea, 2 Bos. & Pull. 270.

There are two or three other views connected with this part of the case which may be usefully adverted to, but by which we do not decide it.

Thus, where a person like Phillips, the original defendant, was not a party to a note, but put his name on the back of it, parol testimony has been deemed competent to show the real object for which it was placed there; and especially if it did not contradict any legal implication from the name being there. And hence, under circumstances like these, where, as in Louisiana and some other States, it is implied by law that such a person puts his name there as a surety or guarantor, no objection exists to parol proof to that effect. 10 Louisiana R. 374; Lawson v. Oakey, 14 Ib. 386; Nelson v. Dubois, 13 Johns. 175; Dean v. Hall, 17 Wend. 214; 5 Mass. R. 358; 12 Ibid. 281; 1 Vermont R. 136; Ulen v. Kitteridge, 7 Mass. R. 233; 4 Wash. C. C. R. 480; 5 Serg. & Rawle, 363. In White v. Howland, 9 Mass. R. 314, he is held to be liable as if signing with the maker as a surety. But however much, in some States, the practice may go beyond this in suits between the parties to the agreement, as in 1 Hammond, 420, and 5 Serg. & Rawle, 363, it could generally not be competent to prove anything by parol, in actions on the note, contrary to what is written or to what is implied in law. Bank of the United States v. Dunn, 6 Peters, 59.

And in other States and in other circumstances, where the inference of law is not that such a name is placed there as a surety, it is very doubtful whether, in a suit on the note, proof that he did it only as a surety is competent. 6 Martin, N. S. 517; Bank of the United States v. Dunn, 6 Peters, 59.

*In England, in the case of such a [*293 name on the back of a bill of exchange, the person may be treated as a new drawer (Chitty on Bills, 241); and if the payee there has also indorsed the note, the implication deemed most proper is, that another name on the back is that of a second indorser, and should so be held in the hands of third persons. Chitty on Bills, 188, 528; Holt's Nisi Prius, 470; 5 Adolph. & Ellis, 436; 6 Nev. & Man. 723. So, 6 Martin, 517. It will be seen, however, that these last are generally cases of actions on the notes or bills of exchange themselves, while the present case is not brought on the note itself, but on a distinct and collateral contract.

Another suggestion bearing on the case might be, that in Louisiana the surety, when paying, may step into the shoes of his creditor, if he pleases, by subrogation, and enjoy all his rights against the debtors or other sureties. Hewes et al. v. Pierce, 1 Martin, N. S. 361; Calliham v. Fanner, 3 Rob. Louisiana, 299; Civil Code of Louisiana, art. 2157. But there the suit is probably in the creditor's name, and not, as here, in that of the surety. So, in some countries where the civil law prevails, such a contract as this, deliberately made before a notary, and by him reduced to writing by request of the parties, would in law be deemed equivalent to a contract in writing; and on that ground be admissible even in a suit on the note between the original parties to it.

The doings of the parties thus have a sort of public form given to them, quasi judicial, and they are bound by them, though not signed by the parties. 2 Domat's Civil Law, b. 2, tit. 1, sec. 1, art. 28; and tit. 5, sec. 5, pp. 661, 662. It would be there deemed an act of too much deliberation by the parties, and of too much formality before that public officer, to be treated merely as an ordinary verbal arrangement. Coop. Justinian, 586; 3 Burr. 1671; Story on Bills, sec. 277. But, though the

Louisiana code, founded chiefly on the civil law, may not expressly abrogate such a doctrine, it does not in terms make records by a notary valid, unless signed by the parties, or consisting of copies of papers signed by the parties and acknowledged before witnesses. Civil Code, art. 2231, 2413; 8 Martin, N. S. 568; 10 Louisiana R. 207, 354. And though the paper containing this is signed by the parties to the sale and attested by witnesses, it is not signed by Preston and Phillips, the parties to this arrangement.

It is not necessary, however, to decide absolutely on the effect of either of these last views. Deeming the action here to be founded on the collateral agreement, and deeming the evidence offered to be competent, for the reasons first stated under this head, these conclusions will virtually dispose of the last six exceptions contained in the record of this case.

Thus, as to Barrow's deposition, the admission of which was the ground of one of these exceptions, it is clearly competent to prove this 294*] *separate parol contract in a suit on that, and not on the note. So, the certificates and notices, also excepted to, were properly proved as a part of the collateral transaction under the general expressions in the petition, and not as notices that should be specially set out in a declaration, where notes are counted on by a holder. In a case like that, the averment of them and the proof are highly material, but in the former case they are rather historical and merely a part of the res gestæ, without its being essential to give them in detail. The original plaintiff avers in the petition that the notes were protested, and that he was obliged to pay them, which would not have been the case without due notices; and this is quite enough in an action on a collateral undertaking.

So, the notary's evidence, which is another of the exceptions, becomes under this aspect entirely competent, and the written memorandum made by him at the time, which is another objection, was also admissible evidence to refresh his memory, if not per se of the facts stated in it. Greenleaf's Ev. sec. 436, 437. That it was admissible to refresh his memory, see Smith v. Morgan, 2 M. & Rob. 259; Horne v. McKenzie, 6 Cl. & Fin. 628. Other cases say such a memorandum is admissible itself to go to the jury. Greenl. Ev. sec. 437, note; 1 Rawle, 182; Smith v. Lane et al. 12 Serg. & Rawle, 84; 2 Nott & McCord, 331; 15 Wend. 193; 16 Ibid. 586–598. If this last be a rule controverted, the writing here was "the act of sale," and contained other matters as to the transaction in connection with this as the whole terms of sale, which were clearly competent, and the whole property went together to the jury as exhibiting the progress and character of the transaction, beside being admissible to refresh the memory of the witness. Bullen v. Michel, 2 Price's Ex. R. 422, 447, 476.

So, the evidence of the sale of Carr's property and of the transfer of it to the original plaintiff, Preston, by the sheriff, and the terms of the transfer, though objected to, are mere links in the chain of the transaction, and unexceptionable in that view; and were, like the evidence of the former sale to Carr by Barrow, duly authenticated.

Upon the whole case, then, we are happy to find that no legal objection seems to be tenable against making the original defendant meet an engagement which, on the record, he appears to have been bound in honor and justice, no less than law, faithfully to discharge. Although the court have deemed it proper thus to deliver an opinion on this case, as it has been argued by the counsel for the plaintiff in error, yet the death of the plaintiff has since been suggested; and no appearance is entered for the defendant. We shall not, therefore, enter judgment in conformity to the opinion until the defendant or the representatives of the deceased appear.

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*JAMES INNERARITY, Plaintiff in [*295
Error,
v.
THOMAS BYRNE.

A citation is not necessarily a part of the record, and the fact of its having been issued and served may be proved aliunde.

MR. Bagby moved to dismiss the writ of error in this case for the want of a citation. None appeared in the record.

Mr. Justice McLean delivered the opinion of the court, saying that the citation was not necessarily a part of the record, it forming no part of the proceedings of the court below. The presumption is, that one was issued when the writ of error was allowed, and it may be proved aliunde.

Motion overruled and case continued to next term.

WILLIAM G. COOK, Plaintiff in Error,
v.
JOHN L. MOFFAT and Joseph Curtis, Defendants in Error.

Notes—lex loci—Maryland insolvent law cannot discharge citizen from contract made in New York with its citizen—State court bound to conform to decision of this court declaring State law unconstitutional.

A contract, made in New York, is not affected by a discharge of the debtor under the insolvent laws of Maryland, where the debtor resided, although the insolvent law was passed antecedently to the contract.

The prior decisions of this court upon this subject reviewed and examined.

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

Cook was a citizen of Maryland, and Moffat and Curtis were citizens of New York.

NOTE.—Lex loci, and lex fori as to interpretation, effect and validity of bills and notes, see note to 3 L. ed. U. S. 205.

Conflict of laws as to negotiable paper, see note to 61 L. R. A. 193.

It was an action brought in July, 1835, by Moffat and Curtis against Cook, upon the common money counts. Cook confessed judgment, subject to the opinion of the court upon the following case stated, namely:

In Circuit Court of the United States, Fourth Circuit, District of Maryland.

John L. Moffat and Joseph Curtis, surviving partners of Jonathan Wilmarth, v. William G. Cook.

Statement of Facts. John L. Moffat, Joseph Curtis, and Jonathan Wilmarth (the last of whom is now deceased) were citizens of the State of New York and resident there, and partners trading under the name and firm of Wilmarth, Moffat & Curtis, and the defendant was a citizen and resident of Maryland during the times when the contracts and transactions upon which this suit is founded, or which constitute the causes of this action, were entered into and had and made between the said firm and said Cook.

That the course of dealing was, that Cook, the defendant, used to write to said firm, ordering such articles or goods as he wanted, and they, said firm, sent them to him, and charged 296*] the goods in *their books. In order to settle the account current from time to time, Cook sent to the said firm (usually by mail, sometimes, perhaps, otherwise) his note at six months, and these notes averaged $500 per month, and were punctually paid, for a time, in Baltimore. Cook at length became embarrassed, and wanted extensions, until he stopped payment entirely; being then indebted to said firm, on book accounts,..... $2,104 98

And owing 1 note, due 4th April, 1832, for	500 00
And owing 1 note, due 14th May, 1832, for	500 00
And owing 1 note (do not know exactly when due), ...	416 02
And owing 1 note, due 2d June, 1832, for	500 00
And owing 1 note, due 30th June, 1832, for	500 00
And owing 1 note, due 1st July, 1832, for	800 00
And owing 1 note, due 13th August, 1832, for	500 00
And owing 1 note, due 24th September, 1832, for	500 00
Total debt, ...	$6,321 00

The above notes were remitted by Mr. Cook to said firm previously to March, 1832, when he stopped payment. On the 7th June following, his New York creditors generally agreed to give him time to pay, and the said firm of Wilmarth, Moffat & Curtis, about that time, by arrangement made with Mr. Disosway, Cook's attorney in New York, gave time, and took Cook's three notes, drawn payable to the said firm, for the sums following, all dated 12th May, 1832, as the respective time as follows, viz.:

One, 12 months after date, for.....	$2,107 00
One, 15 months after date, for.....	2,107 00
One, 18 months after date, for.....	2,107 03
	$6,321 03

These notes were drawn and dated at Baltimore, by Cook, and sent by him to his said attorney, at New York, and there delivered by said attorney to the said firm; they were given for the amount of Cook's account, and the notes then had and held by said firm against Cook; the old notes being then given up to his attorney. These three notes and the consideration thereof, namely, the goods sold and delivered as aforesaid, constitute the ground of this action; the amount of the notes being the amount claimed. It is also admitted that said Cook has applied for and obtained the benefit of the insolvent laws of Maryland since such notes fell due.

Edward Hinkley, Attorney for Plaintiffs.
J. Glenn, for Defendant.

Upon the foregoing statement of facts, the plaintiffs pray for a general and unqualified judgment, notwithstanding the release of Cook, since the making of said notes, under the insolvent laws of Maryland; and the plaintiffs rely upon the cases of Ogden v. Saunders, *12 Wheat. 213; Boyle v. Zacharie and [*297 Turner, 6 Peters, 634; Frey v. Kirk, 4 Gill & Johns. 509.

The circumstances of the notes being dated and made at Baltimore, in favor of citizens, at the time, of New York, does not make the contract a Maryland contract, any more than did the acceptance of bills of exchange by Mr. Ogden, in the State of New York, make such acceptance a New York contract, so as to be discharged by Mr. Ogden's release under the insolvent laws of that State.

The evidences of contracts made between citizens of different States cannot bear date in both the States of the respective parties. In the nature of things, and according to the course of business, they would bear date and be signed by one party only, in one of the States; most commonly in the State of the citizenship and residence of the party signing. And it would be immaterial in principle in which of the States it might bear date. It is a contract between citizens of different States at the time when made, and this is the fact and the principle which excludes it from the operation and effect of a release of the debtor under the insolvent laws of his State.

Edward Hinkley, Att'y for Plaintiffs.

1. The defendant's attorney insists that the contract was to be performed in Maryland, and governed by the laws of Maryland, and that the judgment must be to exempt the future acquisitions of the defendant from execution.

2. That at all events the judgment must be so entered as to exempt the defendant's person from arrest. J. Glenn, for Defendant.

Judgment for the Plaintiffs upon the Case stated.

Whereupon, all and singular the premises being seen, heard, and by the court here fully understood, for that it appears to the court that the said John L. Moffat and Joseph Curtis are entitled to recover in the plea aforesaid. Therefore, it is considered by the court here, that the said John L. Moffat and Joseph Curtis recover against the said William G. Cook, as well the sum of twelve thousand dollars, current money, the damages in the declaration of the said John L. Moffat and Joseph Curtis mentioned, as the

sum of seventeen dollars and twenty-five cents adjudged by the court hereunto the said John L. Moffat and Joseph Curtis, on their assent for their costs and charges by them about their suit in this behalf laid out and expended. And the said William G. Cook in mercy, etc.

Memorandum. Judgment rendered in this cause on this 21st day of April, 1836, for the damages laid in the declaration and costs of suit; the said damages to be released on payment of $7,335.57, with interest from 21st day of April, 1836, and cost of suit.

Memorandum. That no execution against the person of the defendant be issued in the above cause on said judgment without the leave of the court.

298*] *To review this judgment the case was brought up to this court.

The cause was argued by Mr. Mayer and Mr. Johnson for the plaintiff in error, and by Mr. Hinkley for the defendants in error.

Mr. Mayer entered into a critical analysis of all the opinions which had been given by this court on the subject of State insolvent laws, from all which he argued, that the philosophy of the law had never been settled; that, in consequence of the want of harmony in those opinions, the whole subject ought to be again reviewed. There was a difficulty in annexing a meaning to some terms in the Constitution which were in themselves uncertain; such, for example, as the phrase, "impairing the obligation of contracts." This expression was supposed to include a prohibition to pass insolvent laws; and yet in Sturges v. Crowninshield, 4 Wheat. 122, it appeared to be conceded that a State might pass such laws, operating only upon its own citizens. It was also admitted, on all hands, that the United States could pass bankrupt laws, which dissolved a contract entirely. Now, if these laws were prohibited on account of their supposed dishonesty, it was unaccountable that a power to extend them over the whole nation should have been conferred upon Congress. Certainly laws do not become less mischievous by becoming more extensive. It would seem as if bankrupt laws were not considered as impairing the obligation of contracts. In the debates of 1787, they were spoken of as mere commercial regulations, like damages upon bills of exchange. Luther Martin says that the prohibition meant to exclude tender laws, and retrospective laws. All nations have bankrupt laws, and it is not surprising that the power to make them was given to Congress, as auxiliary to the general one of regulating commerce. These State laws only stay all judicial proceedings, like statutes of limitation. It will not do to say that statutes of limitation rest on a presumption that the debt has been paid, because where they apply to land there can be no such presumption.

In support of these and similar views he cited Secret Proceedings and Debates of the Convention, Yates' Notes, 70, 71, 246, 247; 3 Madison Papers, 1442, 1443, 1448, 1480, 1549, 1552; Federalist, 80th number; Story's Conflict of Laws, secs. 312, 395, 404, 422, 438.

Mr. Hinkley, for defendants in error:

It is understood that the question raised upon the statement of facts in this case was decided in the case of *Ogden v. Saunders, 12 Wheat.* 213.

It will be contended that the court cannot, consistently with law and the Constitution of the United States, give an effect to State insolvent laws greater or more extensive than that given by the decision in that case.

*The Constitution is to be construed [*299 with reference to its general as well as to its particular intents.

The general government emanates from the people, and its powers are to be exercised directly upon them and for their benefit. McCulloch v. Maryland, 4 Wheat. 316; Cohens v. Virginia, 6 Ibid. 413.

Moreover, the Constitution is an agreement or compact between each individual of the people and all the rest, as well as between each one of the States and all the others.

The States, as to their sovereign and exclusive powers, are foreign to each other, as well as to the federal government. Woodhull et al. v. Wagner, Bald. C. C. Rep. 296.

It is said there is great obscurity in the clause of the Constitution (art. 1, sec. 10) which declares, among other things, that "no State shall pass any law impairing the obligation of contracts." But if we construe the language as it stands, it is clear, that, forming what logicians call a universal negative proposition, and being absolute and imperative.

1. It excludes every kind and degree of what it prohibits, whatever that be. This has been seen by the court. Sturges v. Crowninshield, 4 Wheat. 122; Green v. Biddle, 8 Ibid. 84.

2. Consequently it excludes every cause, mode and manner, by which the thing prohibited may be affected. Hence it is immaterial what may be the title, provisions, or professed object of a State law, if, in its effect, it impair the obligation of a contract in the sense of the Constitution.

3. It may be admitted, that, in the absence of any bankrupt law of Congress, the States may pass insolvent or bankrupt laws, provided their effect be not extended to impair the obligation of contracts. The power granted to Congress by the Constitution, art. 1, sec. 8, "to establish uniform laws on the subject of bankruptcies throughout the United States," is permissive, not imperative. The decisions which are in accordance with this construction need not be disturbed, however difficult it may be to reconcile the exercise of the power by the States with the prohibitory clause in relation to impairing the obligation of contracts. Perhaps it can only be done in the manner in which it has been done by the decision of Justice Johnson in the case of Ogden v. Saunders, by allowing the States to legislate for their own citizens in matters exclusively within the jurisdiction of their own courts, but not for citizens of other States who have a right to the jurisdiction of the courts of the United States. The justice, policy, or humanity of insolvent or bankrupt laws is not so much a question for the courts as for the Legislatures. If the State Legislatures can constitutionally pass such laws, their own courts may be bound to administer them to all suitors within their jurisdiction. See Babcock v. Weston, 1 Gallis, C. C. R. 168.

4. A creditor may waive his constitutional rights. Consensus *vincit legem. What [*300 acts may amount to a waiver it is for the court to determine. It has been decided, that re-

ceiving a dividend under the insolvent law of a State is evidence of a waiver. Clay v. Smith, 3 Pet. 411. Making himself a party to the proceedings under a State insolvent law in other ways may have the same effect. Bald. C. C. R. 299; Buckner v. Finley, 2 Pet. 586. But a citizen of one State, by simply becoming a party to a commercial contract with a citizen of another State, does not waive any right under the Constitution of the United States. This point is involved in the question put for decision by Justice Johnson in the case of Ogden v. Saunders, 12 Wheat. 358. If, indeed, this were construed to be a waiver, it would in effect take away the jurisdiction of the courts of the United States. What now is the meaning of the phrase "impairing the obligation of a contract?"

The word "contract" is an artificial term of very extensive signification. It is collective and generic, embracing a great number of individuals, but comprehending only the essential properties of each. It may be defined an agreement, not prohibited by law, between two parties at the least, whereby each, for a sufficient consideration, promises or undertakes to do or not to do something. What one promises or gives is ordinarily the consideration for what the other promises or gives. There is a duty imposed on each party by the laws of God and by the laws of man, in civil society, to perform what is stipulated in the contract on his part to be performed. This is the obligation of the contract.

There may be, and usually are, two obligations in a contract, one appertaining to each party. When one party has fulfilled his obligation, there remains only the obligation of the other party. Although the contract include a moral as well as a legal obligation, yet the legal obligation only is intended in the Constitution. The moral obligation acts upon the conscience, understanding, the free will of man, and cannot be enforced by human laws or courts of justice. It may die and revive again. It may remain and be the consideration of a new promise after the legal obligation is released by law. According to Webster, the 'impair' is of French derivation, and signifies to make worse, to lessen the value of.

With reference to the Constitution of the United States the term "contracts" must embrace all subjects to which the judicial powers extend, whether of common law, equity, or admiralty and maritime jurisdiction.

The contract in question is one of common law jurisdiction, and must be adjudicated with reference to the rules of this jurisdiction. There are three sources of law, to one or more of which the court may look for rules to guide. They are distinguished as lex rei sitæ, lex loci contractus, and lex fori. Much depends upon a correct understanding and applicability of these laws, in any given case, as to the results to which the court may be led.

301*] *If the subject of the contract be land, the lex rei sitæ takes precedence, and the place of the contract, or the citizenship or domicil of the parties, is immaterial. All rights and titles in the subject must be governed by *the law of the* State in which it is situate. And *the decisions of the courts of the* State will be *respected as to what the law* is. Bronson v. Kinzie, 1 How. 316. The lex loci contractus is said in general to govern in determining the nature, validity, and interpretation of contracts. Story's Conflict of Laws, sec. 241; The Bank of the United States v. Donally, 8 Pet. 361. And sometimes the law of the place where the contract is to be performed is said to govern.

There is a nice discrimination to be made by courts in regard to the source of the law, as well as to the nature of the law, which ought to govern them.

As to the contract now under consideration, we are furnished with no law, either of New York or of Maryland, in regard to its nature, validity, or interpretation. If not prohibited it is not to be adjudged by their laws. The right of the parties to enter into the contract was not granted by either of those States. It is a right of personal liberty which was conquered by our fathers, and was inherent in the people when the State governments were formed, as well as when the general government was established. The States of the contract were silent as to the laws of the contract, and therefore the law of the former must govern it. Indeed, what is intended by the lex loci contractus would seem to be, not the territorial law, but the law of the government under whose jurisdiction the parties are, in reference to the contract. If the territorial law is silent, and the citizenship of the parties gives them a right to resort to an independent forum, the law of this forum will be the law of the contract.

Jurisdiction given in consideration of personal attributes or qualifications is not always controlled or lost by temporary domicil within the territorial surface or sphere of a subordinate jurisdiction. And this appears to have been the law of the Roman empire in the first century. For, when St. Paul was accused before Festus at Cæsarea, being a Roman citizen, he appealed to Cæsar, and his appeal was allowed. And afterwards, when Agrippa had heard his noble defense, he told Festus that he found nothing in the man worthy of death or of bonds, and that he might have been set at liberty, if he had not appealed to Cæsar. After the appeal, neither the governor not the king could decide the cause. The jurisdiction was gone. And Paul was sent a prisoner to Rome.

Residence of aliens within a State of the Union constitutes no objection to the jurisdiction of the federal court. Breedlove et al. v. Nicolet et al. 7 Pet. 413.

The constitutional right of a citizen to sue in the circuit courts of the United States does not permit an act of insolvency, executed under *the authority of a State, to be a bar [*302 against a recovery upon a contract made in another State. Suydam et al. v. Broadnax, 14 Pet. 67. This case decides to what extent the jurisdiction of the United States will prevail over that of the States, and how far the laws of the States can interfere with the remedies afforded by the courts of the United States.

Neither the statutes of the States nor decisions of the State courts apply to questions arising in a court of the United States upon contracts of a commercial nature. Swift v. Tyson, 16 Peters, 1; Amis v. Smith, 16 Ibid. 303. This court, then, is not to be restrained by any State law in passing judgment upon the contract in question.

To revert to the consideration of the obligation of the contract, what does it require the court to do? What judgment to pronounce? I have said it is the duty imposed upon the party to perform what he has stipulated. It is argued on the other side, that the creditor ought to submit to the insolvent law of the State of which the debtor was a citizen when the contract was made, as he must have contemplated the possibility that the debtor would avail himself of this law. But before insolvency happens, the expectation of the creditor, and of the debtor, too, if he is honest, is, that the debt will be paid without default. It is not probable that the remedy is in the contemplation of the parties. It is not strictly a part of the contract. It is a legal right arising after breach or default, secured by the constitutions and the laws. It is not necessary to be contemplated at the time when the contract is made, in order to be appropriated after the contract is broken. It may be resorted to when there is occasion for its use. And as between the remedy afforded by the State and that by the United States, the latter may be esteemed superior and preferable, and as the creditor has the right of election, it may be presumed, that if he contemplated any remedy at the time of entering into the contract, it was that which he has elected. It is in accordance with the rule of the common law, that of two concurrent jurisdictions a party may elect the superior one. The court are now to render judgment. The obligation of the debtor as a party to the contract is clearly seen and admitted. It is to pay a certain sum in gold or silver coin. But the State, by her act, interposes a release of the debtor, against the will of the creditor, and would thereby bar a judgment corresponding with the debtor's obligation. Does not the Constitution mean, by the obligation of a contract, the obligation entire and full, and in all the integrity and with all the value that was given to it by the terms of the contract? We answer in the affirmative. For if the court gave judgment for the value of the obligation after the State law has acted on it, and after the release shall have been applied, then it suffers exactly what is prohibited by the Constitution. It suffers the law to impair the obligation. And so every obligation might be impaired to any ex-
302*] tent, or wholly *destroyed. The judgment is a record of the obligation, or more exactly of the duty which the Constitution and the law imposes upon the debtor in order that he discharge his obligation.

It would appear, therefore, that in cases in which a court of common law of the United States has jurisdiction over a commercial contract, valid by the law of the State or States where made, a State insolvent law cannot be applied to impair the obligation of the contract in suit. That the forum has law of its own, and that this is the law to be administered, in order to determine and adjudge what is the obligation of the contract.

It has been said, that, by reason of the doubts in regard to the meaning of the Constitution upon this question, resort must be had to external evidence, to the history of the times prior to the formation of the Constitution, and to the debates of the convention had upon that instrument. *In the view we have taken, there*

12 L. ed.

does not appear to be any obscurity in the phrase, "impairing the obligation of contracts." And, unless there is obscurity or latent ambiguity, it is a rule that you cannot go out of the instrument for explanation. And it is a well settled rule of evidence, that what may have passed pending negotiations for a contract does not form a part of the contract finally agreed upon and deliberately executed. And this rule applies with great force to an instrument of so grave and solemn a character as the Constitution of the United States.

But the debates do not seem to furnish anything that militates with the construction which we have given to the phrase in question. It is said that they furnish evidence that none but retrospective laws were intended to be prohibited. At page 1443 of Volume III. of the Madison papers, it is found that "Mr. King moved to add, in the words used in the ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts." Upon which there was debate, which see; Mr. Morris and Colonel Mason being against, and Mr. Sherman, Mr. Wilson, and Mr. Madison in favor of the motion. And at page 1444, Mr. Wilson stated, "The answer to these objections is, that retrospective interferences only are to be prohibited." Whereupon, "Mr. Rutledge moved, instead of Mr. King's motion, to insert, 'nor pass bills of attainder, nor retrospective laws;'"[1] upon which seven States voted in the affirmative and three in the negative. At page 1450, Mr. Dickinson mentioned that ex post facto related to criminal cases only; that some further provision was necessary to restrain the States from retrospective laws in civil cases. At page 1552, we find the words "altering" or "impairing" the obligations of contracts introduced into the tenth section of art. 1. At page 1581, we find the first clause of art. 1, sec. 10, altered so as to read as it now stands in *the Constitution. And there [*304 does not appear to have been any debate upon this section in this form.

It is stated that Mr. Gerry entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, and alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded.

Now, it is a sufficient answer to all that may be inferred from the remark of Mr. Wilson, or any other member of the convention, that the phrase "retrospective laws" was not finally adopted, although it appears to have been suggested. And in the absence of all debate or explanation of the phrase, "or law impairing the obligation of contracts, we are left to construe it according to its plain meaning. It is said that it could not be meant to restrain the States from passing bankrupt or insolvent laws, which the framers of the Constitution must have approved, inasmuch as they gave Congress power to pass a uniform law upon the subject of bankruptcies throughout the States. But if the States were qualified to pass acceptable laws on this subject, what need was

1.—In a note it is said that in the printed journal this was "ex post facto." If the debates were upon this phrase, there is no inference to be made as to the meaning of terms in question.

there of a law of Congress? The inference is the rather, that, while it admitted the power of States to pass such laws, that either the character or effect of them was objectionable.

It is admitted that retrospective laws were intended to be prohibited, as impairing the obligation of contracts. But insolvent and bankrupt laws are usually retrospective; therefore they could not have been intended to be wholly excluded from the prohibition.

The fair meaning of the clause, as to impairing the obligation of contracts, is, that the prohibition or restraint was laid upon the States, and took effect from the moment the Constitution was adopted, so that it was not afterwards competent for any State to pass any law which might have the effect to impair the obligation of any contract to be thereafter made.

As to the distinction between the right and the remedy, it is proper when used to distinguish what is stipulated in the contract, supposing it to be performed without breach, and what the law will compel the delinquent party to do in consequence of his failure to do what he has stipulated. But the remedy is the fruit of the contract, and it is the whole value of the obligation of the delinquent party. This obligation continues as an obligation of the contract at the time of the judgment, and afterwards until satisfaction, or until the judgment dies by lapse of time.

It is difficult to decide in every case how far the remedy may be modified without impairing the obligation. The remedy is given by the United States, although it be adopted from the laws and practice of the States respectively. The only general rule seems to be to distinguish between form and substance. The remedy cannot be wholly taken away, nor essen-
305*] tially impaired. See Green v. Biddle, *8 Wheat. 1-75; Bronson v. Kinzie, 1 How. 316; McCracken v. Hayward, 2 Ibid. 608.

It may be difficult, in strict reasoning, to prove that imprisonment is only a form of remedy. But as gold or silver is the only thing that can constitutionally satisfy the debt, and as an incarcerated body cannot be sold or put into slavery, it seems to be no direct remedy at all, and as a punishment it is unjust against an honest man.

Upon the whole, the judgment ought to be affirmed, and the decisions rest undisturbed.

Mr. R. Johnson, for the plaintiff in error, in reply to Mr. Hinkley, divided the subject into the four following heads:

1. What points have been decided by this court.

2. How far the points decided bear upon the present case.

3. Under all the circumstances of the opin ions given, whether it is not justifiable and proper to look into those opinions.

4. That the law of the case was with the plaintiff in error.

The debtor was a citizen of Maryland at the time of contracting the debt, and at the time of his discharge. Anterior to the Revolution, the State had bankrupt laws which discharged the debt, as well as the person of the debtor. Act of 1774. After the Revolution, special *acts were passed* from time to time, all of *which discharged the debts themselves.* In 1805, *a general system was established,* more extensive than that of 1774. From 1805 to the time when this court decided the case of Sturges v. Crowninshield, no doubt existed of the constitutionality of these laws, either as respecting debts or debtors. The bankrupt law of the United States passed in 1800 recognized State laws. The decision in Sturges v. Crowninshield took the States and the profession by surprise. It was a matter of astonishment that up to that time the States had all been wrong. But this surprise was lessened when the case came to be discussed afterwards by the bench as well as the bar, in Ogden v. Saunders. [Mr. Johnson here went into a minute examination of the opinions of the judges in that and subsequent cases.]

The doctrine cannot be correct, that Maryland law means one thing when applied to her own citizens, and another thing when applied to other persons. The Constitution of the United States is obligatory within a State itself, as well as between citizens of different States. The protection which it extends over all extends to persons in the same State, and if such protection prevents the claims of a foreign creditor from being destroyed by an insolvent law, it must equally secure the claims of a domestic creditor. The result will be, that such laws must be entirely swept away, even as regards the internal concerns of a State; in which her own citizens alone have an interest. But this conclusion is not likely to be *adopted. [*306 The power of a State to pass such laws is not denied. 4 Wheat. 136; 12 Ibid. 277.

Contemporaneous construction has acquiesced in this power. The Federalist does not deny it. State judiciaries acted on it. No convention where the Constitution was discussed ever thought it an objection that this power was taken away from the States. Millions have been distributed by its exercise. As an attribute of sovereignty, a government cannot get along without it. Such laws are known to all the globe where commerce is known. The hazards of life and business make it certain that some men must be ruined. At first, these laws were passed solely for the benefit of the creditors, and bankrupts were punished as guilty. But a more benign spirit at length taught that men might become poor and bankrupt from misfortune as well as crime. The framers of the Constitution did not hold it to be immoral to discharge debtors, because they gave the power of doing so to the United States. The forty-second number of the Federalist says, that the expediency of such a power is not likely to be drawn into question. Can the Constitution be made to say that State laws are unjust, and that the same laws by the United States are not unjust? Or does it rather mean, that under the operation of State laws a sufficient amount of good could not be obtained? State laws cease with their limits. A debtor might be free within his own State, but not beyond it. Giving all possible effect to the Maryland insolvent laws within her limits, yet if a bankrupt debtor went beyond, he was unprotected; and the Constitution must have intended to supply this deficiency, by giving to Congress power to pass a law which should protect him everywhere. But there is nothing in this hostile to State insolvent laws. On the contrary, it is recognizing them and extending their beneficial influence.

The objection is, that there is no uniform system; not that the whole system should be broken up and destroyed. There are higher moral obligations than those of debtor and creditor. It is the duty of a man to live for the happiness of his parent or child, and a wise government will place no insuperable barrier in his way to debar him from fulfilling these duties. Upon this ground, and under the power of a State to control remedies at law, tools, etc., are exempted from surrender. But upon the theory of the opposite counsel, this humane provision must be swept off, because he says the law of a contract is to pay to the uttermost farthing. But the laws of humanity will not permit such utter ruin, nor did the Constitution intend it. The forty-fourth number of the Federalist, page 192, by Mr. Madison, says, that bills of attainder and ex post facto laws are contrary to the principles of the social compact everywhere, and therefore the power to pass them is denied. But if bankrupt laws had been considered as falling within this category, would the power to pass them have been expressly given to the United States?

307*] *Mr. Justice Grier delivered the opinion of the court:

This case came before us by a writ of error to the Circuit Court of the United States for the Maryland District.

Moffat & Curtis, merchants in New York, sold goods to Cook, who resided in Baltimore. On a settlement of their accounts, Cook transmitted his notes to his attorney in New York, who delivered them to the defendants in error. After the notes fell due, Cook applied for and obtained the benefit of the insolvent laws of Maryland. By these laws the debtor, on surrender of his property, is discharged not only from imprisonment, but from his previous debts.

On the trial of this case in the Circuit Court, the plaintiff in error pleaded this discharge, insisting "that the contract was to be performed in Maryland, and governed by the laws of Maryland in existence at the time it was made; and that, therefore, his discharge under her laws was a good defense to the action." The Circuit Court gave judgment for the plaintiffs, and the defendant prosecuted this writ of error.

That the contract declared on in this case was to be performed in Maryland, and governed by her laws, is a position which cannot be successfully maintained, and was, therefore, very properly abandoned on the argument here. For, although the notes purport to have been made at Baltimore, they were delivered in New York, in payment of goods purchased there, and of course were payable there and governed by the laws of that place. See Boyle v. Zacharie & Turner, 6 Peters, 635; Story's Confl. of Laws, sec. 287.

The only question, then, to be decided at present, is, whether the bankrupt law of Maryland can operate to discharge the plaintiff in error from a contract made by him in New York, with citizens of that State.

In support of the affirmation of this proposition, it has been contended—

1st. "That the State of Maryland having power to enact a bankrupt law, it follows as a necessary consequence *that such law must control the decisions of her own forums.*"

2d. "That the courts of the United States are as much bound to administer the laws of each State as its own courts."

It has also been contended that the case of Ogden v. Saunders, while it admits the first proposition, denies the second, and that this court ought to reconsider the whole subject, and establish it on principles more consistent.

But we are of opinion that the case of Ogden v. Saunders is not subject to the imputation of establishing such an anomalous doctrine, although such an inference might be drawn from some remarks of the learned judge who delivered the opinion of the court in that case; the question, whether a State court would be justifiable in giving effect to a bankrupt discharge which the courts of the United States *would declare invalid, was not before [*308 the court, and was therefore not decided. Nor has such a decision ever been made by this court.

The Constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States. When this court has declared State legislation to be in conflict with the Constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision. A bankrupt law which comes within this category cannot be pleaded as a discharge, even in the forums of the State which enacted it.

It is true, that as between the several States of this Union, their respective bankrupt laws, like those of foreign states, can have no effect in any forum beyond their respective limits, unless by comity. But it is not a necessary consequence that State courts can treat this subject as if the States were wholly foreign to each other, and inflict her bankrupt laws on contracts and persons not within her limits.

It is because the States are not foreign to each other in every respect, and because of the restraint on their powers of legislation on the subject of contracts, and the conflict of rights arising from the peculiar relations which our citizens bear to each other, as members of a common government, and yet citizens of independent States, that doctrines have been established on this subject apparently inconsistent and anomalous.

Accordingly, we find that when, in the case of Sturges v. Crowninshield, this court decided "that a State has authority to pass a bankrupt law, provided there be no act of Congress in force to establish an uniform system of bankruptcy," it was nevertheless considered to be subject to the further condition, "that such law should not impair the obligation of contracts within the meaning of the Constitution of the United States, art. 1, sec. 10."

It followed, as a corollary from this modification and restraint of the power of the State to pass such laws, that they could have no effect on contracts made before their enactment, or beyond their territory. Hence, at the same term, the court unanimously decided, in the case of McMillan v. McNeil, that a contract made in South Carolina was not affected by a bankrupt discharge in Louisiana, under a law made antecedently to the contract, although the suit was brought in the Circuit Court of the United States for Louisiana. That case was

precisely similar in all respects to the one before us.

In the Mechanics' Bank v. Smith, a discharge under a Pennsylvania bankrupt law was held not to affect a contract between citizens of that State, made previous to the passage of the law.

Next followed the case of Ogden v. Saunders, which has been made the subject of so much criticism. In that case, Saunders, a citizen of New York, drew bills on Ogden in New York, 309*] which *were accepted and protested there. Ogden was afterwards discharged under the insolvent laws of New York, passed previous to the contract of acceptance, and pleaded this discharge to an action brought against him in the District Court for Louisiana. A majority of the court there decided—

1st. "That a bankrupt or insolvent law of any State, which discharges the person of the debtor and his future acquisitions, is not a law impairing the obligation of contracts, so far as it respects debts subsequent to the passage of such law."

2d. "That a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State."

We do not deem it necessary, on the present occasion, either to vindicate the consistency of the propositions ruled in that case with the reasons on which it appears to have been founded, or to discuss anew the many vexed questions mooted therein, and on which the court were so much divided. It may be remarked, however, that the members of the court who were in the minority in the final decision of it fully assented to the correctness of the decision of McMillan v. McNeil, which rules the present case.

The case of Boyle v. Zacharie, 6 Peters, 635, is also precisely parallel with the present. The contract declared on was made in New Orleans; the defendant resided in Baltimore, and, on suit brought in the Circuit Court for Maryland, pleaded his discharge under the Maryland insolvent laws, and his plea was overruled.

So far, then, as respects the point now before us, this court appear to have always been unanimous; and in order to meet the views of the learned counsel for the plaintiff in error, we should be compelled to overrule every case heretofore decided on this most difficult and intricate subject. But as the questions involved in it have already received the most ample investigation by the most eminent and profound jurists, both of the bar and the bench, it may be well doubted whether further discussion will shed more light, or produce a more satisfactory or unanimous decision.

So far, at least, as the present case is concerned, the court do not think it necessary or prudent to depart from the safe maxim of stare decisis.

The judgment of the Circuit Court is therefore affirmed.

Mr. Chief Justice Taney:

I gave the judgment in this case in the Fourth Circuit, because, sitting in an inferior tribunal, I felt myself bound to follow the decisions of *this court, although* I could not assent to the *correctness of the reasoning upon* which they *are founded. And I acquiesce* in the judgment now given, since a majority of the justices have determined not to consider the question upon the operation of the insolvent laws of the States as altogether an open one; and undoubtedly, according to the decisions heretofore given, the judgment of *the Cir- [*310 cuit Court ought to be affirmed. But, in my opinion, these decisions are not in harmony with some of the principles adopted and sanctioned by this court, and therefore ought not to be followed.

The opinion delivered by Judge Johnson in the case of Ogden v. Saunders was afterwards concurred in and adopted by a majority of the court in the case of Boyle v. Zacharie & Turner, 6 Peters, 643. And the subject has not since been brought to the attention of this court until the case now under consideration came before it.

The opinion of Judge Johnson is stated by him in the following words:

"The propositions which I have endeavored to maintain, in the opinion which I have delivered, are these:

"1. That the power given to the United States to pass bankrupt laws is not exclusive.

"2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, multo fortiori of posterior contracts.

"3. But when in the exercise of that power the States pass beyond their own limits, and act upon the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States."

And afterwards, in delivering the opinion of the court in the case of Boyle v. Zacharie & Turner, Mr. Justice Story says: "The ultimate opinion delivered by Mr. Justice Johnson in the case of Ogden v. Saunders, 12 Wheat. 213, 358, was concurred in and adopted by three judges who were in the minority upon the general question of the constitutionality of State insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the three other judges who concurred in the judgment. So far, then, as decisions upon the subject of State insolvent laws have been made by this court, they are to be deemed final and conclusive."

To the first two propositions maintained in the opinion of Judge Johnson, thus sanctioned and adopted, I entirely assent. But when the two clauses in the Constitution therein referred to are held to be no restriction, express or implied, upon the power of the States to pass bankrupt laws, I cannot see how such laws can be regarded as a violation of the Constitution of the United States upon the grounds stated in the third proposition. For bankrupt laws, in the nature of things, can have no force or operation beyond the limits of the State or nation by which they are passed, except by the comity of other States or nations. And it is difficult, *therefore, to perceive how [*311 the bankrupt law of a State can be incompati-

ble with the rights of other States, or come into collision with the judicial powers granted to the general government. According to established principles of jurisprudence, such laws have always been held valid and binding within the territorial limits of the State by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation; and they have never been considered, on that account, as an infringement upon the rights of other nations or their citizens. But beyond the limits of the State they have no force, except such as may be given to them by comity. If, therefore, a State may pass a bankrupt law in the fair and ordinary exercise of such a power, it would seem to follow, that it would be valid and binding, not only upon the courts of the State, but also upon the courts of the United States when sitting in the State, and administering justice according to its laws; and that in the tribunals of other States it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other. But how far this comity should be extended would be exclusively a question for each State to decide for itself, by its own proper tribunals; and there is no clause in the Constitution which authorizes the courts of the United States to control or direct them in this particular. It would be a very unsafe mode of construing the Constitution of the United States, to infer such a power in the tribunals of the general government, merely from the general frame of the government and the grant to it of judicial power.

I propose, however, merely to state my opinion, not to argue the question. For since the year 1819, when the validity of these State laws was first brought into question in this court, so much discussion has taken place, and such conflicting opinions have been continually found to exist, that I cannot hope that any useful result will be attained by further argument here. I content myself, therefore, with thus briefly stating the principles by which I think the question ought to be decided, and referring to Story's Conflict of Laws, edit. of 1841, sec. 335, and several of the sections immediately following, where the decisions in foreign courts of justice, as well as in our own, upon this subject, are collected together and arranged, and commented on with the usual learning and ability of that distinguished jurist.

Mr. Justice McLean:

I assent to the affirmation of the judgment of the Circuit Court. How an act which impairs the obligations of contracts can be considered constitutional as regards subsequent contracts, and not prior ones, is not within my comprehension. The notion that such a law becomes a part of the contract is in my judgment fallacious. Whatever constitutes a part of the contract is inseparably connected with 312*] *and governs it, wherever it may be enforced. All other forms and modes of proceeding, which affect the contract, belong to the remedy.

An unconstitutional law has the same and no greater effect on subsequent than on prior contracts. *If a State can, in the mode supposed,* disregard the inhibitions of the federal Constitution, there is no limit to the exercise of its powers. It has only to pass an act, however repugnant to the Constitution, and, according to the doctrine advanced, it operates as a law upon all subsequent transactions by a presumed assent to its validity. This principle, if carried out, would effectually subvert all restriction on the exercise of State powers in the federal Constitution.

Mr. Justice Daniel:

In the decision just pronounced, so far as it affirms the judgment of the Circuit Court, I readily concur. I concur, too, in the opinion of the majority of the court, so far as it maintains the position that the contracts sued upon in this case, being essentially New York contracts, could not be discharged by the insolvent laws of Maryland. But to any and every extent to which it may have been intended to assume that these contracts, if properly Maryland contracts—that is, if they had been made in Maryland. and designed to have been there performed—should not have been discharged by the insolvent laws of that State, enacted and in force prior to the contracts themselves, I am constrained to express my entire dissent. I hold it to be invariably just, that the law of the place where a contract is made, or at which it is to be performed, enters essentially into and becomes a part of such contract; and should govern its construction, whenever a departure from that law is not so stipulated as to establish a different rule by the contract itself. This principle of interpretation I deem to be in accordance with the doctrine of the writers upon the comity of nations, as we find it extensively collated by the late Justice Story in his learned researches upon the Conflict of Laws. This rule, moreover, I hold to be in no wise in conflict with the eighth section of the first article of the Constitution of the United States, conferring upon Congress the power to establish uniform laws on the subject of bankruptcy; nor with the tenth section of the same article, which prohibits to the States the power of enacting laws impairing the obligation of contracts. On the contrary, it recognizes in the federal government, and in the governments of the States, the correct and complete distribution of powers assigned to them respectively by the Constitution.

By a reasonable rule of interpretation, and by repeated adjudications of this court, it is held, that the mere investiture of Congress with the power to pass laws on the subject of bankruptcy would not, ipso facto, devest such a power out of the States. The withdrawing of the power from the States would be dependent upon *an actual exercise by Congress [*313 of the power conferred by the Constitution, and upon the incompatibility between the modes and extent of its exercise with an exertion of authority on the same subject by the States. The mere grant of power to Congress, whilst that power remained dormant, would leave the States in possession of whatever authority appertained to them at the period of the adoption of the Constitution. These conclusions are in entire harmony with the decisions of this court in the case of Sturges v. Crowinshield; in that of Ogden v. Saunders, so far as the lat-

ter has been comprehended; for whilst it would be presumptuous not to ascribe any perplexity in this respect rather to my own infirmity than to a defect in the work of much wiser men, I must be permitted to say, that I have great difficulty in reconciling the case of Ogden v. Saunders with other decisions of this court, or in reconciling it even with itself. These conclusions, too, are in accordance with the very perspicuous opinions of Justices Washington and Thompson in the case last mentioned, and with the opinion of Justice Story in that of Houston v. Moore. Yet, if it be asked whether the States can now enact bankrupt laws within the sense and meaning of the power granted to Congress, I answer that they cannot. This reply, however, is by no means a deduction from the terms of the grant to Congress, as expressed in the eighth section of the first article of the Constitution. That provision, I maintain, for aught that its language imports, leaves the States precisely where it found them, except so far as they might be affected by an actual exercise of authority by Congress. The States were found in the habitual practice of bankrupt systems; and as long as they should not be controlled in that practice, by the action of Congress, they would have remained in possession of the right to continue their familiar practice, so far as the mere language of the eighth section of the first article of the Constitution would affect them. But the Constitution has proceeded beyond the potential restriction of the section just mentioned, and in so doing has abridged the power it found in practice in the States. It has, in section tenth of the same article, declared that no State shall have power to pass any "law impairing the obligation of contracts;" and in this inhibition, as I hold, is to be found the true limit upon the power of passing bankrupt laws, previously exercised by the States. Bankrupt laws, as understood at the time of adopting the Constitution, and at all other periods of time, have been interpreted to mean laws which discharge or annihilate the contract itself, with all its obligations; and if the Constitution had stopped short at providing for a discretionary power in Congress to enact such laws, and should have omitted any restraint upon the States, having found the latter exerting the power of passing bankrupt laws, it would have left them, by the mere fact of this omission, still with the power, by retroactive legislation, of dissolving and abrogating contracts. By 314*] connecting the *power given to Congress to pass bankrupt laws with the inhibition upon the States contained in the tenth section of the first article, all power in the latter to enact bankrupt laws as laws operating upon contracts previously existing has been taken away. But a power to discharge a contract made under a system of laws established and known to all, as public laws are inferred and indeed are necessarily admitted to be—laws which may permit, nay, which under certain circumstances may command, such discharge —presents a wholly different aspect of things —one implying no bankrupt power, no power that is retroactive, and incompatible with either *the legal or moral obligations* involved in the *contract; an aspect of things*, which, so far from authorizing an infringement, insists upon a fulfillment, of the contract, an exact compliance with its true obligations. To prevent this, then, would be to impair the obligations of the contract, to set up some new and retroactive rule for its interpretation, and thereby to inflict a wrong on a portion, if not on all, of the contracting parties.

To carry into effect the obligations of parties is the perfect right of communities of which those parties are members, and within which their obligations are made, and within which it may have been stipulated that they should be fulfilled; the enforcement of obligations, when intended to be performed according to the laws of other communities, constitutes a right and a duty recognized by the comity existing amongst all civilized governments. The case under consideration being one of a contract, which, though made in Maryland, was to be performed in the State of New York, the Circuit Court decided very properly that it could not be discharged by the insolvent laws of Maryland. But to prevent a misapprehension of the grounds on which this decision of the Circuit Court is approved, by myself, at least, and that, by assenting to that judgment, I may not hereafter be considered as concluded from an application of what is deemed the correct principle, when a case proper for its application may arise, the aforegoing explanation has been deemed proper.

Mr. Justice Woodbury:

The judgment which has just been pronounced meets with my concurrence; but I have the misfortune to differ as to some of the views that have been expressed in rendering it.

As a matter of fact, the merchandise which is set out as the ground of action in the declaration in this case was sold in New York, by a citizen resident and doing business there, and the note given for it and offered in evidence was delivered to him there. Consequently, in point of law, the contract must be deemed a foreign one, or, in common parlance, a New York, and not a Maryland, contract. 6 Peters, 644; 3 Wheat. 101, 140; 3 Met. 207; 3 Johns. Ch. 587.

*The lex loci contractus, which must [*315 govern its construction and obligations, is therefore the law of New York, unless on its face the contract was to be performed elsewhere. This is the rule in almost every country which possesses any civilized jurisprudence. 16 Johns. 233; 3 Caines, 154; Story on Bills of Exchange, secs. 146, 158, 168; 2 Barn. & Ald. 301; 1 Barn. & Cress. 16; Story's Conflict of Laws, secs. 272-329; 5 Clark & Fin. 1-13; 13 Mass. 1; 6 Cranch, 221; 6 Peters, 172; 7 Ibid, 435; 8 Ibid. 361; 13 Ibid. 65; Peters's C. C. 302; 4 Dall. 325; Baldwin's C. C. 130, 537; 2 Mason's C. C. 151; see more cases, in Towne v. Smith, 1 Wood. & M. 115.

As a question, then, of international law, without reference to any constitutional question, such a contract and its obligations cannot be affected by the legislation of bankrupt systems of other States. It is understood that the whole court concur in the opinion, that this reasoning and these decisions would be sufficient to dispose of the present case without going into other questionable matters; and, accordingly,

no expression of approbation or disapprobation of former decisions in this tribunal, concerning bankrupt discharges, seems to have been necessary on this occasion.

But as the majority of the court have deemed it proper to express some opinions upon them, it devolves on me the necessity of stating very briefly and very generally two or three of my own in relation to this subject, which in some respects do not accord with those of the majority.

What has been and what has not been decided heretofore in respect to the operation of insolvent and bankrupt discharges, in the various cases which have come before this court, it is somewhat difficult to eviscerate, amidst so many conflicting and diversified views among its judges. But without going into an analysis of them now, and without stating in detail how far my individual opinions coincide or differ with what is supposed to have been adjudicated in each case, I would say, that, independent of any binding precedents, the true rules on this subject seem to me to be these:

1. That the States possess a constitutional right to pass laws, whether called insolvent or bankrupt, discharging contracts subsequently made, provided no concurrent legislation by Congress exists at the same time on the subject, and that such laws cannot be considered as impairing the obligation of contracts, which are made under and subject to them, and when Congress is expressly empowered by the Constitution to pass similar laws. 12 Wheat. 23; Bronson v. Kinzie et al. 1 Howard, 311; 2 Ibid. 612.

2. That such laws are to be regarded as if a part of the subsequent contract, incorporated into it; and hence, that the contract, being construed according to the lex loci contractus, should be discharged by a certificate of bankruptcy given to the obligor in the State where the contract was made and was to be performed. 316*] *And this whether the action on it is brought in that State or another, or in the courts of the United States or those of the States, and whether the obligee reside in that State or elsewhere. Considered as a part of the contract itself, it is inseparable from it, and follows it into all hands and all places. 5 Mass. R. 509; 13 Ibid. 4; 13 Pick. 60; 3 Burge's Col. & For. Laws, 876; 3 Story's Conflict of Laws, secs. 281-284; 2 Kent's Com. 390; 2 Mason's C. C. 175; Towne et al. v. Smith, 1 Wood. & M. 115. And though in other States and in other forums it may be a matter of comity merely, in one sense of the word, to respect and enforce foreign contracts and their obligations, yet courts will always do it as right whenever the contracts are valid at home, and not immoral or against public policy elsewhere. 1 Dall. 229; 3 Ibid. 369; Story's Confl. of Laws, secs. 331-335; 3 Burge's Col. & For. Laws, 876, 925; 2 Kent's Com. 392; 4 D. & E. 182; 5 East, 124; 2 Hen. Bl. 553; 1 Knapp's P. C. 265; Adams v. Storey, Paine's C. C. 79.

3. That the ancient State insolvent laws, which were often called here "poor debtor's acts," and in England "lord's acts," and usually discharged only the body from imprisonment, instead of the contract (2 Tidd's Practice, 978; 6 D. & E. 366), were and still are constitutional, whether they apply to future or past contracts. Because they do not interfere at all with the debt due, the contract itself or its obligations, but merely the remedy on it, or the form of legal process, and thus they should govern in that respect no foreign forums, but merely its own courts, as the local and territorial tribunals who issue the precept or process. 4 Wheat. 112, 122, 209; 6 Ibid. 131; 12 Ibid. 213, 272; 2 Kent's Com. 392; Adams v. Storey, Paine's C. C. 79; Campbell et al. v. Claudius, Peters's C. C. 484; 4 Wash. C. C. 424.

Without feeling justified on this occasion in going more at large into these questions, and some others of an interesting character connected with them, I may be permitted to add, that these rules seem to me to have in their favor over some others at least this merit. They give full effect to State powers and State rights over this important matter, when not regulated by Congress. They produce uniformity among the State and the United States courts. They conform to the practice in other countries, and are easily understood and easily enforced.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

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*THE PRESIDENT, DIRECTORS AND [*317
COMPANY OF THE COMMERCIAL BANK OF CINCINNATI, Plaintiffs in Error,

v.

EUNICE BUCKINGHAM'S EXECUTORS, Defendants in Error.

This court cannot question construction of State law, admitted valid.

To bring a case to this court from the highest court of a State, under the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1st. That some of the questions stated in that section did arise in the State court; and, 2d. That the question was decided in the State court, as required in the section.

It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and that this claim was overruled by the court, but it must appear, by clear and necessary intendment, that the question

NOTE.—Jurisdiction of United States Supreme Court.

It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized by statute. Adams v. Preston, 22 How. 473; Congdon Mining Co. v. Goodman, 2 Black. 574; Scott v. Jones, 5 How. 343; Smith v. Adsit, 10 Wall. 185; Klinger v. Missouri, 13 Wall. 257.

What adjudications of State courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts, see note to 62 L. R. A. 513.

must have been raised, and must have been decided, in order to induce the judgment.

Hence, where the Legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the State court was, whether or not some of the provisions of the Act of 1824 applied to the bank subsequently chartered, the question was one of construction of the State statutes, and not of their validity.

This court has no jurisdiction over such a case.

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court o the State of Ohio.

The Reporter finds the following statement of the case prepared by Mr. Justice Grier, and prefixed to the opinion of the court, as pronounced by him:

Eunice Buckingham, the plaintiff below, brought an action of assumpsit against the plaintiffs in error in the Court of Common Pleas of Hamilton County, and filed her declaration claiming to recover twenty thousand dollars for bills or bank notes of the Commercial Bank, of which she was owner, and of which demand had been made of the officers of the bank and payment refused, and claiming interest thereon at six per cent. from the suspension of specie payments, and also twelve per cent. additional damages from the time of demand and refusal. The cause was afterwards removed to the Supreme Court of Ohio, who gave judgment in her favor; and thereupon the defendant removed the case by writ of error to the Supreme Court in bank, by whom the judgment was affirmed, and the plaintiffs in error afterwards sued out a writ of error to this court.

The Supreme Court entered on their record the following certificate, which contains a sufficient statement of the points arising in the case:

"And upon the application of said plaintiffs in error, it is certified by the court here, that the said plaintiffs in error, on the trial and hearing of this case in said Supreme Court for Hamilton County, and also in this court, set up and relied upon the charter granted to them by the General Assembly of the State of Ohio, on the 11th day of February, A. D. 1829; which 318*] charter contains the following *provision: the fourth section provides, 'that said bank shall not at any time suspend or refuse payment, in gold or silver, of any of its notes, bills, or other obligations, due and payable, or of any moneys received on deposit; and in case the officers of the same, in the usual banking hours, at the office of discount and deposit, shall refuse or delay payment in gold or silver of any note or bill of said bank there presented for payment, or the payment of any money previously deposited therein, and there demanded by any person or persons entitled to receive the same, said bank shall be liable to pay as additional damages at the rate of twelve per centum per annum on the amount thereof for the time during which such payment shall be refused or delayed,' and insisted, that, by the provisions above set forth, the said plaintiffs in error ought not to be held liable to pay for interest or damages in case of suspension of specie payments, or upon demand and refusal of payment of their notes or bills, at a greater rate than at the rate of twelve per centum per annum, and the court here overruled the defense so set up, and held, that under and by virtue of the Act of the General Assembly of the State of Ohio, passed January 28th, 1824, and of the said charter of the plaintiffs in error, the defendants in error were entitled to the interest and additional damages allowed to the defendants in error by the Supreme Court for Hamilton County, as stated in the bill of exceptions. The first section of the said Act of the General Assembly of the State of Ohio, of January 28th, 1824, is as follows: 'That in all actions brought against any bank or banker, whether of a public or private character, to recover money due from such bank or banker, upon notes or bills by him or them issued, the plaintiff may file his declaration for money had and received generally, and upon trial may give in evidence to support the action any notes or bills of such bank or banker which said plaintiff may hold at the time of trial, and may recover the amount thereof, with interest from the time the same shall have been presented for payment, and payment thereof refused, or from the time that such bank or banker shall have ceased or refused to redeem his notes with good and lawful money of the United States.' And the eleventh section of which is as follows: 'That when any bank or banker shall commence and continue to redeem their notes or bills with lawful money, the interest on their notes or bills shall cease from the commencement of such redemption, by their giving six weeks' previous notice, in some newspaper having a general circulation in the county where such bank or banker transacts banking business, of the time they intend to redeem their notes or bills with lawful money.' It was contended and claimed in this court, by said plaintiffs in error, that the said Act of the General Assembly of Ohio, of January 28th, 1824, as applied to the said provisions of this charter, impaired the obligation thereof, and violated the provisions of the Constitution of the United States; which claim so set up was overruled *by the court. And it is [*319 further certified by the court here, that on the trial and hearing of this case in this court, the validity of the said act of the Legislature before mentioned was drawn in question, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligations thereof, and was repugnant to the Constitution of the United States, and that the decision of this court was in favor of the validity of the said act of the Legislature as so applied."

The cause was argued by Mr. Stanberry (Attorney-General of Ohio), and Mr. Gilpin for the plaintiffs in error, and Mr. Charles C. Convers for the defendants in error.

As the case went off upon the question of jurisdiction, only so much of the arguments of the counsel is given as relates to that point.

Mr. Stanberry, for p'aintiffs in error:

The first question which presents itself is as to the jurisdiction of this court. It is claimed for the plaintiffs in error, that the jurisdiction arises upon that clause of the Judiciary Act of 1789 which provides for the case where the validity of a statute of a State is drawn in question, as repugnant to the Constitution of the United States, and the decision of the State court is in favor of its validity.

It appears very clearly in the record, that the

validity of a statute of Ohio was drawn in question in the State court, on the ground that the same, as applied to the charter of the plaintiffs in error, impaired the obligation thereof, and that the decision was in favor of the validity of the statute.

The defendants in error are understood to claim that, inasmuch as this statute was in existence at, and prior to, the granting of the charter, it cannot be held to impair the obligation of the charter; in other words, that this prohibition of the Constitution is to be confined to retrospective legislation.

Authority for this distinction is supposed to be found in the opinions of the majority of the judges in Odgen v. Saunders, 12 Wheat. 213.

There is no question that, in Odgen v. Saunders, the majority of the court proceeded upon a distinction between a statute prior and one subsequent to the contract, holding that a statute in force when the contract is made cannot be said to impair the obligation of the contract, for the reason that such pre-existing statute being a part of the law of the land at the time of the contract, the parties are supposed to acquiesce in it, and in fact to make it part of their contract.

In the first place, it is to be observed of this case of Odgen v. Saunders, that the distinction it enforces is opposed to the reasoning of the court in Sturges v. Crowninshield, 4 Wheat. 122, and to the language of the court in McMillan v. McNiell, 4 Wheat. 209.

320*] *As a general distinction, applicable to all laws, it certainly is not sound, for it would quite set aside this most important restraint upon State legislation. It can only have reference to such laws as provide for the manner of enforcing or discharging future contracts, and which may be said to be in the view of the parties when they afterwards enter into the class of contracts provided for in the previous legislation.

In this view, Odgen v. Saunders perhaps settles a just distinction, as applicable to the sort of statute then before the court. The question here was as to the validity of a State bankrupt law, in reference to a subsquent contract. It might well be said, that the parties tacitly adopted and recognized this law, or this mode of discharging their contract, when it was entered into.

But in the case at bar, no such intendment can be made, and it is impossible to suppose that the statute of 1824 was adopted by the parties, or in any way entered into the contract or charter made in 1829. The charter was wholly independent of the statute.

Again, this charter was granted by the State. It does not stand on the footing of a contract between individuals, who are supposed to be bound by the existing laws as to contracts, and to adopt and acquiesce in them. Here the State is one of the contracting parties, and the contract itself is a law. If the charter granted in 1829 provides, as we claim it does, that in case of refusal to pay its notes in gold and silver the rate of interest shall be twelve per cent., it surely cannot be intended that the parties submitted themselves to the prior law of 1824, so as to increase the rate of interest upon such refusal to eighteen per cent., or six per cent. in *addition to the rate stipulated by the charter.* In no sense can it be said that the law of 1824 entered into or became part of the charter. If the charter had been silent as to the rate of interest in the particular case of a refusal to redeem, the general law of 1824 would have settled it, and might well have been considered as entering into the charter and constituting one of its terms, for then there would have been no inconsistency or repugnancy between the general law and the charter stipulations.

It is obvious, then, that the charter is impaired by the law of 1824, when the court add to the twelve per cent, provided for by the charter the six per cent, provided for in that law.

Taking it as granted that a charter or contract is so impaired by a pre-existing law, the case is certainly within the mischief, if it be not within the meaning, of the constitutional prohibition.

A charter is granted by a State, explicitly defining what shall be the consequences of suspension of specie payments, and fixing a certain limit to the liability of the stockholders in that event. This is the contract made between the State and the stockholders. It has no reference to any prior laws, but is a law in itself, superior to all other laws upon the subject matter so provided for by its *stipulations. Upon [*321 a case made between the bank and a holder of its paper, a claim is made to recover eighteen per cent. for suspension or specie payments, instead of the twelve per cent. provided by the charter. This claim is founded upon a statute of the State passed five years before the date of the charter. The bank questions the validity of this statute, so applied to its charter, on the ground that it impairs the charter, in adding to the rate of interest fixed for suspension. The court decides in favor of the validity of the statute as so applied; the charter is no protection, and the liability of the bank is extended beyond the terms of the charter.

It may be said that all this is the act or error of the court, not of the Legislature; that it is simply an error in the construction of the terms of the charter.

Undoubtedly, contracts are liable to be impaired by the errors of the judiciary. It is not for such errors that resort can be had to this court from State tribunals. If a contract be impaired by the application, on the part of the court, of some legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court; but if the contract is impaired by the application of a State law, then the jurisdiction does attach.

The prohibition in the Constitution is in terms the most general. "No State shall pass any law impairing the obligation of contracts." This is a clause which does not execute itself, nor is any mode pointed out in the Constitution by which the prohibition is to be enforced. It is worked out by the Judiciary Act, by means of a case, and the decision of that case by the highest court of the State. That court must first decide upon the question as to the application of the State law; and the decision must affirm its validity. To bring the jurisdiction of the federal tribunal into exercise, to bring about the condition of things to which the constitutional prohibition applies, the law-making and law-expounding authorities of the

State must concur. The law of the State can in no way impair a contract without the agency of the State judiciary. When the law is so applied, and adjudged to be valid by the State court, as to impair a contract, the case arises under the Constitution.

Now, if the constitutional prohibition were confined to State laws, which impaired contracts proprio vigore, the argument against its application to subsequent contract would be very cogent. It might then be asked, with confidence, how can a law per se impair a contract not in existence when it was enacted? But we have seen that the case does not arise upon the law itself, nor until the act of the court concurs with the act of the Legislature. The instant this double agency unites in the application of a law to a contract, so as to impair its terms, that instant it becomes, in the meaning of the Constitution, a law impairing the obligation of the contract.

The constitutional prohibition must be understood, as not applying to the law itself, but to its application by the court. What is said by 322*] *the majority of the judges in Ogden v. Saunders proceeds on that ground. Mr. Justice Trimble, one of the majority, uses this language (p. 316):

"It is not the terms of the law, but its effect, that is inhibited by the Constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the Constitution, but it may not, when applied to a case differently circumstanced, produce such prohibited effect.

Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry."

We are then to understand, from this clear statement of the constitutional prohibition, that it is not necessary to show that the State law is unconsitutional per se; that, in fact, it may be constitutional for some purposes and unconstitutional for other purposes, just as it happens to be applied by the court to the particular case or contract. It is not the purpose or intent of the law ab origine, but its effect or application by the court, which is to be regarded.

This being so, what imaginable difference is there between its application to contracts made before or after its enactment? None whatever, except in such cases as Ogden v. Saunders, where the pre-existing law is of such a character as that the parties to the subsequent contract must have made their contract in reference to it, and tacitly adopted it into the terms of the contract. Such a pre-existing law is, in fact, a part of the whole body of law, which creates and defines the obligation of contracts.

But, with reference to the contract in this case, where no such intendment can be made, where all other laws are set aside by the legislative authority itself in the grant of the charter, which stands as the very law for the very case, what imaginable difference is there in its violation by the application of a pre-existing or subsequent law? At the best, it is a contract violated by a law of the State, not directly and *by its terms, but by its effect*, as applied to this charter.

Suppose this statute had been subsequent in date to the charter, and the court had then applied it to the charter, so as to impair the express stipulations as to interest; the case would have been clearly within the constitutional prohibition. Now, in the supposed case, if it clearly appeared that the court of the State had misunderstood the law in making such application, if it were manifest that the Legislature had no intention, in passing the law, to impair the charter, or in any way to apply it to the charter, would all that oust the jurisdiction of this court, or take the case out of the constitutional prohibition? Surely not. It is the fact, not the intention; the effect and application of the law, not the law itself, or the motive with which it was passed, that we must look to.

*Besides, after the application of the [*323 law to the charter by the State tribunal, the organ to expound and apply the State law, it must be taken conclusively that the law was intended to apply to the contract, and no argument, however cogent, would avail against such conclusion.

Mr. Convers, for defendants in error:

The contract, the alleged violation of which by legislative power is here complained of, is the act of incorporation of the plaintiffs in error, passed by the General Assembly of the State of Ohio, in the ordinary form of legislation, on the 11th day of February, 1829. The law of the State of Ohio, by which it is claimed that the obligation of this supposed contract was impaired, is the "Act to regulate judicial proceedings where banks and bankers are parties, and to prohibit issuing bank bills of certain descriptions," passed on the 28th of January, 1824. The plaintiffs in error are here to assert, before this court, that the State of Ohio, in passing a law, in 1824, impaired, by the "passing" of that law, the obligation of a charter granted afterwards, in 1829; that the contract, although not in existence at the time of the passage of the law complained of, nor for five years thereafter, was nevertheless "impaired" by the prior passing of this pre-existing law!

Two questions, arising from the record, present themselves for consideration—

First. Assuming that the Supreme Court of Ohio erred in its construction of the two statutes referred to, can this court correct the error?

Second. Is there any error in that construction of these statutes which was adopted by the Supreme Court of Ohio, and applied to the case?

I. Can this court correct the supposed error of the Supreme Court of Ohio?

I claim, for the defendants in error, that this court cannot reverse the judgment of the Supreme Court of Ohio, for the errors here alleged against this record.

The clause of the Constitution of the United States under which such reversal is asked, is as follows: "No State shall pass any law impairing the obligation of contracts." I maintain that this provision applies only to statutes passed after a contract has been made, and which, when effect is given to them, according to the legislative intent, impair the obligation of the contract—making its terms different from what they were, as previously settled by

the parties, or its legal effect different from that which it was declared to be by the laws in force at the time when it was made.

This constitutional provision is plain, and construes itself. The law is valid, unless the passing thereof impair a contract. The inhibition directs itself, in express terms, against 324*] the passing of the *law, and nothing more. It was designed as a shield against the putting forth of legislative power to dissolve the obligations by which parties were bound to each other; not to correct the errors or mistakes of the judicial power in their application of laws constitutionally passed. It is the wrongful passing of the law by the Legislature, not the subsequent misapplication or abuse of a law rightfully passed, which is forbidden. The provision relates to the state of things at the time of the passing of the law. If the act do not then impair the contract, it is a valid law. If contracts are afterwards entered into, and the State courts improperly apply the pre-existing law to such contracts, it can in no sense be said that the passing of the law by the State impaired these contracts. The effect is matter ex post facto. It is an act of the court upon a question of purely judicial interpretation; and upon such questions the party must abide the final decision of the highest tribunal of his State. If the power of the Legislature be constitutionally exercised at the time, the act cannot afterwards, by any fiction of relation, be devested of its constitutional character, and become unconstitutional and void. It is the fact that the law when passed by the State is constitutional or unconstitutional, that determines whether it be valid or void. It is upon the act of passing that the constitutional prohibition operates, and, the act once done, it is not in the power of the future to change the fact, that the law was, when passed, constitutional or unconstitutional. This fact, with its character indelibly impressed upon it, as it was at the time of its occurrence, belongs to the past, and over it the future can have no power.

Again, the prohibition is against passing a law "impairing the obligation of contracts." The very term "impairing," here used, shows that the law must have the effect of impairing, when passed, or it does not fall within the prohibition—it is not an "impairing" law. Of necessity, it implies that there must be a contract in esse, upon which the law, at the time of its passage, operates—a contract to be impaired by the passing of the law. The term "impaired" incorporates into itself, as of the very essence of its meaning, that there is a subject matter to be affected—something to be impaired.

Can it, for a moment, admit of controversy, that the sole object of this provision was a restraint upon that dangerous species of legislation, which, after contracts had been made, interposed to discharge them, or alter their terms, without the consent of the parties—that it was to preserve existing contracts inviolate against legislative invasion? Beyond this, it was not intended to abridge the power of legislation belonging to the States. In the case of Sturges v. Crowninshield, 4 Wheat. 122, Mr. Chief Justice Marshall, speaking of this provision, says: "The convention appears to have intended *to establish the great principle that* contracts should inviolate. The Constitution, therefore, declares *that no State [*325 shall pass any law impairing the obligation of contracts." (p. 206.)

The whole matter of contracts—what may and what may not, be the subject of agreement, the competency of parties, the form of the contract, the manner of the discharge—are all left within the range of State legislation; subject only to the qualification, that when a contract, valid according to the laws in force at the time, is once made, no State shall pass any law to change, to weaken, to "impair," in any respect, the obligation by which the parties have bound themselves. If the State have not attempted such interference by passing a law—no matter what errors the courts may commit in their endeavor to ascertain the meaning of the parties, the terms and obligations of their contract—the party aggrieved can find no protection under this clause of the federal constitution. He must look for relief to the constitution and laws of his State, and if they fail him, it is his misfortune, to which he must submit; but such defect in the constitution and laws of the State furnishes no ground upon which he can invoke the interposition of this court, whose function, under this clause of the Constitution, is not to supply the defects of State tribunals, but to check any attempt of the law-making power of the State to retroact upon past contracts and impair their obligations. The point is almost too clear for argument, especially since the authoritative exposition of the meaning of this provision afforded by the decisions of this court in Sturges v. Crowninshield, 4 Wheaton, 122, and in Ogden v. Saunders, 12 Wheaton, 213; which, it is respectfully submitted, are conclusive of the question. See, also, Bronson v. Kinzie et al., 1 Howard, 311, and McCracken v. Hayward, 2 Howard, 608. The highest judicial tribunals of the States of Massachusetts, Connecticut, and New York have, in like manner, declared that if the law be in force at the time when the contract is made, it cannot have the effect of impairing its obligation, and is, therefore, obnoxious to no constitutional objection. Blanchard v. Russel, 13 Mass. R. 16; Betts v. Bagley, 12 Pick. R. 572; Smith v. Mead, 2 Conn. R. 254; Mather v. Bush, 16 Johns. R. 237; Wyman v. Mitchell, 1 Cowen, 321. So decided, also, by the Supreme Court of the State of Ohio in 1821, in the case of Smith v. Parsons, 1 Ohio R. 236. The opinion of the court, pronounced by Judge Burnett, contains a full and able exposition of the principle, that statutes in existence when the contract is made are not within the constitutional prohibition. See, also, Belcher et ux. v. Commissioners, etc. 2 McCord, 23; In re Wendell, 10 Johns. R. 153; Sebrig v. Mersereau, 9 Cowen, 345, 346; Hicks v. Hotchkiss, 7 Johns. Ch. R. 308-313; Blair v. Williams, 4 Littell, 38, 39, 43-46; Golden v. Prince, 3 Wash. C. C. R. 318, 319; Johnson v. Duncan, 3 Martin's Louisiana R. 531; 1 Cond. Louisiana R. 161, 162.

*The truth is, the only question as [*326 to the impairing effect of statutes that can arise in this case is, whether the Act of the Legislature passed on the 11th day of February, 1829—the charter—impaired the provisions of the Act of the Legislature in relation to banks, passed on the 28th day of January,

1824. The Supreme Court of Ohio declared that the Act of 1829 did not impair the Act of 1824; that it left it just as it was—in full operation as to this bank, as well as to other banks. It held, that all that the charter did, in respect to a failure of the bank to redeem its notes, was, not to relieve it of the general liability which attached to all banks, under the law of 1824, but, leaving that act in full force, to provide "additional" security that the bank would fulfill its engagements to the public, and so subserve the purpose of its creation. How, then, can this court, in the exercise of the narrow jurisdiction over State tribunals to which it is confined, reverse the judgment of the Supreme Court of Ohio, even if it were admitted that any error had here intervened?

Again, the question being merely a question as to the meaning of two statutes of Ohio, in pari materia, when taken together, this court, according to the principle settled by its repeated adjudications, will be guided by the construction adopted by the highest judicial tribunal of the State. The Supreme Court of Ohio simply decided, that when the Legislature of that State employs, in relation to a bank, the language contained in the fourth section of this charter, it intends to subject the bank to the provisions of the Act of 1824, precisely as if, in totidem verbis, it were so expressly declared. In the case of Elmendorff v. Taylor, 10 Wheat. 159, Mr. Chief Justice Marshall says: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of that State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the Judicial Department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the court of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction of the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or 327*] *treaties of the United States. Among the many other cases to the same effect are United States v. Morrison, 4 Peters, 124; Green's Lessee v. Neal, 6 Peters, 291.

Now, if it would not have been unconstitutional for the Legislature to have provided by the charter expressly, in so many words, that the plaintiffs in error, on default in the redemption of their notes, should be subject to the six per cent. given by the Act of 1824, as well as to the twelve per cent. "additional" thereto, *it surely was not* unconstitutional for the Supreme Court of the State, to which alone belongs the right of interpreting the language used by the Legislature, to hold that the terms contained in the fourth section of the charter did express just that thing—to declare that the Legislature, by the act of incorporation, had said that this bank should be subject to the six per cent. of the Act of 1824, as well as also to the twelve per cent. as "additional" thereto.

The Supreme Court of Ohio having decided that the Act of 1824 is by the Legislature referred to in the charter and made part of it and the Legislature having full constitutional power to do so when it passed the act of incorporation, when it made its contract with the plaintiffs in error, how can it be that the recovery of the defendants in error, in the Supreme Court of Ohio, is obnoxious to any constitutional objection?

The plaintiffs in error ask this court to wrest from the judicial tribunals of the States the right of expounding the statutes of their own Legislatures—to do what Mr. Chief Justice Marshall says "no court in the universe, which professed to be governed by principle, would undertake to do"—erect itself into a tribunal to correct the alleged misinterpretations of their own statutes by the judiciary of the States.

Unless the construction of the State court make the Legislature to do an act which the Legislature cannot constitutionally do—if the Legislature might rightfully have done precisely what the interpretation of the State court says it did do—can it be possible that there is any violation of the Constitution?

The Supreme Court of Ohio has only decided that the Legislature of that State, by the act of incorporation by the plaintiffs in error did what it had an undoubted constitutional right to do—incorporated in the charter the provisions of the Act of 1824, and added to the penalties which is provided in case of suspension of specie payments.

Indeed, the learned counsel for the plaintiff in error (who has furnished me with his printed brief) admits the soundness of the opinion of Ogden v. Saunders, as applied to a contract to which individuals alone are parties. But he insists that a different rule should obtain where the State is one of the contracting parties—that, in the eye of the Constitution, the properties of a contract as between individuals do not belong to an act of incorporation passed *by the Legislature of a State. Well, [*328 this may be so. But it occurs to me, that this is dangerous ground for him to tread. I have always supposed that the whole basis of the decision of this court in the case of Dartmouth College v. Woodward, by which charters were impaled within the protection of this constitutional provision, was, that the charter was similar to—identical with—a contract between individuals. To establish this, the arguments of the learned counsel and the reasoning of the court in that case were all directed. Every argument of the counsel for the plaintiffs in error, which tends to make good a difference between a charter and an ordinary contract, directly assails the soundness of this leading case without which the plaintiffs in error have no place here in this court; for the foundation of this writ of error is, that this charter is a con-

tract, and as such within the protection of the Constitution of the United States.

The learned counsel for the plaintiffs in error also says, that "undoubtedly contracts may be impaired by errors of the judiciary; and that it is not for such errors that resort can be had to this court from State tribunals." He admits, "that if a contract be impaired, by the application, on the part of the court, of some legal principle, or by misconstruction of the terms of the contract, a case does not arise for the jurisdiction of this court." "But," says he, "if the contract is impaired by the application of a State law, then the jurisdiction does attach."

The admission amounts to this, that the State court may impair the contract, by the misapplication of a legal principle, or by the misconstruction of the terms of the contract, and yet the case not fall within the jurisdiction of this court. But, if this same error be committed, under pretext of a law of the State, even pre-existent to the contract, the case is within the jurisdiction. According to this, if there had never been any such law in existence as the Act of 1824, and the court had rendered precisely the same judgment as that now presented in this record, the error would, by the counsel's own admission, be beyond the reach of this court. There would then be the case of "misconstruction of the terms of the contract"—of "misapplication of a legal principle"—which he concedes to be an error for which the judgment is not amenable to this court; and still he says, that because the mistaken "legal principle," which the court below improperly followed, was the pre-existing statute of 1824, instead of some other legal principle, this court may interpose to reverse the judgment. The same judgment might have been rendered by the Supreme Court of Ohio, and any other ground assigned for it than the Act of 1824—although no better in judgment of law than that, both being equally erroneous—and, by the admission of learned counsel, it could not be impeached in this court for error.

If the State court had the power to render 329*] the judgment, it is *sufficient. The question with this court, whose power over State tribunals is limited, is, whether the judgment can stand, without carrying out, in accordance with the legislative intent, a law of the State passed to impair a contract. If it can, then there is no error here for the correction of this court. It is only where a law is passed to operate upon existing contracts, and where the decision of the State court is "in favor of the validity" of such a law, that jurisdiction to reverse is vested in this court. It matters not how erroneous, in other respects, the opinion of the State court may be. A wrong ground assumed for its judgment is no cause for reversal by this court, unless that ground be solely that the State court has made itself instrumental in giving effect to a law of the Legislature, which, in its enactment, was leveled against an existing contract. Crowell v. Randell, 10 Peters, 368; McKinney et al. v. Carroll, 12 Peters, 66; McDonogh v. Millaudon, 3 Howard, 693.

It cannot be, in rerum natura, that the passing of a law can impair a contract, unless the contract be in being when the law is passed. To hold otherwise—*to declare that Contracts are, by this provision of the Constitution, with-*

drawn not only from all future, but also from all past legislation—is to sweep from the States all legislative power over the subject matter of contracts.

If the Legislature cannot pass laws to operate, in futuro, upon charters subsequently granted, then, as it is conceded that corporations cannot be affected by any laws enacted after the grant of the charter, corporations are indeed supreme. Charters rise independent of all law. Well may learned counsel say that they are a "law unto themselves;" for beyond the few meagre provisions embodied in them, they stand exempt from all legislative power and control.

The learned counsel for the plaintiffs in error, in his endeavor to maintain the position that the Constitution extends to the improper application, by the State court, of a pre-existing law, observes that the wrong is not done by the passing of the law. He says that the law does not, per se, impair the contract; but that it is by the concurrence of the act of the court with the act of the Legislature that the thing is affected.

If this be so, what is the result? Now, it was the intention of the Legislature, when this charter was granted, that the provisions of the Act of 1824 should apply to it, or that they should not apply. If, in legislative intent, the statute of 1824 was to operate upon this bank—if the fourth section of the charter were, what it purports to be, "additional" to that act—then the law of 1824, by the terms of the original compact between the State and the plaintiffs in error, became part of the charter. It is parcel of the contract itself; as much so as if set out in it at large. Of course, then, there is no error in the judgment; for, upon this hypothesis, it *only enforces the agreement of the par-[*330 ties, according to the terms and true meaning of their contract.

If, on the other hand, the Legislature did not design that the law of 1824 should apply, then there could be no "concurrence of the act of the Legislature with the act of the court." The "law making and law expounding authorities of the State" did not "concur." This "double agency," of which he speaks, did not "unite." It was the sole, unauthorized act of the court; an act, too, not only not concurring with, but in direct violation of, the legislative intent. The legislative and judicial acts, so far from being concurrent, were antagonist. The wrong complained of is pure, unmixed judicial wrong. So far as legislation is concerned, all is right. That has not transcended its power to strike at the contract. The blow comes from the judiciary alone; and it is not less the sole act of the judiciary, because, to secure its aim, it seizes upon an act of the Legislature, and, wresting it from its true design, gives it force and direction never contemplated by the Legislature.

The whole complaint of the plaintiffs in error hath this extent, no more—that the court of Ohio, on looking into the contract, with a view to ascertain its meaning, mistook its terms, supposing that the parties had adopted, as part of the charter, the provisions of the Act of 1824; whereas a right interpretation of the contract, as they claim it, excludes these provisions. That law was applied to the case, because, in the judgment of that court, the parties had, when the contract was entered into, made its provisions part of the terms of the contract.

The court simply declared, that, as the contract presented itself to the judicial mind, it was a contract incorporating into itself the provisions of the Act of 1824, as claimed by the defendants in error, and not excluding them, as claimed by the plaintiffs in error. It was, in short, nothing more or less than a simple "misconstruction of the terms of the contract;" and upon that, the learned counsel tells us "a case does not arise for the jurisdiction of this court."

Again, the Act of 1824 relates to the remedy. It is entitled, "An Act to regulate judicial proceedings where banks and bankers are parties." By its express terms, it applies to "all actions brought against any bank or banker." Regarded in this light, it has been held, in respect to this liability on suspension, applicable even to charters previously granted. Atwood v. Bank of Chillicothe, 10 Ohio Rep. 526.

Indeed, the case of Brown v. Penobscot Bank, 8 Mass. Rep. 445, cited by the learned counsel for the plaintiffs in error—proceeding upon the obvious distinction which obtains between the obligation of a contract and the remedy, as repeatedly declared by this court—is to the same point. The Penobscot Bank was chartered in the year 1805. In the year 1809 the Legislature 331*] of *Massachusetts passed a general law, providing, that "from and after the first day of January, 1810, if any incorporated bank within this Commonwealth shall refuse or neglect to pay, on demand, any bill or bills of such bank, such bank shall be liable to pay to the holder of such bill or bills after the rate of two per cent, per month on the amount thereof, from the time of such neglect and refusal." It was claimed, on the part of the Penobscot Bank, that the Act of 1809, "as applied to its charter," was repugnant to the Constitution. The court say, that "if the act upon which the plaintiff relied in this case was unconstitutional, and therefore void, it must be by force of some specific provision in the Constitution of the United States, or in that of this Commonwealth. But none such had been cited at the bar, nor was any such known to exist. The incorporation of a banking company was a privilege conferred by the Legislature on the members. Punctuality and promptness in meeting every demand made on such an institution are essential to its existence; and a failure in this respect, now that bank bills form, almost exclusively, the circulating medium of the country, is a public inconvenience of great extent, and introductive of much mischief. It was, therefore, a duty highly incumbent on the Legislature, by all means within its constitutional authority, to prevent and punish such a mischief, and this the rather, as these corporations received all their powers from legislative grants. The provision made by the act under consideration was equitable and wise, and the community is probably indebted to it for the correction of an evil, which, at the time of passing the law, had increased to an alarming degree. As it had no retrospective effect, there was no ground for complaint on the part of the banks, nor did it militate against any known and sound principle of legislation." p. 448.

In the case of Dartmouth College v. Woodward, 4 Wheat. 696, Mr. Justice Story says, *that "a law punishing a breach of contract, by imposing a forfeiture of the right acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract."*

Now, if the Act of 1824 can apply to previously granted charters, can there be a doubt as to its appropriate application to subsequently granted charters? Such an act, passed after the charter, is held valid, upon the ground that it does not impair any franchise which the corporation may lawfully exercise under the charter. Its object is to prevent an unlawful act—a violation of charter duty. It takes away no vested right, unless the corporation has a vested right to disregard the great purpose of its being, a "vested right to do wrong."

In no case is it held that a corporation is exempt from a general law, passed even after the grant of its charter, which is remedial in its character, and operates upon acts in futuro, unless the language of the charter imperatively requires it.

How much more cogent is the Act [*332 of 1824 in its application to charters granted after its enactment!

How, then, under the simple clause of the Constitution, relied upon by the plaintiffs in error, can the jurisdiction of this court be called into exercise, to reverse, for such an error as this, if error it be, the judgment of the Supreme Court of the State of Ohio?

I take the simple language of the Constitution as I find it: "No State shall pass any law impairing the obligation of contracts." The construction of the plaintiffs in error interpolates. As they read the Constitution, it declares, "No State shall pass any law, nor shall its judiciary make any decision, impairing the obligation of contracts."

In Satterlee v. Mathewson, 2 Peters, 413, it is declared, that "there is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions," and in that case it was accordingly decided, that the Constitution did not extend to an act which was of a judicial nature, although in the form of a law passed by the Legislature of a State. And this was precisely in accordance with the decision made at an early day in the case of Calder v. Bull, 3 Dallas, 386. See opinions of Iredell, J., and Cushing, J. With much less reason can it be claimed that a pure judicial act, done not by the passing of a law by the Legislature, but by the decision of a court, is within the prohibition of the Constitution.

In reply as to what is said, as to the case now before the court falling within the mischief which the Constitution designed to remedy, I have only to say, that, if the court here incline to go beyond the plain language of the Constitution itself, and look into the evils which led to the insertion of this clause, as the history of the time discloses them, ample reasons will be found coming to the support of the position which I maintain. See 4 Wheat. 205, 206.

Besides, in the case of Satterlee v. Mathewson, 2 Peters, 381, this court held, that retrospective statutes were not repugnant to the Constitution of the United States, unless they were ex post facto (using those terms in their restricted sense, as confined to criminal laws), or unless they impaired a contract; although of

like mischief with that against which the Constitution expressly provided. And it was well remarked by Mr. Chief Justice Marshall, in the case of Providence Bank v. Billings, 4 Peters, 563, that the "Constitution was not intended to furnish the corrective of every abuse of power which may be committed by the State governments."

This court will not feel inclined to enlarge the construction of the Constitution, in order to abridge the power of legislation belonging to the States, their highest attribute of sovereignty, by any implication extending this constitutional inhibition to all pre-existing laws [*333] *relating to the subject matter of contracts. Of such latitudinarian construction, so startling to State power, the end cannot be seen from the beginning.

While this court, in the exercise of that high function which sits in judgment upon the validity of the legislative acts of a sovereign State, has always shown itself firm to maintain all just rights under the Constitution of the United States, it has also shown itself not less careful to guard against trenching, by its decisions, upon the remnant of rights which that Constitution has left to the States. So cautious does it move, in the execution of this most delicate trust, that it will not set aside an act of the Legislature of a State, as a void thing, unless it appear clearly to be repugnant to the Constitution. If its constitutionality be doubtful only, the doubt resolves itself in favor of the exercise of State power, and the act takes effect.

But I submit to the court, with great confidence, that, as to this bank, it is clear that the State of Ohio has not, by the passing of any law, impaired the obligation of its charter contract; and that therefore, upon this record, no case arises to which the constitutional inhibition relied upon by the plaintiffs in error can extend.

Mr. Gilpin, for plaintiffs in error, in conclusion:

The Act of the General Assembly of Ohio of 11th February, 1829 (3 Chase's Ohio Stat. 2059), created this corporation for banking purposes, declared its powers, duties, and liabilities, and especially provided for the contingency of its suspending the payment in gold and silver of its bank notes and deposits, by imposing a penalty of twelve per cent. per annum, from the time of demand and refusal. An Act of the 28th January, 1824 (2 Chase's Ohio Stat. 1417), had been previously passed by the same Legislature, making several general regulations in regard to banks and bankers in that State; and, among them, providing for the same contingency, by imposing a payment of six per cent. per annum from the time of suspension. This corporation suspended payment, and the defendant in error, holding a large amount of its notes, brought suit in the Supreme Court of Hamilton County, to recover the penalty. Judgment was given in her favor in that court, for the principal of the notes, and also eighteen per cent. interest, subjecting the corporation to the penalty provided by its charter, and then, in addition, to that provided by the Act of 1824. This judgment was carried by appeal to the Supreme Court in bank of the State of *Ohio, being the highest court of law in that State, and the plaintiffs in error contended that* it was erroneous, because it recognized the validity of the Act of 1824 as applicable to the charter of the corporation, and thus impaired the obligation of the contract made by that instrument. At the hearing of the case the court were equally divided in opinion on the cases assigned, and therefore, according to its practice in such cases, the judgment of the inferior court was *affirmed. No opin- [*334 ion was delivered by the Supreme Court in bank, nor either of the judges. No authoritative construction of that court has been given to the Act of Assembly on the point in question.

The plaintiffs in error contend that this judgment should be reversed by this court, because it is expressly founded on the alleged validity of the Act of 1824, as applicable to their charter; and as that charter was a contract between the State and the corporation, its stipulations are thereby changed, and its obligation impaired.

The charter of 1829 is a contract, to which the parties on one side are the State of Ohio and those claiming privileges reserved to them by the State, and, on the other, this corporation. It is a contract with mutual benefits, not merely of the general kind, but specific, for the State reserves to itself a certain portion of the profits of the institution. It is such a contract as the Constitution of the United States meant to preserve inviolate in its stipulations. It is not a legislative act, operating on the transactions of third parties, or entering into or forming part of their contracts, by the mere force of paramount legislation, but it is an agreement made by the State itself, as a party, for equivalents exacted and received by it from the corporation. It is, even more strongly than in the case of a charitable institution from which the State creating it receives no direct benefit, a contract to which the stockholders, the corporation, and the State are the original parties. "It is," in the words of Chief Justice Marshall (Dartmouth College v. Woodward, 4 Wheat. 518), "a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal property has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also." It is a contract "to be held as sacred as the deed of an individual." Waddell v. Martin, cited 1 Peters's Dig. 481. The government which is a party to it "can rightfully do nothing inconsistent with the fair meaning of the contract it has made." Crease v. Babcock, 23 Pick. 340.

If it is a contract, how are its terms to be ascertained? The charter is the formal and deliberate act of both parties, reducing to literal stipulations what they mutually agree to; laws not introduced form no part of it, except so far as they are general municipal laws regulating all property; the laws that govern contracts between man and man govern this; in such a case, would not the written instrument made by and between the parties be taken as the declaration of their liability? Nothing is better settled than that it would be. Vattel, 2, 17, 263; Co. Litt. 147; Parkhurst v. Smith, Willes, 332; Schooner Reeside, 2 Sumner, 567; Truman v. Lode, 11 Adolph. & Ell. 597; Kain v. Old, 2 Barn. & Cress. 634; Thomas v. Mahan, 4 Green-

leaf, 516. It is true that written contracts 335*] *do not contain all the municipal regulations necessary to their execution. These are tacitly embraced in them. Not so, however, where the State is a party to the contract, and those regulations would essentially vary its terms. In such a case the subsequent law is substituted for a previous one, just as a subsequent contract between the same individuals, relative to the same subject matter, would control, modify, or extinguish a former one.

The contract, then, between the State of Ohio and the Commercial Bank of Cincinnati is that contained in the charter passed by the former in 1829, and agreed to and accepted by the latter. What is the obligation of it? The State obliged the corporation to pay a certain penalty in a certain contingency; for that it was to be liable, and for no more; if any law of the State imposed a larger payment in that contingency, the obligation was changed—impaired. Sturges v. Crowninshield, 4 Wheaton, 122; Green v. Biddle, 8 Wheaton, 84; Odgen v. Saunders, 12 Wheaton, 257.

Is there any State law imposing a larger liability than the contract contained in the charter imposes? It imposes a penalty of twelve per cent. per cent. for suspension; that is the entire liability. The Act of 1824, as construed by the highest court of law in the State, imposes an additional penalty of six per cent. more. This certainly changes and impairs the obligation of the contract between the State and the bank, unless the two laws are so blended together as to be but one regulation; or the mere priority of existence of the Act of 1824 makes it necessarily a part of that of 1829; or the constitutional prohibition does not apply to laws passed previously to the contract; or the effect of the law upon the contract must result directly from its own language, and not from its judicial construction or application. None of these exceptions can be successfully maintained in the present case.

The Act of 1824 is not blended with that of 1829. The latter is a written instrument, deliberately drawn so as to embrace the whole subject matter; if the provisions of the Act of 1824 were part of it, this would have been so declared. The Act of 1829 is not a mere legislative act, prescribing a municipal regulation affecting citizens or corporations, but it is the agreement of the State itself, for its own benefit, securing what it claims for itself, and imposing the conditions on the other contracting party. If there were clauses in the Act of 1824 less favorable to the State, could they be construed so as to affect privileges it might reserve in that of 1829? If the State had agreed, by a general law, in 1824, to advance its bonds to the amount of a million to every bank, and in 1829 agreed by the charter to advance to this bank bonds to the amount of half a million, would it be contended that the former agreement was not superseded by, but added to, the latter? It would be easy to suggest similar contingencies. No. The charter is complete, so far as regards all matters of mutual stipulation between the 336*] parties; *there is nothing in it which requires the Act of 1824 to be blended with it.

Nor is any inference to be drawn, by legal construction, that the parties intended to include the provisions of the Act of 1824 in that of 1829, because it was then in existence, and was not expressly repealed. The facts of the case are at variance with such an implication; so is every legitimate legal inference. Were this a contract between individuals—and so, in the cases before cited, this court has construed such charters—unquestionably the legal presumption would be that the new superseded the existing contract. Such, too, is the presumption in legislation; a subsequent provision by law for the same subject matter is a substitute for a previous one. General laws are so construed; where penalties are imposed, they are not treated as cumulative; where different remedies are given for the same money, both cannot be resorted to, but one or the other must be chosen. Titcomb v. Union F. & M. Insurance Company, 8 Mass. 333; Bartlet v. King, 12 Mass. 545; Adams v. Ashby, 2 Bibb, 98; Morrison v. Barksdale, 1 Harper, 103; Smith v. The State, 1 Stewart, 506; Stafford v. Ingersoll, 3 Hill, 41; Sharp v. Warren, 6 Price, 137; United States v. Freeman, 3 Howard, 564; Daviess v. Fairbairn, 3 Ibid. 644; Beals v. Hale, 4 Ibid. 53. Besides, there can be no inference founded on a general legal principle which is to prevail against an inference derived from the law in the particular case. The Act of 1829 provides for the entire case of suspension of payment of notes and deposits in gold and silver. Even the same court recognized it as so doing, when it was before them on another occasion. State v. Commercial Bank, 10 Ohio, 538. The only expression contained in it, which can be cited as at variance with this view, is the imposition of the increased interest as "additional damages," which, it is contended, should be construed to be in addition to that imposed by the Act of 1824. But the language does not justify this construction; the imposition of the increased interest not merely on notes, but on deposits, which are not provided for in the Act of 1824, is inconsistent with it; why double the rate, if not to substitute one for the other? It was to be an increase of interest, not a penalty imposed, as is shown by the express language to that effect in the charter of the Franklin Bank, of which the provisions on this point are the same. 3 Chase's Ohio Stat. 2078. Nor do judicial interpretations of corresponding provisions warrant such a construction. Hubbard v. Chenango Bank, 8 Cowen, 99; Brown v. Penobscot Bank, 8 Mass. 448; Suffolk Bank v. Worcester Bank, 5 Pickering, 106; Suffolk Bank v. Lincoln Bank, 3 Mason, 1. It is not denied that there are many cases in which laws, existing at the time of making a contract, will be regarded by courts as necessarily forming a part of it. But it is not so where the State is a party to the contract; where the law to be construed is itself the *contract; where it [*337 is not apparent that the parties must have contemplated such an incorporation of previous laws. 3 Story's Com. on the Constitution, 247; 1 Kent's Com. 395. There is no decision of this court on the effect of an existing State law on a contract made by the State itself; every one relates to cases of contracts between third persons; yet even in these it has always been held that it must appear that the existing law was intended to be embraced, either from a reasonable interpretation of the terms

of the contract itself, or from the place where it was made, which justifies the inference of intention that the lex loci was to govern. Sturges v. Crowninshield, 4 Wheaton, 122; Clay v. Smith, 3 Peters, 411; Baker v. Wheaton, 5 Mass. 509, 511. The whole series of decisions in regard to the effect of State insolvent laws on contracts, and as being considered to form, by implication, a part of them, rests on this view of the subject, as does the application of the lex loci to the construction of them.

The prohibition of the Constitution had for its object to prevent the obligation of a contract being impaired by any law whatever, no matter whether its passage was before or subsequent to the contract. The inquiry is, Does a contract exist? What is its obligation? Does a law impair it? If there is in existence a contract, valid in itself, such as the parties had a right to make, not embracing by its terms or by just legal implication the provisions of other laws, then any State law that changes or controls it, or can be so applied by the judicial tribunals of the State as to change or control it, is contrary to the language and intention of the constitutional prohibition, no matter when such law bears date—no matter whether its operation be prospective or retrospective—on contracts existing when it was passed, or entered into subsequently. In the first plan of the Constitution there was no such clause; it was introduced to prevent any interference by laws of the States with private contracts. It was proposed to restrict this to such State laws as were "retrospective," but that was not adopted, and the existing limitation was made with a view to reach the declared object—"a restraint upon the States from impairing the obligation of contracts" in any way. 2 Madison Papers, 1239, 1443, 1445, 1552, 1581. The reference to a future action—that no State "shall pass" such laws—relates to the date of the Constitution; it is a prohibition future as to that instrument, not to the contract to be affected. No State law, after the Constitution should be adopted, was to impair the obligation of a contract; this was the object of the prohibition. Calder v. Bull, 3 Dallas, 388; Sturges v. Crowninshield, 4 Wheaton, 206; McMillan v. McNeill, 4 Ibid. 212; Ogden v. Saunders, 12 Ibid. 255.

It is evident, that if such be the object of this prohibition of the Constitution, then to make it effectual it must operate, not only where its violation is the result of the direct 338*] language of the law, but *wherever the law is so applied by that branch of the State government—its judiciary—which enforces the law, as to produce this result, to violate this prohibition. A legislative act seldom, perhaps never, violates a contract proprio vigore; it is the judgment of a court, applying the act to the contract, which does so; the law impairs the contract only by force of the judgment; it is, indeed, the law that does so, but only because the judicial application of it has given that construction and application to its provisions. If this were not so, then the law would in every case be constitutional, or the reverse, in itself, and not by reason of its application. Yet this will hardly be contended. Suppose a law confers special privileges on a corporation, and a subsequent general law forbids corporations to possess such privileges; the latter law is in itself constitutional, but if the judiciary so applies it as to infringe the privileges of the particular corporation, is it not a violation of the constitutional prohibition? On what other principle do the decisions of this court, in regard to State insolvent laws, rest? They have been held to be constitutional or the reverse, not in themselves, but according to the manner and circumstances to which they are applied by the judgment of a court; if applied to contracts made within the State enacting it, an insolvent law is held to be valid; if applied to those made without the State, the identical law is held to be unconstitutional, or, to speak more correctly, the judgment of the court founded upon it is reversed, as making the law violate the constitutional prohibition. When this whole question was so elaborately discussed by this court (Ogden v. Saunders, 12 Wheaton, 255), no point received more unequivocally than this the concurring assent of the judges; they affirmed the validity of the State insolvent law, as not contrary to the constitutional prohibition in its operation on the contract, because it was made and to be executed within the State that passed the law, and on that ground Judge Johnson placed the ultimate judgment of the court. 12 Wheaton, 368. In one case, Clay v. Smith, 3 Peters, 411, the contract was made in Kentucky, the suit was instituted in Louisiana, a discharge under an insolvent law of the latter was pleaded and admitted, because it appeared that the plaintiff, though a citizen of Kentucky, had received a dividend from the syndics in Louisiana; had not that circumstance occurred, the application of the law of Louisiana to the Kentucky contract would have been held to impair its obligation. Was this the law itself, or its application, which constituted the violation of the constitutional provision? There is scarcely a prohibition of the Constitution that might not be evaded by State laws, if the evasion must arise necessarily from the law itself, and not from its application by the State courts. Cannot a State pass a general law placing certain restrictions on the traveling of coaches and stages, but not referring in terms, or by necessary implication, to the mail coach, and if the highest court of the State recognizes *the law to be valid [*339 as applied to such a coach, is not that a violation of the constitutional reservation to the United States exclusively of matters connected with the postoffice? Would the decision of the State court be affirmed by this court, or, what is equivalent thereto, jurisdiction over it be declined, on the ground that it was a mere judicial misconstruction of the State law? A State may pass a law requiring, in general terms, the captain of a vessel to adopt certain sanitary regulations on board, to carry certain lights, to steer in a certain way so as to avoid collisions, and impose a penalty for neglect; but if the highest court of the State sustained a suit to recover the penalty, when it appeared that the violation of the law was in the course of a foreign voyage, and not within the local jurisdiction of the State where its authority to enforce police regulations prevails, would not that judgment be subject to the revision of this court? A State has a right to borrow money; it may pass a law authorizing its executive to

do so on the faith of the State; if in so doing he should issue "bills of credit," and the highest court of the State should sustain their legality as founded on that law, would this court refuse to revise that judgment, on the ground that the law itself was constitutional, and that its application to the particular case was a mere act of the court, not contemplated by the State Legislature, and therefore not violating the constitutional prohibition?

Again, it is not alone on the language itself of the State law, it is on its construction also by the State court, that the supervising judgment of this tribunal will be founded. The decision of a question arising under a local law of a State by its highest judicial tribunal is regarded by this court as final, not because the State tribunal has power to bind it, but because it has been deliberately held and decided that "a fixed and received construction by a State in its own courts makes a part of the statute law." Elmendorf v. Taylor, 10 Wheat. 152; Shelby v. Guy, 11 Ibid. 361; Green v. Neal, 6 Peters, 298. We have here a local law of the State of Ohio; referring to the law itself, we find it to contain nothing which impairs the obligation of the contract between the State and Commercial Bank of Cincinnati, nothing which violates the constitutional prohibition; it has received a construction by the highest State tribunal which makes it a law impairing that contract, violating that prohibition; that construction has therefore become "a part of the statute law," as fully as if it were in terms contained in it; the judgment of the Supreme Court of Ohio is founded upon the laws as so construed; this court, in revising that judgment, would not, under its own well considered decisions, give a different construction to a local law; much less would it do so when the effect would be to sanction, under the form of a judicial proceeding, an infringement of a constitutional prohibition.

The legislation of Congress also seems to have contemplated the enforcement of this constitutional prohibition, where its infringement 340*] *arises from the judicial construction of a State law. The Constitution prohibits the passage of a State law impairing the obligation of a contract. It leaves to Congress the legislation necessary to enforce this prohibition. How has Congress enforced it? Not by reserving to itself a direct supervision of the State laws; not by subjecting them to a direct supervision of the Supreme Court of the United States; but by requiring that they should first be passed upon and construed by the highest court of the State itself, and that, if the judgment of that court so construes them, or gives them such validity, as to make them repugnant to the constitutional provision, then this court may reverse such judgment, and by so doing make void such an application of the law. What could be the object of this act of Congress, if it was not to sanction a revision of a judgment of the highest court of a State, founded upon its construction of a State law —upon its holding a State law so construed to be valid—whether that construction was in itself right or wrong, whenever the direct effect of such judgment was to impair, under color of that law, the obligation of a contract?

Even the language of the Constitution itself is more comprehensive than if it meant to prohibit an infringement of its provision by a mere legislative "act;" it seems to use the term "law" in a broader sense, as if it was the complete and sovereign action of a State, commenced by its Legislature but consummated by its judiciary. In another section, where it draws the distinction between the actions of these branches of the State government (art. 4, sec. 1), it refers to "public acts" and "judicial proceedings." Did it not mean by a "law" the union of the two? In the clause of the ordinance for the government of the Northwest Territory, intended to embrace the same object as that of the Constitution, and adopted by the Continental Congress almost at the same time, it was declared that no such law ought ever to be made "or have force"—as if any enforcement of it, whether legislative, executive, or judicial, was as much to be guarded against as its formal enactment. 1 Statutes at Large, 51.

Is not the case now before the court exactly that which was adverted to by Judge Trimble, as within the intent and operation of the constitutional prohibition (12 Wheat. 316), where a law might in itself produce no effect prohibited by the Constitution, yet would do so when applied to a case differently circumstanced? He held that the "only necessary inquiry" was, What was "its effect and operation" in the suit upon the particular contract? —whether that effect was to impair its obligation. What has been the effect and operation of applying the Act of 1824 to the suit which has been brought upon this contract of 1829; has it not been to impair its obligation? Such, too, is the whole scope of Chief Justice Marshall's remarks in the same case (12 Wheat. 337), where he denies that the constitutional prohibition is confined to "such laws only as *operate of themselves." He says that [*341 the law itself, at its passage, may have no effect whatever on the contract, and asks, "When, then, does its operation (in violation of the constitutional prohibition) commence? We answer, when it is applied to the contract; then, and not till then, it acts on the contract, and becomes a law impairing its obligation." Can language lay down a legal principle more directly applicable to the case before the court than this? Can there be any doubt that the principle itself is in entire harmony at once with the language and the object of the constitutional prohibition?

It is submitted, therefore, that there is no circumstance to withdraw this application of the Act of 1824 to the charter of the Commercial Bank of Cincinnati from being included within the constitutional prohibition as impairing its obligation. If this has been established, then it is clear that the judgment of the Supreme Court of Ohio, recognizing that act as valid when so applied, may and ought to be reversed by this court; for it appears by the record that the validity of the State law was drawn in question on that ground in the State court, and its validity there affirmed. Miller v. Nichols, 4 Wheat. 311; Wilson v. The Black Bird Creek Marsh Co. 2 Peters, 250; Satterlee v. Matthewson, 2 Peters, 409; Harris v. Dennie, 3 Peters, 292; Crowell v. Randell, 10 Peters, 391.

Mr. Justice Grier, after giving the statement of the case which is prefixed to this report, proceeded to deliver the opinion of the court:

The first and only question necessary to be decided in the present case is, whether this court has jurisdiction.

To bring a case for a writ of error or an appeal from the highest court of a State, within the twenty-fifth section of the Judiciary Act, it must appear on the face of the record, 1. That some of the questions stated in that section did arise in the State court; and, 2. That the question was decided in the State court, as required in the section.

It is not enough, that the record shows that "the plaintiff in error contended and claimed" that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and "that this claim was overruled by the court"; but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. Let us inquire, then, whether it appears on the face of this record, that the validity of a statute of Ohio, "on the ground of its repugnancy to the Constitution or laws of the United States," was drawn in question in this case.

The Commercial Bank of Cincinnati was incorporated by an act of the Legislature of Ohio, passed on the 11th of February, 1829, which provided that, in case that the bank should at 342*] any time suspend *payment, and refuse or delay to pay in gold or silver any note or bill on demand, it should be "liable to pay, as additional damages, to the holder of such notes, twelve per cent. per annum on the amount thereof, for the time during which such payment shall be refused or delayed." By a previous act of 24th of January, 1824, all banks had been declared liable to pay six per cent. interest on their notes, when they had refused payment on demand, from the time of such demand or refusal, "or from the time that such bank or banker shall have ceased or refused to redeem his notes with good and lawful money of the United States." The only question which arose on the trial of the case was, whether the bank was liable to pay the twelve per cent. in addition to the interest of six per cent. given by the Act of 1824, or only the twelve per cent. imposed by the act of incorporation.

Did the decision of this point draw in question the validity of either of these statutes, on the ground of repugnancy to the Constitution of the United States? Or was the court merely called upon to decide on their construction?

We are of opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness.

It is too plain for argument, that, if the act of incorporation had stated, in clear and distinct terms, that the bank should be liable, in case of refusal to pay its notes, to pay twelve per cent. damages in addition to the interest of six per cent. imposed by the Act of 1824, the validity of neither of the statutes could be questioned, on account of repugnancy to the Constitution. But the allegation of the plaintiffs' counsel is, that the statute of 1824 was *not intended by the Legislature to apply to*

their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.

But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the Constitution of the United States has been decided by the State court to be valid, and not where an act admitted to be valid has been misconstrued by the court. For it is conceded that the Act of 1824 is valid and constitutional, whether it applies to the plaintiffs' charter or not; and if so, it follows, as a necessary consequence, that the question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the Act of 1829, and what was the meaning of the phrase "additional damages," as there used, and not to declare the Act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but *whether the Su- [*343 preme Court of Ohio has erred in its construction of them. It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

We are of opinion, therefore, that this case must be dismissed for want of jurisdiction.

Order.

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

JOHN SCOTT and Carl Boland, Plaintiffs in Error,

v.

JOHN JONES, Lessee of The Detroit Young Men's Society, Defendants in Error.

This court no jurisdiction under Judiciary Act to try question whether political body which passed a particular law was a "State."

An objection to the validity of a statute, founded upon the ground that the Legislature which passed it were not competent, or duly organized, under acts of Congress and the Constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject.

In order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its Constitution and laws.

If public bodies, not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or territories within which these bodies are situated and acting.

But their measures are not examinable by this court on a writ of error. They are not a State, and cannot pass statutes within the meaning of the Judiciary Act.

THIS case was brought up by a writ of error, issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Michigan.

It was an ejectment brought in the Circuit Court for the County of Wayne, State of Michigan (State court), by The Detroit Young Men's Society against the plaintiffs in error, to recover lot No. 56, in section one, in the city of Detroit.

On the trial of the cause, in December, 1841, the plaintiffs below offered in evidence—

344*] *1. An Act of incorporation by the Legislature of the State of Michigan, passed on the 26th of March, 1836, entitled "An Act to incorporate the members of The Detroit Young Men's Society." To the admission of this act in evidence the defendants objected, but the court overruled the objection, and allowed it to be read to the jury; whereupon the defendants excepted.

2. A deed, bearing date on the 1st of July, 1836, executed by Solomon Sibley, Judge, George Morell, and Ross Wilkins, Judge, purporting to convey lot No. 56 to The Detroit Young Men's Society, the plaintiffs having first proved, by the witnesses to the deed, that, on or before that day, the said Sibley, Morell, and Wilkins were reputed to be, and acted as, judges of the Territory of Michigan, appointed by the authority of the United States.

The Act of Congress under which they acted was that of 21st April, 1806, ch. 43 (2 Statutes at large, 398).

To the admission of this deed as evidence, the defendants objected, upon five grounds. But the court overruled the objections, and allowed the instrument to be read to the jury; whereupon the defendants excepted.

The defendants then offered in evidence the following:

1. A deed from the treasurer of the County of Wayne to John Scott, dated 10th October, 1833, conveying the title for taxes; which deed the court refused to permit to be read in evidence, unless it were first shown that the title had passed out of the United States, and that the same had been regularly assessed and returned; to which refusal of the court the defendants excepted.

2. A resolution of the Governor and judges of the Territory of Michigan, dated on the 8th of September, 1806, that the basis of the town should be an equilateral triangle, having every angle bisected by a perpendicular line on the opposite side, and then proved, by a mathematical calculation, that lot No. 56 was the same as *that which was known as* lot No. 52 prior to *27th April, 1807; and then* offered a resolution of the governor and judges, dated on 13th March, 1807, conveying said lot No. 52 to Elijah Brush.

To all which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants then offered a witness, to prove that he had applied to the governor and judges for information as to what lots were taxable, and that they had informed him that the lot in question was taxable in 1828; to the admission of which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants further offered parol evidence relative to the conduct and declarations of the governor and judges, to which the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

And on the trial of said issue, it further appeared in evidence, *from the records [*345 of the Secretary of State, that a Legislature of the State of Michigan, duly elected and returned, was organized and duly qualified, under the constitution of said State, on the third day of November, A. D. 1835, and that Stevens T. Mason, having been duly elected and returned, was on the same day duly qualified, and took upon himself the execution of the office of governor under the constitution of the said State of Michigan; that the aforesaid Act, entitled "An Act to incorporate the members, of The Detroit Young Men's Society," was approved by the said Stevens T. Mason on the 26th of March, in the year 1836, and who was at that time governor, acting under the constitution of the State of Michigan; that John S. Horner was Secretary of the late Territory of Michigan, and in the month of July, 1835, acted as governor of said territory; that he was the last person who exercised the functions of territorial governor of the Territory of Michigan; that the last official act of said Horner, as governor of the Territory of Michigan, in the office of the Secretary of State, is a proclamation, dated in the month of July, in the year 1835, but by reputation it appeared that the said Horner purported to act as territorial governor of Michigan until sometime in the year 1836. It further appeared, by the records produced by the late clerk of the late Supreme Court of the Territory of Michigan, that a session of said court purported to have been holden by George Morell and Ross Wilkins, as territorial judges, in the month of June, 1836, and adjourned the 30th of said month. And it further appeared, on the trial of said issue, that Solomon Sibley, George Morell, and Ross Wilkins purported to act as judges of the Territory of Michigan on the 1st of July, in the year 1836. And on the trial of said issue the defendants offered a witness, who was present at the time, to prove to the jury that Solomon Sibley and Ross Wilkins, acting as judges of the Territory of Michigan, held a session of the Supreme Court of said territory on the first Monday of January, in the year 1837, and of which the clerk of said Supreme Court made no record; to the admission of which the plaintiff, by his attorney, objected, and the court sustained the objection, and rejected said evidence, and the defendants, by their attorney, duly excepted thereto.

And the testimony on both sides being closed and commented upon, and the said court being about to charge the said jury, and to commit to them the said cause, the said defendants, by their attorney, moved the said court, and requested them to charge the said jury, in the words or effect following, to wit:

First. That the act herein before mentioned, entitled, "An Act to incorporate the members of The Detroit Young Men's Society," was not of force, or in any wise sufficient in the law to create and constitute of the lessors of the plaintiff a corporation or body politic, in the law, capable to take or hold said lot or premises, nor the title thereof, nor to exercise any 346*] corporate rights or powers in virtue *or under color of said act, unless the jury should find that the State government of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation.

Second. That from and after the establishment and coming into force and operation of said State government, and of the Legislature thereof, the territorial government established by the United States, and previously in full force in and over the Territory of Michigan, ceased, and in law and in fact became abrogated, superseded, and annulled.

Third. That from and after the coming into effect and operation of said State government, the powers, duties, and office of judges of said territory ceased, and became in like manner abrogated and abolished, and by consequence the said Solomon Sibley, George Morell, and Ross Wilkins, as said supposed judges of said territory, were no longer, after the said establishment and coming into operation of said government, competent in the law, as such judges of the Territory of Michigan, by said supposed deed by them executed, to convey any right or title in, to, or of the said lot No. 56, or the premises in question to the said lessors of the plaintiff, nor to perform any other of the functions, nor exercise the powers, previously conferred by any act or acts of Congress upon the territorial judges of said Territory of Michigan.

Fourth. But if the said jury should find that the said Solomon Sibley, George Morell, and Ross Wilkins were, on the said first day of July, in the year 1836, severally in the legal exercise of the office of judge of said Territory of Michigan, duly appointed by the United States, and holding office under such appointment, and that they severally signed and sealed said paper, writing, or deed, in the execution of their said offices, according to the Act of Congress entitled, "An Act to provide for the adjustment of titles to land in the town of Detroit and Territory of Michigan, and for other purposes," approved April 21st, A. D. 1806, then that by consequence it followed and resulted that the said Act, entitled, "An Act to incorporate the members of The Detroit Young Men's Society," was without authority, and in contemplation of law did not create nor constitute the lessors of the plaintiff on the 26th day of March, A. D. 1836, nor on any other day, a corporation or body politic, and corporation competent to purchase, acquire, or hold the lot in question, or any real estate whatever.

Fifth. That a territorial and State government cannot co-exist in any of their respective departments; that if the lessors of the plaintiff were well incorporated, and competent, in virtue of said act of incorporation of the Legislature of the State of Michigan, to take and hold the lot or premises in question, then the territorial government of the Territory of Michigan was, at the date of said paper, writing, or deed, under which the lessors of the plaintiff claim title, *abrogated and at an end, and the [*347 governor and judges of said territory had no legal existence, and said deed is therefore void, and can convey no title in any event; therefore the plaintiff cannot recover.

Sixth. That the paper, writing, or deed under which the lessors of the plaintiff make title to the lot or premises in question, being a deed of bargain and sale, and not a donation, is void, and can in no manner be the foundation of any title, not being executed by the Governor of the Territory of Michigan, as required by the act of Congress, in virtue of which it purports to have been made and executed; and therefore the plaintiff cannot recover. All which charges the court refused to give to the said jury, and to which refusal the defendants, by their attorney, then duly excepted; and, on the contrary, the court charged the jury that the lessors of the plaintiff were well incorporated by the Legislature of the State of Michigan, and by a body competent so to do, and that the aforesaid deed, under which the lessor of the plaintiff makes title, was well executed in the law, and by those competent in the law to convey title to the lot or premises in question; and that, on the 1st day of July, 1836, there was a governor and judges of the Territory of Michigan, competent to convey title to the premises in question, under the act of Congress referred to in said paper, writing, or deed; and that, under said act of Congress, the said paper, writing, or deed was well and sufficiently executed without being executed by the Governor of the Territory of Michigan, or being acknowledged or proved, as required by the law of the time when the same was made, in relation to all the conveyances affecting real estate; to which charges of the court the defendants excepted.

The Supreme Court of Michigan, in March, 1843, affirmed the judgment of the court below, 1 Dougl. Mich. R. 119, and the cause was brought before this court by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was argued by Mr. Woodbridge for the plaintiffs in error, and by Mr. Howard and Mr. Hand (in a printed argument) for the defendants in error.

Mr. Woodbridge, for the plaintiffs in error, enumerated the following causes of error in the decision of the court below, viz.:

That the evidence tendered and offered to be introduced at the trial of said cause by the said plaintiffs in error, in support of the right and title specially set up and claimed by them, under the act of Congress in said record mentioned, as by the said record appears, was rejected, and not permitted to be read and heard on the trial of said cause; whereas, by the law of the land and a just construction of said act of Congress, the same, or some of it, ought to have been admitted and received in evidence on said trial.

348*] *That the matters and things which the said plaintiffs in error moved and prayed the court to give in charge to the jury, as the same in said record are stated and set forth, were not so given in charge to said jury; whereas the same, or some part thereof, ought to have been so by the court given in charge, and the jurors who tried the said cause so therein instructed.

That the matters and things given in charge to the said jurors at the trial of said cause, and as the same in said record appear, ought not, according to the law of the land, to have been so given in charge, nor the said jurors to have been so instructed.

That, on the face of the record and proceedings aforesaid, it appears that the certain legislative act in said record mentioned, the validity whereof was drawn in question in said cause on the ground of its repugnancy to the Constitution and laws of the United States, was decided and pronounced to be valid; whereas, by the laws of the land, the decision in the premises ought to have been against the validity thereof.

This is an action of ejectment brought by defendants in error, in the Circuit Court for the circuit of Wayne county, in the State of Michigan, against the plaintiffs in error, for a lot of ground in the city of Detroit. Exceptions being taken during the trial to sundry decisions of the court, the cause was removed on error to the Supreme Court, the highest judicial tribunal of the State. The several points made were there decided against the plaintiffs in error, and the judgment below (in favor of defendants in error) affirmed. That judgment of affirmance and the whole record is brought by error to this court.

The first testimony sought to be introduced by defendants in error (plaintiffs below) was a private act, appearing to have been passed by the Legislature of the State of Michigan, on the 26th day of March, 1836. It purports to incorporate the defendants in error by the name of "The Detroit Young Men's Society;" to vest them with the capacity to acquire and hold real estate, to sue and be sued, etc. The introduction of this private act was resisted, on the ground that this pseudo Legislature had no legal existence at the time of passing the act. That at that period, and both before and after, the territorial government established by the United States was in full and legal force throughout the District of Michigan, and that Michigan did not become a "State" until the 26th of January, 1837, some ten months after the date of the act objected to; and consequently that the act was repugnant to the sovereignty, Constitution, and laws of the United States, and, as such, of no force and null.

The act was permitted to be introduced and read, and was decided by the State courts to be a good and valid act to incorporate the defendants. To that decision due exception was taken.

Having thus, by the decision of the court, es-
349*] tablished their title *to sue, the defendants in error next offered in evidence the paper purporting to be a deed from the territorial judges, appointed by the President and Senate of the United States, which is set out in the record. Its admission was objected to, on the ground, that, upon a just construction of the Act of Congress of April 21, 1806 (which constitutes the territorial governor and judges ex officio commissioners or trustees, with power, in the manner and for the purposes it indicates, to convey the title of the United States to those lots, and also to ten thousand acres of land adjacent to the city of Detroit), the joint concurrence of the governor of the territory in the execution of the deed was indispensable.

Its admission was also objected to, on the ground that the lot in question was not a part of the ten thousand acres mentioned in the act of Congress, which, alone, the trustees were authorized to sell for money; but a lot within the limits of the town, with respect to which the trustees could dispose of it only by a deed of confirmation to a previous proprietor, or by way of donation to some citizen of the United States who had been resident in the old town at the time of the fire, and who had suffered by the conflagration. There could be no pretense that defendants in error came within that description of persons.

It was objected, also, that the instrument sought to be introduced as a deed was not executed nor authenticated according to the provisions of the ordinance of 1787, nor according to the general law of the territory. But more especially it was objected, that it appears upon the face of it to have been executed by the United States judges of the territory on the first day of July, 1836, many months after the State government was, by the same State judges, decided to have come into full operation; and some four months after the defendants in error had caused themselves to be incorporated by a body which assumed to be the Legislature of a sovereign State. Assuming that the court would adhere to its own decision, and that, according to that decision, the State government had become fully and constitutionally established on a day prior to the incorporation of defendants in error, it was insisted that the territorial government must eo instanti have become abrogated; that the two governments could not exist together; that if the State government had become established, the office of territorial judge, as a consequence, must have ceased; that whensoever their office ceased, their power as ex officio commissioners or trustees ceased also with it; and that consequently their deed was void, as being no longer authorized by the law. These objections were all overruled. The document was received in evidence as a valid instrument to convey the land, and the decisions of the court severally excepted to.

The defendants in error having here rested their case, the plaintiffs in error, whose peaceable possession of the premises had been sufficiently *established, then undertook to [*350 prove that the same lot had been confirmed and conveyed by the governor and judges of the territory, in 1807, to "Tod & McGill," inhabitants, merchants, and proprietors of lots in the old town of Detroit before its destruction by fire. That, having thus become the property of individual proprietors, it became subject to be assessed and taxed, and, the tax remaining unpaid, to be sold for the payment of it. That it was so taxed, and according to the law of the land offered at public auction; and

that plaintiffs in error became the purchasers, and received a deed for it executed by the officer to that end appointed by the law.

In order to establish the important fact, that the title of the lot had passed out of the United States, plaintiffs in error offered and moved to introduce the journals and records of the governor and judges as a board of commissioners or trustees (under the Act of 21st April, 1806). Which journals and records purported to show that the "claims of Tod & McGill" had been duly "adjusted," and the lot in question (with others) confirmed to them as proprietors of lots in "the old town." And, also, plaintiffs moved and tendered to introduce proof of the declarations of the board (the governor and judges), formally and officially made in 1828, in answer to the official application of the assessor of taxes for that year (made with the view of obtaining that information which was necessary to enable him to perform his duty as assessor); that the lot in question had been conveyed by them, had become individual property, and was therefore liable to taxation. Plaintiffs in error also moved and tendered to introduce the deed from the officer appointed by the law to conduct the sales of lands for unpaid taxes; the territorial law providing that the deed itself should be evidence of the regularity of the assessment and sale (Laws of Michigan, 1827, p. 378). All the above mentioned evidence as from time to time during the trial it was offered, was objected to by the defendants in error, overruled by the court, and those several decisions excepted to. Plaintiffs in error then moved the court to instruct the jury on the law as is set out in the record, which motion was in like manner overruled; and the court then proceeded to instruct the jury to the effect stated in the record, to which decisions and charge plaintiffs in error excepted; and upon these exceptions, and in this aspect, the case comes before this court for revision and judgment.

Before commenting more specifically upon the points made in this case, it may be proper to advert briefly to the history and general character of the land titles at Detroit, as they existed prior to the passing of the Act of 1806.

It was about the year 1720, that the French constructed a permanent fortification at Detroit. It was made to constitute one of a line of military posts extending from Quebec, through the country of the lakes, to New Orleans. The population had already become 351*] *considerable, but no grants of land had yet been issued there. After it became a garrison town, other considerations prevented the issue of such grants. The general policy of the government was to retain the proprietary title to lands in the immediate vicinity of their forts. It was customary, however, for the commanding officers of the garrison to grant possessory rights to occupants of houses and lots; subject always, in any pressing exigency, to be revoked. These permits ultimately came to be considered as substitutes, practically as equivalents, for actual grants. They were bought and sold, and passed by descent. And the instances were rare, if any such ever occurred, in which the occupants were disturbed in their possessions.

Such was the tenure by which lots, houses,

and stores were holden in Detroit, when the sovereignty of the country passed successively from the French to the British government, and from that to the United States; and it continued unchanged until the Act of April, 1806; upon which act both the parties rest their respective claims of title.

From the time General Wayne (in 1796) received possession of the military post at Detroit, Michigan became a component part of the old Northwest Territory. When that territory was divided in 1800, it was made to constitute a part of the western division, or Indiana Territory. 2 Stat. at Large, 58. And in January, 1805, it was erected into a separate territory, and its seat of government established at Detroit. 2 Stat. at Large, 309. A few days before the new government provided by Congress for the territory was to go into operation, the town was totally destroyed by fire. This event, together with the peculiar and unsettled condition of its land titles, led to the enactment of the Act alluded to, of April 21, 1806, ch. 43. 2 Stat. at Large, 398.

Reversing the order in which the decisions objected to were made in the State court, it is proposed, first, to consider the titles of the plaintiffs in error to the lot in question, and the correctness of the decision by which our proof was excluded. 2d. The validity of the deed read in evidence by defendants in error, in support of their claim of title, and the correctness of the decision by which it was admitted as evidence. And, 3d. The validity of that legislative act, in virtue of which the defendants in error claim to have been incorporated, rendered competent to sue, and to acquire and hold real estate in their corporate capacity.

The character of the title of plaintiffs in error has already been alluded to. It is "set up" under the Act of Congress of 1806. 2 Stat. at Large, 398. The decision of the State court, in effect, is against it.

Having shown the identity of the lot, the plaintiffs in error tendered in evidence their deed for the premises, executed by the officer appointed by the law, and in respect to which the territorial *statute provides, that [*352 the deed itself shall not only be evidence of the sale, but of the regularity of the proceedings which terminated in that sale. Terr. L. of 1827, p. 378. This testimony was rejected until plaintiffs in error should first have shown, by competent evidence, that the title had passed out of the United States. Plaintiffs in error then offered in evidence the journals and records of the board (the governor and judges), for the purpose of proving the confirmation and conveyance of the premises to "Tod & McGill," according to the provisions of the first section of the Act of the 21st April, 1806.

They further tendered to prove, by the oral testimony of the assessor by whom the tax (in 1828) was assessed, for the nonpayment of which the lot was sold, that, in his character of assessor, he had applied himself to the governor and judges for a designation of the lots they had conveyed, for the purpose of enabling him to execute his sworn duties; that the board, without qualification, declared to him that the lot in question, among others, had been by them so conveyed, and that the lot was accordingly assessed for taxation.

The whole of this testimony, being objected to by the defendants in error, was rejected and excluded by the court. The State court probably considered that the deed to "Tod & McGill" was of a higher grade of testimony; and, it is presumed, rested their decision upon that cardinal maxim, that "the best evidence must be given of which the nature of the thing is capable."

But it is the reason of the rule which constitutes the rule. And I have seen that reason nowhere better stated than by this court in the case of Tayloe v. Riggs, 1 Pet. 596. After stating the rule as above, the court proceeds to say, "That is, no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents." 1 Pet. 596.

In England all title deeds, upon alienation, pass into the hands of the purchaser. This is the long established, and, it is believed, the universal custom, especially in the non-registering counties. Upon descent they go also to the heir, who may coerce their delivery if withholden. The law presumes, therefore, in England, that all title deeds are in the hands of the proprietor; and if a question occur as to their contents, he, being a party, must produce them, unless he show that they are no longer in his possession or power. In such a case the rule is legitimately applied. But it will be perceived, that the reason of that rule does not apply to this case. There may be something like privity of estate, but there is no privity of contract, between plaintiffs in error and "Tod & McGill." Their estate may be our estate, but 353*] it passed from them, *in invitum, by mere operation of law; and the law cannot presume that those gentlemen should voluntarily have given to us their title deeds. The deed, then, not being presumed to be in our possession nor power, we will be permitted by the rules, as well as by the philosophy of the law, to produce secondary evidence of the fact, which the deeds would verify. Thus, in a suit by a widow for her dower, it was holden by Kent that she need not produce the title deeds, for the law presumes it not to be in her power. Bancroft v. White, 1 Caines' Rep. 190. Nor in such a case is it necessary for her to coerce their production. 5 Cowen, 299; Adams on Ejectment, 68, note.

But it is not admitted that the journals and records of the governor and judges, in reference to the public trust confided to them by the Act of 1806, ch. 43, can be justly deemed as secondary evidence of their public acts. On the contrary, it is respectfully insisted, that they should be deemed primary, and of the highest grade of evidence as to those acts.

Thus, the original book of acts of a surrogate, containing an order or "fiat" for administration to be granted, is evidence of the issue of letters of administration. 8 East, 188; 13 East, 234-237; so in a note, Day's edition, 238.

Books of the steward, containing briefs of a surrender and admittance (of copyhold estate) are evidence to prove transfer, without producing original conveyance, etc. 16 East, 208.

But a far more authoritative exposition of the law on this point is to be found in 5 Wheat. 424; 4 Cond. R. 714. The Bardstown trustees were appointed to lay out a town, dispose of lots, etc. The journals of their proceedings were offered in evidence. The court says, "The trustees were established by the Legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved." So in 4 Pet. 342; 16 Pet. 55, 56. This doctrine seems abundantly sustained by other authorities. 3 Dane, 510; Swift on Ev. 23; Esp. 423; Bull. N. P. 249; 4 Burr. 2057.

And even as between individuals, where there is no public trust, nor official oath, proof of an agreement to convey, united with long possession, will authorize a jury to presume a conveyance. 7 Johns. 5.

And in this connection it may be proper to remark, that all that it was incumbent upon plaintiffs in error to establish was the abstract fact that the title to the lot had passed out of the United States; it is immaterial to whom; and no question could be made as to the terms of the deed. By passing out of the United States it became private property, and as such subject to tax, and to sale if the tax was not paid.

Our whole testimony was excluded by the State court; and that decision, we insist, is equivalent to a decision against the title we set up under the act of Congress; for it [*354 admits the truth not only of what prima facie appears on the proofs like a demurrer to evidence, but also of all that the jury might justly infer from them. Consequently it is insisted, that the question upon this point is brought clearly within the scope of the 25th section of the Judiciary Act, and therefore within the jurisdiction of this court upon error.

2d point. The defendants in error were plaintiffs in ejectment in the State court. Did they, by legal evidence, show their right to possession? It is insisted that they did not; that the deed introduced by them was not sanctioned by the act of Congress, under color of which it was obtained; that the act of Congress was misconstrued, and the deed itself a nullity; and that any gross misconstruction of the land laws of the United States it is competent for this court upon error to correct. It has been deemed very necessary that a uniform construction should be put upon the revenue laws. It can hardly be deemed less important, that the same uniformity should prevail in regard to your system of land laws. Nothing, perhaps, more nearly affects the peace, happiness, and prosperity of any country, than that its land titles should be placed upon a footing of permanency, certainty, and simplicity. There is a strong moral obligation resting upon Congress, and upon those who administer the land laws, that they should cause to be preserved the permanency and the certainty of a system which forms the basis of the titles of the millions of people whose rights to their own domicil rest upon the action of this gov-

ernment. Besides, the public domain, too, constitutes one of the sources of the revenue of the nation, and its uniform construction should not be less rigorously enforced. I have not been able to discover that the decision in Matthews v. Zane, 4 Cranch, 382, has been overruled or shaken. In that case the court say, "'Tis supposed that its object (i. e., of the Judiciary Act) is to give a uniform construction to all the acts of Congress," etc.

What is said in Buel v. Van Ness, 8 Wheat. 319, strongly corroborates the doctrine advanced in Matthews v. Zane; and the principle which forms the basis of the decision in Durousseau v. The United States, seems fully to justify and amply to establish it. 6 Cranch, 318.

In Willcox v. Jackson, 13 Pet. 516, 517, etc., Beaubien's case, the defendant in error, being plaintiff in the State court, had set up a title under the acts of Congress, and the decision was in favor of that title; the law of the court authorizing the admission as prima facie evidence of the final certificate of purchase. The court says, that this rule of evidence, rightly construed, is not repugnant to the laws of the United States; but that the decision of the State court was founded in a manifest misconstruction of the land laws. This court then sustained its jurisdiction upon error; and, although the defendant set up no title in himself, pro-355*] ceeded to *correct the misconstruction of the State court, and reversed its judgment. If this case do not, in direct terms, re-affirm the doctrine of Matthews v. Zane, it at least strongly illustrates its correctness and wisdom. But in the case before the court, both parties claim title under the same act; the decision must necessarily be in favor of the one, and against the other; and, as in the analogous cases of Ross v. Barland, 1 Pet. 655, 662, and of Pollard's Heirs v. Kibbe, 14 Pet. 353, the plaintiff in error, against whose title the State court decided, having brought the case here, the whole case may properly become the subject of cognizance; the more especially as it seems to be the law of this court, "that a plaintiff in ejectment must show the right of possession to be in himself positively, and it is immaterial as to his right of recovery whether it be out of the tenant or not, if it be not in himself." 9 Wheat. 524. Assuming, then, that "a case consists of rights and claims of both parties," and that the whole case is here, it is proposed next to show that the instrument in writing, purporting to be a deed, and given in evidence against our objection, was not competent to be introduced as evidence of title.

First. Because it was not executed by the governor of the territory.

Second. Because, on the face of it, it does not purport to convey the lot to any of the persons provided for in the first section of the Act of 1806; nor to convey any of that land which the governor and judges were authorized by the second section of the act to sell and convey. As to the first point: whether any power or trust can be properly executed by a bare majority of those upon whom such power is conferred, is sometimes a complicated question not readily solved.

If the power *relate to an individual and private act merely, all must concur in the act,* *13 L. ed.*

unless the instrument conferring the power provide otherwise, as in the case of awards.

If the act to be done be a public act, and merely ministerial, a majority, as a general rule, may be competent to perform it.

If it be a public act, but yet one requiring the exercise of discretion, deliberation, and judgment, and not merely ministerial, all the trustees should be present, that they may respectively interchange their views, reasons, and opinions; and, all being present, though a majority may decide, yet all should join in the execution of the act.

I do not propose to consume time by commenting upon the principles and the authorities which illustrate these distinctions. Such is supposed to be their general spirit, where no variant course is prescribed by the law or instrument conferring the power. 4 Dane, 805, 806; 1 Bac. Wilson's ed. 319; 3 T. R. 40, 380; 8 East, 326-328; 2 East, 244-247; 1 Bos. & Pull. 229, 241, note; 8 T. R. 454. The difference of construction put upon grants of *power in these different classes of cases [*356 can hardly be sought for in any difference of terms, because the same terms are construed differently, according to the character of the power. A literal interpretation of the words used would seem to require the universal concurrence of all the trustees. In cases of public trusts, considerations having reference to public convenience probably induced a relaxation of the more literally exact interpretation. But if, in particular cases, from any peculiarity in the terms used to confer the power, or from other considerations suggested by the nature and objects of the power, an intent may be inferred to require such unanimity, the courts would, no doubt, fall back upon the literal construction.

The Act of 1806 exhibits, it is believed, a case for the application of these remarks, and prescribes on the face of it its own rule of construction.

The first section of that act points to three distinct objects. 1st. The laying out of the new town. 2d. The adjustment of the claims and possessory rights of resident proprietors, and the execution of deeds to them; and, 3d. The grant of donation lots to that class of resident citizens designated in the section. The proper execution of these powers implied the necessity of vigilance and patient examination, of discretion, and of judgment. But it held out no temptations to avarice, nor called into action any peculiarly elevated sense of moral integrity; and therefore the law says, that "the governor and the judges, or any three of them, may execute those trusts."

But the trust specified in the second section is of a very different character. That section authorizes those gentlemen to sell for money a very valuable property, and to apply the proceeds of those sales, in their discretion, to the purpose of constructing a court-house and jail for the county, in the place of those which had been destroyed by the fire; and all this without the probability of being called to any, or to a very strict account. The proper exercise of such a trust implied the necessity of the firmest integrity—of moral attributes so pure as to elevate them above all imputation of sordid or unworthy influences; it implied, too, the

necessity of peculiar caution on the part of those conferring it. In the execution of it, the presence, the deliberation, the concurrence of all were important. It will be observed, accordingly, that this power is made the subject of a separate section, and of distinct provision. It will be observed, that the qualifying expression "or any three of them," twice and emphatically repeated, when providing for the trusts specified in the first section, is altogether and ex industria omitted in the second. And why is this, unless it be that Congress intended to vary the rule, and to adopt the more rigid, literal, and better guarded construction? It is contended, then, that no act of sale—no deed of conveyance, unless it be for some purpose 357*] provided for in the *first section—can be of any validity, unless concurred in and executed by all the members of the board.

This view is strengthened by what has always been the practical construction, as is contended, put upon the statute before the period when the deed objected to was executed. Not an instance before can, it is believed, be found, where any deed, granted in execution of any of the powers defined in either section of the statute, ever before emanated without the signature of the governor or of the acting governor of the territory.

The governor and the judges were the heads, respectively, of two great departments of the territorial government. In the conferring upon those officers, jointly, the power of adopting laws for the territory, the ordinance of 1787 uses words of similar qualification. That high power is granted to the governor and judges, "or a majority of them." But it has always been deemed indispensable, that, in order to give validity to such laws, the governor must have concurred in their adoption; the qualification "or a majority of them," having always been construed as having reference to the judges only—the last antecedent. And in the grant of the powers specified in the first section of the Act of 1806, ch. 43, it seems probable that Congress had reference to the devolution and the limitations of the powers conferred upon the same classes of officers, acting in the same territory, as defined in the ordinance of 1787.

But however this may be, it is respectfully insisted, that the deed objected to—being a deed of sale, and not a deed of confirmation nor of donation—is fatally defective, being without the signature of the governor.

But, secondly, the deed is objected to because it does not purport to convey said lot to any of the persons provided for in the first section of the Act of April 21, 1806, ch. 43; nor does it purport to sell and convey any of the land which the governor and judges were authorized to sell and convey by the second section of the act.

It is manifestly clear, that the defendants in error do not come within the description of either of the classes of persons mentioned and provided for in the first section of the act. The only power conferred by the second section is that of disposing of the lands comprised within the "10,000 acres adjacent to said town," by sale, *and of applying the* proceeds as in that section is *provided. Now, the lot in dispute* is not a part *of the 10,000, but is in nearly* the middle of the town (see map of the city of Detroit, in 5th vol. of State Papers, p. 494), and constitutes, beyond a doubt, one of those lots which should have been confirmed to its ancient proprietor; and if not claimed by such proprietor, then it could only have been conveyed as a donation lot, in conformity with the act. And if it be said that these things do not sufficiently appear on the face of the deed, then it may be replied, that that very omission constitutes a defect in the deed, which should be esteemed fatal. The *authority conferred upon the governor [*358 and judges was an authority not coupled with an interest. Such an authority must not only be strictly pursued, but it must appear on the very face of the transaction to have been strictly followed. Under the first section no deed is competent, except it be a deed of confirmation or of donation. Under the second section no deed is competent, except it be for a part or the whole of the 10,000 acres; such deed must be executed by the governor and by the judges. It must, in either case, purport to convey the right and title of the United States, and not the title of the governor and judges; or of the judges, as this does. If it be for a part of the 10,000 acres, it should state that fact. The deed is not for a defined tract, but for so much of said lot as had not been previously conveyed by their predecessors. It is not acknowledged; it is not authenticated according to the ordinance of 1787, nor according to the lex temporis. It bears evident marks of imperfection, haste, and crudity. "It lacks substance, and wants form," and ought not to have been read in evidence.

But, thirdly, it is most of all and signally defective, in that it purports to convey the lot to such as are not in the law competent to acquire, nor to hold real estate, and to such as have no title to sue.

That there must be a grantee, in order to constitute a grant, is a proposition not likely to be contested here. "That a patent thus made" (after the death of the supposed patentee) "passes no title," says Mr. Justice Catron (12 Peters, 298), "is true in the nature of things; there must be a grantee before a grant can take effect; and so this court held in Galt v. Galloway," 4 Peters, 345, "and McDonald v. Smalley," 6 Peters, 261.

Was there, then, a grantee, capable of taking under the deed read in evidence in the State court?

In order to establish the affirmative of this proposition, the defendants in error introduced what purported to be an act of the Legislature of the State of Michigan, of the date of March 26, 1836 (Laws of Mich. for 1836, p. 165), constituting them a body politic and corporate, etc., as stated in the record. If defendants in error were by that act duly incorporated by the name they assume, they were competent to acquire real estate; if not so incorporated, they were incapable of receiving it, and their deed is void. If they were thus duly incorporated, they were competent to sue; if not so incorporated, they had no title to sue. The validity of that act was therefore necessarily drawn into question.

To the introduction of this document, as a private legislative act, to suffer it to be read as the law of the land, it was objected that it was not passed by any competent authority, and

168 Howard v.

that it was repugnant to the Constitution and laws of the United States. It was, nevertheless, admitted to be read in evidence, and the defendants in error were, by the same State court, declared to have been duly incorporated, 359*] *etc.; to which decisions exceptions were taken. The whole matter resolves itself into the single question, whether, on the 26th of March, 1836, Michigan was an independent State, and an admitted member of the Union. If, by her own spontaneous movement; if, by assuming that name and character, she were capable of constituting herself such, without any action on the part of the national government, then she undoubtedly constituted at that period one of these United States. But if the action of Congress were necessary in the matter; if it appertain to Congress; if it be the exclusive prerogative of that body to admit new States into this Union, then we have a right to insist that she did not become an independent State, not an admitted member of the Union, until, by the Act of Congress of the 26th January, 1837, she was formally declared to be such. See 5 Statutes at Large, 144.

It cannot be necessary here to refer specifically to that clause in the Constitution which vests this power in Congress. But it is understood to be assumed, on the part of the defendants in error, that in virtue of the stipulations contained in the fifth of the articles of compact, set out in the ordinance of July 13, 1787 (1 Statutes at Large, 51), Michigan became an admitted member of the Union from the time her population amounted to 60,000, and had formed a permanent constitution and State government. The terms of the ordinance provide, that when these contingencies shall have happened, the new States there spoken of "shall be admitted by their delegates into the Congress of the United States on an equal footing," etc. It will not escape notice, however, that before such admission can be effected, other and preliminary measures must be determined upon by Congress.

The boundaries of three of those new States are defined, but subject to be varied, if Congress should deem it expedient to constitute more than three. In the event of there being more than three, the northern boundaries of the three are defined. But whether north of the three, there shall be established one or two additional States, and what shall be their boundaries respectively, are questions left open for the subsequent and future determination of Congress. The further action of Congress on those points, therefore, seemed not only competent, but indispensable, before it could become possible that Michigan should be admitted.

The leading purpose of these "articles of compact" unquestionably was, to establish on a permanent footing over those extensive regions the great principles of freedom and well regulated liberty. How far that purpose will have been attained, future ages will decide. But another and a less disinterested purpose was also had in view; and that was, to induce the more early settlement of the country, and of course to make it a more ample and immediate source of revenue. To that end, the promises contained *in the ordinance were holden out as inducing and stimulating motives to* all who might be disposed to remove and buy there.

*But afterwards it pleased the whole [*360 people of the United States to abolish their government, and to abrogate the old articles of confederation. A new constitution was adopted, an entirely new form of government was established, which took the place of the old one. A literal conformity with the stipulations alluded to became, therefore, neither desirable nor possible. The Congress of the confederation consisted of but one chamber. The votes taken in it were by States. It possessed little power, except that which was merely advisory. It was rather a hall of ambassadors, than a legislative body. Such was the body into which, "by its delegates," the new State was promised admittance; and that body has ceased to exist. But those who framed the new government were too wise and too just to disregard the stipulations and engagements the old government had entered into. The provided, therefore, for meeting those engagements, and fulfilling those stipulations, so far as that could be properly done, consistently with the plan and with the leading principles of the new constitution. They deemed it expedient and wise to vest in Congress exclusively the power to admit those new States into the Union, whenever, in the exercise of a wise and just discretion, the exigency might seem to demand it; and they imposed upon the Congress the moral obligation of conforming to all the bona fide engagements of the old government, so far as it might be done consistently with the public good, and the paramount obligations of the new constitution. To have gone further might not have been wise. How far the provisions of the ordinance of 1787 would have executed themselves, if the government of the confederation had continued; and, if Congress had determined the number of the new States, and defined their boundaries, how far, by the mere force of the stipulations in question, each new State, as it should successively have acquired the requisite population, would have become a member of the Union without the further action of Congress, it is, perhaps, unnecessary to inquire. It may be remarked, however, that to admit a State into the Union implies the performance of some political act; that political act could be executed by Congress only. The form of expression used imples that at some future time that act shall be done; and can any more conclusive inference be drawn from the whole matter, than that an imperious moral obligation is devolved upon Congress to perform the act? But whatever speculations may be indulged as to the effect of the stipulations, had the government continued unchanged, it would seem most unreasonable to suppose, that, under the new constitution, it can by its own force operate as an actual admission of the State without the further action of Congress. That body, with whom the exclusive power remained, had not yet determined whether there should be one or two States north of the southern extremity of Lake Michigan. It had not yet acted upon the subject of the boundaries of such State or States, and without such previous *action, how is [*361 it possible, without a gross encroachment upon the acknowledged prerogatives of Congress to

constitute, by the gratuitous movement of the people of the territory, such State or States? Nor is it difficult to suppose that considerations other than those already alluded to might exist, which would render it just and expedient to suspend for a time the exercise of its power to admit a new State, which, having its sixty thousand inhabitants, should apply for admission. There may exist a difficulty with a foreign power in relation to boundary, which prudence may require the previous adjustment of. The Constitution requires that the representation in the House shall be in proportion to the population of the different States, and be regulated by a uniform ratio. [The exception to this rule having reference manifestly to two of the original thirteen.] The ratio of representation being fixed then at a larger number than sixty thousand, how, without violating this most essential and vital principle, and thus doing great injustice to the older States, can Congress admit such new State, while its population falls short of that required to constitute one election district?

The true principle would seem to be, that every ordinance, law, stipulation, and contract made prior to the Constitution must thenceforward be construed and taken in subordination to it. That Constitution is the paramount law, and must prevail over every law or contract which conflicts with it. By that Constitution, the power to admit new States is vested exclusively in Congress. It is altogether a political power; and for its proper exercise there is no other guaranty than will be found in the honor, wisdom, and moral sense of that body. That power has been exercised. By the Act above referred to, of 26th January, 1837 (5 Statutes at Large, 144), Congress, by solemn declaration, announced that Michigan was admitted as one of the sovereign and independent States of the Union. The authority for performing this political act—for making this legislative declaration—is to be found in the third section of the fourth article of the Constitution. Congress may "make all needful rules and regulations" respecting the territories, and Congress may establish and admit into the Union "new States"; and having thus the power, their execution of it is beyond the control as well of the territories as of all other departments of the government. The history of each of the territories, and long continued practical construction, sufficiently sanction this proposition.

Michigan was originally a part of the old Northwest Territory. Without its consent, it was severed from that territory, and made to constitute a part of that of Indiana. 2 Statutes at Large, 58. In like manner, and without being consulted, it was, in 1805, erected into a new territory (2 Statutes at Large, 309), and its political organization and government totally changed; being thrown back from the second to the first grade of colonial government under 362*] the *ordinance of 1787. Many successive changes in its fundamental law were afterwards, in a spirit of great kindness, but in the exercise of a power unqualifiedly dictatorial, made by Congress. 3 Statutes at Large, 482, 722, 769. Nor is it known that the competency *of such arbitrary legislation* was ever questioned. *Its civil, its criminal,* and its political *codes were all alike the subjects of* frequent and habitual legislation by Congress. And insomuch as it would seem manifest that the ordinance of the confederation of July 13, 1787, cannot have the effect, proprio vigore, to constitute of Michigan an independent State of the Union, and as, from the foundation of the government, Congress has habitually exercised a sovereign control over the destinies of its territories, upon what basis can rest the pretension that Michigan could, of her own free will, throw off the colonial government established for her by Congress, erect herself into an independent and sovereign State, and nolens volens force herself into the Union.

The Legislative Council of Michigan, as it existed in 1834-1835, was constituted by Congress. All the power it possessed was derived exclusively from the grant of Congress. It was appointed to uphold, and, within the sphere prescribed by Congress, to administer, the colonial government Congress had established; and to that end the official oaths of its members were administered to them. This same Legislative Council, under the lead of the youthful and ardent tempered Secretary, who then, in the absence of a commissioned governor, personated the sovereignty of the Union in the executive branch of our territorial government, commenced a course of measures, with a view to subvert and abolish that very government which they had been appointed and sworn to administer, and on the 26th January, 1835, passed an act providing for the election and assembling of delegates to form a constitution and State government; and in the same act prescribed the boundaries within and over which their new State should extend. How far it consisted with good faith, with their own official power and duty, and their oaths of office, thus to undermine the very basis of their political power—thus to subvert a government to which alone they could look for whatsoever political power they possessed, or could exercise—it would be useless, perhaps, now to inquire. The act has subserved its purpose, and has become extinct; and whatsoever has followed in no wise rests on a foundation so frail. The delegates invoked assembled in May, 1835. They devised the form of a constitution and State government. They defined the boundaries within which it should extend. They demanded of Congress, in proper and set phrase, that their proceedings should be sanctioned and confirmed; and that Michigan, thus constituted, should take her place as a recognized member of the Union. In the mean time, and without waiting for the action of Congress in the matter, a majority of those delegates determined to carry their new *government [*363 into immediate effect. Elections, therefore, were holden, thinly attended, to be sure, but they were holden, and a nominal governor and Legislature were declared to be duly elected.

In the month of November, 1835, these functionaries were assembled. If Congress were to accede to the demands of the convention, it was expedient that the Legislature should be ready to act; they therefore continued in session during the winter. In this period of uncertainty and solicitude, they prudently avoided definitive action in all very important matters; but having a due regard to the importance of an outward show of confidence in their position, they busied themselves in passing acts for lay-

ing out new roads, organizing new townships, creating new corporations, and in operations like those. It was at this period that they amused themselves by settling the details of the law to incorporate the defendants in error, the validity of which is now brought into question.

In the mean time, were the demands of the convention acceded to? Far from it! Considering the admission of new States, and by consequence the adjustment of their boundaries as political matters altogether referable to itself, the Congress deemed it proper to exercise its own judgment upon them; and having regard to its own construction of the Constitution of the United States, and of the obligation and meaning of the articles of compact of 1787, rejected, wrongfully, perhaps, but rejected, the demands of the Michigan convention. What remained to be done? Why, if the politicians of Michigan had no right to cast off the government Congress had prescribed for them at pleasure, and erect themselves into an independent and sovereign community, nothing remained for them but to submit, with what grace they might, to the authoritative decision that their movements were not sanctioned, and that their acts were without authority. To continue, in short, as they had continued, under the territorial government of the United States, until, moved by its own sense of right, policy, and justice, Congress should choose to admit the territory into the Union as an independent State, with such dimensions and boundaries as it might prescribe.

The State boundaries, as the same are prescribed by the Legislative Council by its act calling the convention (of January 26, 1835), as well as those adopted by convention, comprise a strip of country several miles in breadth, extending along the whole base of the peninsula. It comprehends towns, villages, and cities. It contains a country of unsurpassed beauty. It contains points having commercial advantages unequalled, except by those of Buffalo, by any throughout the whole region of the Northwest. That strip of country Congress has annexed to Ohio and Indiana respectively. On the other side, Congress has deemed it proper to add an extensive region, having an area of land and [*364] water far *greater than is contained in the whole of the peninsula! And thus changed in her geographical position, dimensions, and people, too, thousands of those who assisted in forming her organic law having been cut off on one side, and unknown numbers of such as did not so participate added on the other, with her identity gone, but with her name preserved, the new State is declared by Congress, on the 26th of January, 1837, to be admitted as one of the States of the Union. 5 Statutes at Large, 144.

If the people of Michigan, through the means of its convention and the Legislative Council accorded to them by Congress, had the right to throw off the laws of the United States, organizing its government at pleasure, and erect themselves into an independent government, then Michigan, with the dimensions her convention prescribed for her, became an independent State in November, 1835.

If the sovereign power of legislating for that *territory, and of admitting it as a new State,*

rested alone in Congress, then Michigan, with dimensions totally variant, became an independent State and member of the Union on the 26th day of January, 1837, and not before.

Will it be said that her recognition by Congress, in 1837, as a State, will have relation back to the period when she declared herself an independent community, and constitute of her a member of the Union as from November 2d, 1835? What, then, will be the condition of those officers who, deriving their authority directly or indirectly from the general government, executed in the mean time those laws which, by express enactment, or by the sanction of Congress, had become the laws of the district? Were they all usurpers, all trespassers? And the judges, too, appointed by this government—will all their adjudications and decrees have become void, and those who executed as well as those who pronounced them become liable, both civilly and criminally, for an usurpation which is against the peace and dignity of the new born State?

The right of the United States to the "Western posts" accrued from the Treaty of 1783. They were not delivered until 1796. Shall that delivery have relation to the period when the right accrued? What, then, will become of the contracts made, the rights accrued, the descents cast, judgments rendered in the interim? Are all void, and those who exercised authority trespassers by relation?

Relation is one of those fictitious devices in the law which never shall be permitted to work a wrong to strangers (3 Caines' Rep. 261; 4 Johns. 230); and it illy accords with the nature and purposes of that device that it should be so applied. Butler & Baker's case, 3 Co. 29. The explicit declaration of Congress can hardly be carried back by relation.

In the case of Owings v. Speed et al. 5 Wheat. 420; 4 Cond. Rep. 714, it became proper to decide when the present national *gov- [*365 ernment took the place of that of the confederation. This court on that occasion say, that "both governments could not be understood to exist at the same time; the new government did not commence until the old one had expired." Referring, then, to the action of other departments of government—to journals, records, official reports, and to contemporaneous history—the court determines that the old Congress continued until November, 1788; the old government potentially until March 2, 1789; and that the new government then commenced. Although it is not admitted, especially in view of the clauses in the Constitution referred to, that any other than the Legislative Department of the government can control, or in the smallest degree affect, the action of Congress in this matter, yet it is with much satisfaction that reference is made to the clear and admirably expressed views which were taken on this subject by the Executive Department of this government; I allude to a communication from the State Department of the 8th of October, 1835, and to be found in House Doc. No. 7 of the First Sess. 24th Congress, pp. 92, 93.

From the views thus presented to the court, it will have appeared very manifestly that the validity of the act incorporating the defendants in error must necessarily have been brought into question on the score of its repugnancy to

the Constitution and laws of the United States. At the threshold of their case it was incumbent upon them to establish their right to sue by the name they assumed. This could be done only by showing a valid act of incorporation. The decision of the State court was in favor of the validity of that act, and thus the case is brought within the words, and the spirit, too, of the twenty-fifth section of the Judiciary Act.

If the Legislature of a State should pass any act violating the Constitution or the laws of the United States, this court would pronounce such act to be void; and that, in passing it, such Legislature had transcended those limits, which all the States, by the Constitution of the United States, had prescribed for it; that in respect to such excess of authority, the Legislature was as no Legislature, and its proceeding coram non judice. If the positions assumed in this case be warranted by the Constitution of the United States, can the court fail to pronounce a similar judgment?

Mr. Hand, for the defendants in error.

That part of Mr. Hand's argument which related to the question of jurisdiction was as follows:

This cause comes into this court from the Supreme Court of the State of Michigan, to which court it had been carried by a writ of error from the Circuit Court of said State for the County of Wayne. It was an action of ejectment for a lot in the city of Detroit. The defendants pleaded the general issue; verdict and judgment for the plaintiffs, the present defendants in error.

366*] *At the trial, numerous exceptions were taken by the defendants, and a bill containing said exceptions, duly sealed, which bill of exceptions is embodied in the record, sent up to this court. The Supreme Court of the State affirmed the judgment of the Circuit Court for the County of Wayne. The defendants in error allege and insist that there is nothing upon the record sent up whereby this court can entertain jurisdiction in this cause; which it is believed can be conclusively shown. By reference to the abstract of the cause presented by the defendants in error, and the record in this cause, it will appear that at the trial of this cause the defendants in error, the Detroit Young Men's Society, claimed to have been incorporated by an Act of the Legislature of the State of Michigan, approved March 26th, 1836, entitled, "An Act to incorporate the members of the Detroit Young Men's Society." Session Laws of Michigan, 1836, page 165. To the admission of this act in evidence, the plaintiffs in error (then defendants) objected, denying the existence of the State of Michigan at the date of the law, and thus denying the valid existence of the act of incorporation itself. The court overruled the objection, and the party excepted. The subject matter of said exception does not come within the provisions of section 25, ch. 20, of the Judiciary Act of 1789. An attempt may be made to bring it under the second clause of said section. Under that clause, there must be "drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States." *Here was produced an act of the* Legislature of *the State of Michigan.* The defendants in the court below objected, not that this statute of the State of Michigan was repugnant to the Constitution, laws, or treaties of the United States, but that it was not a law of a State. It was the existence of the State that passed the law which was denied, and not the authority or power of a State to enact such a law. The objection was, that the act produced had not the sanction or authority of a law of a State, and not that, being a statute of a State, it was repugnant to the laws, etc., of the United States. Certainly this is not within the second clause of section 25.

Mark what is explicitly required by the clause to give the court jurisdiction. First, there must be a statute of a State. Second, the authority of such statute must be drawn in question on the ground that it is repugnant to the Constitution, etc., of the United States. To anything but a statute of a State, or to any objection to such statute but that of repugnancy to the Constitution, etc., of the United States, the clause does not apply.

The Act of the 26th March, 1836, incorporating The Detroit Young Men's Society, was or was not a statute of a State. If it was not a statute of a State, then by no possibility could the second clause of section 25 have any bearing upon it. If it was a statute of a *State, [*367 then Michigan at the time of its enactment was a State, and the only objection made at the trial, to wit, that Michigan was not at the time of the enactment of said act a State, is summarily disposed of.

Again, if said act was a statute of the State of Michigan, then at the trial in the court below its validity was or was not questioned on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. If its validity was not questioned on that ground, then it is not within the provisions of section 25. If its validity was questioned on that ground, then it is within said section. But the validity of said act was not questioned on the ground that said statute was repugnant to the Constitution, treaties, or laws of the United States; therefore this court has no jurisdiction, by virtue of the matters premised. It may be remarked, that the term "repugnant" is a technical term, of a peculiar, ascertained, and known signification, which signification it bears as it occurs in section 25 of the Judiciary Act. A Statute is repugnant to the Constitution, treaties, or laws of the United States, when its subject matter, terms, and provisions are opposed to, and inconsistent with, the subject matter, terms, and provisions of such constitutions, treaties, or laws, so that they cannot both stand together. Said act (section 1) incorporates the defendants, "for the purpose of moral and intellectual improvement." It confers a common name, a common seal, perpetual succession, capacity to sue and be sued, and the right to acquire and hold property to the amount of $25,000. Section fifth reserves to the Legislature a right to alter, amend, or repeal the said act, by a two thirds vote. Such are the simple and ordinary powers and franchises conferred by said act. The utmost captiousness could find nothing in it in the smallest degree repugnant to the Constitution, treaties, or laws of the United States.

The exception taken—that Michigan was not

a State on the 26th March, 1836, ergo, the said act not valid—might peradventure have been well taken, but could not be a ground of jurisdiction of this court, for so far from showing a statute of a State repugnant, etc., it wholly denies said act to be a statute of a State. If it were not a statute, it is not within the provisions of the twenty-fifth section to give this court jurisdiction. If said act be a statute of a State, then no exception was taken that it was repugnant, etc., and the indispensable prerequisites to jurisdiction again wholly fail. See Weston v. City Council of Charleston, 2 Peters, 463, 464; Satterlee v. Matthewson, Ibid. 409; Wilson v. Black Bird Creek Marsh Co. Ibid, 245; Craig v. State of Missouri, 4 Ibid. 410; Crowell v. Randall, 10 Ibid, 368; 5 Cranch, 344. It is clear, therefore, that this is not a case where is "drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States." And this court can entertain no jurisdiction on this ground, it not being a case contemplated by said section.

368*] *From the said case and the record it further appears, that, on the trial of the issue in the court below, the Detroit Young Men's Society, plaintiffs in that court, claimed title to said lot as grantees thereof from the United States, through the Governor and judges of the Territory of Michigan, under an act of Congress, approved April 21st, 1806, entitled "An Act to provide for the adjustment of titles of land in the town of Detroit, Territory of Michigan, and for other purposes" (2 Statutes at Large, 398), and produced and proved a deed of said lot, executed by said governor and judges, bearing date July 1st, 1836. The defendants made several objections to said deed, all of which were overruled, and the title so claimed under the act of Congress was fully sustained by the State court. Do these facts furnish ground of jurisdiction to this court? I think not. To give this court jurisdiction under the first clause of section 25 of the Judiciary Act, where the validity of an authority exercised under the United States is drawn in question, the decision of the State court must be against its validity. Here the decision of the State court was in favor of the authority exercised under the United States, so there can be no pretense of jurisdiction on that ground. Gordon v. Caldcleugh, 3 Cranch, 268. It was perfectly competent for the court below to take cognizance of the title to said lot, there claimed by the plaintiffs under the United States; its decision sustained the title claimed under the United States; it is now res adjudicata by a competent tribunal, and this court has no power to revise or disturb the decision of the State tribunal upon that point.

Upon the plaintiff's case as presented in the court below, and the questions raised thereon, nothing appears upon the record to give this court jurisdiction.

Mr. Howard, for the defendants in error, said that his first duty was to disentangle the case from the matters which did not properly belong to it. The entire record has been brought here, just as it was exhibited to the Supreme Court of the State of Michigan, and although all the *points raised in it were very proper for the* consideration of that tribunal, yet they must nearly all be laid aside under this writ of error. 10 Peters, 268.

The plaintiffs below offered only two pieces of evidence, and then rested their case. These two were: 1. An act of incorporation; 2. A deed from the judges of the United States for the lot in question.

1. The act of incorporation is the hinge upon which the whole controversy turns. It will be considered as properly before this court for examination, and the objections to its admission as evidence will be reserved for discussion hereafter. At present, I am getting rid of superfluous matter.

2. The deed from the judges was also objected to in the State *court. But that [*369 objection can find no place here. The Judiciary Act is very explicit in conferring upon this court an appellate power only where a State court decides against the validity of an authority exercised under the United States. But the authority claimed here was, that the judges of the United States had the legal right to execute this deed, and the decision was in favor of its validity. Jurisdiction over this question is therefore excluded by the terms of the act. It is very clear that the framers of the Act of 1789 thought that, as long as the State courts decided in favor of any power claimed to be exercised under the United States, or against a power claimed under a State law, there was no necessity of a revising power in this court; because the feelings of State pride and State interest would not, probably, allow of such decisions unless they were correct. At all events there was no danger of an encroachment upon the powers of the federal government by the States as long as the State tribunals themselves prevented it by their decisions. All this is so clear, that it is deemed unnecessary to consume any more time upon the question of the admission of this deed. If the decision below was erroneous, this court has no power to review it.

Many questions arose in the court below upon the evidence offered by the defendants, but, with the exception of the point reviewed above, none of them can be considered as properly before this court.

1. The defendants below offered a deed from the treasurer of Wayne County to them, which deed the court refused until it was first shown that the lot was assessable for taxes, and that the title had passed out of the United States. It is not perceived under what head of jurisdiction the reviewing power over this decision can be placed. The authority to tax and sell did not begin until the title passed out of the United States. Consequently the decision is in favor of the exemption from taxation, and not within the twenty-fifth section.

2. The defendants below then offered in evidence a resolution of the governor and judges, that the basis of the town should be an equilateral triangle, etc., etc., and then proved, by a mathematical calculation, that lot No. 56 was the same as lot No. 52. It is evident that the point ruled by the court was, not the invalidity of the deed from the judges, but the insufficiency of the evidence to prove the identity of the two lots. The deed conveyed lot No. 52. But the lot in dispute was lot No. 56, and the first step for the defendants below to take

was to establish the identity of the two lots. But the court decided, as a question of general evidence, that these mathematical calculations were not sufficient to prove it. As a question of general evidence, it can by no possibility be before this court.

3. The defendants further offered certain parol evidence, which the court rejected. With this, we have nothing to do.

370*] *The instructions given by the court below were four, viz.:

1. That the lessors of the plaintiff were well incorporated.

2. That the deed of the judges was well executed.

3. That on the 1st of July, 1836, there were a governor and judges competent to convey title.

4. That the governor need not have signed the deed.

The first point is the one reserved, to which the attention of the court will be called presently. Upon the other three, the decision is in favor of the validity of the commission under the United States, and affords no ground for the jurisdiction of this court.

So with the instructions asked for and refused. Those which are cognizable by this court are only a repetition, in different phraseology, of the same question, viz., whether or not there was in Michigan, at the time of passing the act of incorporation, a Legislature capable of enacting valid laws.

With respect to the question of jurisdiction, it is not necessary to say much, because my colleague has placed that point in an attitude of great strength. But the opposite counsel is endeavoring to maintain two contradictory propositions, which cannot both be correct, viz.: That Michigan was not a State, because the territorial judges were found to be there in the exercise of territorial authority: and, 2d. That the judges had no right to execute the deed, because the establishment of a State government had annulled their authority. Both of these positions could not be sound. The counsel must choose one of them, and maintain only that one. If, with a view to destroy the deed, he set up a State government, be it so. He could then no longer call into question the legality of the charter. But if, with a view to destroy the State government, he set up a territorial authority, be it so. He must then admit the validity of the deed. It was remarkable, too, that the learned counsel was compelled, in order to maintain his argument, to sweep away the very ground upon which he stood in this court. He came here to complain of the statute of a State, in the language of the twenty-fifth section of the Judiciary Act, and his first blow was against the existence of the State herself. But if Michigan was not a State when the act was passed of which he complains, then he destroyed his own standing here, because it was only the statute of a State which was cognizable. And thus, the more effectively the learned counsel sustained his position, by just so much did he make it more apparent that this court had no jurisdiction over the case.

Passing on to another branch of the case, *Mr. Howard said he would endeavor to maintain the three following points,* viz.:

1. That the power to admit new States is a political power to be exercised by Congress alone, and that all questions touching its exercise are political questions, not confined to the judicial power by the Constitution and laws.

2. That the admission of Michigan into the Union was a complete *exercise of the [*371 political power vested in Congress. It ratified the previous proceedings of the people of Michigan, and thereby excludes all inquiry into their correctness by the judicial power.

3. If the objection to the jurisdiction fails, then, That the people of Michigan had a right to proceed to establish a government whenever the contingency happened, as provided for in the ordinance of 1787.

1st Point. The existence of two classes of questions, viz., judicial and political, has been more than once recognized by this court, over one of which jurisdiction reaches, but over the other it does not. The line which divides these two classes has never been traced, but the court has wisely contented itself with deciding, in each case, whether it lay on one side of the line or the other. When these decisions shall have become more numerous, it will be time enough to run the line throughout its whole extent, and frame a theory. For example, this court has considered the question of a dispute of boundary, such as that of the Rio Perdido, as a political question, into the merits of which it would not look. Perhaps it might be laid down as one of the governing principles on this subject, that when a question, from its nature, belongs to the consideration of either the executive or legislative branches of the government, the judicial power will abstain from exercising any jurisdiction over it. See, on this subject, 12 Peters, 517, 657, 731, 736–738; 5 Peters, 20.

No stronger illustration can be given of the nature of the question now before us than to refer to an actual occurrence in our history. The question is, whether Michigan was a State in March, 1836. In the fall of 1836, she cast her vote, as a State, for President and Vice-President of the United States. When the votes were counted, in February, 1837, in the presence of the Senate and House of Representatives, the late Attorney-General, Mr. Grundy, then a member of the Senate, was chairman of the joint committee, and announced the result of the count in this manner: "If the vote of Michigan be counted, Mr. Van Buren has" (naming the number). "If the vote of Michigan be not counted, he has" (naming that number). "But in either event he has received a constitutional majority, and is therefore elected President of the United States."

Now, the question which was thus left unsettled, and which would have distracted the country if it had been necessary to settle, is the precise question which the learned counsel now calls upon this court to decide. Time has not varied it. Suppose that the vote of Michigan had been necessary to make a majority, and this court had then been appealed to to decide whether Michigan had a right to vote or not. Would not the answer have been, "Non nostrum tantas componere lites"? It is not necessary to pursue this train of reflections any further.

*The government which existed in [*372

Michigan during the year 1836 was recognized by the executive of the United States as existing de facto, if not de jure. It was not denounced and treated as an insurrectionary, disorganizing body. No proclamation was issued, calling upon the insurgents to disperse; no militia of the neighboring States were called out to suppress the insurrection. But, on the contrary, Congress and the President remained tranquil spectators of what was doing. If this court follows the lead of the executive in recognizing foreign governments de facto, why not in this case also?

2d Point. It is necessary to recur to dates:

1835, May 11. Convention met to frame a constitution.

1835, November 3. Legislature met and organized.

1836, March 26. Act of incorporation.

1836, April 1. Society went into operation.

1836, June 15. Act of Congress, 5 Stat. at Large. 49. "An Act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed."

1836, June 23. Supplementary act, 5 Stat. at Large, 59.

1836, June 30. Session of United States court and judges.

1836, July 1. Sibley, Morell, and Wilkins acted as judges.

1836, July 1. Deed from the judges.

1837, January 26. Michigan finally admitted, 5 Stat. at Large, 144.

In these acts of Congress, and especially that of June 23, 1836, the proceedings of the people of Michigan are spoken of as valid. The Constitution is mentioned as one "which the people have formed," and propositions are submitted to the "Legislature of the State of Michigan," etc., etc.

These ratifications by Congress, acting under its express power to admit new States, preclude this court from a re-examination of the subject. The power in Congress is a political one, and has been fully exercised under its own responsibility. Will this court ever consent to hear an argument whether Texas was constitutionally admitted or not?

3d Point. The people of Michigan had a right to do what they did under the ordinance of 1787. This ordinance is reprinted in 1 Stat. at Large, 51, note. The fifth article says, when there are sixty thousand persons, it shall be admitted by its delegates into the Congress of the United States; and shall be at liberty to form a permanent constitution and State government.

The Act of Congress of August 7, 1789, 1 Stat. at Large, 50, makes this ordinance "continue to have full effect."

The only difference between the learned counsel and us is, that he thinks there must be a preliminary act of Congress, authorizing a census under federal authority, and the sitting 373*] of a convention; *whilst we contend that it is competent for the people to number themselves, and to assemble in convention, if the number shall be found sufficient.

These rights under the ordinance are political vested rights, which no authority can take away or lessen. But if, by an interpolation into the Constitution, a previous act is held to be necessary by Congress, these rights no longer depend upon the happening of the contingency provided for, but upon the pleasure of Congress.

Very many circumstances might arise to prevent Congress from passing a preliminary law. Want of time, pressure of other business, party intrigue, a difference of opinion between the Houses, and all the ills that legislation is heir to, might occur to prevent such an act. These dangers were not contemplated by the ordinance. The grant of power was full, direct, unequivocal, and positive; as much so as the right of sufferage in an individual when he attains the necessary age. When the fact happens, the right accrues and becomes active.

There is nothing in the nature of the power in Congress which demands the preliminary act, for the people can just as well number themselves, and assemble spontaneously in convention. For the rule, see 16 Peters, 622.

Again, this course of proceeding is sanctioned by long established practice since the foundation of the government.

1791, Feb. 4. Kentucky was admitted without a previous law for a convention. 1 Stat. at Large, 189.

1791, Feb. 18. Vermont was admitted in the same way. 1 Stat. at Large, 191.

In this case, Vermont had been passing laws, by her own independent authority, ever since March, 1789. Any one of these laws might have been questioned on the same ground on which this act of incorporation is now disputed. What would have been the reply of this court? It is furnished in 12 Peters, 724, where the court say, speaking of Vermont: "The people assumed by their own power the position of a State, and settled the controversy by taking to themselves the disputed territory as the rightful sovereigns thereof." 12 Peters, 724.

1796, June 1st. Tennessee admitted. 1 Stat. at Large, 491.

But these had no Act of Congress to authorize a convention, and this point was distinctly brought before both Houses of Congress. The whole of the discussion is an interesting chapter of American history. The committee of the Senate reported against the admission, on the very ground now taken by the opposite counsel, whilst the committee of the House of Representatives assumed the doctrine for which we are contending.

The result was, that the Senate yielded, and the precise question now at issue was settled by Congress, as far as the legislative branch of the government could settle it, fifty years ago.

*The Legislature of Tennessee met on [*374 the 28th of March, 1796, and sat until the last of April, in which time the whole State government was organized. The case is exactly parallel with that of Michigan.

For the proceedings, see Senate Journal for 1796, from April 11th, p. 236, to June 1st, and also December 6, 1836; American State Papers, Gales & Seaton, tit. Miscellaneous, Vol. I., p. 147.

Mr. Justice Woodbury delivered the opinion of the court:

I am instructed by the court to say its opinion in this case is, that it possesses no jurisdiction

over the questions submitted. No other point is decided by us, though others of much interest are involved in the merits respecting the due organization of States, under our political system, and the effect which their admission into the Union by Congress has on the validity of their previous proceedings.

Some contend, that when these matters properly arise in a cause, they are mere political questions—to be settled by the action of the other departments of the government, and not to be re-examined here. Barclay v. Russel, 3 Ves. 429; The Nabob of Arcot's case, 2 Bro. Ch. 6; Foster et al. v. Neilson, 2 Peters, 309; The Cherokee Nation v. Georgia, 5 Peters, 20; Rhode Island v. Massachusetts, 12 Ibid. 730, 736, 738; Garcia v. Lee, Ibid. 517, 518.

And it is argued that the acknowledgment of a domestic State is like the recognition of the independence or existence of a foreign state; and the latter is well known to preclude any further inquiry by the judicial tribunals into the fact of their due organization. See, on this, 5 Peters, 50, 59; 2 Cranch. 241; 3 Wheat. 634; 4 Ibid. 64.

It is further contended, that if a State be recognized or admitted into the Union under a particular form of government or constitution, this, of necessity, implies that such organic arrangement is to be treated as valid from its creation, and the previous legislation under it is to be considered as done or performed by a competent authority.

But we do not find it a duty to decide any of these delicate and important questions, considering the situation of the record in this action and the preliminary points which arise on it, and which must first be disposed of.

This being a writ of error to a State court, sued out with a view to reverse its decision in a case of ejectment between these parties, the only authority and the only ground for our interference with the decisions of the State tribunals is, in substance, that they have overruled some right or defense set up under an act of Congress, or treaty, or Constitution of the United States. 14 Peters, 46, 353; 12 Peters, 66; Williams v. Norris, 12 Wheat. 124.

The principle under which the Judiciary Act of 1789 allows this interference of ours in the relations between the two governments, always 375*] *of so sensitive and responsible a character, is, that no government can be efficient or just without the means of self-protection; and hence, that those who act under it or claim rights beneath the shield of its laws should, within its own territory, be able to appeal to its own tribunals for relief whenever their claims under it are decided against in the courts of the States. But prejudices here are to be guarded against as well as there; and hence the paramount rule of construction, in all cases of this kind, ought to be, not to interfere at all unless the decision is shown to come clearly within the letter and spirit of the act of Congress permitting an appeal; and, when interfering, not to overrule the judgment of the State court unless clearly erroneous.

First, then, is there a proper case presented here for our interference at all? Three instances are enumerated in the Judiciary Act, in which a writ of error lies to a State court, e. g. (1.) "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; (2.) or where is drawn in question the validity of a statute of, or authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; (3.) or where is drawn in question the construction of any clause of the Constitution, or if a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of said Constitution, treaty, statute or commission." 1 Stat. at Large, 85, sec. 25.

A claim is made to sustain this writ and our jurisdiction under the first specification, because an authority was set up by the original plaintiffs, that the deed to the Young Men's Society was good under the acts of Congress, and this was excepted to by the defendant. But that cannot be made the subject of a writ of error, because the State court decided in favor of its validity. Gordon v. Caldcleugh et al. 3 Cranch, 268; Walker v. Taylor et al. 5 Howard, 64.

Another decision, which was made by the State court against the right set up by the original defendant under acts of Congress in respect to this title, is attempted to be made a subject for re-examination under this writ. But it cannot be, for two reasons. One is, it does not appear what acts of Congress are referred to; and the other is the probability, on the face of the record, not that such acts were decided against, but only that the evidence adduced in relation to the right set up under them was overruled. Consequently, nothing remains under which to claim jurisdiction, except the second specification in the Judiciary Act. It is contended that the objection, which was made in this case to the validity of a statute of the State, on the ground that the Legislature were not competent or duly organized, under acts of Congress and the Constitution, *so [*376 as to pass valid statutes, and which was overruled, comes within that specification.

The first difficulty interposed against this point is, that the plaintiffs in error do not in the record specify what parts of the Constitution or act of Congress they consider to have been overruled by the State Court, nor in terms that any parts of either were so overruled. The course pursued here is a looser mode of stating exceptions than is customary, and could hardly be sustained if it did not appear on the record that the competency of the Legislature of the State of Michigan to pass certain laws was in fact called directly in question, and the validity of them contested, on the ground that, when the laws passed, the territorial government over Michigan was still in force, and the new State government had not been duly organized. And it seems to have been admitted on both sides that this objection was urged—and it is difficult to conjecture any other ground for such an objection to the competency and power of the new State government, unless founded on its non-conformity to the existing acts of Congress as to the territory, and the clause in the Constitution for the admission of new States. The argument was

a fair one, that, as the territorial government was still in operation in Michigan for some purposes, no new political organization could take place within its limits which was capable of passing valid laws or charters of incorporation, without a previous sanction by Congress, under the third article of the Constitution.

There probably is enough in this record to show that such questions were raised, and that the State court decided against the validity of the objection, and under this view and the authorities of the following cases we shall then treat this exception as sufficiently set out in the record. Coons et al. v. Gallager, 15 Peters. 18; Williams v. Norris, 12 Wheat. 117; McBride v. Hoey, 11 Peters, 167; Crowell v. Randell, 10 Ibid. 368; M'Kinney v. Carroll, 12 Peters, 70; 5 Ibid. 248.

But the exception, if well stated, applies to nothing except the validity of the particular statute that incorporated the Young Men's Society, under which Jones, the original plaintiff, claims. Nor does it question the validity of that statute on account either of its terms or subject matter, but the inability or incompetency of its makers as a political body to pass any statute whatever. Now, to ascertain whether such an objection can come within the true meaning of the Judiciary Act, it will be necessary to look at the language as well as obvious design of the latter in conferring this searching and overshadowing power of revision over the State tribunals. As before suggested, it was to prevent partiality in them against the authority and agents of the general government; to hold the protecting supervision in respect to its own Constitution, treaties, and acts of Congress, for purposes of self-preservation and self-defense, and finally to insure uniformity in the construction and operation of them over the whole Union.

377*] *Hence, two things must unite, in order to justify it. There must be an act of solemnity and importance, such as a statute, and that statute must be by a State, a member of the Union and a public body, owing obedience and conformity to its Constitution and laws. This seems to have been settled by this court as to the meaning of the word "State," where empowering one to bring an action. It must be a member of the Union. Cherokee Nation v. Georgia, 5 Peters, 18. And it is not enough for it to be an organized political body within the limits of the Union.

In conformity with this, where it is required that a party should be a citizen of a different "State" in order to give a circuit court jurisdiction, it has been held it is not sufficient to be a citizen of the District of Columbia, Hartshorn v. Wright et al. Peters's C. C. 64; Hepburn et al. v. Ellzey, 2 Cranch, 445, or citizen of a territory, New Orleans v. Winter, 1 Wheat. 90, but the party must belong to a State in the Union, one of the members of the confederacy. Chief Justice Marshall in Hepburn et al. v. Ellzey.

Indeed, it has been settled also, that a law passed by Virginia, before the government of the Union took effect, cannot be examined and decided upon under this clause of the Judiciary Act. Owings v. Speed et al. 5 Wheat. 420.

The words of this clause also appear to be *such, as to admit of no other construction than* that the statute is a measure by a body confessedly a State. They are, "where is drawn in question the validity of a statute of, or authority exercised under, any State," etc.

Beside this apparent recognition, that nothing is to be examined which does not apply to what is contained in a statute, and that passed by a State, the evil to be remedied and guarded against was connected merely with the subject matter of statutes, and not with the political competency of their makers.

The fears were, from the reasons just enumerated that through some inadvertence, if not design, a State might legislate against some part of the Constitution, or a treaty, or an act of Congress, and might trench upon matters not within its province nor belonging to its internal concerns, but belonging to Congress, and which, by express terms or necessary implication, were forbidden to be acted on by the State governments.

Such being the evil or danger, it precludes the idea that this clause in the Judiciary Act had any reference to the fact that public bodies which had not been duly organized, and not been admitted into the Union, would, as States, undertake to pass laws, without being empowered to do it, which might encroach on the Union or its granted powers, and hence should be thus guarded against. Such conduct by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of any of the departments of this government, unless so interfering *with its rights as to call for [*378 the political exercise of the executive and legislative authority over our foreign relations.

Again, such conduct by bodies situated within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or territories within which these bodies unlawfully organized are situated and acting. While in that condition, their measures are not examinable at all by a writ of error to this court, as not being statutes by a State, or a member of the Union. And after such bodies are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunals of the general government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State, within the meaning and spirit of the Judiciary Act. And, if so, we must inquire only into the validity of their subject matter, and not as to the new, any more than the old, States, ever suppose that the question of their political competency or power to pass statutes at all was an inquiry intended to be placed under our consideration and decision by the twenty-fifth section of the Judiciary Act.

It follows, then, that a statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of sec. 25 of the Judiciary Act, unless re-enacted or adopted after becoming a State (3 Howard, 482); then it is treated

like the statute of any State; or the admission of the State into the Union by Congress, subsequently with the Constitution and political organization under which the statute was passed, must bring it under our consideration as a statute passed by the State—a competent State—leaving, as in other cases, merely its subject matter to be examined in order to see if it violates or not any acts or provisions of the general government.

The question of their competency is not, however, thus made a closed one, but may be discussed before the proper political tribunals. And where, under particular laws, their competency is not conceded, it may come under the consideration and decision of the State courts, and probably of those of the United States. All we decide in this instance is, that it is not one of the grounds for our re-examination of decision on it, under the Judiciary Act. And it is no more objectionable to shut out such a question from revision in that way, than numerous others which are not included either in the words or objects of that act. Indeed, there were, and still are, some of the highest motives of expediency and sound public policy not to entangle this court with the reconsideration in this way of a matter so purely political and often so full of party agitation. 379*] It is pretty *strong evidence that this view of the Judiciary Act, and our duties under it, must be the correct one, when, on full examination of the precedents, no case can be found where an objection of this character to a statute of a State has ever been sustained, or deemed even a proper ground for exception below, and afterwards brought under the revision of this court by a writ of error. The case of Owings v. Speed et al. 5 Wheat. 421, before cited, comes nearest to this. Taking it for granted, then, we have shown that the revision in a case like this must be of a "statute" and a statute of a "State," and not of a territory, or corporation, college, or unacknowledged political body, and considering these as concessions, or admitted data, before the jurisdiction arises to issue a writ of error, and look into the subject matter of such statute in order to ascertain whether in its terms or operation it runs counter to the powers of the general government, and that it is acknowledged on both sides there is nothing exceptionable in the subject matter of this statute, it follows that there is nothing to revise or correct, which is within the purview of the judicial functions of the general government under the Judiciary Act.

Let the writ of error be dismissed for want of jurisdiction.

Mr. Justice McLean:

I think there is jurisdiction in this case. The Detroit Young Men's Society, in their corporate capacity, brought an action of ejectment against Scott and Boland to recover possession of the lot in question.

The deed under which the lessors of the plaintiff claimed was dated the 1st July, 1836, and was signed by three judges of the Territory of Michigan. In making the conveyance, the judges acted under a law of Congress of the 21st April, 1806. As regards this question, *it is not important to examine the execution of this trust.*

On the trial it was proved "that a Legislature of the State of Michigan, duly elected and returned, was organized and duly qualified under the constitution of the State of Michigan on the 3d November, 1835; and that Stevens T. Mason, having been duly elected and returned, was on the same day qualified as governor, etc. That the Act entitled 'An Act to incorporate the members of the Detroit Young Men's Society' was approved 26th March, 1836."

It was proved, by reputation, that John S. Horner purported to act as territorial governor of Michigan until sometime in the year 1836, and that George Morell and Ross Wilkins acted as judges until June of that year. That a session of the Territorial Court was held on the first Monday of January, 1837.

The State of Michigan was admitted into the Union by the Act of the 26th January, 1837.

On the trial, the counsel moved the court to instruct the jury, that the Act "to incorporate the members of the Detroit Young Men's *Society" was not of binding force, [*380 "unless the jury should find that the State government of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation."

The twenty-fifth section of the Judiciary Act of 1789 provides, "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity," may be re-examined in this court by a writ of error.

This act of incorporation was given in evidence, as a part of the plaintiff's title; and on the validity of the act his right to a recovery depended. The deed having been made to the lessors of the plaintiff as corporators, they could recover only in that capacity. The validity of this statute was questioned, as appears from the record, on the ground that it was passed before the State was admitted into the Union; and the court held that the statute was valid. By the Constitution, Congress has power to admit into the Union "new States." The time of admission is a question of law, and not a political question. At the present term we have had occasion to decide the date of the admission into the Union of the States of Florida and Iowa.

The above facts present the very case provided by the statute for the exercise of jurisdiction by this court. A right was set up under the statute of a State, and that statute was alleged to be repugnant to the Constitution and laws of the United States; and the decision of the State court was in favor of the validity of such statute. No case, it would seem, could arise, more completely within the letter and spirit of the twenty-fifth section.

It is said that the act upon its face does not purport to be repugnant to the Constitution or laws of the United States. If this be admitted, it by no means follows that the act is constitutional. Whether constitutional or not must be

determined by the effect of the act. But in my judgment this act is repugnant to the Constitution and laws of the Union.

Michigan was an organized territory of the United States. Its governor, judges, and all other territorial officers, were in the discharge of their various functions. The sovereignty of the Union extended to it. Under these circumstances, the people of Michigan assembled by delegates in convention, and adopted a constitution, and under it elected members of both branches of their Legislature, governor, and judges, and organized the State government. No serious objection need be made, in my judgment, to the assemblage of the people in convention to form a constitution, although it is the more regular and customary mode to 381*] proceed under the sanction of *an act of Congress. But until the State shall be admitted into the Union by act of Congress, the territorial government remains unimpaired.

No act of the people of a territory, without the sanction of Congress, can change the territorial into a State government. The Constitution requires the assent of Congress for the admission of a State into the Union; and "the United States guaranty to every State in the Union a republican form of government." Hence the necessity, in admitting a State, for Congress to examine its constitution.

The Act "to incorporate the members of the Detroit Young Men's Society," was the exercise of sovereign power—a power totally repugnant to the sovereignty of the Union, in its territorial form. Until the 26th of January, 1837, Michigan was not admitted into the Union and recognized as a State. Whatever effect this admission may have, by way of relation, on the exercise of the political powers of the State prior to that time, is not now a question. The question of jurisdiction relates to the time the act was passed, and its validity.

This act of incorporation was repugnant to the Constitution of the United States, under which the territorial government was organized. It was repugnant to the laws of Congress which formed that organization. It was an exercise of sovereignty incompatible with the sovereignty of the Union, in all its legal forms. And this act was declared by the Supreme Court of Michigan to be valid. I cannot conceive of a clearer case for jurisdiction.

In Holmes v. Jennison, 14 Peters, 540, the governor, in the exercise of a supposed power in the State, directed a fugitive from justice, claimed by the Canadian government, to be delivered up; and the Supreme Court of that State, having brought the accused before it by a habeas corpus, remanded him to custody. This court, under the twenty-fifth section, took jurisdiction of the case, on the ground, in the language of the Chief Justice, "that the exercise of the power in question by the States is totally contradictory and repugnant to the power granted to the United States." And again he says, "All the powers which relate to our foreign intercourse are confided to the general government." "If there was no prohibition to the States, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."

Now, in the case of Holmes, there was no power to surrender the fugitive in the federal government, as such power was not conferred by the laws of nations, but must be given by a treaty, or by reciprocal legislation. Still, as the foreign intercourse was vested in the general government, no part of it could be exercised by the States without conflicting with the federal power. Now, the conflict of power, in the case under consideration, is clear and direct. The *two sovereignties of the State and the [*382 territorial government cannot exist at the same time within the same limits. The territorial government exists in full vigor until it is abolished by the admission of the State. There was, then, a direct and irreconcilable repugnance in the exercise of the sovereign power by the State, so long as the federal authority was exercised in the territory.

Mr. Justice Wayne concurred, that this court had not jurisdiction in this case, but did not assent to any conclusions in the opinion on the merits in this controversy involving the political relations of Michigan with the United States before Michigan was admitted into the Union.

Mr. Justice Nelson concurred with the opinion of Mr. Justice McLean.

Order.

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

THE UNITED STATES, Plaintiffs in Error,
v.
THE BANK OF THE UNITED STATES.

Maryland statute—an instrument drawn by one government on another in form of bill of exchange is not subject to protest and damages, not being governed by the law merchant.

In the case of the United States v. The Bank of the United States (2 Howard, 711), the court is of opinion that the question on the structure of the bill is an open question, and for the first time presented to this court for decision.

The statute of Maryland of 1785, in its terms, does not embrace a bill of exchange drawn on a foreign government.

A bill of exchange in form, drawn by one government on another, as this was, is not and cannot be governed by the law merchant, and therefore is not subject to protest and consequential damages.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was a continuation of the same case, between the same parties, which was reported in 2 Howard, 711.

Being sent back to the Circuit Court, it came

NOTE.—Bill of exchange, requisites of.

What constitutes a bill of exchange. 3 Kent's Com. 74; Bayley on Bills, 1; Harvey v. Kay, 9 Barn. & Cress. 356; Randolph v. Pariah, 9 Port. Ala. 76; Potter v. Tyler, 2 Metc. 58; Miller v.

up for trial in November, 1844, when the jury, under the instructions of the court, found a verdict for the defendant below, viz., the bank.

At the trial, the following bill of exceptions was filed, which brought the case again to this court:

Bill of Exceptions.

Be it remembered, that at the sessions of April, A. D., 1838, came the United States of America into the Circuit Court of the United 383*] *States for the Eastern District of Pennsylvania, and impleaded the President, Directors and Company of the Bank of the United States, in a certain plea of trespass in the case, etc., in which the said plaintiffs declared (prout narr.) and the said defendants pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city of Philadelphia, before the Honorable Archibald Randall, judge of the said court, on the — day of November, A. D., 1844, the aforesaid issue between the said parties came to be tried by a jury of the said district, duly impaneled (prout jury), at which day came as well the plaintiff as the said defendant, by their respective attorneys; and the jurors aforesaid, impaneled to try the issues aforesaid, being also called, came, and were then and there in due manner chosen and sworn, or affirmed, to try the said issues; and, upon the trial, the counsel of the said plaintiffs stated their demand to be for $170,041.18, with interest—the balance unpaid—due to the plaintiffs as holders of 66,692 shares of the capital stock of defendants, of $3.50 per share, being the amount of a dividend of half-yearly profits declared by the defendants in the month of July, A. D. 1834. And to maintain the said issue on the part of the plaintiffs, proved that they were then the holders of said shares of stock, and gave in evidence a resolution of the directors of the said defendants made on the 7th July, 1834 (prout), and their advertisement in one of the daily newspapers of Philadelphia (prout), and the account of the said defendants in their books with the plaintiffs for the first half-year of 1833 (prout).

And the defendants, to maintain the said issue on their part, gave in evidence a bill of exchange, drawn and dated at the Treasury Department of the United States, Washington, 7th February, 1833, by the Secretary of the Treasury on the Minister and Secretary of State for the Department of Finance of the kingdom of France for 4,856,666 66-100 francs, payable at sight to the order of defendants' cashier (prout bill); and the several indorsements thereon (prout); and a writing of the same date with the said bill, under the seal of the United States and hand of the President, dated at Washington (prout); and the presentment and refusal of payment and protest of said bill, at Paris, on the 22d of March, 1833 (prout); protest, and a notice thereof by defendants, through their cashier, to the said Secretary of the Treasury, in a letter of 26th April, 1833 (prout); and the return of said bill and protest to the said Secretary of the Treasury, in a letter from the said defendants' cashier, dated 13th May, 1833, with an account annexed; in which letter and account demand was made of the payment of the principal of the said bill, with costs and charges of protest and interest thereon, and damages on said principal, at fifteen per cent. (prout letter and account); and proved the then rate of exchange to have been as therein stated; *and gave in evidence a statute of the [*384 State of Maryland (prout), passed in 1785, and an article of the commercial code of France (prout); and the correspondence (prout) between the Secretary of the Treasury and the defendants, concerning said bill, before and after the drawing thereof, and proved the allowance by the Secretary of the Treasury of a credit for, and payment thus made, of the principal of said bill; and further proved the presentment to the accounting officers of the treasury, and their rejection and disallowance of a claim on the part of the defendants, for a credit of the said fifteen per cent. thereon, and said cost and charges of protest (prout exemplification); and the said defendants claimed on the said trial a credit for and to set off defalk.: the same claims being, as they allege, in amount equal to the claim of the plaintiffs.

And the said plaintiffs, to rebut the aforesaid claim of the said defendants to a set-off, relied upon and gave in evidence a convention between the United States of America and France, made the 4th day of July, A. D. 1831, and

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Thompson, 8 Mann. & Gr. 576; Byles on Bills of Exchange and Promissory Notes, 1, 4.

A check upon a bank partakes more of the character of a bill of exchange than of a promissory note. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange. Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, 3 Johns. Cas. 259; Woods v. Schroeder, 4 Harr. & J. 276; Bohem v. Sterling, 7 Term. R. 430; Walker v. Geisse, 4 Wheat. 252; Serle v. Norton, 9 Mees. & W. 309; Wookey v. Pole, 4 B & Ald. 1.

A bill or note is not confined to any set form of words. But it must be absolutely and exclusively for the payment of money. Jones v. Fales, 4 Mass. 245; Lawrence v. Dougherty, 5 Yerg. 435; Ellis v. Ellis, Gow. 216; Eddison v. Collingridge, Law Jour. Rep. Com. Pleas, Sept. 1850, p. 268; Rhodes v. Lindly, 8 Hamm. 51; Atkinson v. Manks, 1 Cow. 691; Morris v. Lee, 2 Ld. Raym. 1396; Jerome v. Whitney, 7 Johns. 321; Thomas v. Roosa, 7 Johns. 461; Peay v. Pickett, 1 Nott. & McC. 254.

In England, negotiable paper must be for the payment of money in specie, and not in bank notes. But in this country a note payable in bank bills is a good negotiable note, if confined to a species of *paper universally current as cash. Bayley on Bills, 6; Story on Bills, 53; Whitman* v. Childress, 6 Humph. (Tenn.) 303; Keith v. Jones, 9 Johns. 120; Judah v. Harris, 19 Johns. 144; Sweetland v. Craight, 15 Ohio, 118; But see McCormick v. Trotter, 10 Serg. & R. 94; Gray v. Donahoe, 4 Watts. 400; Hasbrook v. Palmer, 2 McLean. 10.

The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument. Dawkes v. DeLorane, 3 Wils. 207; Beardsley v. Baldwin, 2 Str. 1151; Roberts v. Peake, 1 Burr. 323; Cook v. Satterlee, 6 Cow. 108; Van Vacter v. Flack, 6 Sm. & M. (Miss.) 393; Secord v. Burling, 5 Den. 444.

The event on which the instrument is to become payable must be fixed and certain, or which must inevitably happen. Cook v. Colehan, 2 Str. 1217; Andrews v. Franklin, 1 Str. 24; 1 Wils. 262; 2 Wils. 213; Moffatt v. Edwards, 1 Carr. & Marsh. 16; Walker v. Roberts, 1 Carr. & Marsh. 590; Colehan v. Cook, Willes, 396; Pearson v. Garrett, 4 Mod. 242; Jocelyn v. Lacier, 10 Mod. 294, 316; Appleby v. Biddulph, 8 Mod. 363; Jenny v. Herle, 2 Ld. Raym. 1361; Barnsley v. Baldwin, 7 Mod. 417; Palmer v. Pratt, 2 Bing. 185; Carlos v. Fancourt, 5 Term. 482; Worley v. Harrison, 3 Ad. & Ell. 669; Goss v. Nelson, 1 Burr. 226; Stevens v. Blunt, 7 Mass. 40.

ratified the 2d day of February, A. D. 1832 (prout same), together with an Act of Congress passed the 13th day of July, 1832 (prout), by the seventh section of which it was made the duty of the Secretary of the Treasury "to cause the several installments, with the interest payable thereon, payable to the United States, in virtue of the said convention, to be received from the French government and transferred to the United States in such a manner as he may deem best, and the net proceeds thereof to be paid into the treasury." And also a letter of Edward Livingston, Department of State, dated Washington, 8th February, 1833, to Nathaniel Niles, Esq., Paris. (Prout same.)

And the counsel for the said plaintiffs requested the learned judge to charge the jury—

1. That the evidence in the cause does not show a contract between the government and the bank for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the plaintiff, to transfer to the United States the first installment due under the treaty with France, and that the bill was only one of the instruments for carrying the same into effect. And further, that the question of agency is for the jury to decide.

2. That the Act of Maryland of 1785, under which the defendants claim damages, does not extend to the United States.

3. That the bill in question, being drawn by one government upon another and upon a particular fund, is not a bill of exchange within the legal meaning of the terms, and is not embraced by the statute.

4. That the defendants, being indorsers of the bill, and not the holders or owners at the time of protest, are not entitled to the damages, since they have not paid them.

But the court refused to instruct the jury as requested by the plaintiffs' counsel, and charged them as follows, to wit.:

It is admitted, that if this was a suit between 385*] individuals, and the *defendant was the actual owner of a bill of exchange drawn by the plaintiff on a foreign country, and protested for nonpayment, he would be entitled to the damages now claimed by the bank; but it is contended, 1st, that the evidence in this cause does not show a sale of the bill of exchange to the bank, but an agency on the part of the bank to assist in procuring the transfer of the funds to the United States. The whole of the evidence on this subject is in writing, and therefore a matter of law, and, in my opinion, establishes a clear and unequivocal sale by the United States, and purchase and payment for the bill by the bank; and that in the endeavors to collect it there was no other agency than always exists between the owner and other parties to a bill of exchange. Again, it is said, that if this was a purchase of the bill by the bank, yet the defendants cannot set off this claim, because the Act of Maryland of 1785 does not extend to bills drawn by the government of the United States. When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility, of individuals who are parties to such instruments; there is no difference, except that the United States cannot be sued; and from the unavoidable use of commercial paper by the United States, they are as much interested as the community at large in maintaining this principle.

In the present case, the United States do not sue for a debt due to them as a government, but as stockholders or copartners for their proportion of the profits accruing on the use of their money, which they have invested in the stock of the corporation, and are to be treated in all respects like any ordinary stockholder, who would be bound to pay a debt due to the bank before he could sustain an action for his dividends.

The remaining objections are, that if the Maryland Act of 1785 does embrace bills drawn by government, then this, being a bill drawn on a particular fund, is not a bill of exchange in the legal meaning of the term; and that if it is such a bill, the bank was not the holder or owner of it at the time of protest, and therefore is not entitled to the damages given by the statute.

These questions appear to me to have been determined by the Supreme Court of the United States in the present cause in favor of the defendants; whether they were rightly determined, it is not for us to inquire; that determination is binding on us, and until reviewed by themselves must be considered the law of the land. If I have mistaken their views on this, or erred in any other point of the cause, it will be corrected by a re-examination of the case in that court; but a construction of their opinion, given by the jury, is only capable of being re-examined in this court, which may lead to a new trial and lengthen litigation, to the disadvantage of all parties, as it will undoubtedly be only finally determined in the court of the *last resort. This being, [*386 then, my view of the law, in my opinion the defendants are entitled to the verdict.

And thereupon the counsel for the plaintiffs excepted.

The cause was argued by Mr. Clifford (the Attorney-General) and Mr. Nelson for the United States, the plaintiffs in error, and by Mr. Sergeant for the bank.

Mr. Clifford assigned five causes of error, viz.:

1st. That the bill upon which the damages in controversy are claimed by the defendants in error, under the circumstances stated in the record, is not a bill of exchange and embraced by the Maryland statute of 1785.

2d. That if a bill of exchange within the terms of that statute, the statute does not extend to the United States, so as to render them liable to the payment of the fifteen per cent. damages claimed by the defendants.

3d. That the evidence in the cause does not show a contract between the plaintiffs and the defendants for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the government, to transfer to the United States the first installment due under the treaty with the King of the French of the 4th July, 1831, and that the bill in question was one of the instruments for accomplishing that object.

4th. That the defendants, being indorsers of the bill, and not owners or holders at the time

of protest, are not entitled to damages, since they have not paid them.

5th. That there was error in the charge of the court below in having instructed the jury that the defendants were entitled to their verdict, thus withdrawing from the consideration of the jury the facts which they alone were competent to find.

After stating these points, the Attorney-General proceeded with the argument.

The demand of the plaintiffs is not the subject of dispute. The questions to be determined grow out of the set-off filed by the defendants. That claim had its origin in an unsuccessful attempt of the Secretary of the Treasury, through the medium of the Bank of the United States, to transfer to this country the first installment payable to this government by France, under the convention of the 4th July, 1831. He proposed to discuss very briefly the several points taken in the bill of exceptions, at the last trial in the court below. He had no doubt he might properly do so, notwithstanding the cause was formally before the court on a previous occasion, when a decision was pronounced upon the points then presented under the bill of exceptions at that term. See 2 Howard, 711. If it were not apparent then, the facts now disclosed afford convincing proof that the record in the former cause was in 387*] many respects incomplete. *Fortunately for both parties, the present record is sufficiently full, and the exceptions broad enough, to open the whole merits of the dispute, and to warrant the parties in submitting the cause to a final decision.

1. He submitted first the proposition, that the evidence in the cause does now show a contract between the plaintiffs and the defendants for the sale of a bill of exchange, but an undertaking on the part of the defendants, as the agents of the government, to transfer to the United States the first installment due under the treaty, and that the bill in question was one of the instruments for accomplishing that object.

Whatever the forms may have been, this was a public transaction between two sovereign independent nations, for the purpose of carrying into effect a treaty stipulation. In this general view the real parties are, 1st. The United States; 2d. The government of France; 3d. The Bank of the United States, at that time the fiscal agent of the government, and authorized and commissioned to demand and receive from France a certain fund, and to transfer the same to this country. Such was the purpose. The instruments executed were such as the President of the United States, the Secretary of the Treasury, and the president of the bank deemed sufficient, and best calculated to effect this object. Leaving out of view the parties to the bill in London and Paris, and supposing it to have been presented by the cashier of the bank, in whose favor it was drawn, and protested for nonpayment as in this case, but without intervention—which is the strongest view that can be taken of the case for the bank—still the letters of the parties, and other instruments executed at the date of the bill, would determine the character of the contract. The Act of Congress of the 13th July, 1832, 4 Statutes at Large, 574, made it "the duty of the Secretary of the Treasury to cause the several installments, with the interest thereon, payable to the United States, in virtue of the said convention, to be received from the French government, and transferred to the United States in such manner as he may deem best." Congress conferred the power to cause the fund to be received and transferred. Under this act the Secretary had no right to deal in exchange, or even to draw a bill except as a means to accomplish the purpose described in the act itself. The Secretary of the Treasury took this view of the law in his letter to the president of the bank of the 31st October, 1832. He commences by referring to the convention, and remarks: "The Secretary of the Treasury being charged by the Act of 13th July last with transferring to the United States the several installments receivable under the convention, I am desirous of effecting that object in such a manner as may be most beneficial to the interests of the claimants for whom the money is to be received, and with this view I shall be glad to receive your suggestions in regard to the transfer of the first installment." The *bank was thus officially apprised of [*388 the convention creating the fund to be transferred, and its attention specially directed to the act of Congress devolving that duty upon the Secretary of the Treasury. It was equally well advised, that the sole purpose of the head of that department was to effect the transfer of the first installment, in a manner most beneficial to the claimants. The president of the bank, in his reply of the 5th of November, evidently regarded the proposition as one invoking the agency of the bank. He expresses himself as very willing to offer such suggestions as occur to him, in regard to the transfer of the first installment. "After examining the subject in all its relations, with an anxiety to make the transfer on such terms as would merely prevent a loss to the bank," etc. Having given various suggestions, he concludes by saying, that the bank "is influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury." On the 26th January, 1833, the Treasury Department notify the president of the bank of their readiness to draw on the French government for the first installment payable under the convention. On the 30th January, the reply, marked confidential, after assigning reason for increasing the rate, adds: "Without looking, therefore, to any profit on the operation, but merely with the expectation of incurring no loss upon it." On the 6th of February, the Secretary of the Treasury accepts the terms. The bill was drawn on the 7th, and refers to the convention in these words: "Being the amount of the first installment to be paid to the United States, under the convention concluded between the United States and France, of the 4th of July, 1831 (after deducting the amount of the first installment to be reserved to France under the said convention), and the additional sum of nine hundred and forty thousand francs, being one year's interest at four per cent. on all the installments payable to the United States, from the day of the exchange of the ratifications to the 2d February, 1833."

Memorandum indorsed on the Bill.

Total amount of indemnity payable to the United States, ...	ffs.	25,000,000 00
Less amount of indemnity to be reserved to France,.....		1,500,000 00
		23,500,000 00
One year's interest. from 2d Feb. 1832, to 2d Feb., 1833, at 4 per cent.,.....		940,000 00
First installment payable to the United States, ...		3,916,666 66
Amount of Bill,		4,856,666 66

On the same day the President of the United States executed an instrument in the nature of a power of attorney to the cashier of the bank, authorizing him or his assignee to receive the 389*] amount of the *bill, and, on the receipt of the sum therein specified, to give full receipt and acquittance to the government of France for the first installment. This instrument recites the convention creating the fund—the law of Congress providing for its transfer—the bill of exchange as the means of affecting that object—and, being in itself a power of attorney, establishes the agency of the bank. Then follows the official dispatch of the Secretary of State of the 8th February, advising the acting chargé des affaires in Paris that the bill had been drawn in favor of the cashier of the bank, and that it was accompanied by a full power from the President of the United States, authorizing and empowering him to give the necessary receipt and acquittance to the French government, according to the provisions of the convention, and directing the chargé des affaires to apprise the French government of this arrangement.

The judge in the court below erred in refusing the first instruction prayed for on the part of the United States, and instructing as he did. The agency appears from, 1st. The act of Congress—"cause the several installments to be received and transferred to the United States." 2d. The letter of the Secretary of the Treasury of the 31st October—"I am desirous of effecting that object" (the transfer). 3d. The reply of the president of the bank, of the 5th November, in which he refers to the transfer, and speaks of a bill as the means. 4th. The subsequent letters following out the idea—"without looking, therefore, to any profit on the operation, but merely with the expectation of incurring no loss." 5th. The power of attorney from the President of the United States to the cashier of the bank, to receive the money and execute the discharge. 6. The despatch from the Secretary of State. These several instruments were legally admissible to explain and qualify the bill, and constitute a part of the original contract between the parties. Leeds v. Lancashire, 2 Camp. 205; Hartley v. Wilkinson, 4 M. & S. 25; Chitty & Hulme, 10th American, from 9th London ed. 140; Bayley on Bills, 17 Story on Bills, sec. 34. A bill may be written in part on one paper and in part on another separate and detached paper, if the memorandum on each be contemporaneous, and both be designed to constitute but one entire contract. The contract may thus be qualified, restrained, or enlarged. In one case it is said the paper between the original parties was but an agreement, while in the hands of an innocent holder it might become a valid negotiable security. Bills of exchange and promissory notes, like every other contract, are to be construed in such a manner as if possible to give effect to the intention of the parties. Chitty & Hulme, 167.

2. The second proposition submitted. That the bill upon which the damages in controversy are claimed by the defendants, under the circumstances stated in the record, is not a bill of exchange and embraced by the Maryland statute of 1785.

*Supposing the bill in this case to be [*390 subject to the same rules of law as are made applicable to paper between persons dealing in exchange, still the defendants' claim cannot be sustained. The money must be payable at all events, not dependent on any contingency, either with regard to events, or with regard to the fund out of which payment is to be made, or the parties by or to whom payment is to be made. Chitty on Bills, 134; 1 Stephens' N. P. 777. The writers upon the law of bills of exchange usually refer to a class of cases to illustrate what is meant by a bill or note payable eventually or upon condition, each of them instancing some few of the cases which have been presented for judicial determination. The principle is well stated in Carlos v. Fancourt, 5 T. R. 482, by Mr. Justice Ashhurst and Lord Kenyon: "Unless they carry their own validity on the face of them, they are not negotiable." "It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty." Courts best promote the interest of a mercantile community by adhering strictly to the rules implied in the definition of a bill of exchange, rejecting every contingency. Before proceeding to discuss the contingency appearing on the face of the bill in this case, it is proper to state the nature of the contract of the drawer of a bill. "The drawing of a bill of exchange implies, on the part of the drawer, an undertaking to the payee, and to every other person to whom the bill may be afterwards transferred, that the drawee is a person capable of making himself responsible for the due payment thereof; that he shall, upon due presentment, if applied to for the purpose, express in writing upon the face of the bill an acceptance or undertaking to pay the same when it shall become payable; that he, the acceptor, shall pay the same when it becomes payable, upon due presentment thereof for that purpose; and that if the drawee shall not accept it when so presented, or shall not so pay it when it becomes payable, and the payee or other holder shall give him, the drawer, due notice thereof, then he will pay the sum or amount stated in the bill to the payee or other holder, together with such damages as the law prescribes or allows in such cases as an indemnity." Story on Bills, sec. 121. These are general principles, but every general principle

has its exceptions. It appears on the face of the instrument in this case, that it was drawn by the Secretary of the Treasury, on behalf of the United States, upon the Minister and Secretary of State for the Department of Finance of the government of France, to secure the fulfillment of a treaty stipulation. The answer of the officer of the French government, to whom the bill was presented for payment, as stated in the protest, shows the contingency; he answered, "that having had the orders of 391*] the Minister and Secretary of State *for the Department of Finance, he is instructed to say, that diplomatic treaties which impose engagements on the French treasury, to be discharged, do not become obligatory upon it until the Chambers have sanctioned the financial dispositions which are therein embraced; therefore, the treaty concluded with the United States not being yet sanctioned by the Legislature, the Minister of Finance cannot at present make any payment to avail upon the obligations contracted by the said treaty." Suppose a bill to have been drawn by a citizen of France on the Treasury of the United States. The Federal Constitution provides, "No money shall be drawn from the treasury but in consequence of appropriations made by law." A bill drawn upon the treasury is subject to the contingency of that provision, as much so as if the provision itself were incorporated into the bill, and would it be said, that the drawer contracted against that provision, or that the appropriation had been made when Congress had not assembled?[1] Hence it has been decided in Reeside v. Knox, 2 Wharton, 233, that every bill drawn upon government is drawn upon a fund. A public officer may doubtless draw or receive bills to facilitate the business of his department, but he would transcend his power did he attempt to pledge the responsibility of the government as a merchant or banker.

As to what is contingent, or conditional. "The payment of a bill must not rest on any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument." 3 Kent, 76. "The sum to be paid must not only be in money, and certain in amount, but it must be payable absolutely and at all events. If it be payable out of a particular fund only, or upon an event which is contingent, or if it be otherwise conditional, it is not in contemplation of law a bill of exchange, or in its essential character negotiable." Story on Bills, secs. 55, 56. Other cases illustrating what is a contingency or condition: A note promising to pay plaintiff or order on demand a certain sum, or to surrender the body of A. B. Smith v. Boheme, 3 Lord Raym. 67. A promise to pay T. M. so much money, if my brother doth not pay it within such a time. Appleby v. Biddolph, cited in 8 Mod. 363. I, John Conner, promise to pay to John Ferris or his order fifty pounds; signed John Conner, or else Henry Bond. Ferris v. Bond, cited in Bayley on Bills, 17, and in Stephens' N. P. 777. We promise to pay A B a certain sum on the death of C D, provided he leaves either of us sufficient to pay the said sum, or if he shall be otherwise able to pay it. Roberts v. Peake, 1 Burr. 323. A promise to pay within so many days after the defendant should marry. Beardesley v. Baldwin, 2 Str. 1151. Out of my growing subsistence. Josselyn v. Lacier, 10 Mod. 294. Out of the fifth *pay- [*392 ment when it should become due. Haydock v. Lynch, 2 Lord Raym. 1563. Out of A B's money, as soon as he should receive it. Dawkes v. De Lorane, 3 Wilson, 207. Out of moneys in A B's hands belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West Buckland. Jenny v. Herle, 1 Stra. 591, 592; 2 Lord Raym. 1361. On the sale or produce immediately when sold of the White Hart, St. Albans, and the goods, etc. Hill v. Halford, 2 Bos. & Pull. 413. Pay A B one month after date two hundred pounds, on account of freight of the Veale Galley. Banbury v. Lisset, 2 Str. 1211. Borrowed and received of A B in three drafts by C D payable to us, which we promise to pay unto the said A B with interest. Williamson v. Burnett, 2 Camp. 417. Being the amount of the purchase money for a quantity of fir belonging to D. H. and then lying in the parish of Fillingham. Upon the note was the following indorsement: "This note is given on condition that, if any dispute shall arise between Lady Wray and D. H. respecting the sale of the within mentioned fir, then the note to be void. Hartley v. Wilkinson, 4 Camp. 127. On demand, we promise to pay to A B or his order a certain sum, for value received in stock of ale, brewing vessels, etc., this being intended to stand against me, the undersigned C D, as a set-off for that sum left me in my father's will above my sister's share. Clarke v. Percival, 2 Barn & Adolph. 660. Out of my half-pay, addressed to a navy agent. Stevens v. Hill, 5 Esp. N. P. C. 247. An order to pay one thousand dollars, or what might be due after deducting all advances and expenses. Cushman v. Haynes, 20 Pick. 132. A promise to pay a certain sum provided the ship Mary arrives at a European port of discharge free from capture and condemnation by the British. Coolidge v. Ruggles, 15 Mass. 387. The sum must be certain, not susceptible of contingent or indefinite additions; therefore, in the case of an instrument promising to pay A B the sum of sixty-five pounds, with lawful interest for the same, and all other sums which should be due to him, Lord Ellenborough held that it was not a promissory note even for the sixty-five pounds. Smith v. Nightingale, 2 Stark. 375. I promise to pay, with interest at five per cent. I also promise to pay the demands of the sick club at H. in part of interest and the remaining stock and interest to be paid on demand. Bolton v. Dugdale, 4 Barn. & Adolph. 619. Nor to indefinite and contingent reductions. Thus, where the defendant promised to pay four hundred pounds to the representatives of A B, first deducting thereout any interest or money A B might owe to defendant. Barlow v. Broadhurst, 4 Moore, 471. An order payable, provided the terms mentioned in certain letters written by the drawer were complied with. Kingston v. Long, cited in Bayley on Bills, 14. At thirty days after the arrival of the ship

1.—*As to the law governing the contract, see Bronson v. Kinzie, 1 How. 329; McCracken v. Hayward, 2 Ibid. 612.*

393*] Paragon at Calcutta, pay this *my first of exchange to the order of A B. Palmer v Pratt, 2 Bing. 185.

3. The third point submitted. That if a bill of exchange within the terms of the statute of 1785, that statute does not extend to the United States, so as to render them liable to the payment of the fifteen per cent. damages claimed by the defendants.

The words of the act of Maryland are, "That upon all bills of exchange hereafter drawn in this State, on any person, corporation, company or society in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society or corporation entitled to the same, shall have the right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal mentioned in such bill from the time of protest until the principal and damages are paid and satisfied." The United States are not named in this act, and it therefore does not extend to them. The king shall not be bound by a statute, whether affirmative or negative, which does not expressly name him; yet if there be equivalent words, or if the prerogative be included by necessary implication, it would seem to admit of a different construction. 2 Dwarris, 670; Com. Dig. voce Parliament, B. 3, 8; Murray v. Ridley, 3 Harr. & McH. 171; Contee v. Chew, 1 Harr. & Johns. 417; State v. Bank of Maryland, 6 Gill & Johns. 226; The King v. Wright, 1 Adolph. & Ellis, 434; 3 Coke's Reports, Part V. 14 b, 26; 6 Ibid. Part XI. 70 b, 132; The King v. Archbishop of Armagh, 8 Mod. 8; 1 Stra. 516. As analogies: A statute of limitation does not run against a State unless it is expressly named. Lindsay v. Miller, 6 Pet. 666; State v. Arledge, 2 Bailey, 401; Weatherhead v. Bledsoe, 2 Overton, 352; People v. Gilbert, 18 Johns. 227; State Treasurer v. Weeks, 4 Vermont R. 215; Stoughton v. Baker, 4 Mass. R. 522–528; Nimmo v. Commonwealth, 4 Hen. & Mun 57; Bayley v. Wallace, 16 Serg. & Rawle, 254; Commonwealth v. Baldwin, 1 Watts, 54; Wallace v. Mercer, 6 Ham. 366. A statute of limitations does not affect the United States. United States v. Hoar, 2 Mason, 311.

4. That the defendants, being indorsers of the bill, and not owners or holders at the time of protest, are not entitled to damages, since they have not paid them.

The act of Maryland, after the words recited under the last point, reads thus: "And if any indorser of such bill shall pay to the holder, or the person or persons, company, society or corporation entitled to the same, the value of the principal and the damages and interest as aforesaid, such indorser shall have a right to 394*] *receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society, or corporation liable to such indorser on such bill of exchange." Messrs. Hottinguer, by paying the bill supra protest for the honor of the bank, became indorsees, and acquired all the rights and were entitled to all the remedies against the bank and prior parties which the holder had, whom they paid without any indorsement or formal transfer of the bill. These rights they might have asserted to their full extent, or they were at liberty to limit and narrow them. Chitty & Hulme, 509; Mertens v. Winnington, 1 Esp. R. 112. They became the holders and indorsees by the law merchant. Konig v. Bayard, 1 Pet. 250. An acceptor for the honor of an indorser is, after payment by him, the holder. Bayley on Bills, 339; and he refers to Louviere v. Laubray, 10 Mod. 36, as authority; see, also, Story on Bills, secs. 124, 125; Byles on Bills, 83. Chancellor Kent says: "If he takes up the bill for the honor of the indorser, he stands in the right of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties." 3 Kent, 87; Mutford v. Walcot, 1 Lord Raym. 574; Cox v. Earle, 3 Barn. & Ald. 430; Alvord v. Baker, 9 Wend. 323; Schimmelpennich v. Bayard, 1 Pet. 264. As an illustration: A person who accepts for honor is only liable if the original drawee do not pay, and to charge such acceptor there must be a presentment for payment to such original drawee. Hoare v. Cazenove, 16 East, 391; Williams v. Germaine, 7 Barn. & Cress. 468; Bayley on Bills, 159; see, also, Ex-parte Wackerbarth, 5 Ves. 574; Ex-parte Lambert, 13 Ves. 179; Vandewall v. Tyrrell, 1 Moody & Malk. 87. Messrs. Hottinguer were therefore in no sense agents of the bank, but became ex vi termini the holders of the bill. If they were the holders in the legal sense, then the bank at the time held only the character of indorsers; they were the sureties of the drawer. Story on Bills, secs. 108, 120. The bank did not pay the fifteen per cent. damages to Messrs. Hottinguer, therefore they cannot claim them from the United States.

Mr. Justice Catron delivered the opinion of the court:

The United States sued the Bank of the United States for a dividend on stocks held by the government in the bank, and the defendant pleaded and relied in defense on the set-off, being the damages claimed by the defendant of fifteen per cent. on a protested draft in the form of a bill of exchange, drawn by the government of the United States on the government of France, for a sum of money due from the latter government to the former, by treaty stipulations, to obtain possession of which the draft was drawn. The bank was the payee and original holder. The *holders at [*395 the time of protest (Messrs. Rothschilds, of Paris) caused it to be protested for nonpayment; and Hottinguer & Co. intervened immediately after, and took up the draft for the honor of the bank. The corporation refunded to Hottinguer & Co. the amount advanced, including interest and charges, together with one half per cent. commissions, and thus again became possessed of the draft.

The Circuit Court, on a former trial, held that the damages claimed as a set-off depended on a statute of Maryland of 1785; that by the statute the holder at the time of protest alone

could demand damages from any previous party to a bill, and that if he failed to do so, and recovered less from any previous indorser, the latter could only recover the amount actually paid (with interest and charges accruing subsequently) from the drawer; and therefore the bank could set up no claim by force of the statute of Maryland, taking its own assumption to be true, that this was a legal bill of exchange, and properly subject to protest. This instruction altogether rejected the defense relied on, and the jury found for the plaintiffs; and from that decision the defendants prosecuted a writ of error to this court. When the cause came before us in 1844 (2 Howard, 711), this single question was presented for our determination; nor could this court decide any other question; and such was the unanimous opinion of the court, although the judges then present differed as regarded the true construction of the statute of Maryland; the majority holding the construction of the Circuit Court to have been erroneous, and that the bank, as payee, on taking up the draft from Hottinguer & Co., had the same right to demand damages under the statute that the holder had at the time of protest. The court, however, when giving its opinion, threw out some suggestions on the structure of the bill; first remarking, that, "before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel, though, not having been excepted to by the government, it is not a matter for decision." The instruction given cut off every other question the government might have raised in opposition to the set-off claimed; and as this court, when acting as a court of errors, can only legitimately revise the questions of law that have been raised and decided in the circuit courts, it must of necessity, on a second writ of error being prosecuted, have power to revise such rulings of the court below on the second trial as affect the merits of the controversy, and to pass on the questions not previously presented, as open questions, in the particular cause. However high the regard of judges that did not concur may be for the views entertained and expressed by other judges, on a question of law not brought up for decision, still it is impossible to recognize such views as binding authority, consistently with the due administration of justice; as by doing so the merits of 396*] *the controversy might be forestalled, without proper examination. We therefore feel ourselves at liberty to treat of the structure and character of the instrument before us as an open question. And so, also, we deem the question open, whether the statute of Maryland subjected to protest and damages a government. The statute provides, "That upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society in any foreign country, and regularly protested, the owner or holder of such bill shall have a right to so much money as will purchase a good bill of the same time of payment, and upon the same place, at the current rate of exchange of such bills; and also fifteen per cent. damages upon the value of the principal sum *mentioned* in such bill, with costs of protest, *together with legal interest,*" etc. The United States refunded to the bank, on the return of the draft, the principal sum, together with all the charges actually incurred by the bank, and the interest accruing from the date of drawing to the time when the money was refunded; but refused to pay the fifteen per cent. damages claimed by the bank. This refusal was not founded on the true construction of the Maryland statute; the government insisting it had no application to the transaction, but that the drawing was a nation upon nation, and not governed by the law merchant; and that the form of one of the instruments making up the transaction did not and could not alter its character or legal effect, so as to bring it within the law merchant. That the government was only bound to do equity to the bank to the extent of the amount refunded to Hottinguer & Co. And these conflicting assumptions make up the question we are now called on to determine, as will be seen by referring to the third and fourth instructions asked to be given to the jury, on part of the plaintiffs, on the second trial; they are as follows:

"3. That the bill in question, being drawn by one government upon another, and upon a particular fund, is not a bill of exchange within the legal meaning of the terms, and is not embraced by the statute.

"4. That the defendants, being indorsers of the bill, and not the holders or owners at the time of protest, are not entitled to the damages, since they have not paid them."

Being refused, the judge stated to the jury, that "these questions appear to me to have been determined by the Supreme Court of the United States in the present cause in favor of the defendants"; and further remarking, that, "if I am mistaken in their views on this, it will be corrected by a re-examination of the cause in that court."

That the judge was mistaken as regarded the questions arising on the third instruction, we have already stated; but in regard to the fourth instruction, the charge was proper, as the question presented by it had been decided.

*Suppose, then, a bill of exchange [*397 could be drawn by the government of Maryland, or by the government of the United States in this District, as the successor of Maryland, on the government of France; would the statute of Maryland give damages to a holder in case the bill was dishonored by France, and formally protested? The statute provides for damages upon all foreign bills drawn in that State, "on any person, corporation, company, or society."

Is the government of France either a person, corporation, company, or society, within the meaning of the act? If it is, and was indebted, and could be drawn on and protested, then it follows that the drawer of the bill (in such an instance as this), on taking it up any paying the damages, could lawfully demand from France, as drawee, the damages paid, and rightfully enforce the demand by the sword, if payment was refused; as the demand would be a perfect right, and this the ultimate remedy. In our opinion, Maryland, by her act of 1785, never contemplated the idea that a foreign government should be subject to be drawn upon by bills of exchange, and to protest and damages as incidents, like individual persons, or trading

companies, or corporations; but that the statute had reference to the latter only; and that therefore this bill, on its face, "is not embraced by the statute," in the language of the rejected instruction.

The second consideration arising on the instruction involves the structure and charter of the instrument, not so much in form, as in substance; for the name of the instrument cannot change its nature and character. The draft was drawn by one government on another, and of necessity accompanied by other documents, and the question is, was it a negotiable bill of exchange, in the legal meaning of the terms. The Circuit Court held that it was; and this is the prominent legal point in the cause, or at least has been so treated at the bar, and on which this court has bestowed much consideration.

A bill of exchange is an instrument governed by the commercial law; it must carry on its face its authority to command the money drawn for, so that the holder, or the notary, acting as his agent, may receive the money, and give a discharge, on presenting the bill and receiving payment; or, if payment is refused, enter a protest, from which follows the incident of damages. But if no demand can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill and be presented with it, it cannot be a simple bill of exchange, that circulates from hand to hand, as the representative of current cash.

The draft in question was drawn for 4,856,666.66 francs; being moneys owing and shortly to become due from France to the United States, according to a treaty stipulation; and these facts are distinctly set forth on the face of the draft, 398*] and by indorsements on it. *The paper was signed by the Secretary of the Treasury of the United States, and addressed to the Minister and Secretary of State for the Department of Finance of the kingdom of France, and was payable to the order of Samuel Jaudon, cashier, etc. The mere signature of our Secretary of the Treasury could not be recognized by the French government as conferring authority on the holder to demand payment. The transaction being one of nation with nation, he who demanded payment must have had not only the authority of this nation before he could have approached the French government, but that authority must have been communicated by the head of this government through the proper department carrying on our national intercourse, which was the State Department. Accordingly, of even date with the draft (7 February, 1833), an instrument was drawn up reciting, the fact of indebtment, and cause thereof; the amount due; the authority conferred by an act of Congress on the Secretary of the Treasury to apply for the money in such manner as he might deem best; the fact and manner of drawing for it; and then comes the official authority to the payee to receive the money, in these terms:

"Now, therefore, be it known, that I, Andrew Jackson, President of the United States, do ratify and confirm, and approve the drawing of the said bill by the Secretary of the Treasury aforesaid, and *do hereby authorize the said Samuel Jaudon, or his assignee of the said* bill, to receive the amount thereof; and on receipt of the sum therein mentioned, to give full receipt and acquittance to the government of France for the said first installment, and the interest due on all the installments, payable on the said second day of February, by virtue of the said convention; and I, Andrew Jackson, President as aforesaid, do hereby ratify and confirm all that may be lawfully done in the premises.

"In testimony whereof, I have caused the seal of the United States to be hereunto affixed. Given under my hand, at the city of Washington, the seventh [L. S.] day of February, in the year one thousand eight hundred and thirty-three, and of the independence of the United States of America the fifty-seventh.

"Andrew Jackson,

"By the President:

"Edw. Livingston,

"Secretary of State."

This accompanied the draft, and was placed in the hands of the payee, and no doubt passed through the hands of the different indorsees. Still, neither the power more than the draft could be presented to the French government by a mere individual who was holder, or by a notary public, and therefore, on the next day after the draft and power bear date, the Secretary of State of our government addressed a despatch to our chargé d'affaires and representative at the French court, in the following terms:

*"Department of State, } [*399
Washington, 8th February, 1833. }

"Nathaniel Niles, Esq., Paris.

"Sir:—The Secretary of the Treasury, in conformity with the provision of a law of the last session of Congress, yesterday drew a bill upon the Minister of State and Finance of the French government, for the first installment and the interest thereupon, and for the interest upon the remaining installments; which interest is stipulated to be paid by that government to this in twelve months from the date of the exchange of the ratification of the late convention between the United States and His Majesty the King of the French. The bill is drawn in favor of Samuel Jaudon, cashier of the Bank of the United States, or order, and will go accompanied, to the assignee thereof in France, by a full power from the President, authorizing and empowering him, upon the due payment of the same, to give the necessary receipt and acquittance to the French government, according to the provision of the convention referred to.

"You will take an early opportunity, therefore, to apprise the French government of this arrangement.

I am, Sir, respectfully, your obedient servant, Edw. Livingston."

Until the French government was thus officially advised, the bill and accompanying power combined were valueless in the hands of the holder, as against France.

It follows, as we suppose, from the character of the drawer and the drawee, and the nature of the fund drawn upon, that this transaction could not be governed by the commercial law; much less by a statute of Maryland, which happened to be in force in the District of Columbia, where the draft was drawn.

But it is insisted, and with much plausibility,

that as between the bank as payee, and the United States as drawer, no such objections can be alleged by the United States; they having assumed the draft to be a bill of exchange, and dealt with it as commercial paper, are bound by the assumption. Still, the question meets us, that no form of draft could authorize a legal demand upon the drawee (France) on the face of the draft. So far from being a simple paper, carrying its authority to receive the money with it, the parties now before the court conceded, at the time the drawing took place, by obtaining the power, that the right to receive the money did mainly depend, and must depend, on the power signed by the President, and countersigned by the Secretary of State, with the seal of the United States attached, and the communication of the facts in official form, and through the proper channel, to the government of France, that is, through its Department of Foreign Affairs. These were the conditions and contingencies with which the draft was encumbered. They were legal consequences, 400*] apparent *on its face, and are yet more apparent by the accompanying facts that took place at the time of drawing.

Again. This controversy is between the original parties; the law governing the dealing, each was bound to know; the facts they did know equally well; and if a mutual mistake was made in supposing that a negotiable commercial instrument could be founded on our claim against France, this mistake cannot change the commercial law, which in our opinion could not be made to apply to the subject matter of drawing, nor in any form of instrument founded on the subject matter.

The principal argument adduced to sustain the set-off claimed is founded on the fact, that by an act of Congress the Secretary of the Treasury had a discretion to adopt any appropriate means to obtain the money, and that a bill of exchange was an appropriate means. To this assumption it may be answered, that France was not bound by the act of Congress, but by the treaty; it stipulated, "that the indemnity of twenty-five millions of francs should be paid, in six annual installments, into the hands of such person or persons as should be authorized to receive it." We repeat that this authority was to come from our government to the French government; was to pass through the Department of State here, and through the Department of Foreign Affairs there, and thus only could it reach the Minister of Finance, M. Humann. Our Secretary of the Treasury could not communicate with the Minister of Finance, nor with any other functionary of the French government, and therefore the bill drawn by Mr. McLean on M. Humann, standing alone, was idle as waste paper, notwithstanding the act of Congress, in so far as the French government was concerned. Nor had M. Humann any power to pay the money, had it been in the treasury, until instructed to do so by the Department of Foreign Affairs.

1. For these reasons, we are of opinion that the question on the structure of the bill is an open question, because for the first time presented to this court for decision.

2. *That the statute* of Maryland of 1785, in *its terms, does not embrace* a bill of exchange *drawn on a foreign government.*

3. That a bill of exchange in form, drawn by one government on another, as this was, is not, and cannot be, governed by the law merchant; and that therefore it is not subject to protest and consequential damages.

And on these grounds we order that the judgment of the Circuit Court be reversed, and that the cause be remanded to that court for another trial thereof, on the principles stated in this opinion.

Mr. Chief Justice Taney filed the following memorandum:

The Chief Justice withdrew from the bench in the argument of this case, having given an official opinion, when he was Attorney-General of the United States, against the claim made by the *bank and concurring altogether [*401 with the above opinion given by the court.

Mr. Justice McLean:

I dissent from the opinion of the court. No point is made in this case which was not elaborately discussed and substantially ruled in the same case, reported in 2 Howard, 711. It is true, the structure of the bill, and the liability of the government to the damages claimed, not being points made in the former bill of exceptions, were not authoritatively adjudged. But these points were so connected with the construction of the Maryland statute, the question then before the court, that neither the counsel nor the court could escape their consideration. No other instrument than a foreign bill of exchange is embraced by the statute, and if the government be not liable to damages on a protested bill, no decision could have been given against it.

The points were as fully and as ably argued then as they have been at the present term. The addition of one learned counsel at the bar is the only change in the advocates. But the changes on the bench show the uncertainty of life, and the emptiness of human hopes. Two judges, distinguished for their great learning and ability, who participated in the former judgment, have gone to their account; ill health causes the absence of another, and the opinions of the two now present remain unchanged. We submit, as we are bound to do, to the views of our four learned associates who now decide this case.

It is insisted that the bank did not purchase the bill of exchange from the government, but acted as its agent, using the bill as an instrument through which to perform its agency.

By the fifteenth section of its charter the bank, when required by the Secretary of the Treasury, was bound "to give the necessary facilities for transferring the public funds from place to place within the United States or territories, without charge." But this duty was limited to transfers within the Union, and did not extend to foreign countries.

The correspondence between the Secretary of the Treasury and the president of the bank, in relation to this bill, shows a purchase of it by the bank. In his first letter to the bank, dated the 31st of October, 1832, the Secretary of the Treasury states the amount due under the French Treaty; that it was made his duty to have the amount transferred to the United States, and the views of Mr. Biddle as to the

mode of transfer were solicited. In his answer Mr. Biddle says: "The simplest form would be the sale of a bill on Paris, drawn by the Secretary of the Treasury"; that "the bank has already in Paris a larger sum than it has any immediate use for, yet it is not indisposed to increase it, because it may hereafter have occasion for the fund, and because it is believed 402*] that, if *the terms can be made acceptable, the purchase of the whole by the bank would be the best operation for the government." The rates of exchange are then stated, and a proposition to purchase the bill at a certain per cent.

On the 26th of January ensuing, the Secretary says he is ready to draw the bill, and adds: "I presume the bank is still disposed to purchase, and on the terms offered in your letter of the 5th of November." And also he says: "It is desirable that the credit be given to the treasurer by the bank, on receiving the bill."

To this letter Mr. Biddle replies, that the rate of exchange has declined between England and France, and that the bank could not take the bill on the terms at first proposed. On the 6th of February the new terms were accepted, and on the following day the bill was transmitted, and its proceeds were placed on the books of the bank to the credit of the government.

These facts show a proposal to sell the bill by the Secretary, and an agreement to purchase it by the bank at a certain per cent.; that the bill was drawn and forwarded to the bank, and that for the amount of it a credit was entered to the government. In the face of these statements, which show a purchase of the bill beyond all doubt, it is extraordinary that the fact should be controverted.

It is contended that the bill, "under the circumstances stated in the record, is not a bill of exchange, and is not embraced by the Maryland statute of 1785."

The Secretary of the Treasury proposed to sell a bill of exchange to the bank, and the bank agreed to purchase the bill. On its face it is called a bill of exchange, and it was negotiated as such by the bank to Baring, Brothers & Co., of London, and by them to N. M. Rothschild, who indorsed it to Messieurs D. Rothschild, Brothers, of Paris. When the bill became due, a demand of payment was made on the drawee, and a protest for nonpayment, which was followed by due notice to the drawer. The government paid the cost of protest and other expenses to the bank, and also the commissions charged by Hottinguer & Co., who took up the bill, supra protest, as the agents of the bank; but the fifteen per cent. damages given by the Maryland statute were refused. And in a letter to the Secretary of the Treasury, the Attorney-General says: "I have carefully examined the claims presented by the Bank of the United States, on account of the protest of the bill of exchange drawn by you on the French government," etc. "The account," he says, "stated by the bank, if supported by proper vouchers, appears to be correct, with the exception of the claim of fifteen per cent. damages on the amount of the bill."

But now it seems that these eminent civilians and bankers were ignorant of the legal import of this instrument—men who had been all their *lives conversant with bills of exchange, and* who had used them in their moneyed operations annually, to an amount equal to, if *not [*403 greater than, the revenue of this government. Yet these men, the richest and most experienced bankers in the world, were mistaken in calling and treating this paper as a bill of exchange. And the government, too, were reprehensible for paying the costs of protest, for such costs could be charged only on a bill of exchange.

Against all this knowledge, experience, and action, it is now contended that the paper is a mere assignment, or anything else than a bill of exchange. That designation is repudiated, not the less zealously for having been the result of second thought.

But what are the new lights shed upon this question?

Two documents are found in the present record, which were not before the court at the former argument; and these, it is said, have a material bearing on the case. The first is a letter dated 8th February, 1833, from the Secretary of State to Mr. Niles, our chargé d'affaires at Paris, informing him that a bill had been drawn on the French government for the first installment and interest under the treaty, in favor of Samuel Jaudon, cashier of the Bank of the United States, and requesting that notice should be given of the arrangement to the French government.

This is nothing more than a letter of advice, which usually precedes a bill of exchange, of which the payee in this instance had no knowledge. It, however, conduces to show the nature of the transaction, as not only the substance of a bill of exchange was regarded, but also its form and accompaniment.

The other document was under the seal of the United States, and signed by the President and Secretary of State. It stated the substance of the treaty; the act of Congress authorizing the Secretary of the Treasury to have the installments, as they became due, transferred to the United States; and that the Secretary had drawn a "bill on the Minister and Secretary of State for the Department of Finance of the French government, payable at sight, for four millions eight hundred and fifty-six thousand six hundred and sixty-six francs and sixty-six centimes, being the amount of the first installment, payable to the United States, under the said convention, on the second of the present month of February, and of the interest which is payable at the same time; which bill is payable to Samuel Jaudon," etc., and the President ratifies the act of drawing the bill, and the receipt which shall be given.

Now, this paper is supposed to take away from the bill of exchange its character as a commercial instrument. It can have no other effect than to show that the Secretary had authority to draw the bill. It was no part of the bill of exchange, and indeed was not necessary to its negotiability. The indorsement of Jaudon implied an undertaking that he was the cashier of the bank, and that the bill was genuine and would be paid. No one can doubt that the payment of the money by the French government on the bill, without any additional evidence, would have been good. The bill upon its face *was perfect, and authorized [*404 the holder to receive and receipt for the money.

At most, the document can only be considered

as authenticating the law under which the Secretary acted in drawing the bill. And this was all that the French government, under any circumstances, could require. But suppose this paper was a power of attorney, signed by the President, authorizing the Secretary to draw the bill; would that change or in any way affect its commercial character?

Any person may draw, accept, or indorse a bill by his agent. A partner may indorse for the firm. And this authority may be by parol or writing not under seal. So a corporation may draw by its agent. Banks are in the constant practice of drawing bills through their cashiers. And has it ever been supposed, that, if evidence accompanied or was attached to the bill of the authority of the drawer, it impaired its commercial properties? Mr. Chitty says, in his Treatise on Bills (p. 27): "Where a bill is not signed by the party himself, the party taking it must first satisfy himself that the agent had power so to act for the supposed principal." In the case of The East India Company v. Tritton, 3 Barn. & Cress. 280, three bills upon the East India Company were payable to Hope or order; they got into possession of Card, who indorsed them for Hope. Card had a power of attorney from Hope, but it was not sufficient to warrant these indorsements. This power being seen by the holders of the bill, they were bound by it, as having notice of its extent.

But a bill drawn by an agent, under a power, was never supposed to be less a bill than if it had been drawn by the principal. And in such cases the assignee has only to satisfy himself that the drawer acted under a proper authority. This no more vitiates the bill, than evidence of the genuineness of the signature of the drawer. The bill in question was complete upon its face, and it is inconceivable to me how the paper signed by the President can affect it.

In the argument it is supposed that, in drawing this bill, the government acted in its sovereign capacity. The idea of attaching sovereignty to all the agencies of the government, however exercised, is as novel as it is unconstitutional. Cover every transaction of the agents of the government by the attributes of its sovereignty, and a despotism, characterized by the grossest acts of injustice and oppression, must result.

A bill of exchange derives all its properties from the commercial law. It is a most convenient instrument for the transfer of funds from one country to another. And its chief and only value, in this respect, arises from the legal principles with which it is invested, and which regulate the duties and liabilities of those who become parties to it. In negotiating such an instrument, the government does not act in its sovereign capacity. It becomes subject, like all other parties to the bill, to the commercial principles which govern it.

405*] *In the case of The United States v. Administratrix of Barker, 12 Wheat. 559, it was held, that "whenever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence in order to charge the indorser as in a transaction between individuals." And in that case the indorser was held to be discharged by the negligence of the government. And again, in The United States v. Bank of the Metropolis, 15 Peters, 392, the court say: "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference except that the United States cannot be sued."

These decisions, and many others that might be referred to, put an end to the assumption, that a bill of exchange drawn by the government is an act of sovereignty, or anything different in principle from a bill drawn by an individual. Whether drawn by the government or an individual, a bill of exchange is the same commercial instrument, and subject to the same law. No principle is better settled than this by the decisions of this court.

But it is supposed that there is something in the character of the drawee, the French government, which destroys the commercial character of the bill. This position is as unsustainable as that of the character assumed for the drawer. The bill was drawn on M. Humann, the Minister of Finance of the French government. The money was due, and the payment of it was subject to no contingency from the face of the bill, nor from any circumstance connected with it. The drawer guaranteed the payment of the bill on presentation by the holder, under all the responsibilities which the law attached. A demand, protest, and notice were the only conditions on which these responsibilities were to become fixed. These conditions have been performed by the bank, and the government has acknowledged its liability by paying a part of the damages claimed. But throwing itself upon its sovereignty, the government refuses to pay the damages claimed under the statute of Maryland, on the ground that the instrument is not a bill of exchange. If this ground be true, the costs of protest should not have been paid by it.

It is contended, that, as the question is now here, between the original parties to the bill, the bank may be supposed to have taken the bill under a full knowledge that it might not be paid by the French government; and could not be paid by it, unless the Chambers should make an appropriation. And from this knowledge it is inferred that the bank took upon itself the risk of the punctual payment of the bill. This assumption is shown to be unfounded by the fact that the government, on being notified of the protest, immediately returned the money to the bank which it had paid on account of the bill. Now, if there had been any understanding, express or implied, such as is presumed, in regard to the punctual payment of *the bill, would the government [*406 have done this? There can be but one answer to this question.

There was no doubt in the minds of the original parties to this bill, that it would be paid on presentation. What was the language of this government on receiving notice of the protest? Was the failure of the French Chambers to make the appropriation received as an apology for the dishonor of the bill? That government was informed, in terms not to be misunderstood, that no excuse for a delay of

payment could be received. That the obligation of the French government was absolute, and in no degree dependent on the will of the Chambers; and an immediate payment was required. The bank, shortly after the receipt of this bill, indorsed it to Baring Brothers & Co., in London. This affords the highest evidence that the bank believed the bill would be honored.

It is argued that the French government did not subject itself to a bill of exchange, and consequently to the payment of damages on a default of payment. This may be admitted, and yet it does not reach the question. The bill was not presented until the money was due, and by drawing it our own government undertook that it should be paid. This is as well settled as any other principle in the commercial law.

It seems to be considered that the case might have been stronger against the government, had it been made by an indorsee of the bill. This cannot be correct. Every indorsee, from the face of the bill, had all the notice which can be charged against the bank.

But it is contended that the bill was drawn on a particular fund, and therefore was not a bill of exchange.

It is admitted, if the payment of the bill is made to depend upon any contingency, it is not a bill of exchange. In the language of Mr. Chitty, "If the payment is to depend on the sufficiency of a particular fund, the bill or note will be invalid." The case of Jenny v. Herle, 2 Lord Raym. 1361, was much relied on in the argument. "Herle sued Jenny upon a bill drawn by him upon Pratt, and payable to Herle, as follows: 'Sir, you are to pay Mr. Herle £1,945 out of the money in your hands belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West Buckland.' Herle had judgment in the Common Pleas; but upon a writ of error, the Court of King's Bench held that this was no bill of exchange, because it was only payable out of a particular fund, supposed to be in Pratt's hands, and the judgment was accordingly reversed."

The decision in that case did not turn upon the words on the face of the bill, "being part of the consideration money for the purchase of the manor of West Buckland;" but on these, "You are to pay Mr. Herle out of the money in your hands belonging to the proprietors of the Devonshire mines." The former words here cited in effect are the same as those used 407*] in the French bill, showing *the consideration on which it was drawn; but in Herle's case these words constituted no objection to the bill, and were not referred to by the court. The case turned exclusively on the direction to "pay out of the money in your hands belonging to the proprietors of the Devonshire mines." Had these words been omitted, the bill would have been good. So that the case of Herle, so much relied on by the plaintiff's counsel, does not show the invalidity of the French bill.

The bill in Herle's case, in the language of the court, was payable out of money supposed to be in Pratt's hands. *Consequently it was payable out of no other fund. And if the* fund supposed to be in Pratt's hands was not there, then the bill was not payable. Compare this with the French bill: "Sir, I have the honor to request you to pay at sight of this my first of exchange, etc., to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four millions eight hundred and fifty-six thousand six hunderd and sixty six francs sixty-six centimes, which comprises the sum of 3,916,666.66 francs, constituting the amount of the first payment to be made to the United States, by virtue of the convention concluded between the United States and France, the 4th of July, one thousand eight hundred and thirty-one (deduction made of the amount of the first payment, reserved to France by said treaty), and the additional sum of nine hundred forty thousand francs, for a year's interest at four per cent. upon the entire sums payable to the United States, dating from the day of the exchange of ratification to the second of February, 1833."

Now, there is not on the face of this bill any intimation out of what fund the French government should pay it. It specifies on what account the bill was drawn, showing the amount was due; but this does not affect the character of the bill. The installment "was referred to," in the language of Mr. Chitty, "in order to show the consideration, and not to render the payment contingent."

In Burchell, Adm'r, etc., v. Slocock, 2 Lord Raym. 1545, the action was on a promissory note, whereby the defendant promised to pay to A B £101 12s. in three months after the date of the said note, "value received out of premises in Rosemary Lane, late in the possession of G. H. The court, on demurrer, held this to be a promissory note within the statute." And so in Hausoullier v. Hartsinck, 7 Term, 733, the defendant promised to pay ——, or bearer, £25, being a portion of a value as under deposited in security for the payment thereof. Upon a special case being reserved, the court said they were clearly of opinion, that though, as between the original parties to the transaction, the payment of the notes was to be carried to a particular account, the defendants were liable on these notes, which were made payable at all events.

The question is, whether the payment of the bill is made to depend *upon any con- [*408 tingency. Now, it is clear this is not done in the French bill. It is made payable absolutely, without any condition expressed or implied.

The maker of a note promised to pay A B eight pounds, so much being to be due from me to C D, my landlady, at Lady day next, who is indebted in that sum to A B. Was held not to be conditional. Chitty on Bills, 139. Now, in this instrument the consideration is stated; but that did not vitiate the note. The French bill states nothing more, than that the amount drawn for was due by treaty. And yet this is supposed to destroy its negotiable character. A decision to this effect would, in my judgment, introduce a new principle into the law governing bills of exchange.

Is the bank entitled, under the statute of Maryland, to the fifteen per cent. damages?

The argument that the State of Maryland did not intend to subject her sovereignty to the provisions of the statute is entitled to but little

consideration. The interest involved does not reach the sovereignty of the State; and it is sufficient to say, there is no exemption of the interests of the State in the statute; and in passing it, the Legislature intended, as in the enactment of every other law, that all legal effect should be given to it.

The words of the statute are "that upon all bills of exchange hereafter drawn in this State on any person, corporation, company, or society in any foreign country," etc.; and it is intimated that these words do not embrace a foreign government. In answer to this, it may be said the bill is drawn on M. Humann, and is literally within the statute.

From the cases above cited, it is clear that the government, in drawing or negotiating a bill of exchange, subjects itself to all the liabilities of an individual; consequently it is liable to the fifteen per cent. damages, under the Maryland statute, if the bank is entitled to them. These damages were considered by this court in the former decision as designed by the statute to cover re-exchange. This construction is opposed, and it is argued that re-exchange is provided for in the statute, where it declares that the holder of a protested bill "shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bill." And the fifteen per cent. damages in this view are considered as a penalty.

Instead of covering re-exchange by the above provision, the Legislature intended to give the holder of the protested bill the money he paid for it, varying only as the rate of exchange should be at the time. If the rate of exchange at the protest of the bill was lower than when it was purchased, the holder under the statute would recover less than he paid for it; but if exchange had risen, he would recover more. Now, this exchange is limited to this 409*] *country, and therefore cannot have been intended as re-exchange. Re-exchange is a bill drawn at the place of payment of the protested bill, which shall sell for the amount of such bill. The holder of the French bill, on its protest, was entitled, on commercial principles, independently of the statute, to a bill on this country which would sell at Paris for the amount of the protested bill. This would be a very different sum from that which was paid for the bill in this country. The re-exchange depends upon the state of trade between the two countries, direct and circuitous, the money market, always regulated by the demand and supply, and other circumstances of a local character, which show that the price at which the bill was purchased in this country can never be the price at which a bill on this country would sell at Paris, or in any foreign country. This fact being known to the Legislature of Maryland, they could not have intended by the above provision to cover re-exchange. The statute gives to the purchaser of the bill the amount he paid for it, with the small variation stated, and nothing more. The fifteen per cent. damages were given in lieu of re-exchange, and not as a penalty. This is the view taken by the court in its *former decision.*

It is said that the bank, not having paid damages on the bill, is not entitled to them. The bank, having negotiated the bill, was responsible for its payment, with damages. And after the protest, the agents of the bank supervened, and paid the amount of it to the holder. The propriety of this payment is not questioned. By this act, the bank became the holder of the bill, not as indorsee, but as the original payee. In effect, this ownership obliterated and annulled the indorsements on the bill. The bank, as the holder, could look to no one but the government for payment. And payment to the bank in this country was made, shortly after notice of protest was received.

But the damages given by the statute have been withheld. Had the bank never negotiated the bill, and made a demand of payment, and protest for nonpayment, with regular notice, the right to the damages claimed could not have been contested. And this is the precise condition of the bank. It is the holder, having paid the amount of the bill at Paris.

The large amount of the damages claimed has been adverted to in the argument. This should have no influence on the legal questions that arise.

Suppose the bank had not taken up the bill after protest; is there any doubt that the holders could have recovered damages from their indorsers, and they from the bank? This would have subjected the bank to the payment of the damages given by the law of the place where the bill was first indorsed. But this circuitous course was prevented by the payment of the bill. It thus appears that the bank paid this large sum of money in Paris, unexpectedly, *which in the nature of things must [*410 have subjected it to great inconvenience and loss. By the payment, the credit of the government, as the drawer of the bill, was sustained, and the eventual liability of the bank for principal and damages anticipated.

Now, as between individuals, this would entitle the holder of the bill to the fifteen per cent. damages. And it is equally clear and just, that the bank should receive the same. There has been paid to it by the government the principal, costs of protest, and the commission charged by Hottinguer & Co. as the agents of the bank, who took up the bill, but not one cent has been paid to the bank for the advance of the money at Paris. On the principles of equity, independently of the statute, the bank is entitled to the difference in value of the sum paid by it in Paris, and the sum received by it from the government in this country. This is re-exchange, which the fifteen per cent., in my opinion, was intended to cover. Of this opinion was the court which formerly decided this case.

I think the judgment of the Circuit Court should be affirmed.

Mr. Justice Wayne also dissented from the opinion of the court.

Mr. Justice Woodbury, having given an official opinion as Secretary of the Treasury against the claim of the bank in this case, did not sit.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of

Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to award a venire facias de novo, and for further proceedings to be had therein in conformity to the opinion of this court.

MALINDA FOX
v.
THE STATE OF OHIO.

State law punishing the offense of passing counterfeit coin, not unconstitutional.

The power conferred upon Congress by the fifth and sixth clauses of the eighth section of the first article of the Constitution of the United States, viz., "To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;" "To provide for the punishment of counterfeiting the securities and current coin of the United States;" does not prevent a State from passing a law to punish the offense of circulating counterfeit coin of the United States.

411*] *The two offenses of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offense directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached.

The prohibitions contained in the amendments to the Constitution were intended to be restrictions upon the federal government, and not upon the authority of the States.

THIS case was brought up by a writ of error, issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Ohio.

It was an indictment, in the State court, against Malinda Fox, for "passing and uttering a certain piece of false, base, and counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin currently passing in the State of Ohio, called a dollar."

Being convicted, the case was taken by her, upon writ of error, to the court in bank of the State, its highest judicial tribunal; and at the December Term, 1842, of that court, the judgment of the Common Pleas was affirmed.

From this decision of the court in bank the plaintiff in error brought the case to this court, and claimed a reversal of the judgment, on the ground that the courts of that State had no jurisdiction of the offense charged in the indictment, but that the jurisdiction belongs exclusively to the courts of the United States.

The cause was argued by Mr. Convers for the plaintiff in error, and Mr. Stanberry (Attorney-General of Ohio) for the State.

The opening and closing arguments of Mr. Convers, for the plaintiff in error, have been consolidated, and will be found after that of Mr. Stanberry.

Mr. Stanberry made the following points:

1. That the offense charged in the indictment is not for uttering any counterfeit of the coin of the United States, or of any foreign coin regulated by Congress, or made current money of the United States.

2. That, if it should be held that the coin so passed was a counterfeit of any of the current coin of the United States, that for the mere offense of uttering there is no jurisdiction in the courts of the United States, but it exclusively belongs to the courts of the State. 1 East's Pleas of the Crown, 162; 1 Hale's P. C. 19, 188; 1 Hawk. P. C. 20.

3. That if not exclusive, the jurisdiction of State courts is concurrent with those of the United States. Federalist, No. 32; Houston v. Moore, 5 Wheat. 1, 31; State v. Antonio, 3 Wheeler's C. C. 508; State v. Tutt, 2 Bailey, 44; Chess v. State, 1 Blackford, 198; White v. Commonwealth, 4 Bin. 418.

1. The first question which arises upon the transcript is as to the *character of the [*412 piece of coin which the plaintiff in error has been convicted of passing. It seems to be taken for granted by her counsel, that it was a counterfeit of some piece of coin which, under the laws of Congress, has been made current money of the United States. The only description given is, that it was a piece of coin in the similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar.

The silver coins which have been made current by acts of Congress are the following:

All silver coins of the coinage of the mint of the United States; Spanish milled dollars; Spanish pillar dollars; French crowns; the five-franc pieces; and the dollars of Mexico, Peru, and Bolivia.

The Congress of the United States, in the exercise of the power to coin money and regulate its value and the value of foreign coin, has not seen fit to regulate the value of any other foreign silver coins than those above mentioned. The power to punish offenses respecting the coin, vested in Congress by the sixth clause of the eighth section of the first article of the Constitution of the United States, is limited to the counterfeiting of the current coin of the United States. No coin can be said to be current coin of the United States but that which has been made so by actual coinage at the mint, or by some act of Congress regulating its value.

Here, then, is a power given, in the most unlimited terms, to regulate the value of all foreign coins, and to make them current money of the Union; and a further power to punish the counterfeiting of the coin so made current. Obviously the power of punishment, in other words, the jurisdiction over offenses against the coin, is limited to the currency so established. The power to punish arises out of the exercise of the power to regulate. Does it then appear that the piece of coin, which the plaintiff in error was convicted of passing, was a counterfeit of any of the coins so made current by Congress?

There is no term of the description given of this coin which can be relied upon as bringing it within the coin made current by Congress, except the words "good and legal silver coin." Now, if that description of the coin can only refer to the national currency, and could only be satisfied by proof that the counterfeit dollar

was in the similitude of an American, Mexican, Peruvian, or Bolivian dollar, all which are established by act of Congress, then it would be sufficient.

No such limited signification can be given to these words. If the averment was "good and legal silver coin of the United States," it would be different; but it is "good and legal silver coin, currently passing in the State of Ohio."

But there is a certain test of the meaning of this descriptive allegation, and that is, to inquire whether a conviction under this indict-
413*] ment *could have been had, upon proof of passing a counterfeit in the similitude of any of the foreign silver coins of the denomination of a dollar not made part of our national currency by act of Congress.

In order to this, we must look at the statute of Ohio creating the offense, as well as at the indictment.

The words of the statute are: "That if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," etc. 29 Ohio Stat. 136.

There can be no question that this provision covers every description of coin, domestic and foreign, whether made current by act of Congress or not. Take, then, the case of passing a counterfeit of a German dollar, which is a description of coin not made current by act of Congress, and what difficulty would be in the way of a conviction under this statute and indictment.

It may be claimed, by the plaintiff in error, that the words "good and legal silver coin currently passing in the State of Ohio," though not used in the statute, yet make a descriptive averment of some coin made legal or current by act of Congress. If that be so, there is no question that the averment, though unnecessarily made, must be proved, upon the familiar doctrine that all merely descriptive allegations become material.

Now, these words, "good and legal silver coin," are not found in that clause of the Constitution which gives to Congress the power to regulate the coin, or in the other clause which provides for the punishment of counterfeiting; but the descriptive words there used are "current coin of the United States." These last are the operative words which distinguished the national coin from the mass of the currency.

It may be argued, that legal coin can only mean current coin of the United States, as none other is legal. That is true in one sense. If we were now engaged in the construction of a contract to pay money, in which the payment was stipulated to be made in good and legal coin, the meaning undoubtedly would be current coin of the United States; for it is only that sort of coin which can discharge a contract to pay money, or which is a legal tender in payment. But we are not now looking for the meaning of these words as used in a contract, but in an indictment for passing counterfeit money. Coin, which may not be legal for the payment of a debt, may yet be legal as currency; although not regulated in value by act of Congress, it is yet lawful as a circulation. *It seems to me there* can be no question that the latter is the true sense in which these words are used in the indictment, especially when we take the whole sentence, "good and legal silver coin currently passing in the State of Ohio;" and that, instead of being descriptive of a particular coinage, they are merely descriptive of the genuineness *and lawfulness of [*414 the original which has been counterfeited, and are put in opposition to the other words used in the indictment— "forged, base, and counterfeit"—to express exactly the contrary.

2. The Constitution authorizes Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States."

The plaintiff in error has been convicted of passing a counterfeit dollar. I claim, that though it be admitted this coin was of the current coin of the United States, yet the offense of uttering or passing it is not an offense cognizable by the United States.

This leads to a consideration of the meaning of the term "counterfeiting," as used in the Constitution. It is claimed for the plaintiff in error that it is a generic term, and includes every offense in relation to the coin.

This clause does not carry with it a power to define and punish the offense, as is the case in the clause in relation to piracies and felonies committed on the high seas, but is strictly limited to the punishment of an offense named and designated. The consequence is, that, in the absence of any grant of power to define or enlarge, the jurisdiction of the United States is to be confined to the very offense so named— the offense of counterfeiting. What, then, is the meaning of this term, as used in the Constitution? It is nowhere defined in the Constitution itself, so that we are to find its meaning elsewhere. At the time the Constitution was framed, the offense of counterfeiting was well known and certainly defined; and in that country from which it was adopted, it stood among the class of crimes which amounted to high treason.

It was never understood that the offense of counterfeiting the coin of England, and the offense of passing coin so counterfeited, were the same. On the contrary, they were carefully distinguished and defined; the one amounting to treason, the other to simple felony or misdemeanor.

Speaking of the English statutes against this species of treason, Mr. East, in his Pleas of the Crown, Vol. I. p. 162, says: "It is first to be seen what is a counterfeiting within these statutes. There must be an actual counterfeiting, either by the party himself or by those with whom he conspires. A mere attempt to counterfeit, such as preparing the materials or fashioning the metal, is not sufficient, except in those particular instances which have been so declared by statute."

So, too, in Hale's Pleas of the Crown, p. 19; "What shall be a counterfeiting? Clipping, washing, and filing of the money, for lucre or gain, any of the proper money of the realm, or of other realms, allowed to be current by proclamation, not within this statute, but made high treason by Stat. 5 Eliz., but no corruption of blood or loss of dower. Impairing, diminishing, falsifying, scaling, or lightening the proper money of this realm, or the money

415*] of any *other realm made current by proclamation, their counselors, consenters, and aiders, within neither of the former, but made treason by the statute of 18 Eliz., but without corruption of blood or loss of dower."

Several of these modes of debasing the coin were not understood to be within the common law offense of counterfeiting; for it is said by Hale, in reference to the statute against clipping the coin, that it was "introductive of new laws."

1 Hawkins's P. C. 20, is yet closer to the point. "High treason, respecting the coin, is either with respect to counterfeiting the king's coin, or with respect to bringing false money into the realm. As to the first branch of counterfeiting, it is declared, by 25 Ed. III. c. 2, 'that, if a man counterfeit the king's money, he shall be guilty of high treason.' As to what degree of counterfeiting will amount to high treason, it is said that those who coin money without the king's authority are guilty of high treason within this act, whether they utter it or not; and that those who have the king's authority to coin money are guilty of high treason if they make it of baser alloy than they ought; and that those also are guilty of the same crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, etc., are not within the statute. But it seems that those who barely utter false money made within this realm, knowing it to be false, are neither guilty of high treason, nor of a misprision thereof, but only of a high misprision."

Further, in 1 East's Pleas of the Crown, p. 178, under the title, "Receiving, uttering, or tendering of counterfeit coin," it is said: "These may amount to different degrees of offense, according to the circumstances. If A counterfeit the gold or silver coin current, and by agreement before such counterfeiting B is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law." "But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor, before the statute 15 Geo. II., hereafter mentioned; yet, if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treason, and therefore a misprision of the same. In like manner, I have before shown that the statutes against the importation of false money do not extend to the receivers, not having taken any part in the bringing in of such money."

These authorities show conclusively that the term "counterfeiting" has had a long and well established meaning; that it is confined to the act of making or debasing; that those only are guilty who are engaged in the act, either as principals or abettors; and that the mere uttering of the false money so manufactured by another belongs to another and lower class of offenses.

416*] *Now, how can it be said that this term is used in the Constitution in any new or enlarged sense, as nomen generalissimum, including the passing, vending, receiving, and *unlawful possession of false coin, as well as the making and unlawful possession of the in-*
12 L. ed.

struments for counterfeiting, and all the other like offenses which are found in the criminal laws of the several States? If we give this term its meaning at the common law, or its more enlarged signification in the English statutes in existence at the adoption of the Constitution, it will not include any of these lesser offenses.

It is certainly to be understood that the learned men who framed the Constitution were well advised of the true meaning of this term, and if they intended to use it in any new sense, that intention would have been expressed.

But I think it quite clear, not only from the use of a well known term, but from the nature of the thing, that it was used expressly according to that meaning.

This criminal jurisdiction was given to the United States in aid of its duty to coin money and regulate its value.

The coining and legitimation of money are prerogatives of the sovereign power. 1 Hale, 188. The laws of England vest this power in the king· and, to secure it, they declare that the offense of counterfeiting alone shall amount to high treason. It was not found expedient or necessary to guard this royal prerogative by making any lesser offense touching the coin a matter of lese majestie.

The Constitution of the United States very wisely vests the same prerogative in the federal government; and, following the English laws, it vests along with the prerogative the power to punish the single offense, which in England was found to be the most dangerous invasion of the power. The prerogative is to coin good money, and regulate its value, and the offense is to coin bad money, and impair the value of the good. The power to punish is simply given in aid of the prerogative, and goes no further than the offense which directly and necessarily impairs it.

3. If the court should be against the defendant in error upon the foregoing points, we are next to consider the more important question, whether the States have jurisdiction over offenses against the current coin of the United States.

Such a jurisdiction, if not indispensable, is to the last degree useful and expedient. And it has been exercised almost, if not quite, universally by the different States which compose the Union. The rightfulness of this jurisdiction is now, for the first time, questioned in this court. Certainly it presents a question of the first magnitude, for no one can foresee what may be the consequences of taking from the States the power of self-protection, which they have so long exercised, against a class of criminals swarming over the entire Union, and against a species of crime which, more than any other, affects the common business of the people.

*The argument against the exercise [*417 of this jurisdiction by the States proceeds upon the ground that it exclusively belongs to the courts of the United States, and that it arises out of the provisions of the Constitution giving to Congress the power to coin money, regulate its value and the value of foreign coin, and to punish the counterfeiting of the current coin of the United States; and out of the exercise of these powers by Congress in the enact-

ment of laws regulating the coin, and providing punishment for the offense of counterfeiting.

The question is simply one of criminal jurisdiction over an offense cognizable in every State of the Union, either at the common law or by virtue of State legislation.

It is clear, in the first place, that this branch of criminal jurisdiction belonged to the States, respectively, before the adoption of the Constitution; and that it continues with them, unless it has been wholly surrendered to the federal government. It is also clear, that there is no express prohibition in the Constitution to the exercise of this jurisdiction by the States. The exclusion of State jurisdiction is argued from the fact that the Constitution vests a jurisdiction over this offense in the United States, by authorizing Congress to pass laws for its punishment, which jurisdiction, it is said, must necessarily be exclusive. We deny this inference, and claim that the jurisdiction may be concurrent.

The mere grant of a power in the Constitution has never been held to devest the States of the power so granted. There must be something more; either a prohibition, a grant in exclusive terms, or a manifest incompatibility.

Take, for instance, the power to levy taxes. This is granted in the Constitution, but no one has ever supposed that thereby the States devested themselves of this power. So, too, in the clause granting to Congress the power to coin money; inasmuch as this power existed in the States as independent sovereignties, it would have remained in them, notwithstanding the grant, if, by a separate clause, it had not been expressly prohibited to them.

This express prohibition against the coinage of money by the States, which follows the grant of the power in the Constitution, affords a cogent argument against any implied prohibition of jurisdiction over offenses against the coin. The prohibition was not left to inference, but was expressly stated. It is, therefore, a legitimate argument against a like prohibition of the criminal jurisdiction, that it is not also expressed.

There are undoubtedly powers granted in the Constitution which are necessarily exclusive, though not expressly prohibited to the States. The power to establish uniform rules for naturalization, to regulate the value of foreign coin, to fix the standard of weights and measures—all these are necessarily exclusive; for there could be no regulation, uniformity, or fixed standard, if each State were allowed to legislate upon these subjects.

418]* *In respect of such powers as are not necessarily exclusive, but which it was deemed expedient to withdraw altogether from State jurisdiction, it will be found that an express and cautious prohibition accompanies the grant. This is so as to the power to lay duties, to coin money, to enter into treaties, to declare war, to emit bills of credit, and to maintain armies or navies in time of peace. It can be said of nearly all those powers, with infinitely more force than as to the mere power of criminal jurisdiction now in question, that they are essentially of a national character, and that the exclusion of State authority might have been left to inference. Why, then, if a prohibition of criminal jurisdiction was intended, was it not also expressed? Why expressly prohibit, with respect to powers of such a character, and omit the prohibition as to a power much less obvious to a prohibition by implication?

In the absence, then, of exclusive grant and express prohibition, the plaintiff in error has no ground to stand upon, unless she makes out a case of repugnancy or incompatibility.

I think it is quite evident that, if this power is lost to the States on this doctrine of incompatibility, the loss is altogether fortuitous, and not the result of intention; and that, consequently, such a loss ought not to obtain, except from the most controlling necessity. Indeed, that is true of all the exclusive powers claimed for the federal government on this ground.

The true doctrine is found in the thirty-second number of the Federalist, and is stated as follows:

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to Congress. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another, which might appear to resemble it, but which would, in fact, be essentially different; I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction, or repugnancy, in point of constitutional authority."

It very clearly appears, from this exposition of the powers of the *general govern- [*419
ment and of the States, that there may be an exercise of concurrent jurisdiction in the case of a granted power; that the mere grant works no exclusion of State sovereignty, even where its concurrent exercise may lead to occasional interference in the policy of either government, and that nothing short of absolute and total repugnancy and contradiction will suffice.

And now what is there in the exercise of this criminal jurisdiction by the States, which makes it so absolutely repugnant to the exercise of the same jurisdiction by the general government? I have heard nothing urged which amounts to more than an argument of expediency or convenience, or that shows anything beyond a liability to "occasional interference."

And, in truth, these arguments from inconvenience are more fanciful than real; for the experience of forty years, during which there

has been a concurrent exercise of this jurisdiction, has not furnished a solitary instance of collision or practical inconvenience.

It is said the criminal may be subjected to a double prosecution by this concurrent jurisdiction, and that the conviction or acquittal in one tribunal will not bar a prosecution in the other. This admits of serious question. The doctrine of criminal proceedings and sentences, between governments that are essentially foreign to, and independent of, each other cannot apply, in full force, between the United States and one of the States, in respect of an offense committed within the limits of one of the States, and which is prohibited as well by the laws of the Union and of the particular State.

It is said by Mr. Justice Washington, in Houston v. Moore, 5 Wheat. 31, that, in cases of concurrent criminal jurisdiction between the general government and the States, the sentence of either court may be pleaded in bar in the other, in like manner as the judgment in a civil suit. Crimes have reference to place, and are necessarily confined to territorial limits. It follows from this that a crime committed in one State cannot be cognizable in another, either for the purposes of trial and punishment, and that the result of the prosecution, either of acquittal or conviction, is necessarily confined to the territorial limits of the State. It has even been held that a conviction for an infamous offense in one of the States, which works a personal disqualification in the State where the conviction is had, is of no force in another State. Commonwealth v. Green, 17 Mass. R. 515.

The doctrine, it seems to me, does not apply to an offense committed in the body of a State, which is at the same time an infraction of federal and State law. It is not as to either, in regard to territorial limits, a foreign offense, except when committed in some fort, arsenal, dock yard, or other place lying within any State over which the sole jurisdiction has been surrendered by the State to the general government. Such places no longer belong to the 420*] States, *and are as essentially foreign to them, for all purposes of local jurisdiction, as if they were situate in another State.

The objection founded on the power of pardon vested in the two executives is also made to the concurrent jurisdiction. It is said, by the exercise of this power either government may obstruct the due administration of the criminal laws of the other. This is not to be intended, even if it should be granted that a pardon by either would expiate the offense against both. Arguments founded on a supposed abuse of power are most unsatisfactory. In point of fact, no such abuse has yet arisen, nor is it likely to arise; for both governments are deeply concerned in the prevention of this sort of crime, and the State much more than the federal government.

But if it were admitted that the concurrent jurisdiction involved a liability to a double prosecution, or that there was probability of interference by the exercise of the pardoning power, these results would not devest the States of this portion of their sovereignty. We must look for that in the Constitution—in the terms of the grant; and if the surrender is *not found there, it is not to be taken from the States, merely on the ground of occasional interference or collision.*

The double prosecution never can extend to cases of life and limb, for that is forbidden, as well to the States as to the general government, by the fifth article of the amendments to the Constitution. There is no consitutional difficulty in the way of a double prosecution, involving merely imprisonment or fine, or any other punishment short of life or limb. Indeed, there are many cases of admitted concurrent jurisdiction which lead to this result. Such is the case of a soldier of the United States who commits a crime in the body of a State, and not within a place over which the United States possess exclusive jurisdiction. He is unquestionably liable to prosecution and punishment, as well in the State courts as before a court-martial of the United States. So, too, the same offense may be punished by impeachment by the United States, and prosecution in the local criminal tribunals.

Indeed, in the ordinary administration of criminal law by the respective States, it may happen that what at the common law is considered, and is in fact, but one offense, may be punished in two States. This is so in respect of goods stolen in one State and carried into another. Very many of the States take jurisdiction of the offense, by reason of the mere asportation of the goods into their territory, and not one of them allows the plea of acquittal or conviction of the larceny in the State where the theft was committed, except, perhaps, the State of New York.

It is not pretended, on the part of the plaintiff in error, that there has been any decision of the question at bar by this court. Reliance is had upon a solitary decision by the Supreme Court of one of the States, in which State jurisdiction has been denied. This is the case of Mattison v. Missouri, 3 Mo. Rep. 421.

*That case, instead of establishing a [*421 rule, stands as a remarkable exception to the universal practice of the courts of all the other States. If it were necessary to say more, it might be added, that the force of its authority is weakened by a strong dissenting opinion of one of the judges, and that it does not appear to have been followed, or at all relied upon, in a subsequent case before the same court. State v. Shoemaker, 7 Mo. Rep. 177.

In most of the States, this branch of concurrent jurisdiction has constantly been exercised without question, and in those States in which it has been drawn into question the decisions have fully sustained the jurisdiction. State v. Antonio, 3 Wheeler, C. C. 508; State v. Tutt, 2 Bailey, 44; Chess v. State, 1 Blackf. 198; White v. Commonwealth, 4 Bin. 418.

Another argument in favor of concurrent criminal jurisdiction is found in the fact, that in every general law passed by Congress on the subject of crimes, this power in the States has been recognized by a provision very similar to that contained in the twenty-sixth section of the act now in force. That section is in these words: "That nothing in this act contained shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offenses made punishable by this act." 4 Statutes at Large, 121.

I admit that Congress cannot confer jurisdiction upon the State courts, and that this provision could not give the power if it be surrendered in the Constitution. It is not in that view that this section helps out the State jurisdiction, but merely as a long continued exposition of the opinion of Congress that such jurisdiction exists, and has not been surrendered.

Furthermore, this section quite overcomes any argument to be derived from the eleventh section of the Judiciary Act, which provides, that the circuit courts of the United States shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where that act, or the laws of the United States, shall otherwise provide. 1 Statutes at Large, 78.

It is claimed for the plaintiff in error, that this provision in favor of State jurisdiction ought to be limited to a jurisdiction under the laws of the States in force at the time of its enactment; and as the law of Ohio, under which this prosecution was had, has been enacted subsequently, it cannot be helped by the provision.

The case of The United States v. Paul, 6 Peters, 141, is relied upon as establishing this distinction.

That case was a prosecution in the Circuit Court of the United States, for an offense committed at West Point, a place within the exclusive jurisdiction of the United States. No question of concurrent jurisdiction could arise, for in such places the jurisdiction of the United States is exclusive. The prosecution was for 422*] an *offense not defined in the criminal code of the United States, and was had under the provisions of the third section of the Act of Congress of March 3, 1825, which provides, that all crimes committed in places within the exclusive jurisdiction of the United States, which crimes are not defined by any law of the United States, shall be punished in the same manner in which such crimes are punished by the laws of the particular State. The offense was one not made punishable by the laws of New York when the Act of 1825 was passed, and the only question was, whether the jurisdiction of the United States should be limited to such offenses as were then defined by the State legislation. This court held that the jurisdiction should be so limited.

The distinction between the question there made and the one at bar is obvious. The third section of the Act of 1825 adopted the entire criminal code of the States, as to all crimes other than those specifically enumerated in the body of the act. This was a code of criminal law for the regulation of all persons within the places under the exclusive jurisdiction of the United States, and it was precisely equivalent to an enactment by Congress of every offense then constituting the criminal codes of the States. No laws or offenses were adopted into this code of the United States but those then in existence. To bring a subsequent State law or a new offense into this code would require a further adoption, or a new enactment by Congress. It could not otherwise be made the law for the exclusive place, for it would work *the greatest* injustice to persons within such *place to make them liable to* new offenses, cre-
ated by a foreign jurisdiction, not in any way
218

provided for or established by the laws under which they lived.

Now, with regard to the provision for concurrent jurisdiction by State courts, under the twenty-sixth section, there is no reason for a limitation to such laws as were in force at the time of the passage of the act. The subsequent laws could only operate upon persons within the jurisdiction in which they were enacted, and bound in every sense to obey them.

The plaintiff in error also relies upon the case of Prigg v. Pennsylvania, 16 Peters, 539. The doctrine declared in that case is, that, as to fugitives from labor, the jurisdiction of the United States is exclusive, and that no State can exercise any jurisdiction even favorable to the right secured by the Constitution.

There is perhaps nothing in the clause of the Constitution upon that subject which amounts to an express exclusion of State jurisdiction, and yet the peculiar nature of the subject leads to that result. The reclamation of fugitives is essentially a national subject, and matter of international law and treaty stipulations between independent sovereignties. It was therefore proper to provide for it in our Constitution, and the provision is so made as to execute itself without the aid of any legislation. Besides, this provision is not so *much in the [*423 character of a grant, or surrender of power, as of a compromise or treaty between the States, securing to a portion of the States an important and delicate right against all subsequent interference. In this compromise the federal government is alone vested with all jurisdiction over the subject, and neither of the States can, by the exercise of any jurisdiction or power, change or impair the right so secured. It is wholly withdrawn from State sovereignty.

I have now considered the arguments for the plaintiff in error against the exercise of concurrent jurisdiction. They have been shown to be all founded in supposed inconvenience. In conclusion, I must ask the attention of the court to some of the consequences which must follow a denial of this jurisdiction.

The criminal code of the United States is made up of a few sections, and defines but a few offenses. Except in places under the exclusive jurisdiction of the United States, it has a very limited operation; and as to such places, it adopts for their government the criminal code of the particular State in which they happen to be situate. It establishes no rules for criminal procedure, other than by some general adoption of the State laws and practice. There is no local magistracy in the several States appointed to take the initiative in prosecutions; and the courts of the United States, sitting in one place, and at long intervals, are badly accommodated to the administration of criminal law. Besides all this, the federal government does not possess a jail or penitentiary out of the District of Columbia or its territories.

Now, to say nothing of other crimes, if it be held that the offense of counterfeiting includes the long list of crimes which have relation to spurious coin, and that the jurisdiction over all of them is wholly withdrawn from the States, anyone can see that the consequences must be most disastrous. There is not a class of crime so common, nor a class of offenders so dexterous, and requiring so much a local

vigilance. What speed could be made by the marshal of such a State as Ohio, and his deputy, the only executive officers in that State bound to act in arresting and bringing to justice these offenders, carrying on their business in the eighty counties of the State? If it be said that the State magistrates, sheriffs, and constables may act—a matter, by the way, of grave doubt, especially as to judicial action—yet no one pretends that they are bound to act; you relieve them from the obligation to act under State law the instant you oust the State jurisdiction.

And what is to be done with this class of criminals now convicted in State courts, and undergoing their punishment in the penitentiaries of the States? If this branch of jurisdiction does not belong to the States, their sentences are nullities, and all these felons must be released.

These are some of the arguments from incon-
424*] venience, from a *denial of this salutary jurisdiction to the States; and they far outweigh all like arguments which have been urged by the plaintiff in error.

Mr. Convers, in reply, for the plaintiff in error:

The whole subject matter of the coin—its creation, regulation, its protection—is vested exclusively in the federal government. Constitution of U. S. art. 1, secs. 8, 20. That the right to coin money is exclusively in Congress is conceded; for not only is the power to coin expressly granted by the Constitution, but the exercise of the coining power by the States is expressly prohibited.

This exclusive power of creation would, of itself, upon all sound principles of construction, carry with it the right of regulating and of protecting the thing when created, even in the absence of express grant to regulate and protect. But as the right of coinage is one of the highest attributes of sovereignty, the Constitution, for the purpose of shutting out all controversy between the federal and State governments touching so delicate and important a power, proceeds, not from the necessity of the thing, but ex abundanti cautelâ, to prohibit coining by the States—preferring that the exclusive right of the federal government to this great prerogative power should not rest upon construction alone, however clear and necessary might be the implication in favor of its exclusive claim. The prohibition against the exercise of this power by the States was therefore inserted in the Constitution.

So with respect to the right to punish an injury to the coin of the United States—the right to preserve it and make it subserve the great purpose of its creation—this is a necessary incident to the power to create, and as the chief power is exclusive, so is this power to preserve the coin and make it available also exclusive; for the incident follows and partakes of the character of its principal. Notwithstanding this incidental power thus results, by necessary implication, as an exclusive power, it was prudent not to leave it to construction, clear as that is; but, in a matter of which the people were so jealous as of the exercise of criminal jurisdiction by the federal government, to declare in express terms the right to punish.

The legislative power over the subject being exclusive, it follows that the judicial power of the United States over the same thing is also exclusive. In all governments, the judicial is co-extensive with the legislative power. They are co-existent and co-essential elements of government. The courts of the States, therefore, have no jurisdiction over offenses against the coin.

The Constitution declares that the judicial power shall extend to "all cases arising under the Constitution, laws, and treaties of the United States." This is a grant of exclusive jurisdiction. It extends to all cases arising under the laws of the United States. It *is [*425 clearly exclusive; for the Constitution, after declaring that the judicial power shall extend to "all cases" of certain descriptions, and proceeding to provide for other cases, in which it is admitted the jurisdiction is concurrent, drops, ex industriâ, the word "all," and declares that it shall extend to "controversies between citizens of different States," etc.; thus leaving, in the cases last enumerated, concurrent jurisdiction with the States. The distinction upon which the Constitution proceeds in this respect is a clear and intelligible one. Where the federal jurisdiction is made to depend upon the subject matter, the Constitution extends it to "all cases" growing out of such subject matter, and makes it exclusive. Where it depends, not upon the subject matter, but upon the character of the parties, it is simply declared to extend to "controversies" between certain parties, and not to "all cases" or to "all controversies" between them, and the jurisdiction is not exclusive, but concurrent with a like jurisdiction in the State tribunals.

Now, it has repeatedly been decided that the State courts cannot take jurisdiction of a prosecution for an offense against an act of Congress, or for the recovery of a penalty for the violation of any of the penal laws of the United States. Commonwealth v. Feely, 1 Virginia Cases, 321; Jackson v. Rose, 2 Ibid. 34; United States v. Lathrop, 17 Johns. 4; Haney v. Sharp, 1 Dana, 442; Eli v. Peck, 7 Conn. R. 244; Davison v. Champlin, Ibid.; State v. McBride, 1 Rice's S. C. R. 400; Mathison v. Missouri, 4 Missouri R. 421. From these authorities it follows that Congress has no right to confer judicial power, touching its own proper legislation, upon State tribunals. They are not "ordained and established by Congress." Their judges are not amenable to Congress. They hold, in many of the States, by a different tenure of office from that declared by the federal Constitution. The judicial power of the United States is declared to extend to all cases arising under the laws of the United States, and is expressly vested in the Supreme Court and such other tribunals as Congress may ordain and establish. Art. 3, sec. 1.

It is true, that, in some of the cases just cited it is said that the State tribunals, although not bound to take the jurisdiction tendered by Congress, yet may, if they see proper to do so, assume it. This cannot be. The question is one of power under the Constitution, not of discretion.

Now, under the Constitution, Congress has or has not the power to transfer jurisdiction to the courts of the States. If it have the power, then it is the duty of the States to receive and

exercise the jurisdiction; for, in the peculiar relation subsisting between the general and State governments, the right on the part of Congress to transfer jurisdiction implies the corresponding duty on the part of the States to receive it. Right and duty, used in reference to the general and State governments, are cor-
426*] relative terms. If *it be not the duty of the States to take upon themselves the jurisdiction, when directed so to do by Congress, it is not the right of Congress to confer it.

This view of the subject accords with the contemporaneous construction of the Constitution afforded by the eleventh section of the Judiciary Act of 1790, 1 Stat. at Large, 78, which provides that "the circuit courts of the United States shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where that act or the laws of the United States shall otherwise provide." The latter part of this provision has reference to the cases as to which that act or the laws of the United States may provide that some other court of the United States (not State court) shall have cognizance, instead of the Circuit Court. It countenances no such thing as giving to the State tribunals cognizance of these crimes and offenses.

The twenty-sixth section of the Crimes Act of March 3d, 1825, 4 Stat. at Large, 122, relied upon by the defendant in error, is only a saving of jurisdiction to the States, under the laws thereof, over offenses made punishable by that act. It does not profess to confer jurisdiction, but only to leave with the States any jurisdiction which, under their laws, they might rightfully have. That act assumed to exercise over the offenses therein declared all the jurisdiction rightfully belonging to the United States, under the Constitution and by the twenty-sixth section, to guard against encroaching upon the rights of the States.

But if this section of the Act of 1825 did expressly provide that jurisdiction should be vested in State courts over offenses made cognizable by that act, it would clearly be void; for, as already shown, Congress has no power to delegate judicial power to the State courts. If it be intended to authorize the State Legislatures to make laws to be enforced in their own courts for the punishment of the same offenses punishable by that act, Congress transcended its powers in thus attempting to assign to the States the power of legislation, which, by the Constitution, is vested in Congress itself. The legislative power of Congress is not an assignable commodity. The federal government is not an original, but derivative government of delegated and limited, not original, powers. Its powers, both legislative and judicial, are vested in itself, to be exercised by itself—not to be transferred to others—delegatus non est delegare.

Whether, then, the saving in the 26th section of the Act of 1825 were intended to apply only to the exercise of judicial power by the State court over the particular "offenses made punishable by that act," where the laws of the States required their courts to take cognizance of offenses against the laws of the United States, *in cases* where Congress so directs, or, *what would be more objectionable, to authorize the States to legislate* for the punishment of the identical offenses made punishable by the act of Congress, and to enforce *such [*427 laws in the State forum, it is in either case alike unconstitutional and void.

But it is said, that, admitting that the power to punish the offense of counterfeiting is an exclusive power, being expressly granted to the United States, yet that the power to punish the passing of counterfeit coin does not belong to Congress, or if it possess such power at all, it holds it concurrently with the States. In support of this, it is urged that whilst the Constitution expressly invests Congress with power to punish the offense of counterfeiting, it is silent as to the right to punish the uttering of false coin.

Indeed, the argument of the counsel for the defendant in error goes to the extent of denying to the general government the right to punish at all the offense of passing counterfeit money. But the argument cannot be sustained. The power to punish the offense of uttering is essential to enable Congress to protect its coinage, and to make it available. The circulation of the base interferes with that of the genuine coin. It discredits it by casting suspicion upon it. The law of self-protection gives to Congress the right to provide against the uttering and passing of the counterfeit.

It is said, however, that technically there is a distinction between the crime of counterfeiting and uttering. That the former is of higher grade; that in England it is denounced as high treason, while the latter is regarded as a misdemeanor. But this was not so at common law. It is only in virtue of certain acts of Parliament, expressly declaring that counterfeiting should be regarded as treason against the crown, and punished as such—leaving the kindred crimes of uttering, as all offenses against the coin originally were, misdemeanors only. Blackstone, in his Commentaries Vol. IV. pp. 88, 89, says, that there is no foundation in reason for the distinction created by the British statutes.

From the fact that, at the time of the adoption of the Constitution, this distinction obtained in England, although only in virtue of statutes of that realm, and with no reason to justify it, the counsel for the defendant in error claims that the power given to Congress to punish "counterfeiting" must be taken as restricted to that which was declared high treason in England, and does not extend, therefore, to any of the offenses which grow out of counterfeiting, and are necessarily incident to it.

This argument cannot be sustained. The reasoning by which it is attempted to support it is too artificial to be applied to such an instrument as the Constitution—the organic law of a great nation—which deals only in generals, and cannot, from its nature, be expected to descend into details. The Constitution having granted the power to punish the crime in chief, gives, as incidental to that, the right to punish all other crimes of like nature, growing out of the principal offense, and which are its necessary concomitants; especially where, as in this instance, the grant is of power to punish *the higher grade of the like offense, [*428 for the greater power includes the less.

The term "counterfeiting," as used in the

Constitution, is nomen generalissimum—the generic term for crimes debasing or impairing the coin. The passing of the spurious is an immediate and direct injury to the genuine coin, for it displaces it in the circulation, and discredits it by exciting distrust and suspicion. Indeed, it is only by the passing of the base that the genuine is injured. To what end is it that the counterfeiting is prohibited and punished, but to prevent the counterfeit from getting into circulation—to prevent its passing? The sole object of punishing the act of counterfeiting is to prevent the circulation and passing of the counterfeit, to the prejudice of the genuine.

The argument of the counsel for the defendant in error, while it concedes the power to punish the act of counterfeiting, in order to prevent the consequence which flows from it —the passing and circulation of counterfeit coin—would yet deny the power to punish for bringing about that very consequence itself—the passing; for doing the very thing to prevent which the act of counterfeiting is itself made punishable.

However apposite the argument might be, on a question of criminal special pleading, which deals in technical refinement, it is wholly out of place when applied to constitutional construction.

Again, the grounds upon which it is claimed that the States have power to punish offenses against the coin of the United States is, that the powers belonging to the States prior to the adoption of the Constitution are retained by them, unless prohibited by the Constitution in express terms, or by necessary implication.

Now, if it were conceded that the exclusive right of punishing the passing of base coin was not vested in Congress by express grant, it would not follow that the States possessed that power—because the States never, at any time, had the power of punishing offenses against the coinage of the United States. They had no such original power before the Constitution, because no such coinage was then in existence. They then had the power to punish counterfeiting of their own State coin, and of foreign coin. But the coin of the United States is not the coin of a State, but of the federal government. It is not a foreign coin; for in regard to the federal coin, the States are not foreign to each other, or to the United States—all deriving their coin from the same source, the federal government.

A coin so peculiar in the relation which the States sustain to it as that of the United States coin was wholly unknown to the original States. It is a new thing—a creation of the Constitution itself. It cannot, therefore, be said that the States, before the adoption of the Constitution, were ever possessed of the right to punish offenses against the federal coin, or 429*] destructive of its end, *and that such power, not being taken away from the States by the Constitution, remains to them to be exercised as part of their original proper powers. This view of the question seems conclusive in favor of the exclusive power of the United States over the protection and preservation of its coin, including the derivative and secondary offense *of passing, as well as the offense in chief of counterfeiting. Finally, it is* claimed on behalf of the defendant in error, that if the United States possess the power to punish the uttering, it is only concurrent with a like power belonging to the States.

What has been already said shows, I think, conclusively, that the power of Congress to punish the crime of counterfeiting is exclusive; and as the power to punish the passing is derived from the same source, being necessarily incidental, that also is exclusive. The same reasoning that supports the claim of one to an exclusive character supports that of the other to a like exclusive character.

The difficulties and collisions which result from the concurrent exercise of power in either case are precisely the same. A slight consideration of the consequences which result from regarding the power to punish either the counterfeiting or the passing as concurrently vested in the federal and State government, will conclusively show that no such concurrent power can exist.

Now, if the power be concurrent, a conviction in the State court is, on the one hand, a bar to a prosecution in the federal court, and e converso, a conviction in the federal court is a bar to a prosecution in the State court; or, on the other hand, such conviction in one court is not a bar to a prosecution in the other. The weight of authority is decidedly in favor of the doctrine, that a conviction in either court is a bar to a prosecution in the other. It has been repeatedly held that a man cannot be convicted and punished for two distinct felonies growing out of the same identical act, and that a former conviction or acquittal of an offense of one denomination is a bar to another prosecution for an offense of another and different denomination, founded upon the same act. 1 Green's N. J. R. 362; 2 Haywood's N. C. R. 4; 2 Hawks, 98; 2 Tyler, 387; 2 Va. Cases, 139; 7 Conn. 54.

In regard to concurrent jurisdiction, it is also a universal principle, wherever the common law is known, that, of the concurrent courts, the one which first takes jurisdiction acquires by that act the right to go on and exercise the jurisdiction throughout, to the exclusion of all other concurrent tribunals. The right to jurisdiction is concurrent; but when the exercise of the right once begins in any one of the concurrent courts, so that jurisdiction attaches to the particular case, the case then becomes one exclusively cognizable by that court, and the other tribunals cannot interfere. 16 Mass. R. 171; Ibid. 203; 3 Yerger, 167; 2 Stew. & Port. 9; 1 Hawks, 78; Payne's C. C. R. 621.

*In Antonio's case, 3 Wheeler's Crim. [*430 Cases, 508, and also reported in 2 Comst. S. C. R. 781, so strongly relied upon by the defendant in error to show the concurrent power of the State, it is said that a conviction in the State is a bar to a prosecution for the same act in the federal court. The same thing is said by Mr. Justice Washington, in Huston v. Moore, 5 Wheat. 31.

Now, if a prosecution in a State court is to be sustained under the twenty-sixth section of the Act of Congress of 1825, it follows that Congress has the power to devest the courts of the United States of their jurisdiction over acts declared offenses and made punishable by act of Congress, notwithstanding the Constitution

expressly declares that the judicial power in "all cases, arising under the Constitution, laws, and treaties of the United States" shall be vested in the courts of the United States. And Congress in the twentieth section of that act has expressly provided for punishing the crime of passing and uttering counterfeit coin—the very crime of which the plaintiff in error was convicted in the State court. And not only so, but, if the conviction in the case now before the court be sustained, being a conviction under a statute of Ohio, passed in 1835, providing for the punishment of the same crime, Congress also parts with its proper power of legislation and transfers that to the Legislatures of the States—transfers a power given to Congress to be exercised by itself alone for the benefit of the people of the whole Union, and not to be delegated to other legislative bodies.

The principle that a State conviction is a bar to a federal prosecution, and that, where there is concurrent jurisdiction, the tribunal first taking jurisdiction afterwards holds that jurisdiction, and exercises it throughout, to the exclusion of all others, necessarily leads to this result. Both the legislative and judicial powers of the United States are thus rendered abortive. The States, by the agency of Congress (whether the language of the act of Congress authorizing it be in terms imperative or permissive), are made to defeat the powers granted by the Constitution to the general government.

But the evil does not stop here. The jurisdiction of the States, when a prosecution is once begun in their tribunals, is exclusive, as well to discharge the convict from punishment, as for inflicting it; and the pardoning power, in such case, becomes exclusively vested in the executive of the State. The President, then, has no right to pardon, or to refuse to pardon, although the offense consists of an act made punishable by Congress. The pardoning power vested in him by the Constitution is by the action of the State governments, by the direction or with the consent of Congress, invaded. Congress has placed a case which properly belongs to him, under the Constitution of the United States, beyond his reach.

Thus, upon this construction, not only are 431*] the functions of the *legislative and judicial departments of the federal government taken from them, and vested in the States, but the President of the United States is stripped of his prerogative of executive clemency. Surely a doctrine leading to such results cannot be sustained; and there is no escape from it but to hold that a conviction in a State court is no bar to a prosecution in the courts of the United States. For, if the concurrent jurisdiction of the State courts do not become exclusive, upon a prosecution being commenced and carried on to conviction and punishment, it follows that neither a prosecution nor conviction in a State court can be a bar to a prosecution under the act of Congress in the federal courts; and that a person may be thus twice put in jeopardy, and twice punished, for the same offense, contrary to the fifth article of the amendments to the Constitution of the United States, which declares that no person shall "be subject, for *the same offense, to be twice* put in jeopardy of *life or limb.*"

If Congress merely permit the States to punish the offense, when it might prevent it, and afterwards punish the same act itself, it violates both the letter and spirit of this great safeguard of the citizen—one which is also a fundamental principle of the common law. It has already pervaded its criminal jurisprudence. Indeed, even in civil cases the common law declares nemo bis vexare pro eadem causâ.

The constitution of Ohio contains a like prohibition against a double prosecution and double punishment; and yet, if the doctrine of the defendant in error be sustained, the plaintiff in error is liable, notwithstanding this double guarantee, to be twice prosecuted, twice convicted, and twice punished, for the same offense. These great constitutional provisions become a mere mockery. There is no escape from the alternative presented, between devesting the judicial, legislative, and executive departments of the federal government of their constitutional powers, and the double jeopardy and punishment, except to hold that the cognizance of the offense is exclusively vested in the general government.

It is suggested by the counsel of the defendant in error that the protection against the double jeopardy does not apply to this case, where the punishment is imprisonment only, the language of the fifth article of the amendment to the Constitution being "twice put in jeopardy of life or limb." He seems to think that it must be a case of actual, total loss or destruction of limb, to come within the constitutional protection. This is clearly a mistake. That it extends to cases where the punishment was total loss or destruction of limb is true, although there were but very few cases of such punishment known to the common law at any time, even in its earliest and most barbarous periods; and I believe none at all when the Constitution was adopted. But the jeopardy of limb was not confined to cases of actual dismemberment. It is a common law *term, [*432 and extends to all cases where punishment inflicted any injury upon limb, and of course to confinement or restraint of the freedom of limb, whether it be by the imprisonment in the stocks, the dungeon, or the penitentiary, as well as to cases of actual dismemberment.

In conclusion I ask, what reason is there for vesting a concurrent jurisdiction in State tribunals? The federal government has no need of such aid. In its own ample resources, in the plentitude of its own proper powers, lie the means of its safety and protection. Hic arma, hic currus. To hold that the States have concurrent power will lead to jealousies and contentions between the two jurisdictions. It cannot be expected that this devisum imperium, this "joint occupation" of the same ground by the federal and State governments, can go on without engendering strifes and collisions.

In view, then, of the difficulties that result from the doctrine of concurrent right in the States, as well as of the clear grant to the federal government of the whole subject matter of the coin, I submit whether the attempt to make out the concurrent right does not fail, and ask, therefore, a reversal of the judgment.

Mr. Justice Daniel delivered the opinion of the court:

This case comes before us on a writ of error

to the Supreme Court of the State of Ohio, by whose judgment was affirmed the judgment of the Court of Common Pleas for the County of Morgan in that State, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her for that offense to imprisonment and labor in the State penitentiary for three years.

The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7th, 1835, and the particular clause on which the indictment was founded is in the following language, viz: "That if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," etc., "every person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more then fifteen nor less than three years." As has been already stated, the plaintiff was convicted of the offense described in the statute, her sentence was affirmed by the Supreme Court of the State, and, with the view of testing the validity of the sentence, a writ of error to the latter court has been issued.

With the exceptions taken to the formality or technical accuracy of the pleadings pending the prosecution, this court can have nothing to do. The only question with which it can regularly deal in this case is the following, viz: whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and, consequently, whether the conviction and sentence founded 433*] on *the statute, are consistent with or in contravention of the Constitution of the United States, or of any law of the United States enacted in pursuance of the Constitution. For the plaintiff, it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the eighth section of the first article of the Constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offenses which may be denominated offenses against the coin itself, such as counterfeiting, scaling, or clipping it, or debasing it in any mode, but that they embrace other offenses, such as frauds, cheats, or impositions between man and man by intentionally circulating or putting upon any person a base or simulated coin. On behalf of the State of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the Constitution in question, either by a natural and philological interpretation of their language, or by any real necessity for the attainment of their objects; and that if any act of Congress should be construed as asserting this meaning in the Constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the Constitution, nor one deriving its authority regularly from that instrument.

We think it manifest that the language of the Constitution, by its proper signification, is limited *to the facts, or to the faculty in* Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offense of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the legal coin as it was — affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offenses, but essentially also in their characters. The former is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree, be reached. A material distinction has been recognized between the offenses of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not; but those who barely utter false money are neither guilty of treason nor of misprision of treason. 1 Hawkins's Pleas of the Crown, 20. Again (1 East's Crown Law, 178), if A counterfeit the gold or silver coin, and by agreement before such counterfeiting B is to receive and vent the money, he is an aider and abettor to the *act itself of counterfeit- [*434 ing, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for cheat and misdemeanor, etc. These citations from approved English treaties on criminal law are adduced to show, in addition to the obvious meaning of the words of the Constitution, what has been the adjudged and established import of the phrase "counterfeiting of coin," and to what description of acts that phrase is restricted.

It would follow from these views, that if within the power conferred by the clauses of the Constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the Constitution, or from any apparent or probable conflict which might arise between the federal and State authorities, operating each upon these distinct characters of offense. If any such conflict can be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary State power. The punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable. It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offense of passing base coin, and the federal government should denounce a penalty against the same act, an individual un-

der these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the Constitution, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the Constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of Barron v. The Mayor and City Council of Baltimore, 7 Peters, 243; and such, indeed, is the 435*] only rational and intelligible *interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal Constitution restrictions upon their own authority—restrictions which some of the States regarded as the sine qua non of its adoption by them. It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offense described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the State. So far, then, neither the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the Constitution or any law of the United States made in pursuance thereof.

The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things affirmed.

Mr. Justice McLean:

I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.

The defendant in the State court was indicted and convicted of passing "a certain piece of false, base, counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." This is made an offense by the law of Ohio, and punished by imprisonment in the penitentiary, and being kept at hard labor, not more than fifteen, nor less than three years. The defendant was sentenced to imprisonment at hard labor for three years.

The Act of Congress of the 3d of March, 1825, punishes the same offense, "by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years."

The eighth article of the Constitution gives power to Congress "to coin money, regulate the value thereof, and of foreign coin." Also, "to provide for the punishment of counterfeiting the securities and current coin of the United States."

Jurisdiction is taken in this case, on the ground that the law under which the defendant in the State court was sentenced is repugnant *to the Constitution of the United [*436 States, and the above cited act of Congress.

Objection is made to the sufficiency of the description of the counterfeit coin alleged to have been passed. But I think the indictment, although not technical in this averment, is maintainable. The false coin is alleged to be of the similitude "of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." The words "legal," "currently passing," and "dollar," are significant, and must be held to be the coin made legal and current by act of Congress, and that the denomination of a dollar, so connected, is a coin legal and current.

The power to "coin money, regulate the value thereof and of foreign coin," vested by the Constitution in the federal government, is an exclusive power. It is expressly inhibited to the States. And the power to punish for counterfeiting the coin is also expressly vested in Congress. This power is not inhibited to the States in terms, but this may be inferred from the nature of the power. Two governments acting independently of each other cannot exercise the same power for the same object. It would be a contradiction in terms to say, for instance, that the federal government may coin money and regulate its value, and that the same thing may be done by the State governments. Two governments might act on these subjects, if uniformity in the coin and its value were not indispensable. There can be no independent action without a freedom of the will, and in this view how can two governments do the same thing, not a similar thing? The coin must be the same and the value the same; the regulation must be the result of the same discretion, and not of distinct and independent judgments. This power, therefore, cannot be exercised by two governments.

The Act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States," etc., provides by the twenty-sixth section, that "nothing in that act shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offenses made punishable by that act."

Offenses are made punishable in that act committed on the high seas, in navy yards, and other places where the United States have exclusive jurisdiction, and also for counterfeiting the coin of the United States. Now, it must be admitted that Congress cannot cede any portion of that jurisdiction which the Constitution has vested in the federal government. And it is equally obvious, that a State cannot punish offenses committed on the high seas, or in any place beyond its limits. The above section, therefore, cannot extend to offenses without the State, nor to State statutes subsequently enacted. It is a settled rule of construction, that the statutes of a State subsequently enacted must be expressly adopted by Congress. The statute under which the defendant below 437*] was *indicted was passed the 7th of March, 1835, so that no force could be given to it by the act of Congress of 1825.

That Congress have power to provide for the punishment of this offense seems to admit of no doubt. Coin is the creation of the federal government; and the power to punish the counterfeiting of this coin is expressly given in the Constitution. And these powers must be incomplete, and in a great degree inoperative, unless Congress can also exercise the power to punish the passing of counterfeit coin. Such a power has been exercised by the federal government for many years, and its constitutionality has never been questioned.

Counterfeiting the notes of the Bank of the United States was made an offense by Congress, and punishments were inflicted under that law. This power was never doubted by anyone who believed that Congress had power to establish a national bank. It seemed to be the necessary result of the power to establish the bank. For the principal power was in a great degree a nullity, unless Congress had power to protect that which they had created. I speak not of the power to establish the bank, but of the power which necessarily resulted from the exercise of that power. And if this power to protect the notes of the bank was necessary, the power to protect the coin is still clearer, as there can be no question as to the constitutionality of the act of Congress to establish the coin and punish the act of counterfeiting it. In relation to the bank, the principal power is doubted by many, but in relation to the coinage there can be no doubt. The protection of the coin was at least as necessary as the protection of the notes of the bank. But it cannot be necessary further to illustrate the power of Congress to punish the passing of counterfeit coin. It is a power which seems never to have been doubted.

Under the power "to establish postoffices and post roads," Congress have provided for punishing violations of the mail, regulated the duties of the agents of the Postoffice Department, required, under heavy penalties, ferry keepers to pass over the mail without delay, etc. These and numerous other regulations are necessary to carry out the principal power. And so in relation to the coin. It is reasonable to suppose that Congress, having power to coin money, and to punish for counterfeiting the coin, should have no power to punish for passing counterfeit coin? Is this coin created by the federal government, and thrown upon the community without power to prevent a fraudulent use of it? The powers of the general government were not delegated in this manner. Where a principal power is clearly delegated, it includes all powers necessary to give effect to the principal power. This is not controverted, it is believed, by anyone. It would seem, therefore, that the power to punish for passing counterfeit coin is clearly in the federal government.

*Can this same power be exercised [*438 by a State? I think it cannot. Formerly Congress provided that the State courts should have jurisdiction of certain offenses under their laws, and in several States indictments were prosecuted, and to a limited extent the laws of the Union were enforced by the States. But some States very properly refused to exercise the jurisdiction in such cases, and it was too clear for argument that Congress could not impose such duties on State courts. And this doctrine is now universally established. Consequently no State court will undertake to enforce the criminal law of the Union, except as regards the arrest of persons charged under such law. It is therefore clear, that the same power cannot be exercised by a State court as is exercised by the courts of the United States, in giving effect to their criminal laws.

In some cases the acts of Congress adopt the laws of the States on particular subjects; but even these, so far as the United States are concerned, become their laws by adoption, as fully as if they had been originated by them, and cannot be considered in any different light than as if they had been so passed.

If a State punish acts which are made penal by an act of Congress, the power cannot be derived from the act of Congress, but from the laws of the State. And in this light must the act of Ohio be considered, under which the defendant below was punished.

The act of Ohio does not prescribe the same punishment for passing counterfeit coin as the act of Congress. This State law must stand upon the power of the State to punish an act over which the law of Congress extends and punishes. The passage of counterfeit coin is said to be a fraud which the State may punish.

With the same propriety, it is supposed that a State may punish for larceny a person who steals money from the mail or a postoffice. And yet a jurisdiction over this offense, it is believed, has not been exercised by a State.

The postmaster or the carrier, as the case may be, has a temporary possession of letters, but the money abstracted from a letter in the mail or in the postoffice may be laid in the owner, who, in contemplation of law, retains the right of property until the money shall be received by the person to whom it is forwarded.

Many, if not all, of the States punish for counterfeiting the coin of the United States, while the same offense is punished by Act of Congress. And, as before stated, the Constitution vests this power expressly in Congress. Now, in these two cases, viz., counterfeiting the coin, and passing counterfeit coin, the same act is punished by the federal and State governments. Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such

cases, where the federal government has an undoubted jurisdiction, a State government can punish the same act. The point is not 439*] *whether a State may not punish an offense under an act of Congress, but whether the State may inflict, by virtue of its own sovereignty, punishment for the same act, as an offense against the State, which the federal government may constitutionally punish.

If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the law of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offense, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized n the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Mr. Hamilton, in the thirty-second number of The Federalist, says there is an exclusive delegation of power by the States to the federal government in three cases: 1. Where in express terms an exclusive authority is granted; 2. Where the power granted is inhibited to the States; and 3. Where the exercise of an authority granted to the Union by a State would be "contradictory and repugnant."

The power in Congress to punish for counterfeiting the coin, and also for passing it, is exercised under the third head. That a State should punish for doing that which an act of Congress punishes, is contradictory and repugnant. This is clearly the case, whether we regard the nature of the power or the infliction of the punishment. As well might a State punish for treason against the United States, as for the offense of passing counterfeit coin. No government could exist without the power to punish rebellion against its sovereignty. Nor can a government protect the coin which it creates, unless it has power to punish for counterfeiting or passing it. If it has not power to protect the constitutional currency which it establishes, it is the only exception in the exercise of federal powers.

There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the State governments. The federal is a limited government, exercising enumerated powers; but the powers given are 440*] *supreme and independent. If this were not the case, it could not be called a general government. Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt. The sixth article of the Constitution preserves the government from so great a reproach. It declares, that "this Constitution, and the laws of the United States made in pursuance thereof, etc., shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." That the act of Congress which punishes the passing of counterfeit coin is constitutional, would seem to admit of no doubt. And if that act be constitutional, it is the supreme law of the land; and any State law which is repugnant to it is void. As there cannot, in the nature of things, be two punishments for the same act, it follows that the power to punish being in the general government, it does not exist in the States. Such a power in a State is repugnant in its existence and in its exercise to the federal power. They cannot both stand.

I stand alone in this view, but I have the satisfaction to know that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the Supreme Court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented. But at that time, on account of the diversity of opinion among the judges present, and the absence of others, a majority of them being required by a rule of the court, in constitutional questions, to make a decision, a reargument of the cause was ordered. I think the judgment of the State court should be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, in this cause be, and the same is hereby in all things affirmed, with costs.

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*NATHANIEL S. WARING and Peter [*441 Dalman, owners of the steamboat De Soto, her tackle, apparel, and furniture, Appellants,

v.

THOMAS CLARKE, late master of the steamboat Luda, and agent of P. T. Marionoux and T. J. Abel, owners of said steamboat Luda, her tackle, apparel, furniture, and machinery, Appellees.

U. S. admiralty and maritime courts have jurisdiction over case of collision in tide water on Mississippi River though infra corpus comitatus—act to provide for better security of passengers.

The grant in the Constitution, extending the judicial power "to all cases of admiralty and mar-

itime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the Constitution was adopted by the States of the Union.

Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision.

In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be infra corpus comitatus, courts of admiralty of the United States have jurisdiction.

The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away.

The Act of 7th July, 1838 (5 Statutes at Large, 304), for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, is obligatory in all its provisions, except as it has been altered by the Act of 1843 (5 Statutes at Large, 626), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State, or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States.

By the law of 7th July, 1838, masters and owners neglecting to comply with its conditions are liable to a penalty of two hundred dollars, to be recovered by suit or indictment. And if neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it.

THIS case was an appeal from the Circuit Court of the United States for East Louisiana.

It was a suit in admiralty, brought originally in the District Court for the Eastern District of Louisiana, by Thomas Clarke, as late master of the steamboat Luda, and as agent for her owners, against the steamboat De Soto and her owners, Waring and Dalman, to obtain compensation for the destruction of the Luda by means of a collision between said boats.

A libel, answer, and supplemental libel and supplemental answer were filed, which were as follows:

To the Honorable Theodore H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The libel and complaint of Thomas Clarke, late master of the steamboat Luda, of New Orleans (and agent of P. T. Marionoux, of the parish of Iberville, in Louisiana), and of T. J. Abel, of the city of New Orleans, owners of the said steamboat Luda, her tackle, apparel, furni-442*] ture, *and machinery, and who authorize libelant to institute this suit against the steamboat De Soto, her tackle, apparel, and furniture, whereof S. S. Selleck now is, or lately was, master, now in the River Mississippi, in the port of New Orleans, where the tide ebbs and flows, and within the admiralty jurisdiction of this court, and against Nathaniel S. Waring, Peter Dalman, and Parker, all residing within the jurisdiction of this honorable court, owners of said steamboat De Soto, and also against all persons lawfully intervening for their interest in said steamboat De Soto, in a cause of collision, civil and maritime; and thereupon the said Thomas Clarke, master and agent as aforesaid, alleges and articulately propounds as follows:

First. That the steamboat Luda, whereof libelant was then master, was, on the first day of November last past, at the port of New Orleans, and destined on a voyage or trip from thence to Bayou Sarah, on the River Mississippi, about one hundred and sixty-five miles from the city of New Orleans, with lading of goods, wares, and merchandise, to the amount of ———— in value, or thereabouts, and several passengers, and was at that time a tight, staunch, and well built vessel, of the burden of two hundred and forty-five [tons]; and was then completely rigged, and sufficiently provided with tackle, apparel, furniture, and machinery; and then had on board, and in her service, twenty-two mariners and fireman, which was a full complement of hands to navigate and run said steamboat Luda on the voyage above mentioned, and all the necessary officers to command said boat.

Second. That on said first day of November, 1843, the said steamer Luda, provided and manned as aforesaid, departed from the said port of New Orleans, being propelled by steam, on her aforesaid voyage to Bayou Sarah; and, in the prosecution of her voyage on the said River Mississippi, arrived at what is called the Bayou Goula bar, in said river, about ninety-five miles from the said port of New Orleans, on or about the hour of two o'clock A. M., of the morning of the second day of November, 1843, and was running as near to, or closely "hugging" said bar, being on her starboard, as she could safely; whilst the said steamer was running in that position, pursuing the usual track which steamboats ascending the said river take under the circumstances, and going at her usual speed of about ten miles per hour, at the time aforesaid, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, Garrett Jourdan, the pilot of said steamer Luda, who was then at the wheel, and controlled and directed said boat on said voyage, and Levi Babcock, also the pilot of said boat, and who was then on the hurricane deck of said boat, observed the said steamboat De Soto, whereof the said S. S. Selleck was then master, of the burden of two hundred and fifty tons, or thereabouts, descending said river, being propelled by *steam, and controlled and [*443 directed at the time by one James Wingard, pilot of said boat, who then had the wheel, steering said boat in a direction parallel with, and at a distance from, the course then pursued by the Luda, sufficient to have passed the said Luda without touching; and at a distance of about nine hundred feet or more, and in that position, the said boats continued to run, the Luda ascending, the De Soto descending, the said river as aforesaid, until their bows were nearly opposite to each other, when, notwithstanding there was sufficient room for said boats to have passed each other without collision, and notwithstanding the said Luda was

NOTE.—As to jurisdiction of federal courts as affected by locality—ebb and flow of tide—high seas, see notes to 4 L. ed. U. S. 404; 6 L. ed. U. S. 358; 5 L. ed. U. S. 37.

Admiralty jurisdiction of contracts, see note to 66 L.R.A. 193.

then in her proper position, running as near said bar as she could safely, said James Wingard, the said pilot of the De Soto, suddenly turned the wheel, and threw the De Soto out of her proper position, and changed her course nearly at right angle to the one she [had] been running, in a direction towards the Luda; and notwithstanding the pilot of the said Luda rang her bell, and threw her fire-doors open to apprise the De Soto of the situation of the Luda, the said pilot of the De Soto, either intentionally and willfully, or most grossly, negligently, and culpably, ran the bow of the De Soto, with great force and violence, foul of and against the Luda, about or near midship on the larboard side, and thereby so broke and damaged the hull and machinery of the Luda, that the said Luda in a few minutes filled with water and sunk to the bottom of said river, in ten or twelve feet water, where she now lies a total wreck, worthless, and an entire loss; and so sudden did she fill with water and sink, that two of the crew, a white man and negro, were drowned, or are missing and cannot be found; the balance of the crew, officers, and passengers barely escaped with their lives, and were not able to save anything of the freight on board, or any part of said boat, her tackle, apparel, and furniture, etc., or even their clothes, the whole being lost by reason of the said boat De Soto having run foul of and against the said Luda as aforesaid, and sinking said Luda as aforesaid.

Third. That at the time the collision and damage mentioned in the next preceding article happened, it was impossible for the steamer Luda to get out of the way of the said steamer De Soto, by reason that the former was in her proper position, running as near to, or closely "hugging" said bar, as she could prudently and safely; that there was room enough for the said steamboat De Soto to steer clear of, and pass by, the said Luda, without doing any damage whatever, or coming in collision with the Luda; and that if the said James Wingard, the pilot of the said De Soto, had not changed the direction of the said De Soto, but kept her in her proper position as aforesaid, and had not refused, or at least carelessly and culpably neglected, to endeavor to keep clear of said Luda, which it was his as well as the officers' duty to do, of said De Soto, and which they might with ease and safety have done, the 444*] *aforesaid collision, damage, and loss of life and property would not have happened; and libelant expressly alleges that the same did happen by reason of the culpable negligence, incompetency, or willful intention of the said pilot and officers of the said De Soto.

Fourth. That the said steamboat Luda, before and at the time of being run foul of, damaged, and sunk by the said steamer De Soto, as hereinbefore mentioned, was a tight, strong, and staunch boat, and was, together with her tackle, apparel, and furniture, and machinery, worth the sum of fifteen thousand dollars; and that the books, papers, etc., belonging to said boat, and the property belonging to the officers and crew of said boat (exclusive of goods, wares, and merchandises on board of said boat), belonging to various persons unknown to libelant, as well the value thereof, were reasonably worth the sum of one thousand dollars; all of which was lost as aforesaid, and that by reason of the said steamboat Luda having been run foul of and sunk by the said steamer De Soto, as hereinbefore mentioned. Libelant, as master and agent of the owners of said Luda, has sustained damages to the amount of sixteen thousand dollars, which sum greatly exceeds the value of the said steamer De Soto; and for the payment of which sum the said steamer De Soto and her owners, the said Nathaniel S. Waring, Peter Dalman, and Parker, are liable in solido, and should be compelled to pay.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court; in verification whereof, if denied, the libelant craves leave to refer to the depositions and proofs to be by him exhibited in this cause; and libelant further alleges, that he has reason to fear that the said steamer De Soto will depart in less than ten days beyond the jurisdiction of this honorable court.

Wherefore libelant prays, that process in due form of law, according to the course of courts of admiralty and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamboat De Soto, her tackle, apparel, machinery, and furniture; and the said Nathaniel S. Waring, Peter Dalman, and Parker, who is the clerk of said boat, may be cited, as well as all other persons having or pretending to have any right, title, or interest therein, to appear and answer all and singular the matters so articulately propounded herein. That after monition, and other due proceedings according to the laws and usages of admiralty, that this honorable court may pronounce for the damages aforesaid, and condemn the said Nathaniel S. Waring, Peter Dalman, and Parker, and all other persons intervening for their interest in said boat, to pay in solido the sum of sixteen thousand dollars to libelant; and also to decree and condemn the said steamer De Soto, her tackle, apparel, and furniture, to be sold to satisfy by privilege and preference the claim of your libelant, with his costs in this behalf expended, and *for such other and further [*445 decree be rendered in the premises as to right and justice may appertain; and your libelant will ever pray, etc.

W. S. Vason, Proctor.

Thomas Clarke, being duly sworn, deposeth, that the material allegations of the above libel are true.

(Signed) Thomas Clarke.

Upon this libel, the judge ordered admiralty process in rem to issue against the steamboat De Soto, and also process in personam against the owners, citing them to appear and answer the libel. The answer was as follows:

To the Honorable Theo. H. McCaleb, Judge of the District Court of the United States, within and for the Eastern District of Louisiana.

And now Peter Dalman, of the city of La-Fayette, in the district aforesaid, and Nathaniel S. Waring, intervening for their interest in the said steamboat De Soto, and for answer to the libel and complaint of Thomas Clark, as late master of the steamboat Luda, and agent of P

F. Marionoux and T. J. Abel, late owners of the steamboat Luda, against the steamboat De Soto, her tackle, apparel, etc., and against Peter Dalman, and Nathaniel S. Waring, and Parker, as owners of the said steamboat De Soto, and also against all persons intervening for their interest in said steamboat De Soto, allege and articulately propound as follows:

First. That the respondents are the true and lawful owners of the said steamboat De Soto.

Second. That it doth appear from the allegations of the said libel, and these respondents expressly propounded and allege the fact to be so, that the trespass, tort, or collision set forth and alleged in the said libel, if any such did take place in the manner and form set forth in said libel, which these respondents most respectfully deny, was on the River Mississippi, off and near the mouth of the Bayou Goula, about ninety-five miles above the city of New Orleans, within the State of Louisiana, within the body of a county or parish of said State, to wit, the parish of Iberville or County of Iberville, in said State.

Third. The tide does not ebb and flow at the place where the said collision, tort, or trespass is alleged to have taken place.

Fourth. That it is not alleged in said libel, and these respondents aver and propound that the said collision did not take place on the high seas, or in sailing or navigating to or from the sea.

Fifth. That neither the said steamboat Luda, nor the said steamboat De Soto, were, at the time the said collision took place, or the tort or trespass aforesaid is alleged to have been committed, employed in sailing or navigating on any maritime voyage, but were wholly employed, and then were actually pursuing a voy-
446*] age confined *to the River Mississippi, to wit, the said steamboat Luda on a voyage from the city of New Orleans to Bayou Sarah, about one hundred and sixty miles above the said city, and the said steamboat De Soto on a voyage or trip from Bayou Sarah aforesaid to the city of New Orleans, where her said voyage or trip was to end.

Sixth. That neither the said steamboat Luda, nor the said steamboat De Soto, were built, designed, or fitted, or ever intended to be employed or used in any manner for a maritime or sea voyage, nor have they, or either of them, ever been used, employed, or engaged in any such maritime or sea voyage, but were wholly built, designed, or intended for the navigation of the said River Mississippi, or other rivers or streams entering therein, and the transportation of goods and passengers from the said city of New Orleans up the said river or streams to the interior of the country, and the transportation of passengers, goods, cotton, and other produce of the country from the landings, and places, and plantations of the inhabitants on the bank or banks of said rivers and streams to the said city of New Orleans, without proceeding any further down the said River Mississippi, nearer to its mouth or to the sea, and were both so employed at the time the said collision, trespass, or tort is alleged to have been committed.

Seventh. That this honorable court, by reason of all the matters and things so above pr-

pounded and articulated, has not jurisdiction, and ought not to proceed to enforce the claim alleged in the libel aforesaid against the said steamboat De Soto, or against them, these respondents, intervening for their interest, or against these respondents in their proper persons, as prayed for in and by said libel.

Eighth. That all and singular the premises are true; in verification whereof, if desired, these respondents crave leave to refer to the depositions and other proof to be by them exhibited in this cause. And the said respondents, in case their said plea to the jurisdiction of the court, so as above propounded, articulated, and pleaded, should be overruled, then they, for further defensive answer, articulately propound and say—

1st. That they admit that the said two steamboats did come into collision at the time stated in the said libel, but they do expressly deny that the said collision was caused or did happen by any fault, negligence, or intention of these respondents, or the master, officers, or crew of the said steamboat De Soto, or any other person or persons for whom these respondents, or the said steamboat De Soto, can in any manner be liable or responsible.

2d. That the said collision was caused by the fault or negligence, or want of skill, in the person or persons having charge or command of the said steamboat Luda, or the pilots, officers, or crew of said steamboat, or that the same was by accident, for which these repondents are not liable.

*3d. That the said sinking of the [*447
said steamboat Luda, and her loss alleged in said libel, was not caused by any damage she received in the collision aforesaid, but by the negligence, want of skill, and fault of the person or persons in charge of the said steamboat Luda.

4th. That at the time the said collision did take place the said steamboat Luda was not seaworthy, and was not properly provided with a commander and other usual and necessary officers of competent skill to manage and conduct the said steamboat, by reason of which the collision aforesaid did take place, and the said boat did afterwards sink.

5th. That the said steamboat De Soto did suffer a great damage by the said collision, to the amount of five hundred dollars, and these respondents have and will suffer great damage by the seizure and detention of said steamboat De Soto under the process issued in this case, and to the amount of five thousand dollars.

Wherefore, and by reason of all the matters and things herein propounded and pleaded, these respondents pray that this honorable court will pronounce against the said libel, that the same may be dismissed, and the said steamboat De Soto restored to your respondents, with all costs in this behalf expended.

That your honor may pronounce for the damages claimed by these respondents, as before stated, and condemn the libelants to pay the same, in solido, to these respondents, and that your respondents may have all such other and further order, decree, and relief in the premises as to law and justice may appertain, and the nature of their case may require.

(Signed) Peter Dalman,
N. S. Waring.

The supplemental bill was as follows:

To the Honorable Theo. H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The amended and supplemental libel of Thomas Clarke, late master of the steamboat Luda, and agent of the owners thereof, etc., against the steamboat De Soto, her tackle, apparel, and furniture, and against Nathaniel S. Waring, Peter Dalman, and Parker, owners thereof, etc., etc., and against all persons intervening for their interest in the steamer De Soto, etc., in the cause of collision, civil and maritime, etc., filed herein by leave of this honorable court, first granted and obtained, to amend his original libel herein filed and pending in said court.

And thereupon the said Thomas Clarke, as master and agent aforesaid, doth allege and articulately propound, as amendatory and supplemental to the allegations articulately propounded in his said original libel, as follows:

448*] *First. That at the time of the collision between the said steamboats, the said De Soto and the said Luda, set forth and described in the second article of his original libel, to wit, on the first day of November, 1843, and for a considerable time previous thereto, both of said boats were employed as regular packets, running between the port of New Orleans and the town of Bayou Sarah, situate on the bank of the Mississippi River, about one hundred and sixty miles from the city of New Orleans, carrying freight and passengers for hire between said places; and the said steamboat De Soto was, at the time the said collision took place, returning from the said town of Bayou Sarah, on a voyage or trip to the city of New Orleans, and the steamboat Luda was, at the said time, going on a voyage or trip from the city of New Orleans to the said town of Bayou Sarah; and libelant expressly alleges, that both of said boats were contracted for, intended and adapted to, and were actually engaged in, navigating tide waters at the time of said collision, running and making trips between the city of New Orleans and the said town of Bayou Sarah, in the River Mississippi, between which places the tide ebbs and flows the entire distance; and that the place where the said collision happened, to wit, the Bayou Goula bar, in the River Mississippi, and also the said town of Bayou Sarah, and the entire distance between the said town and the city of New Orleans, are within the admiralty and maritime jurisdiction of this honorable court.

Second. That on the night the collision took place between the said boats, to wit, on the night of the first day of November, 1843, there were not two lights hoisted out on the hurricane deck of the said boat De Soto, one forward, the other at the stern, of said boat; nor did the master and pilot of the said boat De Soto, or either of them, when the said boat, then descending the said River Mississippi, was within one mile of the boat Luda, then ascending said river, shut off the steam of the said boat De Soto, nor permit the said boat to float down upon the current of said river until the said boat Luda passed the said boat De Soto, as the laws of this State require boats descending said river to do, when meeting boats ascending said river; and libelant expressly alleges, that said master and pilot of the De Soto did neglect or refuse to comply with the requirements of said law of this State, as well with the usage and customs observd by all boats navigating said river, and that, had the said master and pilot not neglected or refused to comply with the requirements of said law, but conformed thereto, and observed the said usage and customs established by boats navigating said river, by shutting off the steam of the De Soto as soon as they discovered the Luda, or had approached within one mile of her, and permitted the De Soto to float upon the current of said river until the Luda had passed the De Soto, the said collision would not have occurred between the said boats, nor would the said De *Soto have run foul of and against the [*449 said Luda, as set forth in the second article of his original libel.

Third. That at the time of said collision, the said steamer Luda was earning freight, being employed by libelant in fulfilling certain verbal contracts of affreightment, entered into by and between him and the Port Hudson, and Clinton, and West Feliciana railroad companies, and various planters, in the month of October, 1843, to transport all the cotton, and sugar, and produce of the country, which said railroad companies and planters might deliver on the banks of the River Mississippi, within the ebb and flow of the tide on said river, to the city of New Orleans during the business season, to wit, from the 1st of October, 1843, to 1st of May, 1844; that the said boat Luda would have earned during said period, by carrying freight in pursuance of said contracts of affreightment, and in the fulfillment and discharge thereof, over and above all expenses, the sum of eight thousand dollars profit for libelant; that by reason of the sinking and destruction of the said steamer Luda, by being run foul of by the said De Soto, as herein and in his original libel is particularly set forth and alleged, libelant has been compelled to forfeit said contracts of affreightment, and to lose the amount of the freight which the said Luda would have earned by fulfilling said contracts, which he would have done, had he not been prevented by the sinking and destruction of said Luda by the said De Soto, to wit, the sum of eight thousand dollars, which sum libelant claims as damages sustained by him resulting from said collision, in addition to the value of said boat Luda, claimed in his original libel, to wit, the sum of sixteen thousand dollars, which two sums make the sum of twenty-four thousand dollars; and libelant expressly alleges, that he has sustained damages to the amount of twenty-four thousand dollars, by reason of the sinking and destruction of the said steamboat Luda by the said boat De Soto, and that the said boat De Soto and owners are liable, and ought to be compelled to pay said sum.

Fourth. That all and singular the premises are true, in verification whereof, if denied, libelant craves leave to refer to depositions and other proof, to be by him exhibited on the trial of this case.

Wherefore, in consideration of the premises, libelant reiterates his prayer in his original libel, unto the citations of the owners of the said boat De Soto, and condemnation of said boat, and prays that the said owners may be

condemned to pay, in solido, the sum of twenty-four thousand dollars, with all costs in this behalf expended to libelants, and for such other and further relief in the premises as to justice and equity may appertain, etc.

(Signed) Thomas Clarke.

The supplemental answer was as follows:

450*] *To the Honorable Theo. H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The amended and supplemental answer of Peter Dalman and Nathaniel S. Waring, claimants and respondents in the case now pending in this honorable court, of Thomas Clarke, late master of steamer Luda, for himself and others, owners of said steamer, against the steamer De Soto, and these respondents with leave of the court first granted and obtained to amend their answer; and thereupon the said respondents and claimants do allege and articulately propound as follows:

First. They admit that the steamers Luda and De Soto, at the time of the collision, were actually engaged in the Bayou Sarah trade, and had been so engaged for a short time previous thereto; but they deny that said boats were contracted for or used in navigating tide waters, and allege that the steamer De Soto was contracted and used for the Red River trade, where the tide neither ebbs nor flows; and for the reasons given, and for facts stated in their original answer, that this honorable court has not jurisdiction.

Second. They deny all the allegations in the second article of said amended libel, and allege that the steamer De Soto was lightened, managed, and guided in a proper, careful, and lawful manner, at and before the time of collision, and subsequently thereto.

Third. They deny all the allegations of libelant in the third article of said amended libel, and they further say, that even if the libelant should show on the trial of this cause, or be permitted to do so, which should not be allowed, that they have suffered or sustained consequential damages from said collision, that said libelant has no right to recover such damages from the respondents; they therefore pray that no such claim be allowed the libelants, and that these respondents and claimant may have judgment, as prayed for in the original answer and claim.

(Signed) Jno. R. Grymes,
Wm. Dunbar,
Proctors for Defendants.

Upon the two questions of fact raised in these libels and answers—viz., 1st, the extent to which the tide ebbs and flows up the Mississippi River, and, 2d, to whose fault the collision was to be attributed—a great body of evidence was taken, which it is not thought necessary to insert.

On the 24th of January, 1844, the following judgment was entered by the District Judge:

"The court, having duly considered the law and evidence in this cause, and for reasons that hereinafter will be given in length and filed in court, doth now order, and adjudge and decree, that the plea to the jurisdiction be overruled, and that the libelants do recover from the steamboat De Soto and owners, Peter

451*] Dalman and *Nathaniel S. Waring, the sum of twelve thousand dollars, and the costs of suit; and it is further ordered, that the steamboat De Soto be sold, after the usual and legal advertisements, and that the proceeds thereof be deposited in the registry of the court, subject to its further order.

From this judgment an appeal was filed to the Circuit Court.

In April, 1844, the appeal came on to be heard in the Circuit Court, when much additional testimony was produced, and on the 29th April the court ordered that the exception to the jurisdiction of the court should be dismissed, and the cause proceed on its merits.

On the 6th of May, 1844, the Circuit Court affirmed the decree of the District Court, with costs, from which an appeal was taken to this court.

The cause was argued by Mr. Johnson for the appellants, and Mr. Crittenden for the appellees, upon the two grounds, first, of the jurisdiction of the court, and second, on the facts of the case.

The question of jurisdiction came up again, covering additional points, in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston, which was argued by Mr. Ames and Mr. Whipple for the appellants, and Mr. Greene and Mr. Webster for the appellees. The discussion in the latter case took a wider range than in that now under review, and the reporter prepared himself with a full report of the arguments of counsel, upon the entire subject of jurisdiction. But the court having ordered the New Jersey Company case to be continued and re-argued, the reporter is not at liberty, of course, to make use of the materials, and is obliged to submit the report of the case of the two steamboats to the profession without any arguments of counsel.

Mr. Justice Wayne delivered the opinion of the court:

This is a libel in rem, to recover damages for injuries arising from a collision, alleged to have happened within the ebb and flow of the tide in the Mississippi River, about ninety-five miles above New Orleans.

The decree of the Circuit Court is resisted upon the merits, and also upon the ground that the case is not within the admiralty and maritime jurisdiction of the courts of the United States.

We will first consider the point of jurisdiction.

The learned counsel for the appellants, Mr. Reverdy Johnson, contended, that, even if the evidence proved that the collision took place within the ebb and flow of the tide, the court had not jurisdiction, because the locality is infra corpus comitatus.

Two grounds were taken to maintain that position.

1. That the grant in the Constitution of "all cases of admiralty and maritime jurisdiction" was limited to what were cases of *ad- [*452 miralty and maritime jurisdiction in England when our Revolutionary war began, or when the Constitution was adopted, and that a collision between ships within the ebb and flow of the tide, infra corpus comitatus, was not one of them.

2. That the distinguishing limitation of ad-

miralty jurisdiction, and decisive test against it in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And as auxiliary to this ground it was urged, that the clause in the ninth section of the Judiciary Act of 1789 (1 Statutes at Large, 76), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," took away such cases from the admiralty jurisdiction of the courts of the United States.

The same positions have been taken again by Mr. Ames and Mr. Whipple, in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston. Everything in support of them, which could be drawn from the history of admiralty jurisdiction in England, or from what had been its practice in the United States, and from adjudged cases in both countries, was urged by those gentlemen. All must admit, who heard them, that nothing was omitted which could be brought to bear upon the subject. We come, then, to the decisions of these points, with every advantage which learned research, and ingenious and comprehensive deduction from it, can give us.

It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be, in the sense in which it is used by the common law judges in England, infra corpus comitatus. It is this point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction.

We do not think that either of the grounds taken can be maintained. But before giving our reasons for this conclusion, it will be well for us to state the cases in which the instance court in England exercised jurisdiction when our Constitution was adopted.

In cases to enforce judgments of foreign admiralty courts, when the person or his goods are within the jurisdiction. Mariners' wages, except when the contract was under seal, or made out of the customary way of such contracts. Bottomry, in certain cases only, and under many restrictions. Salvage, when the property shipwrecked was not cast ashore. Cases between the several owners of ships, when they disputed among themselves about the policy or advantage of sending her upon a particular voyage. In cases of goods, and the proceeds of goods piratically taken, which will 453*] be arrested by a *warrant from the court, as belonging to the crown and as droits of the admiralty. And in cases of collision and injuries to property or persons on the high seas.

It may as well be said by us, at once, that, in cases of this last class, it has frequently been adjudicated in the English common law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the open coast; and that any branch of the sea within the fauces terræ, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 and 15 Richard II. and 2 Henry IV., to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising infra corpus comitatus. So sternly has the admiralty been excluded from what we believe to have been its ancient jurisdiction in England, that a prohibition within a few years has been issued in a case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the River Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. The Public Opinion, 2 Hagg. 398.

It has not, however, been the undisputed rule, nor allowed to be the correct interpretation of the statutes of Richard. It has always been contended by the advocates of the admiralty, that ports, creeks, and rivers are within its jurisdiction, and not within those statutes; meaning that the ancient jurisdiction in such localities was not excluded by the words of the statutes. Browne, however, in his Civil and Admiralty Law, Vol. II. p. 92, thinks they were within the words of the statutes; not meaning, though, to affirm the declaration of Lord Coke, that those statutes were affirmative of the common law. We think they were not. However much every true English and American lawyer may feel himself indebted to the learning of that great lawyer, and will ever be cautious of disparaging it, it is difficult for anyone to read and reflect upon the part which he took in the controversy upon admiralty jurisdiction in England, without assenting to Mr. Justice Buller's remarks, in Smart v. Wolf, 3 Durn. & East, 348: "With respect to what is said relative to the admiralty jurisdiction in 4th Inst. 135, I think that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction. The passage in 4th Inst. 135, disallowing the right to take stipulations, is expressly denied in 2 Lord Raym. 1286. And I may conclude with the words of Lord Holt in that case, that in this case 'the admiralty had jurisdiction, and there is neither statute nor common law to restrain them.'"

"Having thus admitted, to the fullest [*454 extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken, that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States.

We have already said it cannot be maintained. It is opposed by general, and also by constitutional considerations, to which we have not heard an answer.

In the first place, those who framed the Constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the States when they were colonies, than was allowed in England, from the interpretation which was given by the common law courts to the restraining statutes of Richard II. and Henry IV. The commissions to the vice-admirals in the

colonies, in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted. That to the governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said provinces."

In a work by Anthony Stokes, his majesty's Chief Justice in Georgia, entitled, "A View of the Constitution of the British Colonies in North America and the West Indies," will be found, at page 166, the form of the commission of vice-admiral for the provinces in North America. He says, in page 150, the dates in the commission are arbitrary, and the name of any particular province is omitted. Its language is, "And we do hereby remit and grant unto you, the aforesaid A B, our power and authority in and throughout our province of —— afore mentioned, etc., etc., and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of F." The extracts from both commissions are the same. We have the authority of Chief Justice Stokes, that all given in the colonies were alike. The jurisdiction given in those commissions is as large as was exercised in the ancient practice in admiralty in England. It should be observed, too, that they were given long before my difficulties occurred between the mother country and ourselves; and that they contained no power complained of by us afterwards, when it was said an attempt was made to extend admiralty powers "beyond these ancient limits." The king's authority to grant those commissions in the colonies has never been, and cannot be, denied. In all the appeals taken from the colonial courts to the High Court of Admiralty in England, no such thing was ever intimated.

Was it not known, also, that, whilst the States were colonies, vice-admiralty courts 455*] *had been in all of them—in some, as has just been said, by commissions from the crown, with additional powers conferred upon them by acts of Parliament; in others, by rights reserved in their charters, and in other colonies by their own legislation?—that, whether from either source, they exercised a jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas?—that acts of Parliament recognized their jurisdiction as original maritime jurisdiction, in all seizures for contravention of the revenue laws?

Was not a larger jurisdiction in admiralty exercised in Massachusetts, throughout her whole colonial existence, than was permitted to the admiralty in England by the prohibitions of her common law courts? Were her members in the convention which formed our Constitution ignorant of it?

Were the members from Pennsylvania and South Carolina forgetful, that the extent of the admiralty jurisdiction in the colonies had been the subject of judicial inquiry in England, growing out of proceedings in the admiralty courts of both of those States in revenue cases?—that it had been decided in 1754, in the case of The Vrow Dorothea, 2 Rob. 246—which was an appeal from the vice-admiralty judge in South Carolina to the High Court of Admiralty, and thence to the delegates—that the jurisdiction in admiralty in the colonies for a breach of the revenue laws was in its nature maritime, and was not a jurisdiction specially conferred by the statute of William III. ch. 22, sec. 6; a judgment which subsequently received the assent of all the common law judges, in a reference to them from the privy council? 2 Rob. 246; 8 Wheat. 397, note. This, too, after an eminent lawyer, Mr. West, assigned as counsel to the Commissioners of Trade and Plantations, had in 1720 expressed the opinion, that the statutes of 13 and 15 Richard II. ch. 3, and 2 Henry IV. ch. 11, and 27 Elizabeth, ch. 11, were not introductive of new laws, but only declarative of the common law, and were therefore of force in the plantations; and that none of the acts of trade and navigation gave the admiralty judges of the West Indies increase of jurisdiction beyond that exercised by the High Court of Admiralty at home.

Shall it be presumed, also, that the members of the convention were altogether disregardful of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her Act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, "and *the uncertainty of jurisdiction in the [*456 trial of maritime causes," which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also, there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England.

Further, the proceedings of our Continental Congress in 1774 afford reasons for us to conclude that no such limitation was meant. The admiralty jurisdiction, ancient and circumscribed as it afterwards was in England, and as it was exercised in the colonies, was necessarily the subject of examination, when the Congress was preparing the declaration and resolves of the 14th October, 1774; in which it is said, "that the several acts, of 4 George III. ch. 15, 34; 5 Geo. III. ch. 25; 6 Geo. III. ch. 52; 7 Geo. III. ch. 41; and 8 Geo. III. ch. 22, which impose duties for the purpose of raising a reve-

der these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the Constitution, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the Constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of Barron v. The Mayor and City Council of Baltimore, 7 Peters, 243; and such, indeed, is the 435*] only rational and intelligible *interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal Constitution restrictions upon their own authority—restrictions which some of the States regarded as the sine qua non of its adoption by them. It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offense described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the State. So far, then, neither the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the Constitution or any law of the United States made in pursuance thereof.

The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things affirmed.

Mr. Justice McLean:

I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.

The defendant in the State court was indicted and convicted of passing "a certain piece of false, base, counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." This is made an offense by the law of Ohio, and punished by imprisonment in the penitentiary, and being kept at hard labor, not more than fifteen, nor less than three years. The defendant was sentenced to imprisonment at hard labor for three years.

The Act of Congress of the 3d of March, 1825, punishes the same offense, "by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years."

The eighth article of the Constitution gives power to Congress "to coin money, regulate the value thereof, and of foreign coin." Also, "to provide for the punishment of counterfeiting the securities and current coin of the United States."

Jurisdiction is taken in this case, on the ground that the law under which the defendant in the State court was sentenced is repugnant *to the Constitution of the United [*436 States, and the above cited act of Congress.

Objection is made to the sufficiency of the description of the counterfeit coin alleged to have been passed. But I think the indictment, although not technical in this averment, is maintainable. The false coin is alleged to be of the similitude "of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." The words "legal," "currently passing," and "dollar," are significant, and must be held to be the coin made legal and current by act of Congress, and that the denomination of a dollar, so connected, is a coin legal and current.

The power to "coin money, regulate the value thereof and of foreign coin," vested by the Constitution in the federal government, is an exclusive power. It is expressly inhibited to the States. And the power to punish for counterfeiting the coin is also expressly vested in Congress. This power is not inhibited to the States in terms, but this may be inferred from the nature of the power. Two governments acting independently of each other cannot exercise the same power for the same object. It would be a contradiction in terms to say, for instance, that the federal government may coin money and regulate its value, and that the same thing may be done by the State governments. Two governments might act on these subjects, if uniformity in the coin and its value were not indispensable. There can be no independent action without a freedom of the will, and in this view how can two governments do the same thing, not a similar thing? The coin must be the same and the value the same; the regulation must be the result of the same discretion, and not of distinct and independent judgments. This power, therefore, cannot be exercised by two governments.

The Act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States," etc., provides by the twenty-sixth section, that "nothing in that act shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offenses made punishable by that act."

Offenses are made punishable in that act committed on the high seas, in navy yards, and other places where the United States have exclusive jurisdiction, and also for counterfeiting the coin of the United States. Now, it must be admitted that Congress cannot cede any portion of that jurisdiction which the Constitution has vested in the federal government. And it is equally obvious, that a State cannot punish offenses committed on the high seas, or in any place beyond its limits. The above section, therefore, cannot extend to offenses without the State, nor to State statutes subsequently enacted. It is a settled rule of construction, that the statutes of a State subsequently enacted must be expressly adopted by Congress. The statute under which the defendant below 437*] was *indicted was passed the 7th of March, 1835, so that no force could be given to it by the act of Congress of 1825.

That Congress have power to provide for the punishment of this offense seems to admit of no doubt. Coin is the creation of the federal government; and the power to punish the counterfeiting of this coin is expressly given in the Constitution. And these powers must be incomplete, and in a great degree inoperative, unless Congress can also exercise the power to punish the passing of counterfeit coin. Such a power has been exercised by the federal government for many years, and its constitutionality has never been questioned.

Counterfeiting the notes of the Bank of the United States was made an offense by Congress, and punishments were inflicted under that law. This power was never doubted by anyone who believed that Congress had power to establish a national bank. It seemed to be the necessary result of the power to establish the bank. For the principal power was in a great degree a nullity, unless Congress had power to protect that which they had created. I speak not of the power to establish the bank, but of the power which necessarily resulted from the exercise of that power. And if this power to protect the notes of the bank was necessary, the power to protect the coin is still clearer, as there can be no question as to the constitutionality of the act of Congress to establish the coin and punish the act of counterfeiting it. In relation to the bank, the principal power is doubted by many, but in relation to the coinage there can be no doubt. The protection of the coin was at least as necessary as the protection of the notes of the bank. But it cannot be necessary further to illustrate the power of Congress to punish the passing of counterfeit coin. It is a power which seems never to have been doubted.

Under the power "to establish postoffices and post roads," Congress have provided for punishing violations of the mail, regulated the duties of the agents of the Postoffice Department, required, under heavy penalties, ferry keepers to pass over the mail without delay, etc. These and numerous other regulations are necessary to carry out the principal power. And so in relation to the coin. It is reasonable to suppose that Congress, having power to coin money, and to punish for counterfeiting the coin, should have no power to punish for passing counterfeit coin? Is this coin created by *the federal government, and thrown upon the* community without power to prevent a fraudulent use of it? The powers of the general government were not delegated in this manner. Where a principal power is clearly delegated, it includes all powers necessary to give effect to the principal power. This is not controverted, it is believed, by anyone. It would seem, therefore, that the power to punish for passing counterfeit coin is clearly in the federal government.

*Can this same power be exercised [*438 by a State? I think it cannot. Formerly Congress provided that the State courts should have jurisdiction of certain offenses under their laws, and in several States indictments were prosecuted, and to a limited extent the laws of the Union were enforced by the States. But some States very properly refused to exercise the jurisdiction in such cases, and it was too clear for argument that Congress could not impose such duties on State courts. And this doctrine is now universally established. Consequently no State court will undertake to enforce the criminal law of the Union, except as regards the arrest of persons charged under such law. It is therefore clear, that the same power cannot be exercised by a State court as is exercised by the courts of the United States, in giving effect to their criminal laws.

In some cases the acts of Congress adopt the laws of the States on particular subjects; but even these, so far as the United States are concerned, become their laws by adoption, as fully as if they had been originated by them, and cannot be considered in any different light than as if they had been so passed.

If a State punish acts which are made penal by an act of Congress, the power cannot be derived from the act of Congress, but from the laws of the State. And in this light must the act of Ohio be considered, under which the defendant below was punished.

The act of Ohio does not prescribe the same punishment for passing counterfeit coin as the act of Congress. This State law must stand upon the power of the State to punish an act over which the law of Congress extends and punishes. The passage of counterfeit coin is said to be a fraud which the State may punish.

With the same propriety, it is supposed that a State may punish for larceny a person who steals money from the mail or a postoffice. And yet a jurisdiction over this offense, it is believed, has not been exercised by a State.

The postmaster or the carrier, as the case may be, has a temporary possession of letters, but the money abstracted from a letter in the mail or in the postoffice may be laid in the owner, who, in contemplation of law, retains the right of property until the money shall be received by the person to whom it is forwarded.

Many, if not all, of the States punish for counterfeiting the coin of the United States, while the same offense is punished by Act of Congress. And, as before stated, the Constitution vests this power expressly in Congress. Now, in these two cases, viz., counterfeiting the coin, and passing counterfeit coin, the same act is punished by the federal and State governments. Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such

cases, where the federal government has an undoubted jurisdiction, a State government can punish the same act. The point is not 439*] *whether a State may not punish an offense under an act of Congress, but whether the State may inflict, by virtue of its own sovereignty, punishment for the same act, as an offense against the State, which the federal government may constitutionally punish.

If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the law of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offense, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized n the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Mr. Hamilton, in the thirty-second number of The Federalist, says there is an exclusive delegation of power by the States to the federal government in three cases: 1. Where in express terms an exclusive authority is granted; 2. Where the power granted is inhibited to the States; and 3. Where the exercise of an authority granted to the Union by a State would be "contradictory and repugnant."

The power in Congress to punish for counterfeiting the coin, and also for passing it, is exercised under the third head. That a State should punish for doing that which an act of Congress punishes, is contradictory and repugnant. This is clearly the case, whether we regard the nature of the power or the infliction of the punishment. As well might a State punish for treason against the United States, as for the offense of passing counterfeit coin. No government could exist without the power to punish rebellion against its sovereignty. Nor can a government protect the coin which it creates, unless it has power to punish for counterfeiting or passing it. If it has not power to protect the constitutional currency which it establishes, it is the only exception in the exercise of federal powers.

There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the State governments. The federal is a limited government, exercising enumerated powers; but the powers given are 440*] *supreme and independent. If this *were not the case,* it could not be called a general government. *Nothing* can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt. The sixth article of the Constitution preserves the government from so great a reproach. It declares, that "this Constitution, and the laws of the United States made in pursuance thereof, etc., shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." That the act of Congress which punishes the passing of counterfeit coin is constitutional, would seem to admit of no doubt. And if that act be constitutional, it is the supreme law of the land; and any State law which is repugnant to it is void. As there cannot, in the nature of things, be two punishments for the same act, it follows that the power to punish being in the general government, it does not exist in the States. Such a power in a State is repugnant in its existence and in its exercise to the federal power. They cannot both stand.

I stand alone in this view, but I have the satisfaction to know that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the Supreme Court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented. But at that time, on account of the diversity of opinion among the judges present, and the absence of others, a majority of them being required by a rule of the court, in constitutional questions, to make a decision, a reargument of the cause was ordered. I think the judgment of the State court should be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, in this cause be, and the same is hereby in all things affirmed, with costs.

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*NATHANIEL S. WARING and Peter [*441 Dalman, owners of the steamboat De Soto, her tackle, apparel, and furniture, Appellants,

v.

THOMAS CLARKE, late master of the steamboat Luda, and agent of P. T. Marionoux and T. J. Abel, owners of said steamboat Luda, her tackle, apparel, furniture, and machinery, Appellees.

U. S. admiralty and maritime courts have jurisdiction over case of collision in tide water on Mississippi River though infra corpus comitatus—act to provide for better security of passengers.

The grant in the Constitution, extending the judicial power "to all cases of admiralty and mar-

itime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the Constitution was adopted by the States of the Union.

Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision.

In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be infra corpus comitatus, courts of admiralty of the United States have jurisdiction.

The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away.

The Act of 7th July, 1838 (5 Statutes at Large, 304), for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, is obligatory in all its provisions, except as it has been altered by the Act of 1843 (5 Statutes at Large, 626), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State, or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States.

By the law of 7th July, 1838, masters and owners neglecting to comply with its conditions are liable to a penalty of two hundred dollars, to be recovered by suit or indictment. And if neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it.

THIS case was an appeal from the Circuit Court of the United States for East Louisiana.

It was a suit in admiralty, brought originally in the District Court for the Eastern District of Louisiana, by Thomas Clarke, as late master of the steamboat Luda, and as agent for her owners, against the steamboat De Soto and her owners, Waring and Dalman, to obtain compensation for the destruction of the Luda by means of a collision between said boats.

A libel, answer, and supplemental libel and supplemental answer were filed, which were as follows:

To the Honorable Theodore H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The libel and complaint of Thomas Clarke, late master of the steamboat Luda, of New Orleans (and agent of P. T. Marionoux, of the parish of Iberville, in Louisiana), and of T. J. Abel, of the city of New Orleans, owners of the said steamboat Luda, her tackle, apparel, furni- 442*] ture, *and machinery, and who authorize libelant to institute this suit against the steamboat De Soto, her tackle, apparel, and furniture, whereof S. S. Selleck now is, or lately was, master, now in the River Mississippi, in the port of New Orleans, where the tide ebbs and flows, and within the admiralty jurisdiction of this court, and against Nathaniel S. Waring, Peter Dalman, and Parker, all residing within the jurisdiction of this honorable court, owners of said steamboat De Soto, and also against all persons lawfully intervening for their interest in said steamboat De Soto, in a cause of collision, civil and maritime; and thereupon the said Thomas Clarke, master and agent as aforesaid, alleges and articulately propounds as follows:

First. That the steamboat Luda, whereof libelant was then master, was, on the first day of November last past, at the port of New Orleans, and destined on a voyage or trip from thence to Bayou Sarah, on the River Mississippi, about one hundred and sixty-five miles from the city of New Orleans, with lading of goods, wares, and merchandise, to the amount of ———— in value, or thereabouts, and several passengers, and was at that time a tight, staunch, and well built vessel, of the burden of two hundred and forty-five [tons]; and was then completely rigged, and sufficiently provided with tackle, apparel, furniture, and machinery; and then had on board, and in her service, twenty-two mariners and fireman, which was a full complement of hands to navigate and run said steamboat Luda on the voyage above mentioned, and all the necessary officers to command said boat.

Second. That on said first day of November, 1843, the said steamer Luda, provided and manned as aforesaid, departed from the said port of New Orleans, being propelled by steam, on her aforesaid voyage to Bayou Sarah; and, in the prosecution of her voyage on the said River Mississippi, arrived at what is called the Bayou Goula bar, in said river, about ninety-five miles from the said port of New Orleans, on or about the hour of two o'clock A. M., of the morning of the second day of November, 1843, and was running as near to, or closely "hugging" said bar, being on her starboard, as she could safely; whilst the said steamer was running in that position, pursuing the usual track which steamboats ascending the said river take under the circumstances, and going at her usual speed of about ten miles per hour, at the time aforesaid, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, Garrett Jourdan, the pilot of said steamer Luda, who was then at the wheel, and controlled and directed said boat on said voyage, and Levi Babcock, also the pilot of said boat, and who was then on the hurricane deck of said boat, observed the said steamboat De Soto, whereof the said S. S. Selleck was then master, of the burden of two hundred and fifty tons, or thereabouts, descending said river, being propelled by *steam, and controlled and [*443 directed at the time by one James Wingard, pilot of said boat, who then had the wheel, steering said boat in a direction parallel with, and at a distance from, the course then pursued by the Luda, sufficient to have passed the said Luda without touching; and at a distance of about nine hundred feet or more, and in that position, the said boats continued to run, the Luda ascending, the De Soto descending, the said river as aforesaid, until their bows were nearly opposite to each other, when, notwithstanding there was sufficient room for said boats to have passed each other without collision, and notwithstanding the said Luda was

NOTE.—As to jurisdiction of federal courts as affected by locality—ebb and flow of tide—high seas, see notes to 4 L. ed. U. S. 404; 6 L. ed. U. S. 358; 5 L. ed. U. S. 37.

Admiralty jurisdiction of contracts, see note to 66 L.R.A. 193.

then in her proper position, running as near said bar as she could safely, said James Wingard, the said pilot of the De Soto, suddenly turned the wheel, and threw the De Soto out of her proper position, and changed her course nearly at right angle to the one she [had] been running, in a direction towards the Luda; and notwithstanding the pilot of the said Luda rang her bell, and threw her fire-doors open to apprise the De Soto of the situation of the Luda, the said pilot of the De Soto, either intentionally and willfully, or most grossly, negligently, and culpably, ran the bow of the De Soto, with great force and violence, foul of and against the Luda, about or near midship on the larboard side, and thereby so broke and damaged the hull and machinery of the Luda, that the said Luda in a few minutes filled with water and sunk to the bottom of said river, in ten or twelve feet water, where she now lies a total wreck, worthless, and an entire loss; and so sudden did she fill with water and sink, that two of the crew, a white man and negro, were drowned, or are missing and cannot be found; the balance of the crew, officers, and passengers barely escaped with their lives, and were not able to save anything of the freight on board, or any part of said boat, her tackle, apparel, and furniture, etc., or even their clothes, the whole being lost by reason of the said boat De Soto having run foul of and against the said Luda as aforesaid, and sinking said Luda as aforesaid.

Third. That at the time the collision and damage mentioned in the next preceding article happened, it was impossible for the steamer Luda to get out of the way of the said steamer De Soto, by reason that the former was in her proper position, running as near to, or closely "hugging" said bar, as she could prudently and safely; that there was room enough for the said steamboat De Soto to steer clear of, and pass by, the said Luda, without doing any damage whatever, or coming in collision with the Luda; and that if the said James Wingard, the pilot of the said De Soto, had not changed the direction of the said De Soto, but kept her in her proper position as aforesaid, and had not refused, or at least carelessly and culpably neglected, to endeavor to keep clear of said Luda, which it was his as well as the officers' duty to do, of said De Soto, and which they might with ease and safety have done, the 444*] *aforesaid collision, damage, and loss of life and property would not have happened; and libelant expressly alleges that the same did happen by reason of the culpable negligence, incompetency, or willful intention of the said pilot and officers of the said De Soto.

Fourth. That the said steamboat Luda, before and at the time of being run foul of, damaged, and sunk by the said steamer De Soto, as hereinbefore mentioned, was a tight, strong, and staunch boat, and was, together with her tackle, apparel, and furniture, and machinery, worth the sum of fifteen thousand dollars; and that the books, papers, etc., belonging to said boat, and the property belonging to the officers and crew of said boat (exclusive of goods, wares, and merchandises on *board of* said boat), belonging to various *persons unknown to libelant*, as well the value *thereof, were reasonably worth* the sum of one thousand dollars; all of which was lost as aforesaid, and that by reason of the said steamboat Luda having been run foul of and sunk by the said steamer De Soto, as hereinbefore mentioned. Libelant, as master and agent of the owners of said Luda, has sustained damages to the amount of sixteen thousand dollars, which sum greatly exceeds the value of the said steamer De Soto; and for the payment of which sum the said steamer De Soto and her owners, the said Nathaniel S. Waring, Peter Dalman, and Parker, are liable in solido, and should be compelled to pay.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court; in verification whereof, if denied, the libelant craves leave to refer to the depositions and proofs to be by him exhibited in this cause; and libelant further alleges, that he has reason to fear that the said steamer De Soto will depart in less than ten days beyond the jurisdiction of this honorable court.

Wherefore libelant prays, that process in due form of law, according to the course of courts of admiralty and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamboat De Soto, her tackle, apparel, machinery, and furniture; and the said Nathaniel S. Waring, Peter Dalman, and Parker, who is the clerk of said boat, may be cited, as well as all other persons having or pretending to have any right, title, or interest therein, to appear and answer all and singular the matters so articulately propounded herein. That after monition, and other due proceedings according to the laws and usages of admiralty, that this honorable court may pronounce for the damages aforesaid, and condemn the said Nathaniel S. Waring, Peter Dalman, and Parker, and all other persons intervening for their interest in said boat, to pay in solido the sum of sixteen thousand dollars to libelant; and also to decree and condemn the said steamer De Soto, her tackle, apparel, and furniture, to be sold to satisfy by privilege and preference the claim of your libelant, with his costs in this behalf expended, and *for such other and further [*445 decree be rendered in the premises as to right and justice may appertain; and your libelant will ever pray, etc.

W. S. Vason, Proctor.

Thomas Clarke, being duly sworn, deposeth, that the material allegations of the above libel are true.

(Signed) Thomas Clarke.

Upon this libel, the judge ordered admiralty process in rem to issue against the steamboat De Soto, and also process in personam against the owners, citing them to appear and answer the libel. The answer was as follows:

To the Honorable Theo. H. McCaleb, Judge of the District Court of the United States, within and for the Eastern District of Louisiana.

And now Peter Dalman, of the city of La-Fayette, in the district aforesaid, and Nathaniel S. Waring, intervening for their interest in the said steamboat De Soto, and for answer to the libel and complaint of Thomas Clark, as late master of the steamboat Luda, and agent of P

F. Marionoux and T. J. Abel, late owners of the steamboat Luda, against the steamboat De Soto, her tackle, apparel, etc., and against Peter Dalman, and Nathaniel S. Waring, and Parker, as owners of the said steamboat De Soto, and also against all persons intervening for their interest in said steamboat De Soto, allege and articulately propound as follows:

First. That the respondents are the true and lawful owners of the said steamboat De Soto.

Second. That it doth appear from the allegations of the said libel, and these respondents expressly propounded and allege the fact to be so, that the trespass, tort, or collision set forth and alleged in the said libel, if any such did take place in the manner and form set forth in said libel, which these respondents most respectfully deny, was on the River Mississippi, off and near the mouth of the Bayou Goula, about ninety-five miles above the city of New Orleans, within the State of Louisiana, within the body of a county or parish of said State, to wit, the parish of Iberville or County of Iberville, in said State.

Third. The tide does not ebb and flow at the place where the said collision, tort, or trespass is alleged to have taken place.

Fourth. That it is not alleged in said libel, and these respondents aver and propound that the said collision did not take place on the high seas, or in sailing or navigating to or from the sea.

Fifth. That neither the said steamboat Luda, nor the said steamboat De Soto, were, at the time the said collision took place, or the tort or trespass aforesaid is alleged to have been committed, employed in sailing or navigating on any maritime voyage, but were wholly employed, and then were actually pursuing a voy-
446*] age confined *to the River Mississippi, to wit, the said steamboat Luda on a voyage from the city of New Orleans to Bayou Sarah, about one hundred and sixty miles above the said city, and the said steamboat De Soto on a voyage or trip from Bayou Sarah aforesaid to the city of New Orleans, where her said voyage or trip was to end.

Sixth. That neither the said steamboat Luda, nor the said steamboat De Soto, were built, designed, or fitted, or ever intended to be employed or used in any manner for a maritime or sea voyage, nor have they, or either of them, ever been used, employed, or engaged in any such maritime or sea voyage, but were wholly built, designed, or intended for the navigation of the said River Mississippi, or other rivers or streams entering therein, and the transportation of goods and passengers from the said city of New Orleans up the said river or streams to the interior of the country, and the transportation of passengers, goods, cotton, and other produce of the country from the landings, and places, and plantations of the inhabitants on the bank or banks of said rivers and streams to the said city of New Orleans, without proceeding any further down the said River Mississippi, nearer to its mouth or to the sea, and were both so employed at the time the said collision, trespass, or tort is alleged to have been committed.

Seventh. That this honorable court, by reason of all the matters and things so above pro-

pounded and articulated, has not jurisdiction, and ought not to proceed to enforce the claim alleged in the libel aforesaid against the said steamboat De Soto, or against them, these respondents, intervening for their interest, or against these respondents in their proper persons, as prayed for in and by said libel.

Eighth. That all and singular the premises are true; in verification whereof, if desired, these respondents crave leave to refer to the depositions and other proof to be by them exhibited in this cause. And the said respondents, in case their said plea to the jurisdiction of the court, so as above propounded, articulated, and pleaded, should be overruled, then they, for further defensive answer, articulately propound and say—

1st. That they admit that the said two steamboats did come into collision at the time stated in the said libel, but they do expressly deny that the said collision was caused or did happen by any fault, negligence, or intention of these respondents, or the master, officers, or crew of the said steamboat De Soto, or any other person or persons for whom these respondents, or the said steamboat De Soto, can in any manner be liable or responsible.

2d. That the said collision was caused by the fault or negligence, or want of skill, in the person or persons having charge or command of the said steamboat Luda, or the pilots, officers, or crew of said steamboat, or that the same was by accident, for which these repondents are not liable.

*3d. That the said sinking of the [*447
said steamboat Luda, and her loss alleged in said libel, was not caused by any damage she received in the collision aforesaid, but by the negligence, want of skill, and fault of the person or persons in charge of the said steamboat Luda.

4th. That at the time the said collision did take place the said steamboat Luda was not seaworthy, and was not properly provided with a commander and other usual and necessary officers of competent skill to manage and conduct the said steamboat, by reason of which the collision aforesaid did take place, and the said boat did afterwards sink.

5th. That the said steamboat De Soto did suffer a great damage by the said collision, to the amount of five hundred dollars, and these respondents have and will suffer great damage by the seizure and detention of said steamboat De Soto under the process issued in this case, and to the amount of five thousand dollars.

Wherefore, and by reason of all the matters and things herein propounded and pleaded, these respondents pray that this honorable court will pronounce against the said libel, that the same may be dismissed, and the said steamboat De Soto restored to your respondents, with all costs in this behalf expended.

That your honor may pronounce for the damages claimed by these respondents, as before stated, and condemn the libelants to pay the same, in solido, to these respondents, and that your respondents may have all such other and further order, decree, and relief in the premises as to law and justice may appertain, and the nature of their case may require.

(Signed) Peter Dalman,
N. S. Waring.

The supplemental bill was as follows:

To the Honorable Theo. H. McCaleb, Judge of the United States District Court in and for the Eastern District of Louisiana.

The amended and supplemental libel of Thomas Clarke, late master of the steamboat Luda, and agent of the owners thereof, etc., against the steamboat De Soto, her tackle, apparel, and furniture, and against Nathaniel S. Waring, Peter Dalman, and Parker, owners thereof, etc., etc., and against all persons intervening for their interest in the steamer De Soto, etc., in the cause of collision, civil and maritime, etc., filed herein by leave of this honorable court, first granted and obtained, to amend his original libel herein filed and pending in said court.

And thereupon the said Thomas Clarke, as master and agent aforesaid, doth allege and articulately propound, as amendatory and supplemental to the allegations articulately propounded in his said original libel, as follows:

448*] *First. That at the time of the collision between the said steamboats, the said De Soto and the said Luda, set forth and described in the second article of his original libel, to wit, on the first day of November, 1843, and for a considerable time previous thereto, both of said boats were employed as regular packets, running between the port of New Orleans and the town of Bayou Sarah, situate on the bank of the Mississippi River, about one hundred and sixty miles from the city of New Orleans, carrying freight and passengers for hire between said places; and the said steamboat De Soto was, at the time the said collision took place, returning from the said town of Bayou Sarah, on a voyage or trip to the city of New Orleans, and the steamboat Luda was, at the said time, going on a voyage or trip from the city of New Orleans to the said town of Bayou Sarah; and libelant expressly alleges, that both of said boats were contracted for, intended and adapted to, and were actually engaged in, navigating tide waters at the time of said collision, running and making trips between the city of New Orleans and the said town of Bayou Sarah, in the River Mississippi, between which places the tide ebbs and flows the entire distance; and that the place where the said collision happened, to wit, the Bayou Goula bar, in the River Mississippi, and also the said town of Bayou Sarah, and the entire distance between the said town and the city of New Orleans, are within the admiralty and maritime jurisdiction of this honorable court.

Second. That on the night the collision took place between the said boats, to wit, on the night of the first day of November, 1843, there were not two lights hoisted out on the hurricane deck of the said boat De Soto, one forward, the other at the stern, of said boat; nor did the master and pilot of the said boat De Soto, or either of them, when the said boat, then descending the said River Mississippi, was within one mile of the boat Luda, then ascending said river, shut off the steam of the said boat De Soto, nor permit the said boat to float down upon the current of said river until the said boat Luda passed the said boat De Soto, as *the laws of this* State require boats descending *said river to do, when meeting* boats ascending *said river; and libelant expressly* alleges, that said master and pilot of the De Soto did neglect or refuse to comply with the requirements of said law of this State, as well with the usage and customs observd by all boats navigating said river, and that, had the said master and pilot not neglected or refused to comply with the requirements of said law, but conformed thereto, and observed the said usage and customs established by boats navigating said river, by shutting off the steam of the De Soto as soon as they discovered the Luda, or had approached within one mile of her, and permitted the De Soto to float upon the current of said river until the Luda had passed the De Soto, the said collision would not have occurred between the said boats, nor would the said De *Soto have run foul of and against the [*449 said Luda, as set forth in the second article of his original libel.

Third. That at the time of said collision, the said steamer Luda was earning freight, being employed by libelant in fulfilling certain verbal contracts of affreightment, entered into by and between him and the Port Hudson, and Clinton, and West Feliciana railroad companies, and various planters, in the month of October, 1843, to transport all the cotton, and sugar, and produce of the country, which said railroad companies and planters might deliver on the banks of the River Mississippi, within the ebb and flow of the tide on said river, to the city of New Orleans during the business season, to wit, from the 1st of October, 1843, to 1st of May, 1844; that the said boat Luda would have earned during said period, by carrying freight in pursuance of said contracts of affreightment, and in the fulfillment and discharge thereof, over and above all expenses, the sum of eight thousand dollars profit for libelant; that by reason of the sinking and destruction of the said steamer Luda, by being run foul of by the said De Soto, as herein and in his original libel is particularly set forth and alleged, libelant has been compelled to forfeit said contracts of affreightment, and to lose the amount of the freight which the said Luda would have earned by fulfilling said contracts, which he would have done, had he not been prevented by the sinking and destruction of said Luda by the said De Soto, to wit, the sum of eight thousand dollars, which sum libelant claims as damages sustained by him resulting from said collision, in addition to the value of said boat Luda, claimed in his original libel, to wit, the sum of sixteen thousand dollars, which two sums make the sum of twenty-four thousand dollars; and libelant expressly alleges, that he has sustained damages to the amount of twenty-four thousand dollars, by reason of the sinking and destruction of the said steamboat Luda by the said boat De Soto, and that the said boat De Soto and owners are liable, and ought to be compelled to pay said sum.

Fourth. That all and singular the premises are true, in verification whereof, if denied, libelant craves leave to refer to depositions and other proof, to be by him exhibited on the trial of this case.

Wherefore, in consideration of the premises, libelant reiterates his prayer in his original libel, unto the citations of the owners of the said boat De Soto, and condemnation of said boat, and prays that the said owners may be

condemned to pay, in solido, the sum of twenty-four thousand dollars, with all costs in this behalf expended to libelants, and for such other and further relief in the premises as to justice and equity may appertain, etc.

(Signed) Thomas Clarke.

The supplemental answer was as follows:

450*] *To the Honorable Theo. H. McCaleb. Judge of the United States District Court in and for the Eastern District of Louisiana.

The amended and supplemental answer of Peter Dalman and Nathaniel S. Waring, claimants and respondents in the case now pending in this honorable court, of Thomas Clarke, late master of steamer Luda, for himself and others, owners of said steamer, against the steamer De Soto, and these respondents with leave of the court first granted and obtained to amend their answer; and thereupon the said respondents and claimants do allege and articulately propound as follows:

First. They admit that the steamers Luda and De Soto, at the time of the collision, were actually engaged in the Bayou Sarah trade, and had been so engaged for a short time previous thereto; but they deny that said boats were contracted for or used in navigating tide waters, and allege that the steamer De Soto was contracted and used for the Red River trade, where the tide neither ebbs nor flows; and for the reasons given, and for facts stated in their original answer, that this honorable court has not jurisdiction.

Second. They deny all the allegations in the second article of said amended libel, and allege that the steamer De Soto was lightened, managed, and guided in a proper, careful, and lawful manner, at and before the time of collision, and subsequently thereto.

Third. They deny all the allegations of libelant in the third article of said amended libel, and they further say, that even if the libelant should show on the trial of this cause, or be permitted to do so, which should not be allowed, that they have suffered or sustained consequential damages from said collision, that said libelant has no right to recover such damages from the respondents; they therefore pray that no such claim be allowed the libelants, and that these respondents and claimant may have judgment, as prayed for in the original answer and claim.

(Signed) Jno. R. Grymes,
Wm. Dunbar,
Proctors for Defendants.

Upon the two questions of fact raised in these libels and answers—viz., 1st, the extent to which the tide ebbs and flows up the Mississippi River, and, 2d, to whose fault the collision was to be attributed—a great body of evidence was taken, which it is not thought necessary to insert.

On the 24th of January, 1844, the following judgment was entered by the District Judge:

"The court, having duly considered the law and evidence in this cause, and for reasons that hereinafter will be given in length and filed in court, doth now order, and adjudge and decree, that the plea to the jurisdiction be overruled, and that the libelants do recover from the steamboat De Soto and owners, Peter

451*] Dalman *and* *Nathaniel S. Waring, the

sum of twelve thousand dollars, and the costs of suit; and it is further ordered, that the steamboat De Soto be sold, after the usual and legal advertisements, and that the proceeds thereof be deposited in the registry of the court, subject to its further order.

From this judgment an appeal was filed to the Circuit Court.

In April, 1844, the appeal came on to be heard in the Circuit Court, when much additional testimony was produced, and on the 29th April the court ordered that the exception to the jurisdiction of the court should be dismissed, and the cause proceed on its merits.

On the 6th of May, 1844, the Circuit Court affirmed the decree of the District Court, with costs, from which an appeal was taken to this court.

The cause was argued by Mr. Johnson for the appellants, and Mr. Crittenden for the appellees, upon the two grounds, first, of the jurisdiction of the court, and second, on the facts of the case.

The question of jurisdiction came up again, covering additional points, in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston, which was argued by Mr. Ames and Mr. Whipple for the appellants, and Mr. Greene and Mr. Webster for the appellees. The discussion in the latter case took a wider range than in that now under review, and the reporter prepared himself with a full report of the arguments of counsel, upon the entire subject of jurisdiction. But the court having ordered the New Jersey Company case to be continued and re-argued, the reporter is not at liberty, of course, to make use of the materials, and is obliged to submit the report of the case of the two steamboats to the profession without any arguments of counsel.

Mr. Justice Wayne delivered the opinion of the court:

This is a libel in rem, to recover damages for injuries arising from a collision, alleged to have happened within the ebb and flow of the tide in the Mississippi River, about ninety-five miles above New Orleans.

The decree of the Circuit Court is resisted upon the merits, and also upon the ground that the case is not within the admiralty and maritime jurisdiction of the courts of the United States.

We will first consider the point of jurisdiction.

The learned counsel for the appellants, Mr. Reverdy Johnson, contended, that, even if the evidence proved that the collision took place within the ebb and flow of the tide, the court had not jurisdiction, because the locality is infra corpus comitatus.

Two grounds were taken to maintain that position.

1. That the grant in the Constitution of "all cases of admiralty and maritime jurisdiction" was limited to what were cases of *ad- [*452 miralty and maritime jurisdiction in England when our Revolutionary war began, or when the Constitution was adopted, and that a collision between ships within the ebb and flow of the tide, infra corpus comitatus, was not one of them.

2. That the distinguishing limitation of ad-

miralty jurisdiction, and decisive test against it in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And as auxiliary to this ground it was urged, that the clause in the ninth section of the Judiciary Act of 1789 (1 Statutes at Large, 76), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," took away such cases from the admiralty jurisdiction of the courts of the United States.

The same positions have been taken again by Mr. Ames and Mr. Whipple, in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston. Everything in support of them, which could be drawn from the history of admiralty jurisdiction in England, or from what had been its practice in the United States, and from adjudged cases in both countries, was urged by those gentlemen. All must admit, who heard them, that nothing was omitted which could be brought to bear upon the subject. We come, then, to the decisions of these points, with every advantage which learned research, and ingenious and comprehensive deduction from it, can give us.

It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be, in the sense in which it is used by the common law judges in England, infra corpus comitatus. It is this point that we are now about to decide, and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction.

We do not think that either of the grounds taken can be maintained. But before giving our reasons for this conclusion, it will be well for us to state the cases in which the instance court in England exercised jurisdiction when our Constitution was adopted.

In cases to enforce judgments of foreign admiralty courts, when the person or his goods are within the jurisdiction. Mariners' wages, except when the contract was under seal, or made out of the customary way of such contracts. Bottomry, in certain cases only, and under many restrictions. Salvage, when the property shipwrecked was not cast ashore. Cases between the several owners of ships, when they disputed among themselves about the policy or advantage of sending her upon a particular voyage. In cases of goods, and the proceeds of goods piratically taken, which will 453*] be arrested by a *warrant from the court, as belonging to the crown and as droits of the admiralty. And in cases of collision and injuries to property or persons on the high seas.

It may as well be said by us, at once, that, in cases of this last class, it has frequently been adjudicated in the English common law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the open coast; and that any branch of the sea within the fauces terræ, where a man may *reasonably discern from* shore to shore, is, or *at least may be, within the* body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 and 15 Richard II. and 2 Henry IV., to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising infra corpus comitatus. So sternly has the admiralty been excluded from what we believe to have been its ancient jurisdiction in England, that a prohibition within a few years has been issued in a case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the River Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. The Public Opinion, 2 Hagg. 398.

It has not, however, been the undisputed rule, nor allowed to be the correct interpretation of the statutes of Richard. It has always been contended by the advocates of the admiralty, that ports, creeks, and rivers are within its jurisdiction, and not within those statutes; meaning that the ancient jurisdiction in such localities was not excluded by the words of the statutes. Browne, however, in his Civil and Admiralty Law, Vol. II. p. 92, thinks they were within the words of the statutes; not meaning, though, to affirm the declaration of Lord Coke, that those statutes were affirmative of the common law. We think they were not. However much every true English and American lawyer may feel himself indebted to the learning of that great lawyer, and will ever be cautious of disparaging it, it is difficult for anyone to read and reflect upon the part which he took in the controversy upon admiralty jurisdiction in England, without assenting to Mr. Justice Buller's remarks, in Smart v. Wolf, 3 Durn. & East, 348: "With respect to what is said relative to the admiralty jurisdiction in 4th Inst. 135, I think that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction. The passage in 4th Inst. 135, disallowing the right to take stipulations, is expressly denied in 2 Lord Raym. 1286. And I may conclude with the words of Lord Holt in that case, that in this case 'the admiralty had jurisdiction, and there is neither statute nor common law to restrain them.'"

*Having thus admitted, to the fullest [*454 extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken, that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States.

We have already said it cannot be maintained. It is opposed by general, and also by constitutional considerations, to which we have not heard an answer.

In the first place, those who framed the Constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the States when they were colonies, than was allowed in England, from the interpretation which was given by the common law courts to the restraining statutes of Richard II. and Henry IV. The commissions to the vice-admirals in the

colonies, in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted. That to the governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said provinces."

In a work by Anthony Stokes, his majesty's Chief Justice in Georgia, entitled, "A View of the Constitution of the British Colonies in North America and the West Indies," will be found, at page 166, the form of the commission of vice-admiral for the provinces in North America. He says, in page 150, the dates in the commission are arbitrary, and the name of any particular province is omitted. Its language is, "And we do hereby remit and grant unto you, the aforesaid A B, our power and authority in and throughout our province of —— afore mentioned, etc., etc., and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of F." The extracts from both commissions are the same. We have the authority of Chief Justice Stokes, that all given in the colonies were alike. The jurisdiction given in those commissions is as large as was exercised in the ancient practice in admiralty in England. It should be observed, too, that they were given long before my difficulties occurred between the mother country and ourselves; and that they contained no power complained of by us afterwards, when it was said an attempt was made to extend admiralty powers "beyond these ancient limits." The king's authority to grant those commissions in the colonies has never been, and cannot be, denied. In all the appeals taken from the colonial courts to the High Court of Admiralty in England, no such thing was ever intimated.

Was it not known, also, that, whilst the States were colonies, vice-admiralty courts 455*] *had been in all of them—in some, as has just been said, by commissions from the crown, with additional powers conferred upon them by acts of Parliament; in others, by rights reserved in their charters, and in other colonies by their own legislation?—that, whether from either source, they exercised a jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas?—that acts of Parliament recognized their jurisdiction as original maritime jurisdiction, in all seizures for contravention of the revenue laws?

Was not a larger jurisdiction in admiralty exercised in Massachusetts, throughout her whole colonial existence, than was permitted to the admiralty in England by the prohibitions of her common law courts? Were her members in the convention which formed our Constitution ignorant of it?

Were the members from Pennsylvania and South Carolina forgetful, that the extent of the admiralty jurisdiction in the colonies had been the subject of judicial inquiry in England, *growing out of proceedings in the admiralty* courts of both of those States in revenue cases?—that it had been decided in 1754, in the case of The Vrow Dorothea, 2 Rob. 246—which was an appeal from the vice-admiralty judge in South Carolina to the High Court of Admiralty, and thence to the delegates—that the jurisdiction in admiralty in the colonies for a breach of the revenue laws was in its nature maritime, and was not a jurisdiction specially conferred by the statute of William III. ch. 22, sec. 6; a judgment which subsequently received the assent of all the common law judges, in a reference to them from the privy council? 2 Rob. 246; 8 Wheat. 397, note. This, too, after an eminent lawyer, Mr. West, assigned as counsel to the Commissioners of Trade and Plantations, had in 1720 expressed the opinion, that the statutes of 13 and 15 Richard II. ch. 3, and 2 Henry IV. ch. 11, and 27 Elizabeth, ch. 11, were not introductive of new laws, but only declarative of the common law, and were therefore of force in the plantations; and that none of the acts of trade and navigation gave the admiralty judges of the West Indies increase of jurisdiction beyond that exercised by the High Court of Admiralty at home.

Shall it be presumed, also, that the members of the convention were altogether disregardful of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her Act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, "and *the uncertainty of jurisdiction in the [*456 trial of maritime causes," which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also, there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England.

Further, the proceedings of our Continental Congress in 1774 afford reasons for us to conclude that no such limitation was meant. The admiralty jurisdiction, ancient and circumscribed as it afterwards was in England, and as it was exercised in the colonies, was necessarily the subject of examination, when the Congress was preparing the declaration and resolves of the 14th October, 1774; in which it is said, "that the several acts, of 4 George III. ch. 15, 34; 5 Geo. III. ch. 25; 6 Geo. III. ch. 52; 7 Geo. III. ch. 41; and 8 Geo. III. ch. 22, which impose duties for the purpose of raising a reve-

nue in America, extend the power of the admiralty courts beyond their ancient limits." Journal of Congress, 1774, 21. Again, when it was said (Journal, 33), after reciting other grievances under the statute of 1767, "And amidst the just fears and jealousies thereby occasioned, a statute was made in the next year (1768) to establish courts of admiralty on a new model, expressly for the end of more effectually recovering of the penalties and forfeitures inflicted by acts of Parliament, framed for the purpose of raising revenue in America." And again, in the address to the king (Journal, 47), it is said, "By several acts of Parliament, made in the fourth, fifth, sixth, seventh, and eighth years of your majesty's reign, duties are imposed upon us for the purpose of raising a revenue, and the powers of the admiralty and vice-admiralty courts are extended beyond their ancient limits; whereby our property is taken from us without our consent," etc. Why this repeated allusion to the ancient limits of admiralty jurisdiction, by men fully acquainted with every part of English jurisprudence, if they had not believed it had existed in England at one time much beyond what was at that time its exercise in her admiralty courts?

With these proceedings of the Continental Congress every member of the convention which framed the Constitution was familiar. They knew, also, what had been the extent and the manner of the exercise of admiralty jurisdiction in the States, after the war began, until the articles of confederation had been ratified—what it had been thence to the adoption of the Constitution. Advised, as they were by personal experience, of the difficulties which at-
457*] tended the *separate exercise by the States of admiralty powers, before the confederation was formed, and afterwards from the restricted grant of judicial power in its articles, can it be supposed, in framing the Constitution, when they were endeavoring to apply a remedy for those evils by getting the States to yield admiralty jurisdiction altogether to the United States, it was intended to circumscribe the larger jurisdiction existing in them to the limited cases, and those only then allowed in England to be cases of admiralty and maritime jurisdiction?—that the latter was exclusively intended, without any reference to the former, with which they were most familiar? Can it be reasonable to infer that such were the intentions of the framers of the Constitution? Is it not more reasonable to say—nay, may we not say it as certain—that, in their discussions and thoughts upon the grant of admiralty jurisdiction, they mingled with what they knew were cases of admiralty jurisdiction in England what it actually was and had been in the States they were representing, with an enlarged comprehension of the controversy which had been carried on in England for more than two hundred years, between the judges of the common law courts and the admiralty, upon the subject of its jurisdiction? Besides, nothing can be found in the debates of the convention, nor in its proceedings, nor in the debates of the conventions in the States upon the Constitution, to sanction such an idea. It is remarkable, *too, that the words, "all cases of* admiralty and *maritime jurisdiction," as* they now are in the *Constitution, were in the first plan of govern-*
234

ment submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately. That would not have been accomplished, if it had been intended to limit the power to the few cases of which the English courts took cognizance.

But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of "all cases of admiralty and maritime jurisdiction," as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution—as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England—a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States "to all *cases of admiralty and [*458 maritime jurisdiction." One extension of the jurisdiction of the courts of the United States exists beyond the limitation proposed, just as it existed in the colonies before they became independent States, which never has been a case of admiralty jurisdiction in England. We mean seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within the respective districts of the courts, as well as upon the high seas. And this, we have shown in a previous part of this opinion, was decided in England as early as 1754, with the subsequent assent of the common law judges, not to be a jurisdiction conferred upon the courts of admiralty in the colonies by statutes, but was a case in the colonies of admiralty jurisdiction. 2 Rob. 246. And so it is treated in the ninth section of the Judiciary Act of 1789. We cannot help thinking that section —a declaration by Congress contemporary with the adoption of the Constitution—very decisive against the limitation contended for by counsel in this case. Again, this court decided, as early as 1805 (2 Cranch, 405), in the case of The Sally, that the forfeiture of a vessel, under the act of Congress against the slave trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of The La Vengeance, 3 Dall. 397. Again, Congress, by an act passed the 19th of June, 1813, 3 Stat. at Large, 2, declared that a vessel employed in a fishing voyage should be answerable for the fishermen's share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is by law liable to be proceeded against for the wages of seamen or mariners in the merchant service. We shall cite

no more, though we might do so, of legislative and judicial interpretations, to show that the admiralty jurisdiction of the courts of the United States is not confined to the cases of admiralty jurisdiction in England when the Constitution was adopted.

No such interpretation has been permitted in respect to any other power in the Constitution. In what aspect would it not be presented, if applied to the clause immediately preceding the grant of admiralty jurisdiction—"to all cases affecting ambassadors, other ministers, and consuls?" Is that grant, too, to be interpreted by the jurisdiction which the English common law courts exercise in cases affecting those functionaries, or to be regulated by what Lord Coke says, in 4 Inst. 152, to be their liabilities to punishment for offenses? Try the interpretation proposed by its application to the grant to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." Would it not result in this, that all the power which Congress had under that grant was the bankrupt system of England as it existed there when the Constitution was adopted? Such a limitation upon that clause we deny. We think we may very safely say, 459*] such interpretations of *any grant in the Constitution, or limitations upon those grants, according to any English legislation or judicial rule, cannot be permitted. At most, they furnish only analogies to aid us in our constitutional expositions. We therefore conclude, that the grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the Constitution was adopted.

We will now consider the proposition, that the test against admiralty jurisdiction in England and the United States is the competency of a court of common law to give a remedy in a given case in a trial by jury; or that in all cases, except in seamen's wages, where the courts of common law have a concurrent jurisdiction with the admiralty, and can try the cause and give redress, that alone takes away the admiralty jurisdiction. It has the authority of Lord Coke to sustain it. But it was the effort and the design of Lord Coke to make locality the boundary in cases of contract, as well as in tort, that is, to limit the jurisdiction in admiralty to contracts made on the sea and to be executed on the sea; and to exclude its jurisdiction in all cases of marine contracts made on the land, though they related exclusively to marine services, principally to be executed on the sea. To that extent the admiralty courts were prohibited by the common law judges from exercising jurisdiction, until the unreasonableness and inconvenience of the restriction forced them to relax it in the case of seamen's wages. Then it was that the common law courts began to reflect upon what jurisdiction in admiralty rested, and upon the principles upon which it would attach. With the acknowledgment of all of them ever since, it was affirmed that the subject matter, and not locality, determined the jurisdiction in cases of contract. Passing over intermediate decisions showing the manner and the reasons given for the relaxation in the one case, and *the revival of the other, for which the admiralty always contended, we will cite the case of Menetone v. Gibbons, 3 Durn. & East, 269, 270. Lord Kenyon and Sir Francis Buller say, in that case, the question whether the admiralty has or has not jurisdiction depends upon the subject matter. We wish it to be remarked, however, that the manner of proceeding is another affair, with which we do not meddle now.

It was only upon the principle that the subject matter in cases of contract determined the jurisdiction, that this court decided the cases of The Aurora, 1 Wheat. 96. The General Smith, 4 Wheat. 438, and The St. Jago de Cuba, 9 Wheat. 409.

If, then, in both classes of civil cases of which the Instance Court has jurisdiction, subject matter in the one class, and locality in the other, ascertains it, neither a jury trial nor the concurrent jurisdiction of the common law courts can be a test for jurisdiction in either class. Crimes, as well as those of which the admiralty has jurisdiction as those of which it has not, except in cases of impeachment, the Constitution *declares shall be tried by a [*460 jury. But there is no provision, as the Constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the Constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the Constitution, providing that in suits at common law the trial by jury should be preserved. Cases under twenty dollars are not so provided for. Does not the specification of amount show the class of suits meant in the amendment, if anything could show it more conclusively than the term "suits at common law?"

Suits at common law are a distinct class, so recognized in the Constitution, whether they be such as are concurrent with suits of which there is jurisdiction in admiralty, or not. Can concurrent jurisdiction imply exclusion of jurisdiction from tribunals, in cases admitted to have been cases in admiralty, without trial by jury? Again, suits at common law indicate a class, to distinguish them from suits in equity and admiralty; cases in admiralty another class distinguishable from both, as well as to the system of laws determining them as the manner of trial, except that in equity issues of fact may be sent to the common law courts for a trial by jury. Suppose, then, the seventh amendment of the Constitution had not been made, suits at the common law and in admiralty would have been tried in the accustomed way of each. But an amendment is made, inhibiting any law from being passed which shall take away the right of trial by jury in suits at common law. Now, by what rule of interpretation or by what course of reasoning can such a provision be converted into an inhibition upon the mode of trial of suits which are not exclusively suits at common law, recognized, too, as such by the Constitution, for the trial of which Congress can establish courts which are not courts of common law, but courts of admiralty, without or with a jury, in its discretion, to try all issues of fact? Tried in either way, though, they are still cases in admiralty, and this power in Congress, under the grant of admiralty jurisdiction, to try issues of fact in it by jury,

being as well known when the seventh amendment was made as it is now, is conclusive that it was done with reference to suits at common law alone. There is no escape from this result, unless it is to be implied that the amendments were proposed by persons careless or ignorant of the difference in the mode of trial of suits at common law and in admiralty. But they were not so, for we find some of them in Congress, a few months after, preparing and concurring in the enactment of a law, that the "trials of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."

In respect to the clause in the ninth section of the Judiciary Act—"saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it"—we 461*] *remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libelant may complain—securities which a court of common law cannot give.

Having disposed of the objections to the jurisdiction of the courts of admiralty of the United States, growing out of the supposed limitation of them to the cases allowed in England and from the test of jury trial, we proceed to consider that objection to jurisdiction in this case, because the collision took place infra corpus comitatus. We have admitted the validity of this objection in England, but on the other hand it cannot be denied that the restriction there to cases of collision happening supre altum mare, or without the fauces terræ, was imposed by the statutes of Richard, contrary to what had been in England the ancient exercise of admiralty jurisdiction in ports and havens within the ebb and flow of the tide. We have seen no case, ancient or modern, from which it can correctly be inferred, that such exercise of jurisdiction was prohibited by mere force of the common law. The most that can be said in favor of the statutes of Richard being affirmative of the common law, are the assertions of Lord Coke and the prohibitions of the common law courts, subsequent to those statutes, and founded upon them, restricting the jurisdiction of the courts of admiralty to cases of collisions happening upon the high seas; contrary to what we have already said was its ancient jurisdiction in ports and havens in cases of torts and collision, and certainly in opposition to what was then, and still continues to be, the admiralty jurisdiction, in cases of collision, of every other country in Europe.

But giving to such prohibitions of the courts *of common law the utmost* authority claimed for them—that is, that they are affirmances of the common law as interpretations of the statutes of Richard—does it follow that they are to be taken as a rule in the admiralty courts of the United States in cases of collision? Must it not first be shown that the statutes of Richard were in force as such in America, and that the colonies considered and adopted that portion of the common law as applicable to their situation? Now, the statutes of Richard were never in force in any of the colonies, except as they were adopted by the legislation of some of them; and the common law only in its general principles, as they were applicable, *with [*462 such portions of it as were adopted by common consent in any one of the colonies, or by statute. This being so, the rule in England for collision cases being neither obligatory here by the statutes of Richard nor by the common law, we feel ourselves permitted to look beyond them, to ascertain what the locality is which gives jurisdiction to the courts of the United States in cases of collision or tort, or what makes the subject matter of any service or undertaking a marine contract. Are we bound to say, because it has been so said by the common law courts in England in reference to the point under discussion, that "sea" always means "high sea," or the "main sea?"—that the waters flowing from it into havens, ports, and rivers are not "parcel of the sea?"—that the fact of the political division of a country into counties makes it otherwise, and takes away the jurisdiction in admiralty, in respect to all the marine means of commerce and the injuries which may be done to vessels in their passage from the sea to their ports of destination, and in their outward bound voyages until they are upon the high sea? Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than the designation of it by the common law courts in England? Especially when the latter has in no instance been applied by England as a limitation upon the general admiralty law in any of her colonies; and when in all of them, until the Act of 2 William IV. c. 51, was passed, the commissions give to her vice-admirals jurisdiction "throughout all and every of the sea shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever." Besides, the use of the word "sea" to fix admiralty jurisdiction, and what part of it might be within the body of a county, have not been settled points among the common law judges in England. Lord Hale differed from Lord Coke. The former, in defining what the sea is, says, "that it is either that which lies within the body of the county or without; that arm or branch of the sea which lies within the fauces terræ is, or at least may be, within the body of a county; that part which lies not within the body of a county is called the main sea." It is difficult to reconcile the differences of opinion and of definition given by the common law courts in Lord Coke's day, and for fifty years afterwards, as to the meaning and legal application of the word "sea," so as to make a practical rule to govern the decisions of cases, or to determine what were cases of admiralty jurisdiction. But there is no difficulty in making such a rule, if the

construction of it, by the admiralty courts, is adopted. In that construction, it meant not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows. We think in the controversy between the courts of admiralty and common law, upon the subject of jurisdiction, that the former have the best of 463*] the argument; that they *maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtlety which is found n the arguments of their adversaries. The conclusions of the admiralty, too, are more congenial with our geographical condition. We may very reasonably infer they were thought so on that account by the framers of the Constitution when the judicial grant was expressed by them in the words, "all cases of admiralty and marine jurisdiction." In those words it is given by Congress to the courts, leaving to them the interpretation of what were such cases; as well the subject matter which makes them so, as the locality which gives admiralty jurisdiction in cases of tort and collision. The grant, too, has been interpreted by this court in some cases of the first class, which leaves no doubt upon our minds as to the locality which gives jurisdiction in the other. We do not consider it an open question, but res adjudicata by this court. In Peyroux et al. v. Howard & Varion, 7 Pet. 342, the objection to the jurisdiction was overruled, upon the ground that the subject matter of the service rendered was maritime, and performed within the ebb and flow of the tide, at New Orleans. The court say, although the current in the Mississippi at New Orleans may be so strong as not to be turned backward by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide. The material consideration is, whether the service is essentially a maritime service and to be performed on the sea or on tide water. In the case of the Steamboat Orleans v. Phœbus, 11 Peters, 175, the jurisdiction of the court was denied, on the ground that the boat was not employed or intended to be employed in navigation and trade on the sea, or on tide waters. In The Steamboat Jefferson, Johnson, claimant, 10 Wheat. 428, this court says: "In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, on the sea or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend. We say, the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case of voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment." *In United States v.*

Coombs, 12 Pet. 72, where the question certified to the court directly involved what was *the admiralty jurisdiction, under the [*464 grant of "all cases of admiralty and maritime jurisdiction," the language of the court is, "The question which arises is, What is the true nature and extent of the admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high water-mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high water-mark. It is the doctrine which has been repeatedly asserted by this court; and we see no reason to depart from it." Now, though none of the foregoing cases are cases of collision upon tide waters, but of contracts, services rendered essentially maritime, and in a case of wreck, the point ruled in all of them, as to the jurisdiction of the court in tide water as far as the tide flows, was directly presented for decision in each of them. The locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening in it. Our conclusion is, that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be infra corpus comitatus; that the case before us did happen where the tide ebbed and flowed infra corpus comitatus, and that the court has jurisdiction to decree upon the claim of the libelant for damages.

Before leaving this point, however, we desire to say that the ninth section of the Judiciary Act countenances all the conclusions which have been announced in this opinion. We look upon it as legislative action contemporary with the first being of the Constitution, expressive of the opinion of some of its framers, that the grant of admiralty jurisdiction was to be interpreted by the courts in accordance with the acknowledged principles of general admiralty law. In that section the distinction is made between high seas and waters which are navigable from the sea by vessels of ten or more tons burthen. Admiralty jurisdiction is given upon both, and though the latter is confined by the language to cases of seizure, it is so with the understanding that such cases were strictly of themselves within the admiralty jurisdiction. It declares that issues of fact in civil causes of admiralty and maritime jurisdiction shall not be tried by a jury, and makes so clear an assignment to the courts of jurisdiction in criminal, admiralty, and common law suits, that the two last cannot be so confounded as to place both of them under the seventh amendment of the Constitution, which is, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

As to the merits of this case, as they are disclosed by the evidence, we think that the Luda was run down, whilst she was in the accustomed channel of upward navigation, by the De Soto, being *out of that for which [*465 she should have been steered to make the port to which she was bound. It is a fault which makes the defendants answerable for the losses

sustained from the collision. That loss will not be more than compensated by the decree of the Circuit Court. We shall direct the decree to be affirmed.

There is a point in this case still untouched by us, which we will now decide. The libelants claim a recovery, independently of all the other evidence in the case, upon the single fact disclosed by it, that the collision happened whilst the De Soto was navigating the river at night without such signal lights as are required by the tenth section of the Act of the 7th of July, 1838, 5 Stat. at Large, 304. It is entitled, "An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam." The tenth section of it declares, "It shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars." This section, and the other provisions of the act, except as it has been changed by the Act of 1843, 5 Stat. at Large, 626, apply to all steamers, whatever waters they may be navigated upon, within the United States or upon the coast of the same, between any of its ports. Signal lights at night are a proper precaution conducing to the safety of persons and property. The neglect of it, or of any other requirement of the statute, subjects the masters and owners of steamboats to a penalty of two hundred dollars, which may be recovered by suit or indictment. Sec. 11. But, besides the penalty, if such neglect or disobedience of the law shall be proved to exist when injury shall occur to persons or property, it would throw upon the master and owner of a steamboat by whom the law has been disregarded the burden of proof, to show that the injury done was not the consequence of it.

It is said, in this case, that the De Soto had not signal lights. Whether this be so or not, we do not determine; but it is certain, from some cause or other, they were not seen by those navigating the Luda. If they had been, it is not improbable that the collision would have been avoided. We do not put our decision of this case, however, upon this ground, but we do say, if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it.

The Act of July 7th, 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a State or between States, or waters running from one State into another State, or on the coast of the United States between the ports of the same State or different States.

466*] *Mr. Justice Catron:

The question here is, how far the judicial powers of the district courts extend in cases of admiralty and maritime jurisdiction, as conferred by the Constitution. With cases of prize, and cases growing out of the revenue laws, we *have no* concern at present. These depend on *the general power conferred* on the judiciary to try all cases arising under the laws of the United States. It is only with the extent of powers possessed by the district courts, acting as instance courts of admiralty, we are dealing. The Act of 1789 gives the entire constitutional power to determine "all civil causes of admiralty and maritime jurisdiction," leaving the courts to ascertain its limits, as cases may arise. And the precise case here is, whether jurisdiction exists to try a case of collision taking place on the Mississippi River, on fresh water slightly influenced by the pressure of tide from the ocean, but within the body of the State of Louisiana, and between vessels propelled by steam, and navigating that river only. It is an extreme case; still, its decision either way must govern all others taking place in the bays, harbors, inlets, and rivers of the United States where the tide flows; as the rule is, that locality gives jurisdiction in cases of collision, and that it exists if the influence of the tide is at all felt. 2 Browne's Civil and Admiralty Law, 110; 7 Peters, 343. Where this collision occurred, the influence of the tide was felt.

We have, then, presented, simply and broadly, the question whether the district courts, when acting as instance courts of admiralty, have power to try any case of collision occurring in the body of a county of any State.

In Great Britain, in 1776, where our separation from that country took place, the common law courts issued writs of prohibition to the Court of Admiralty, restraining the exercise of this jurisdiction in cases of collision taking place on rivers within the flow of tide, and within the body of an English county; but the admiralty has continued at times to exercise the jurisdiction, nor do I think the validity of such a decree could be called in question, because of the want of power. In the British colonies on this continent, and elsewhere, the jurisdiction to proceed in rem (in such a case) has been undisputed, so far as I can ascertain, and a cause of collision in the Instance Court of Admiralty is peculiarly a suit in rem, commencing with the arrest of the ship. Abbott on Shipping, 233.

I agree with my dissenting brethren, that the Constitution of the United States is an instrument and plan of government founded in the common law, and that to common law terms and principles we must refer for a true understanding of it, as a general rule having few exceptions; and so, also, to the common law modes of proceeding in the exercise of the judicial power we must refer as a general rule covering the whole ground of remedial justice to be administered by the national courts. To this there are two prominent *excep- [*467 tions; first, the trial of cases in equity; and, second, of cases of admiralty and maritime jurisdiction. These may be tried according to the forms of the English Chancery Court, or the English Admiralty Court, and without the intervention of a jury. In chancery, the true limit of judicial power is prescribed by the sixteenth section of the Judiciary Act of 1789. The equity powers begin where the common law powers end, in affording an adequate remedy. So, in cases arising in bodies of counties (where the common law prevails) that would be cognizable in the admiralty had the cause

of action arisen on the ocean, the English rule has been equally stringent in maintaining the common law remedies where they could afford plain and adequate relief. And I think the case before us must be tested by the foregoing principles. The proceeding is against the vessel, which the decree condemns; the case is the same as on a bottomry bond enforced against the vessel or of a mortgage enforced in chancery. In neither case have the common law courts any power to afford relief, by enforcing the lien on the thing; still, the remedy at law, in case of the mortgage or the collision, is open to the injured party to proceed against the person; that is, of the debtor in the one case, and against a trespasser in the other. By the maritime law, the vessel doing the injury is liable in rem for the tort; this is the right, and the remedy must be found somewhere. Chancery has no power to interfere, nor have the common law courts any power to seize the vessel and condemn her; and it seems to me to be a strange anomaly, that where no other court can afford the particular relief, in a case confessedly within the admiralty jurisdiction if occurring on the ocean, that the power did not exist because the trespass took place in the body of a State and county.

I have thus briefly stated my reasons for sustaining admiralty jurisdiction in this instance, because of the divided opinions of the judges on the question; and because I do not intend to be committed to any views beyond those arising on the precise case before the court. I therefore concur that the jurisdiction exists. The facts in my judgment authorize the affirmance of the decree below.

Woodbury, J., dissenting.

It is important to notice in the outset some unusual features in this case. The Supreme Court is called upon to try the facts as well as the law in it, and to decide them between parties in interest who belong to the same State, and as to a transaction which happened, not on the high seas, as is usual in torts under admiralty jurisdiction, but two hundred miles above the mouth of the Mississippi River, within the limits of a county, and in the heart of the State of Louisiana. A question of jurisdiction, therefore, arises in this, which is very important, and must first be disposed of. 468*] It *involves the trial by jury as to trespassers of every kind happening between the ocean and the head of tide waters in all the numerous rivers of the United States, as well as the rights of the citizens near them, in such disputes with their neighbors, to be tried by their own local tribunals and their own laws, rather than be subject to the great inconvenience and expense of coming hither, at such a distance, and under a different code to vindicate their just claims. These interesting considerations in the case, and my differing in opinion on them from the majority of the court, will, it is hoped, prove a sufficient apology for justifying that difference in some detail.

A great principle at the foundation of our political system applies strongly to the present case, and is, that, while supporting all the powers clearly granted to the general government, *we ought to forbear interfering with* what has been reserved to the States, and, in cases of doubt, to follow where that principal leads, unless prevented by the overruling authority of high judicial decisions. So, under the influence of kindred considerations, in case of supposed improvements or increased convenience by changes of the law, it is an imperative duty on us to let them be made by representatives of the people and the States, through acts of Congress, rather than by judicial legislation. Paine's C. C. 75. Starting with these views, then, what is the character of the adjudged cases on the facts here to which they are to be applied?

Those to be found on the subject of torts through the collision of vessels are mostly of English origin, coming from a nation which is not only the source of much of our own jurisprudence, but entitled by her vast commerce to great respect in all matters of maritime usage and admiralty law. No principle appears to be better settled there than that the Court of Admiralty has not jurisdiction over torts whether to person or property, unless committed on the high seas, and out of the limits of a county. 3 Bl. Com. 106; 4 Instit. 134; Doug. R. 13; 2 East's Crown Law, 803; Bac. Abr. Courts of Admiralty, A; 5 Rob. Ad. 345; Fitzh. Abr. 192, 416; 2 Dod. 83; 4 Rob. Ad. 60, 73; 2 Brown's Civ. and Ad. Law, 110, 204; 2 Hagg. Ad. 398; 3 D. & E. 315; 3 Hagg. Ad. 283, 369; 4 Instit. 126; Chamberlain et al. v. Chandler, 3 Mason's C. C. 244. This is not a doctrine which has grown up there since the adoption of our Constitution, nor one obsolete and lost in the midst of antiquity; but it is laid down in two acts of Parliament as early as the fourteenth century, and has been adhered to uniformly since, except where modified within a few years by express statutes. The Public Opinion, 2 Hagg. Ad. 398; 6 Dane's Abr. 341.

The first of these acts, the thirteenth of Richard II., declared that the admiralty must "not meddle henceforth of anything done within the realm, but only of a thing done upon the sea." 3 Hagg. Ad. 282; 1 Statutes at Large, 419. Then, in two years after, *to remove any doubts as to what was [*469 meant by the realm and the sea, came the fifteenth of Richard II., ordering, that of "things done within the bodies of counties, by land or water, the admirals shall have no cognizance, but they shall be tried by the law of the land." 2 Pickering's Statutes, 841. This gave to the common law courts there, and forbade to the admiralty, the trial of all collisions between vessels when not on the high seas, and not out of the body of a county, though on waters navigable and salt, and where strong tides ebbed and flowed. 2 Hagg. Ad. 398; Selden on Dominion of the Sea, B. 2, ch. 14. And it did this originally, and continued to do it, not only down to the eighteenth century, but to our Revolution, and long since; because it was necessary to secure the highly prized trial by jury, rather than by a single judge, for everything happening where a jury could be had from the vicinage of the occurrence within a county, and because it secured a decision on their rights by the highly prized common law, inherited from their fathers, and with which they were familiar, rather than by the civil

law or any other foreign code, attempted to be forced upon the commons and barons by Norman conquerers or their partisans.

Among the cases in point as to this, both long before and since our Revolution, one of them, Velthasen v. Ormsley, 3 D. & E. 315, happened in A. D. 1789, the very year the Constitution was adopted. See, also, Violet v. Blague, Cro. Jac. 514; 2 Hagg. Ad. 398; 4 Instit. 134-138; 6 Dane's Abr. 341, Prohibition. And one of the most strenuous advocates for admiralty jurisdiction in Great Britain admits, that for damages done by the collision of ships, "if done at sea, remedy can be had in the admiralty, but not if it happen within the body of a county." 2 Browne's Civ. and Ad. Law, 111.

Since then, on his complaint, an express statute has been passed (1 and 2 George IV. ch. 75, sec. 32), that any damage done by a foreign ship, "in any harbor, port, river, or creek," may be prosecuted either in admiralty, or common law courts. The Christiana, 2 Hagg. Ad. 184; 38 British Statutes, ch. 274. And, later still, a like change is considered by some to be made concerning injuries by domestic ships, under the 4 and 5 Victoria, ch. 45. (See it in the Statutes at Large.) But till these statutes, not a case of this kind can probably be found sustained in admiralty, even on the River Thames, at any place within the body of a county, though yearly covered with a large portion of the navigation of the world. See cases before cited, and 1 Dod. Ad. 468; 1 Wm. Rob. 47, 131, 182, 316, 371, 391, 474; Curtis's Admiralty, tit. Collision.

Nor is this a peculiarity in the admiralty system of that country confined to torts alone. But the same rule prevails as to crimes, and has always been adhered to, with a single exception, originally made in the statute itself of Richard, as to murder and mayhem committed in great vessels in the great rivers below the 470*] first bridges. *Com. Dig. Admiralty, E, 5, note; Hale's History of Common Law, 35; 3 Rob. Ad. 336; 4 Inst. 148; 1 Hawk. P. C. ch. 37, sec. 36; Palmer's Practice in House of Lords, 371, note.

The next inquiry is, if this distinction, confining the jurisdiction in admiralty over torts to such as happen on the high seas without the limits of a county, rested on such important principles as to be adopted in this country? Some seem disposed to believe it of so little consequence as hardly to have been worth attention. But this is a great mistake. The controversy was not in England, and is not here, a mere struggle between salt and fresh water, sea and lake, tide and ordinary current, within a county and without, as a technical matter only.

But there are imbedded beneath the surface three great questions of principle in connection with these topics, which possess the gravest constitutional character. And they can hardly be regarded as of little consequence here, and assuredly not less than they possessed abroad, where they involve, (1.) the abolition of the trial by jury over large tracts of country, (2.) the substitution there of the civil law and its forms for the common law and statutes of the States, *(3.) and the encroachment* widely on the jurisdiction of the tribunals of the State over disputes happening there between its own citizens.

Without intending to enter with any minuteness into the origin and history of admiralty jurisdiction abroad, it will be sufficient, in order to illustrate the vital importance of this question of locality, to say that the trial by jury and the common law, so ardently adhered to by the Anglo-Saxons, was soon encroached on after the conquest by the Norman admirals claiming jurisdiction over certain maritime matters, not only on the ocean, and trying them without a jury, and on principles of their favorite civil law, but on the waters within the body of a county, and where a jury could easily be summoned, and where the principles of the common law had ever in England been accustomed to prevail. A struggle, therefore, of course, soon sprung up in respect to this, as their monarchs had begun to organize an admiral's court within a century after the conquest, but without any act of Parliament now found to vindicate it. See the Statutes at Large, and 3 Reeves' History of the English Law, 197. And laying down some regulations as to its powers by ordinances, as at Hastings, under Edward I., but not by an acts of Parliament consulting the wishes of the barons and the Commons. Whether this was constitutional or not, it was sufficient to make them look on the admiralty as a foreign and odious interloper. Reeves says (3 Reeves' Hist. of English Law, 137.) "The office of admiral is considered by the French as a piece of State invented by them." And whether it was imported thence by the conquerors, or originated with the Rhodians, or Romans, or Saracens, rather than the French or English, its principles seem to *have been transplanted to Western [*471 Europe from the Mediterranean, the cradle of commerce for all but the Asiastic world; and it was regarded by the commons and barons of England as an intruder into that realm, and without the sanction of Parliament.

In the course of a few years, that same sturdy spirit, which in Magna Charta was unwilling to let the laws of England be changed for a foreign code, proceeded, by the 13th and 15th of Richard II., to denounce and forbid the encroachments of the admirals, and their new forms and code of the civil law, into the bodies of counties and the local business of the realm. It produced those two memorable acts of Parliament, never since departed from in torts or crimes except under express statutes, and fixing the limit of jurisdiction for them at the line between the countries and the high seas. And they have ever since retained it there, except as above named, from the highest principles of safety to the common law, English liberties and the inestimable trial by jury—principles surely no less dear in a republic than a monarchy.

If the power of the admiral was permitted to act beyond that line, it was manifestly without the apology which existed thus far on the ocean, of there being no jury to be called from the vicinage to try the case. Prynne's Animadversions, 92, 93; Fitzh. Abr. 192, 216. And if the act, by an alias and a fiction, was alleged to be done in the county, when in fact it happened at a distance, on the seas, the jury would be less useful, not in truth residing near the place of the occurrence, not acquainted with the parties

or witnesses, and the case itself, not being one happening where the common law usually operated, and with which the people and the judges were familiar.

This last circumstance furnished another reason why the admiralty court was allowed there, and should be here, to continue to exercise some jurisdiction, besides their military and naval power, over the conduct of seamen and the business of navigation when foreign. Because such matters were connected with the ocean, with foreign intercourse, foreign laws, and foreign people, and it was desirable to have the law as to them uniform, and administered by those possessing some practical acquaintance with such subjects; they being, in short, matters extraterritorial, international, and peculiar in some degree to the great highway of nations. It is when thus confined to that great highway and its concerns, that admiralty law deserves the just tribute sometimes paid to it of expansive wisdom and elevated equity.[1] Then only there is an excellence in such regulations as to navigation over those for rights and duties on land; the last being often more for a single people, and their limited territory, while the former are on most matters more expanded, more liberal— [472*] the gathered wisdom of and for *all maritime ages and nations. They are also what has been approved by all rather than a few, and for the territory of all in common. And hence that beautiful tribute paid to them by Antoninus, and just as beautiful, that he was "lord of the world, but Law the lord of the sea." 2 Browne's Civ. and Ad. Law, 38.

The sea being common to all nations, its police and the rights and duties on it should be governed mainly by one code, known to all, and worthy to be respected and enforced by all. This, it will be seen, indicates in letters of strong light the very line of boundary which we have been attempting to draw, on grounds of deep principle, here as well as in England. It is the line between State territory and State laws on the one hand, and the ocean, the territory of all nations, and the laws of all nations, the admiralty and sea laws of all nations, on the other hand, leaving with those, for instance, residing within local jurisdictions, and doing business there, the local laws and local tribunals, but with those whose home and business are on the ocean the forms and laws and tribunals which are more familiar to them. This line being thus a certain and fixed one, and resting on sound principles, has in England withstood the shock of ages. It is true, that some modifications have been recently made there, but only by express statutes, and carefully guarded so as not to innovate on the common law and the trial by jury. That this line of distinction was in fact appreciated quite as highly here as in England is shown by various circumstances that need not be repeated; but among them were solemn resolutions of the old Congress against acts concerning trade and revenue, extending the power of admiralty courts beyond their ancient limits, and thus taking away the trial by jury. 1 Journal, 19, 20. And as a striking evidence of the dangerous importance attached to this outrage, it was remarked in the convention of North Carolina, that "the Stamp Act and the taking away of the trial by jury were the principal causes of resistance to Great Britain." 4 Elliot's Deb. 157. Indeed, this same jealousy of the civil law, and its mode of proceeding without a jury, led, in the first legislation by Congress, to forbid going into chancery at all, if relief at law is as ample and appropriate. See sixteenth section of Judiciary Act, 1 Statutes at Large, 83. So as to admiralty, a statute of Pennsylvania, passed during the Revolution, allowed it only in cases "not cognizable at common law." 1 Dall. 106. And our fathers never could have meant, that parties, for matters happening within a county or State, should be dragged into admiralty any more than equity, if as full a remedy, and of as good a kind, existed in courts of law, where they could enjoy their favorite code and mode of trial. 1 Bald. C. C. 405. This would leave much to admiralty still, as well as to equity, and more especially in the former, by proceedings in rem. And when it became convenient to vest additional power in the same court, or power over a wider range of territory, as it might in the progress of society and [*473 business, it could be done here by express statute, as it has been in respect to the lakes, under the power to regulate commerce, and allowing a trial by jury if desired.

In short, instead of less, much additional importance should be attached to this line of distinction here, beyond what exists in England; because it involves here not only all the important consequences it does there, but some which are new and peculiar. Instead of being, as it once was there, a contest between courts of one and the same government, it may become here a struggle for jurisdiction between courts of the States and courts of the United States, always delicate and frequently endangering the harmony of our political system. And while the result there, in favor of the admiralty, would cause no additional inconvenience and expense, as all the courts sit in one city, such a result here compels the parties to travel beyond their own counties or States, and in case of appeal to come hither, a distance sometimes of a thousand or fifteen hundred miles.

Admitting, then, as we must, that the doctrine I have laid down as to torts was the established law in England at our Revolution, and was not a mere technical doctrine, but rested on great principles, dear to the subject and his rights and liberties, should it not be considered as the guide here, except where altered, if at all, by our colonial laws or constitutions, or acts of Congress, or analogies which are binding, or something in it entirely unsuitable to our condition? The best authorities require that it should be. 1 Peters' Ad. 116, 236, note; 1 Peters' C. C. 104, 111-114; 1 Paine's C. C. 111; 2 Gall. 398, 471; 3 Mason, 27; Bemis v. The Janus et al. 1 Baldwin's C. C. 545; 12 Wheat. 638; 1 Kent's Com. 377; 4 Dall. 429; 4 Wash. C. C. 213. Yet this is contested in the present case.

Some argue that the Constitution, by extending the judicial power to "all cases of admiralty and maritime jurisdiction," meant cases different from those recognized in England as belonging to the admiralty at the Revolution, or those as

1.—And the vice-admiral is hence quaintly called "the justice of the peace for the sea," by Sir Leoline Jenkins: but who ever supposed him the justice of the peace two hundred miles inward from the sea?

modified by ourselves when colonies. These jurists stand prominent, and their views seem to-day adopted by a portion of this court. See the argument in De Lovio v. Boit, 2 Gall. 398.

The authorities which I have cited against this position seem to me overwhelming in number and strength; and some of them come from those either engaged in making the Constitution, or in construing it in the earliest stages of its operation. Let me ask, What books have we for admiralty law, then, as well as common law—both referred to in the Constitution—but almost exclusively English ones? What had the profession here been educated to administer—English or French admiralty? Surely the former. The judges here were English, the colonies English, and appeals, in all cases on the instance side of the court, lay to the English admiralty at home.

474*] *What "cases of admiralty," then, were most likely to be in the minds of those who incorporated those words into the Constitution? —cases in the English reports, or those in Spain, or Turkey?—cases living and daily cited and practised on both in England and here, or those in foreign and dead languages, found in the assizes of Jerusalem near the time of the Crusades?

It is inferred by some, from 6 Dane's Abr. 352, 353, that cases in admiralty are to be ascertained, not by English law at the Revolution, but by principles of "general law." And Judge Washington held, it is said, we must go to the general maritime law of the world, and not to England alone. Dain et al. v. Sloop Severn, 4 Hazard's Penn. Reg. 248, in 1828. But the whole tenor of Mr. Dane's quotations and reasons, in respect to admiralty jurisdiction, is to place it on the English basis; and Judge Washington, in several instances, took it for his guide, and commended it as the legal guide. In The United States v. Gill, 4 Dall. 429, he says: "But still the question recurs, Is this a case of admiralty and maritime jurisdiction within the meaning of the Constitution? The words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England, from whose code and practice we derived our systems of jurisprudence, and, generally speaking, obtain the best glossary." See, also, 4 Wash. 456, 457.

Neither of these eminent jurists was ever likely to go to the laws of Continental Europe as guides, unless in cases not well settled either here or in England, and then, as in the common law courts and in chancery, they might properly search all enlightened systems of jurisprudence for suggestions and principles to aid. Chancellor Kent, also, with his accustomed modesty, yet with clearness, supporting a like doctrine with that just quoted from Judge Washington, observes: "But I apprehend it may fairly be doubted, whether the Constitution of the United States meant, by admiralty and maritime jurisdiction, anything more than that jurisdiction which was settled and in practice in this country under the English jurisprudence when the Constitution was made." 1 Kent's Com. 377. Another strong proof that this was the opinion prevailing here at that time is, that a court of admiralty was established in Virginia, in 1779, under the recommendation of Congress to all the States to make prize courts; and, by the act of Assembly, it is expressly provided that they are to be "governed in their proceedings and decisions by the regulations of the Congress of the United States of America, by the acts of the General Assembly, by the laws of Oleron, and the Rhodian and Imperial laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and nations." 10 Hening's Stat. 98. They thus, after our own laws, State and national, made England the guide.

It is said by others, appealing to feelings of national pride, that we are to look to our own Constitution and laws, and not to England, for a guide. So we do look to our own [*475 laws and Constitution first, and when they are silent go elsewhere. But what are our own laws and Constitution, unless those in England before our Revolution, except so far as altered here, either before, or then, or since, and except such in England then as were not applicable to our condition and form of government? This was the guide adopted by this court in its practice as early as August 8th, 1791 (1 Howard, 24), and as late as January, 1842, it treated the practice in England as the rule in equity, where not otherwise directed; and in Gaines et al. v. Relf et al., 15 Peters, 9, it decided that when our own "rules do not apply, the practice of the circuit and district courts must be regulated by the practice of the Court of Chancery in England." See, also, Vattier v. Hinde, 7 Peters, 274. And most of its forms and rules in admiralty have been adopted in our district and circuit courts. See Rule XC. in 1 How. 66, Pref. And this court has again and again disposed of important admiralty questions, looking to England alone, rather than the continent, as a guide when they differed.

Thus the continental law would carry admiralty jurisdiction over all navigable streams. Yet this court has deliberately refused to do it, in The Thomas Jefferson, 10 Wheat. 428. Had it not so refused, in repeated instances, there would have been no necessity for the recent act of Congress as to the lakes and their tributaries. So, the civil law gives a lien for repairs of domestic ships; but this court has not felt justified in doing it without a statute, because not done in England. 7 Peters, 324. And in Hobart v. Drogan et al. 10 Peters, 122, this court felt bound to follow the English decisions as to salvage, though in some respects harsh. See, also, 3 Howard, 568.

So, when the Constitution and the acts of Congress speak, as they do in several instances, of the "common law," do they not mean the English common law? This court so decided in Robinson v. Campbell, 3 Wheat. 223, adhering, it said, "to the principles of common law and equity, as distinguished and defined in that country, from which we derive our knowledge of those principles." Why not, then, mean the English admiralty law when they speak of "cases of admiralty and maritime jurisdiction"? They of course must, by all analogous decisions and by established usage, as well as by the opinions of eminent jurists. The English decisions furnish, also, the most natural, appropriate, uniform, and well known principles, both for action and judicial decision.

It would be extraordinary, indeed, for this court to undertake to exercise a legislative power as to this point, and without warrant to search the world over and select, for the trial of private rights, any law they may prefer. On the contrary, its duty rather is to declare the law which has already become ours, which we inherited from our ancestors or have enacted ourselves, and which is not vagrant and 476*] *uncertain, but to be found in our own judicial history and institutions, our own Constitution, acts of Congress, and binding precedents. Congress also might, in many instances, perhaps, make the law better than it is, and mould it so as to meet new exigencies in society, and suit different stages of business and civilization; and, by new laws as to navigable waters, judicial tribunals, and various other matters, is yearly doing this. But does this court possess that legislative power? And if Congress chooses to give additional jurisdiction to the District Court on the lakes, or tide waters, or navigable streams between them, and allow jury trials when desired, under its power to regulate commerce and collect a revenue, will this not answer every valuable purpose, and supply any new want or fancied improvement in a more satisfactory and more constitutional manner than for courts to do it without consulting Congress?

That Congress possess the power to do this cannot be plausibly questioned. The late law as to jurisdiction over the lakes, which is given to the District Court, but not as an admiralty case under the Constitution, and with a jury when desired, is a strong illustration of legislative opinion being the way we contend.

Any expansion or enlargement can be thus made, and by withdrawing in part the jurisdiction now conferred on the district courts in any matters in admiralty, Congress can also abridge the exercise of it as experience and time may show to be wise. For this reason, we are unable to see the force of the argument just offered by four members of this court, that if the English admiralty law was referred to in the expression of "all cases of admiralty and maritime jurisdiction," no change in it could be made, without being at the trouble and expense of altering the Constitution.

But in further answer to this, let me ask if the Constitution, as they contend, was meant to include cases in admiralty as on the continent of Europe rather than in England, could the law as to them be more easily altered than if it was only the law of England? And would it not take the interpretation of the admiralty law as much from the courts in one case as in the other?

It is conceded, next, that legislation has, in some respects, in England, since 1789, changed and improved her admiralty proceedings; but this only furnishes additional evidence that the law was different when our Constitution was framed, and that these changes, when useful and made at all, should be made by legislation and not by judicial construction, and they can rightfully have no force here till so made. United States v. Paul, 6 Peters, 141. The difference, too, between a change by Congress and by this court alone is, futhermore, that the former, when making it, can and doubtless *will allow a trial by jury, while we are unable* to do this, if we make the change by construing the case to be one legitimately of admiralty jurisdiction.

Finally, then, the law, as it existed in England at the time of the *Revolution, as [*477 to admiralty jurisdiction over torts, is the only certain and safe guide, unless it has been clearly changed in this respect, either by the Constitution or acts of Congress, or some colonial authority. We have already seen that the Constitution has not used words which are fairly open to the idea that any such change was intended. Nor has it made any alteration in terms as to torts. And no act of Congress has introduced any change in respect to torts, having in this respect merely conferred on the district courts cognizance of "all civil cases" in admiralty, without in a single instance defining what shall be such cases in connection with torts. The next inquiry, then, is, whether the colonies changed the law as to the locality of torts, and exercised jurisdiction over them in admiralty, though committed within a county and not on the high seas.

I am compelled to go into these details more than would otherwise be done, considering their tediousness, on account of the great reliance on them in one of the opinions just read. In order to operate on the point under consideration, it will be seen that any colonial change must have been so clear and universal as to have been referred to in the Constitution and the Act of Congress of 1789, and to be the meaning intended by their makers to be embraced in the expression of "cases of admiralty and maritime jurisdiction," rather than the meaning that had usually been attached to them by the English language and the judicial tribunals of England, for centuries. And this change, likewise, must have been clearly meant to be referred to and adopted, notwithstanding its great encroachment in torts on the boasted trial by jury, and which encroachment they were denouncing as tyranny in other cases, and notwithstanding its natural consequences would be new collisions with the powers of the State tribunals, which they were most anxious to avoid. I have searched in vain to find acts of Assembly in any of the thirteen colonies, before 1776, making such a change, much less in a majority or all of them. Nor can I find any such judicial decisions by vice-admiralty courts in any of them, much less in all. Nor is it pretended that any acts of Parliament or judgments in the courts in England had prescribed a different rule in torts for the colonies from what prevailed at home.

It would be difficult, then, to show that a law had become changed in any free country, except by evidence contained in its legislation, or constitutions, or judicial decisions. But some persons, and among them a portion of this bench, have referred to commissions of office to vice-admirals as evidence of a change here; and some, it is feared, have been misled by them. 1 Kent's Com. 367, note; 2 Gall. 373.

These commissions, in the largest view, only indicated what might be done, not what was actually afterwards done under them. In the next place, all must see, on reflection, that a commission issued by the king could not repeal or alter the established laws of the land.

478*] *Besides the forms of some of these commissions, referred to in De Lovio v. Boit, 2 Gall. 398, an entire copy of one of them is in Stokes, and another in Duponceau on Jurisdiction, p. 158, and in Woodcock's Laws of the British Colonies, p. 66. It will be seen that they are much alike, and though there are expressions in them broad enough to cover all "fresh waters" and "rivers," and even "banks of any of the same" (Woodcock, 69), yet tide waters are never named as the limit of jurisdiction; and, over and paramount to the whole, the judge is required to keep and cause to be executed there "the rights, statutes, laws, ordinances, and customs anciently observed." Where anciently observed? In England, of course; and thus, of course, were to comply with the English statutes and decisions as to admiralty matters.

This limitation is inserted several times, from abundant caution, in the commission in Woodcock, 66, 67, 69.

But besides these conflicting features in different parts of them, the commissions of vice-admirals here seem, in most respects, copies of mere forms of ancient date in England (Woodcock's Brit. Col. 123), and, of course, were never intended to be used in the colonies as alterations of the laws, and were, as all know, void and obsolete in England when differing from positive statutes. So virtually it was held in the colonies themselves. The Little Joe, Stewart's Ad. R. 405; and The Apollo, 1 Hag. Ad. 312; Wookcock's Laws and Const. of the Colonies, 123. These commissions, also, if they prove anything here actually done different from the laws in England, except what was made different by express statute, as to matters connected with breaches of the laws of revenue and trade, and not as to torts, prove quite too much, as they go above tide water and even on the land.

But it is not believed that they led to any practices under them here different from the laws at home in respect to torts. None can now be found stated, either in reports of cases or contemporaneous history. Probably in the colonies the same rules as at home prevailed on this, for another reason; because no statute was passed as to torts here, and appeals to the admiralty at home existed, on the instance side of the court, till a recent change, so as to preserve uniformity in the colonies and at home. Bains v. The James, Baldw. 549; Woodcock, 242. A case of one of those appeals is reported in 2 Rob. 248, 249 (The Fabius). There the enlarged powers conferred on vice admiralty courts by the 6 and 7 of William III., as to seizures and prosecutions for breaches of the laws of trade and revenue, are not, as I understand the case, considered admiralty powers, and we all know they were not so per se or proprio vigore. A looser practice in the colonies, but no difference of principle, except under statute, appears to have been tolerated. Woodcock's Laws, etc. 273.

In accordance with this, Tucker, in his Ap 479*] pendix to Part I. *of 1 Black. Com. 432, after a careful examination of charters and other documents, comes to the conclusion, *that the* laws at home before emigration, both *statute and common law, so far as* applicable *to the condition of the colonies*, and in favor of life, liberty, and property of the subject, "remained in full force therein until repealed, altered, or amended by the legislative authority of the colonies respectively, or by the constitutional acts of the same when they became sovereign and independent States." See, also, to this effect, Montgomery v. Henry, 1 Dall 49; 1 Chalmers's Op. 195; Woodcock, 156. But what seems to settle this inquiry is the treatise of a colonial judge, giving some data on this very subject, and of course well informed on the subject. Stokes's View of Constitution of British Colonies (p. 270) contains an account of the admiralty jurisdiction in the colonies before the Revolution.

Two things are clearly to be inferred from him: 1st. That admiralty and maritime cases extended only to matters "arising on the high seas"; and, 2d. That the practice and rules of decision in admiralty were the same here as in England.

Thus, in chapter 13, page 271, he says: "In the first place, as to the jurisdiction exercised in the court of vice-admiralty in the colonies, in deciding all maritime causes, or causes arising on the high seas, I have only to observe, that it proceeds in the same manner that the High Court of Admiralty in England does." "The only book that I have met with, which treats of the practice of the High Court of Admiralty in England, is Clarke's Praxis Admiralitatis, and this is the book used by the practitioners in the colonies."[1]

In connection with this, all the admiralty reports we have of cases before the Revolution, and of cases between 1776 and 1789, seem to corroborate the same view, and are worth more to show the actual jurisdiction here than hundreds of old commissions containing obsolete powers never enforced. There is a manuscript volume of Auchmuty's decisions made in the Vice-Admiralty Court in Massachusetts, about 1740. See Curtis's Merchant Seamen, 348, note. It will be difficult to find in them, even in one colony, much more in the thirteen, clear evidence of any change here, before the Revolution, in respect to the law concerning the locality of torts.

The very first case of Quitteville v. Woodbury (April 15, 1740) is a libel for trespass. But it is carefully averred to have taken place "at the Bay of Hondurus, upon the open sea, on board the ship King George."

*No other case of tort is printed, and [*480 on a careful examination of what has not been printed no case is found varying the principle. There is one for conversion of a vessel and cargo, July 30th, 1742, tried before George Cradock, deputy-judge in admiralty, Farrington v. Dennis. But the conversion happened on the high seas, or what in those days was often termed the "deep sea." So a decision in the State of Delaware, in 1788, reported in the

1.—Woodcock on the British Colonies is equally explicit, that the vice-admiralty courts in the colonies were called so because in fact subordinate to the admiralty at home, and with like jurisdiction, except where altered by positive statute. Thus, speaking of "the jurisdiction of the admiralty over subjects of maritime contract," he says: "With respect to this authority it may be only necessary to observe, that in such matters the Admiralty Court in the colonies holds plea agreeably to the course of the same court in England." (P. 272).

Introduction to 4 Dall. 2 (last edit.); the judge seems to concede it to be law in that colony, that all cases, except prize ones, must happen "on the high seas" in order to give the admiralty jurisdiction over them.

So a few cases before the adoption of the Constitution are reported in Bee's Admiralty Decisions, though they are mostly on contracts. But they all make a merit of conforming to the course in the English admiralty, rather than exhibiting departures from and enlargements of its jurisdiction. See one in A. D. 1781 (Bee's Adm. 425), and another in the same year (p. 419), and another in 1785 (p. 369). But the most decisive of all is a case in A. D. 1780, in the High Court of Appeals in Pennsylvania, Montgomery v. Henry et al. 1 Dall. 49.

It was a proceeding in admiralty, regarded by some as sounding in tort, and by some in contract; but as to the line of jurisdiction, this having happened, as averred, on the River Delaware, the court say, through Reed, their president: "But it appears to us, that from the 13th and 15th Richard II. the admiralty has had jurisdiction on all waters out of the body of the county. There has been great debate as to what is meant by high seas. A road, haven, or even river, not within the body of the county, is high sea in the idea of civilians. Therefore, if the River Delaware is out of the body of any county, we think it clear that it is within the admiralty jurisdiction."

In short, as to this matter the first principles of English jurisprudence, as applicable to her colonies, show that there could be no difference here on a matter of this kind, unless authorized by express statute at home, extending to the colonies, or by acts of Assembly here, expressly sanctioned at home.

Blackstone says: "For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force." 1 Bl. Com. 108; 2 P. Wms. 75. Exceptions of course exist as to matters not applicable to their condition, but none of them reach this case, and require consideration.

Were not we then British colonies, and beginning here in an uninhabited country, or, what is equivalent, tenanted by a people not having any civilized laws? Why, then, were not the principles of English admiralty law in force here in the vice-admiralty courts, as much 481*] *as the English common law in other courts—and which has been declared by this tribunal to have been the basis of the jurisprudence of all the States in 1789? 3 Peters, 444. Indeed, any laws in the plantations contrary to or repugnant to English laws were held to be void, if not allowed by Parliament at home. 3 Bl. Com. 109. App. 380, by Tucker.

What is left, then, for the idea to rest on of a change in respect to the locality of torts here, to give admiralty courts jurisdiction over them different from what existed in England in 1776? We have already seen that there is nothing in the Constitution, nothing in any acts of Congress, nothing in any colonial laws, or colonial decisions in the vice-admiralty courts. Some venture to infer it merely from analogies. But denying the competency for courts of limited jurisdiction, like ours, to do this, if impairing

jury trials and encroaching on State jurisdictions, without any express grant or authority to that effect, let me ask, what are the analogies? The only ones which can be imagined are cases of crimes, contracts, and seizures for breaches of laws of revenue and trade. But the decisions as to crimes prove directly the reverse.

In respect to them, no change whatever on this point has occurred, and the rule recognized in this country as the true one concerning their locality is, like that in England, if tried in admiralty as being crimes by admiralty law, they must have been committed without the limits of a county or State. 4 Mason, C. C. 308; 5 Ibid. 290; 1 Dall. 49; 3 Wheat. 336, 371; 4 Ibid. 76, 379; 12 Ibid. 623; 4 Wash. C. C. 375; Baldw. C. C. 35.

And all crimes on the waters of the United States made punishable in the courts of the United States, by acts of Congress, with few or no exceptions, if connected solely with admiralty jurisdiction, are scrupulously required to have been committed on the sea or the high seas, "out of the jurisdiction of any particular State."

In all criminal cases in admiralty in England, the trial has also been by jury, by an express act of Parliament, ever since the 32 Henry VIII. (Com. Dig. Admiralty), and so far from the same principle not being considered in force here, the Constitution itself, before any amendments, expressly provided for all criminal trials of every kind being by a jury. Art. 3, sec. 2, and Federalist, No. 81.

So, the old Confederation (article 9th) authorized Congress to provide courts for the trial "of piracies and felonies committed on the high seas." 1 Laws, Bioren's edit. p. 16. And when Congress did so, they thought it expedient to adopt the same mode of trial for acts "on the sea" as on the land, and "according to the course of the common law"; and under a sort of mixed commission, as under the 28 Henry VIII., to try these offenses, consisting of the justices of the Supreme Court in each State, united with the admiralty judge, they imperatively required the use of a jury. 7 Journ. of Old Cong. 65; Duponceau on Juris. 94, 95, note.

*Finding, then, that any analogy [*482 from crimes directly opposes, rather than favors, any change as to torts, let us proceed to the case of contracts. It will be necessary, before they can be allowed any effect, for their friends to show, that the locality of contracts has been changed here, and then that such change should operate on torts. Contracts, in one aspect of the subject, did not differ as to their locality from torts and crimes before Richard II. any more than after.

But as the question in relation to the locality of contracts here is still undecided, and is before this court awaiting another argument, on account of divisions of opinion among its members in respect to it, no analogy can be drawn to govern other questions from what is itself thus uncertain; and it is not deemed decorous by me to discuss here the moot question as to contracts, or, till the other action pending in relation to them is itself settled, to draw any inference from what I may suppose to be, or not to be, their locality.

Without, then, going farther into the subtilties as to the locality or want of locality of contracts within admiralty jurisdiction, so fully discussed in 2 Gallison, 475, by Judge Story, on the one hand, and in 12 Wheaton, 622, by Justice Johnson, on the other, as well as in the case of The Lexington, at this term, it is enough to say, that is not the question now under consideration. It is, at the nearest, but collateral, and differently situated. For in trespass it was always a test, not only that it happened on the sea, instead of merely tide water, but out of the body of a county.

And above all this, those very writers who contend that locality does not govern the jurisdiction over contracts admit that it controls, and always has controlled, the right to try both torts and crimes (with the exceptions before named, and not influencing this question), during all the fluctuations and struggles about contracts during the last four hundred years.

In the resolutions said to have been prepared by the judges in 1632, with a view to arrange differences concerning jurisdiction, no change or modification is made as to torts. Dunlap's Prac. 13, 14; Bevans's case, 3 Wheat. 365, note.

Nor was there any in the mutual arrangement between the different courts in 1575. See it in 3 Wheat. 367; note; Prynne's Animadversions, 98, 99. And in Crowell's Ordinance of 1648, on the jurisdiction of the admiralty, so much relied on by those friendly to the extension of it, and by some supposed to have been copied and followed in this country, damages by one ship to another were included, but it was meant damages on the sea, being described as "damages happening thereon, or arising at sea in any way." Dunlap's Ad. 16.

Hence, even in admiralty writers and admiralty courts, it is laid down repeatedly, "in torts, locality ascertains the judicial powers." And again, "in all matters of tort, locality is the strict limit." 2 Bro. Civ. and Ad. Law, 110. So in The Eleanor, 6 Rob. Ad. 40, Lord 483*] *Stowell said, "the locality is everything," instead of holding it to be an obsolete or immaterial form.

Lastly, in respect to analogies in seizures for breaches of the laws of revenue and trade, it is claimed that some change has occurred there, which should influence the jurisdiction over torts. But these seizures are not for torts, nor has the change in relation to the trial of them happened on any principle applicable to torts. Moreover, it has been made as to seizures only under express statutes, and the construction put on those statutes; and if this is to be followed by analogy, no change can be made as to torts except by express statutes.

But there has never been any such statute as to them, and if without it the change was made by analogy, tide waters would not be the test, as is here contended, but, like cases of seizures, any waters navigable by a boat of ten tons burthen. It is even a matter of very grave doubt, whether a mistake was not committed in refusing a trial by jury in cases of seizure, under our Judiciary Act, whenever desired, or at least whenever not made on the high seas. Kent, Dane, and several others, think the early decisions made on this, and which have since been *merely copied, were* probably erroneous. 1 *Kent's Com. 376; 6 Dane, 357.*

So thought Congress, likewise, when, Feb. 13th, 1801 (sec. 11th), it conferred on the Circuit Court jurisdiction over "all seizures on land or water, and all penalties and forfeitures made, arising, or accruing under the laws of the United States." This was original cognizance, though not in a court of admiralty, and properly treated seizures on water as on land, and to be all of course tried by a jury. 2 Stat. at Large, 92. This was a change made by Congress itself, aided by some of the first lawyers in the country. But as the whole statute was repealed, on account of the obnoxious circumstances as to the judges under which it was passed, all the changes fell with it.

The admiralty in England did not exercise any jurisdiction over seizures for revenue, though on the ocean. 8 Wheat. 396, note. But it was in the Court of Exchequer, and was devolved on admiralty courts in the colonies for convenience, as no court of exchequer existed there. Duponceau's Jurisdiction, 139, and note. This additional jurisdiction, however, was not an admiralty one, and ought to have been used with a jury, if desired, as in the Exchequer. Powers not admiralty are for convenience still devolved on admiralty courts; and it was a great grievance, complained of by our ancestors here, that such a trial was not allowed in such cases before the Revolution. Undoubtedly it was the expectation of most of those who voted for the Act of 1789, that the trial by jury would not be here withheld in cases of seizures for breach of laws of the revenue, which they had always insisted on as their constitutional right as Englishmen, and, a fortiori, as Americans.

*They had remonstrated early and [*484 late, and complained of this abridgment of the trial by jury even in the Declaration of Independence, and as one prominent cause and justification of the Revolution. 1 Journal of Old Congress, 45; 6 Dane's Abr. 357; Baldw. C. C. 551. As plenary evidence of this, it is necessary to quote here but a single document, as that was drawn up by John Jay, afterwards the Chief Justice of this court. It is the address by the old Congress, October 21st, 1774, to the people of Great Britain, and among other grievances says: "It was ordained, that whenever offenses should be committed in the colonies against particular acts imposing duties and restrictions upon trade, the prosecutor might bring his action for the penalties in the courts of admiralty; by which means the subject lost the advantage of being tried by an honest, uninfluenced jury of the vicinage, and was subjected to the sad necessity of being judged by a single man—a creature of the crown—and according to the course of a law (civil) which exempts the prosecutor from the trouble of proving his accusation, and obliges the defendant either to evince his innocence or to suffer."

Now, after these reprobations of such a practice—after two specific amendments to the Constitution to secure the trial by jury in cases before doubtful—and after three clauses in the Judiciary Act expressly allowing it in all proper cases, who can believe that they intended in the ninth section of that very act to use language which ought to be construed so as to deprive them entirely of a jury trial in that very class of cases where the refusal of it had long

been denounced by them as oppressive, unlawful, and one of the grounds for a revolution? Should we thus brand them with duplicity, or tyranny?

As a single illustration that their views in the Act of 1789 have probably been misconstrued or misapprehended, if seizures for breaches of the laws of revenue and trade were in reality "cases of admiralty and maritime jurisdiction," as meant in the Constitution, then no statute was necessary, like a clause in that of 1789, to make them so, and to make them so not at the line of tide water, which is here contended for, but wherever a boat of twenty tons could go from the ocean. And if they were not such cases to that extent and in that manner without a statute, but were common law and exchequer cases, then it is certain a statute would not make them "admiralty cases," but might devolve their trial on the District Court, allowing a jury, as that trial was expressly reserved by the amendment to the Constitution in all common law cases. Stokes discloses the derogatory reason assigned for such a violation of our forefathers' rights by some of the British statutes before the Revolution. Stokes on Constitution of Colonies, 360. With much naiveté, he says: "In prosecutions in the courts of vice-admiralty in the colonies for the breach of any act of Parliament relating to the trade and revenue of the colonies, all questions as well of fact as of [*485] *law are decided by a judge alone, without the intervention of a jury; for such was the inclination of the colonists in many provinces to carry on a contraband trade, that to try the fact of an information by a jury would be almost equivalent to the repealing of the act of Parliament on which such information was grounded. In other respects, I apprehend the proceedings should be conducted as near as may be to the practice of the Court of Exchequer in England." And the reason said to have been assigned by Judge Chase for the construction first put on the Judiciary Act—that seizures for violation of the laws of revenue and trade were meant by Congress to be treated as cases in admiralty, and tried without a jury, though they never had been so tried in England till the encroaching statutes, and never here except as our fathers declared to be illegally—is almost as harsh, and more derogatory on our fathers themselves, as being an act done by themselves, in saying it was to avoid "the great danger to the revenue if such cases should be left to the caprice of juries. The United States v. Betsey, 4 Cranch, 446, note.

Whoever could conjecture, for such a reason, that a statute was intended to have such a construction, seems to have forgotten the remonstrances of our fathers against the odious measures of England corresponding with such a construction; and to have overlooked the probable difference in the feelings of juries towards laws made by themselves or their own representatives, and those made by a Parliament in which they were not represented, and whose doings seemed often designed to oppress, rather than protect, them. And what presumption is there that an exclusion of juries from trials as to trade and revenue, for causes like these, was meant to be extended to torts?

The reason *is totally inapplicable, and hence the presumption entirely fails. What a stretch 12 L. ed.*

of presumption without sufficient data is it to infer that this resisted case of seizures is first strong evidence of a larger jurisdiction in admiralty established here, and likely to be adopted under the Constitution by those who had always ardently opposed it, and next is evidence of a larger jurisdiction in other matters, disconnected entirely with that and all the reasons ever urged in support of it?

The last inquiry on this question of jurisdiction is, What have been the decisions concerning the locality of torts in admiralty in the courts of the United States since the Constitution was adopted?

It is the uncertainty and conflict concerning these, which has in part rendered it necessary to explore with so much care how the law was here, when our present system of government went into operation.

It is a matter of surprise, on a critical examination of the books, to see upon how slight foundations this claimed departure from the *established law in force in England as [*486 to torts rests, when looking to precedents in this country. I do not hesitate to concede to the advocates of a change, that the doctrine has been laid down in two or three respectable compilers. Curtis on Merchant Seamen, 362; Dunlap's Ad. 51. But others oppose it; and we search in vain for reasons assigned anywhere in its favor. The authorities cited from the books of reports in favor of a change here are not believed, in a single instance, to be in point, while several appear to maintain a contrary doctrine.

They are sometimes mere dicta, as the leading case of De Lovio v. Boit, in 2 Gall. 467, 424, that having been a case of a contract and not a tort; or as in 1 Mason C. C. 96, that having occurred on the high seas. So Thomas v. Lane, 2 Sumner, 1; Ware, 75, 96; 4 Mason, C. C. 380. Or they are cases cited, such as Montgomery v. Henry, 1 Dall. 49, which relate to contracts alone. See, also, case by Judge Conkling, in New York Leg. Ob. Oct. 1846; The Mary, 1 Paine's C. C. 673. Or they happened, as was averred in 1 Dall. 53, on waters out of any county. Or they are cases of seizure for breaches of the laws of trade, and navigation and revenue, depending on express statute alone. The Vengeance, 3 Dall. 297; The Betsy, 4 Cranch, 447; Wheelan v. The United States, 7 Ibid. 112; Conkling's Pr. 350; 1 Paine's C. C. 504; Gilp. 235; 1 Wheat. 9, 20; 8 Ibid. 391. And are, as before explained, probably misconstrued.

The parent of many of these mistaken references, and of the decisions as to seizures, is the case of The Vengeance, in 3 Dall. 297, a case which Chancellor Kent, in his Commentaries, justly says "was not sufficiently considered." Vol. I. p. 376. It was not a case of tort, as some seem to suppose; nor even a seizure, under the act of 1789, for a breach of the laws as to revenue and trade. But it was an information for exporting arms, prohibited by a special act, passed 22d May, 1793.

Some of the references, likewise, are to cases of prize, which in England as well as here never depended on locality, like the high seas, but might be even on land, and were at first conferred on the admiralty courts by special commission, and were not originally a part of

its permanent jurisdiction. 10 Wheat. 315; 5 Ibid. 120, App.; 4 Dall. 2; Doug. 613, note; 1 Kent's Com. 357. Where any of the references in the books here are to printed cases of tort, they uniformly appear to have been committed on the high seas, or without the body of a county and State. Burke v. Trevitt, 1 Mason, 96, 99, 360; Manro v. The Almeida, 10 Wheat. 474, 486, 487; The Josefa Segunda, Ibid. 315; Thomas v. Lane, 2 Sumner, 1; The Apollon, 9 Wheat. 368; Plummer v. Webb, 4 Mason's C. C. 380, and Ware, 75; Steele v. Thatcher, Ware, 96. If the act happened in foreign countries, in tide waters, there may well be jurisdiction, as being not within the body of any 487*] county here. *Thomas v. Lane, 2 Sumner, 9. Such was the case of The Apollon (9 Wheat. 368), not being a case within tide waters and a county in this country.

There is an expression in 12 Peters, 76, which is supposed by some to sanction a change. But it is only a dictum, that having been a case of crime, and the idea and the expression are, not that torts or crimes could be tried in admiralty, when committed within a county, on tide water therein, but that in no case, if committed on land or above tide water, could they be tried there as admiralty offenses, but only as offenses defined and punished by acts of Congress under the power to regulate commerce. United States v. Coombs, 12 Peters, 76. This may be very true, and yet in torts, as well as crimes, they may not be punishable without a statute, and as mere admiralty cases, unless committed on the ocean.

During this session I have for the first time seen a case decided in one of our circuits, which holds that the tide waters of the Savannah River are within the jurisdiction of the admiralty, as to collisions between boats. Bullock v. The Steamboat Lamar, 1 Western L. J. 444. But as the learned judge seems to have taken it for granted that the question of jurisdiction had been settled by previous decisions, he does not go into an examination of its principles, and cites only one authority (7 Peters, 324), which will be found to be a case of contract and not tort. So that, with this single exception, so far as it be one, not a single reported case is found, and only one manuscript case referred to (Dunl. Adm. 51), where a tort was committed within one of our counties, though on tide water, which was adjudged to be within admiralty jurisdiction, since the country was first settled, or of a like character in England, unless by recent statutes, for the last four centuries.

On the contrary, in Bee's Admiralty Reports and Peters's, in Gilpin's and Ware's, cases for torts are found, but all arising on the high seas, unless some doubt exists as to one in the last, partly overruled afterwards in the Circuit Court. So, whatever may be the obiter dicta, it is the same as to all in Paine, Washington, Baldwin, and even Gallison, Mason, Sumner, and Story. Indeed, this result accords with what was rightfully to be anticipated from the rule laid down in the first elementary law book in the hands of the profession at the time of the Revolution, that "admiralty courts" (3 Bl. 106) had cognizance of what is "committed on *the high seas, out of the reach of our ordinary courts of justice.*" And "all admiralty causes must be, therefore, causes arising wholly upon the sea, and not within the precincts of any county." 3 Bl. Com. 106.

Moreover, as to American authorities directly against these supposed changes as to torts, it is hardly possible to find anything stronger than the absence we have just referred to, almost entire, of any attempt in actions to sustain the jurisdiction in admiralty *over torts, [*488 unless happening on the high seas, and the uniform settled decisions in England, that it exists only there. But, beside this, there is the absence likewise of any colonial statutes or colonial decisions to bring in question at all the adjudged cases at home, which governed this question here no less than there. There is next the remark by Chancellor Kent, that if tides ebb and flow in a county, a recovery cannot be had for a tort there, on the principles of the common law courts. 1 Kent's Com. 365, note; 3 Hagg. Ad. 369.

And no one can read the learned Digest of Dane without seeing that in torts he considers the trial by jury proper, wherever they occur within the body of any county. 6 Dane's Abr. Prohibition. And it is laid down generally, in several other instances in this country, that the locality of torts must be on "the sea," in order to confer jurisdiction on the admiralty. Thackery et al. Gilp. 524, 529; 3 Mason, 243; Baldw. C. C. 550–554; so in Adams v. Haffards, 20 Pick. 130. See, also, the colonial case before cited from 1 Dall. 53, Montgomery v. Henry et al., directly in point, that the line of the county was the test, and not tide water, unless without the county. This was in 1780, and is most conclusive proof that no colonial enlargement of mere admiralty jurisdiction as to this matter had occurred here in practice, either under the words of commissions to vice-admiralty judges, or any difference of circumstances and condition.

But, beside this, one resolve of the old Congress shows that they considered the line of the county as the true one; and hence its violation in cases of trade and revenue, under statutes passed to oppress them, caused their remonstrances that the vice-admiralty courts had transgressed the ancient limits of the bodies of counties. 1 Journal of Old Cong. 21–23. How unlikely, then, is the inference from this, that the framers of the Constitution regarded this encroachment as the true line, and, when protesting against it, not only meant to adopt it, but extend it to cases of torts?

It is not a little remarkable, too, that in maturer life Judge Story himself, in speaking of the jurisdiction over torts (3 Com. on Constit. 1659), says: "The jurisdiction claimed by the courts of admiralty as properly belonging to them extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea." That means, at common law, outside of a county.

Thus says Coke, in 4 Inst. 134: "So as it is not material whether the place be upon the waters infra fluxum et refluxum aquæ; but whether it be upon any water within any county." See Laws, 234. Again, the ebb and flow of tide, to give jurisdiction to the admiral, means on the coast outside. Fortescue, De Laudibus L. Ang. 68, note. So in 2 Madison, Papers, 799, 800, it will be seen that Judge Wil-

son deemed the admiralty jurisdiction to relate to what the States had not exercised power over, and to the sea. So in The Federalist, No. 80, cases arising on the high seas are said to be those embraced.

489*] *Indeed, the departure from the settled line of jurisdiction as to torts here, so far as it may have gone in theory or speculation, seems likely to have begun in mistake rather than in any old commission or adjudication, founded on any statute or any well settled principle. It is likely to have commenced either by omitting to discriminate between torts and contracts, or between torts depending on general principles and seizures for violating laws of revenue and trade, which depended on the words of a special statute, and the construction given to those words; or from a supposed but unfounded analogy to the rules as to prizes, with which our fathers were very familiar in the Revolution, and taking cognizance of them in admiralty here, as in England, if captured anywhere, not only on tide water or "below high water-mark," but even on land. 4 Dall. 2; 2 Bro. Civ. and Adm. Law, 112; 5 Wheat. App. 120. Or it may have occurred, and that probably was oftenest the case, from various general expressions in the English books and cases as to the admiralty jurisdiction being co-extensive with tide waters, when that expression means, in all the adjudged cases in England as to torts and crimes—and must, on principle, as before shown, mean, in order to secure the trial by jury and the common law—the tide waters on the sea coast, the flux and reflux of the tide, out of the body of a county.

There is a similar expression in Judge Story's Commentaries on the Constitution, Vol. III. sec. 1667, as to crimes, in speaking of the existence of admiralty jurisdiction over them in creeks "and bays within the ebb and flow of tide;" but he takes care to add, very properly, "at least in such as are out of the body of any county in a State." Probably the true origin of the whole error was by looking to expressions about tide waters, or the ebb and flow of tide, without noticing further that the act must be in such tide waters as "are out of the body of any county in a State," and that this was indispensable to be observed, in order to protect the invaluable principles we have been discussing.

The power of the general government and its courts over admiralty matters was doubtless conferred on account of its supervision over foreign trade and intercourse with other nations, and not to regulate boats like these, far in the interior, and never going to any foreign territory, or even adjoining State, much less touching the ocean. Nothing can be more significant of the correctness of this limitation to matters on the ocean, than the remarks of Chief Justice Jay, in Chisholm v. Georgia, 2 Dall. 475, that the judicial power of the Union was extended to "cases of admiralty and maritime jurisdiction, because, as the seas are the joint property of nations, whose rights and privileges thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction."

Our forms of proceeding, also, in admiralty, 490*] and which are founded *on substance, *count usually on the transaction as having happened on "the high seas," knowing full well that they are the great theatre and territory for the exercise of admiralty law and admiralty power; and being obliged to make such an allegation in England in order to gain jurisdiction. Ross v. Walker, 2 Wils. 265.

Half the personal quarrels between seamen in the coasting trade and our vast shore fisheries, and timber men on rafts, and gundalo men, and men in flat boats, workmen in the sea coast marshes, and half the injuries to their property, are where the tide ebbs and flows in our rivers, creeks and ports, though not on the high seas. But they never were thought to be cases of admiralty jurisdiction when damages are claimed—much less when prosecuted for crimes; never in creeks, though the tide ebbs and flows there through half of our seaboard towns—never in rivers. All is within the county, and is usually tried before State officers and by State laws.

It has just been remarked by one of my brethren, as to torts and crimes, as has been before said by some in controversies as to contracts, that the statutes of Richard II. were not in force in the colonies. See 2 Gall. 398, 473; 1 Peters's Ad. 233; Ware, 91; Hall's Ad. Pract. 17, Pref. I cheerfully concede it may well be doubted whether any portion of the common law or English statutes, passed before the settlement of this country, became in force here, unless suited to our condition, or favorable to the subject and his liberties. But these statutes were both. They were suited to the condition of those attached to the common law and jury trial in the colonies, no less than at home, and they were in favor of the rights and liberties of the subject, to be tried by his own and not foreign laws, and by a jury for all matters happening within the realm, and not on the high seas. And so far from ancient statutes of that character not having any force here, they had as much as those parts of the common law which were claimed, October 14, 1774, by Congress among the "indubitable rights and liberties to which the respective colonies are entitled." 1 Journal of Congress, 28. They came here with them, as a part of their admiralty law, as much as came any portion of the common law, or the trial by jury. They came as much as Magna Charta or the Bill of Rights, and they should exist here now, in respect to all matters, with all the vigor that characterized them at home at the time of our Revolution. Baldw. C. C. 551; Ramsey v. Alleyne, 12 Wheat. 638. So decided virtually in Montgomery v. Henry, 1 Dall. 53; Talbott v. The Three Briggs, 1 Dall. 106.

The principles, dear to freemen of the Saxon race—preferring the trial by jury, and the common law, to a single judge in admiralty, and the civil law—which were involved in these statutes, could be no less highly prized by our American fathers than their English ancestry, especially when we look to their numerous resolutions on *this subject, both before [*491 and during the Revolution, cited in other portions of this opinion.[1]

1.—They are so numerous as to remind one of the zeal and perseverance in favor of the great charter, which was such as to require it to be read twice a year in each cathedral, and to have it ratified anew over thirty times, when put in peril by encroaching monarchs. 1 Stat. at Large (English), 274, ch. 3; also, p. 1, note.

One of the soundest jurists has said long since "The common law of England, and every statute of that country made for the benefit of the subject before our ancestors migrated to this country, were, so far as the same were applicable to the nature of their situation, and for their benefit, brought over hither by them; and wherever they are not repealed, altered, or amended by the constitutional provisions or legislative declaration of the respective States, every beneficial statute and rule of the common law still remains in force." Tucker, in Part II. of Bl. Com. App. 99; 2 Chalm. Op. 75; Woodcock, 159.[1]

Whether the 13 and 15 of Richard II. were in affirmance of what was the true limit of admiralty jurisdiction at first in England, or otherwise, is not very material. But it is certain that it was likely to be but declaratory of that, as the people were so devoted to the common law trials by jury. The extraordinary idea, that these statutes were not in force here, was first broached in A. D. 1801, and then in a district court, in direct opposition to the views expressed in 1 Dall. 53. The point then decided under that novel notion was, that a lien existed for repairs of a domestic ship, without the aid of any statute, and has been since expressly overruled by this court in The General Smyth, 4 Wheat. 413. And why overruled by this court, but on the principle that the admiralty jurisdiction here was what it had been in England before our Constitution, and not elsewhere—not that of France before the Norman conquest, or that of Holland now?

Indeed, Justice Story, as a commentator in respect to other clauses of the Constitution no more open to such a construction than this, concedes that they are to be "understood" "according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American States were familiarly acquainted." 3 Story's Com. on the Constitution, 506, sec. 1639.

Nor let it be again offered in extenuation, that, the power being concurrent in the common law courts, the plaintiff from choice goes into the admiralty; because the other party, who is often prosecuted only to be vexed and harassed, and who has rights as well as the plaintiff, may be thus forced into admiralty, rather than 492*] the *common law, much against his choice. Nor let it be said further, as an apology, that the trial by admiralty is better and more satisfactory, when our ancestors, both English and American, have resisted it, and excluded it in all common law cases, for reasons most vital to public liberty and the authority of the local tribunals. Such an enlargement of a power so disliked by our fathers is also unnecessary; because, if desirable to have the United States courts try such cases, rather than those of the States, they can be enabled to do it by express provisions, under the power to regulate foreign commerce and collect revenue, as is now done on the Lakes. 12 Peters, 75; 5 Statutes at Large, 726; Act of February 26th, 1845; and reserving, as in that case, the right of trial by jury.[2]

I have thus examined this question in all its various aspects, and endeavored to answer all which has been suggested in favor of a change here as to the line of admiralty jurisdiction in the case of the collision of vessels, as well as other marine torts.

Among my remarks have been several, showing that there was nothing in our condition as colonists, or since, and nothing in the nature of the subject and the great principles involved, which should render the same line of jurisdiction not proper in America which existed in England, but in truth some additional reasons in favor of it here. I do not now, in conclusion, propose to dwell much on this peculiar condition of ours, though some members of this court have just urged it earnestly as a reason why the same line does not apply, as they have why the statutes of Richard II. did not apply. But the idea is as untenable in respect to the principle generally, looking to our condition, as we have already shown it to be in respect to those statutes. Thus, in that condition, what reason was there ever for a change? None. And, if otherwise believed, when we were colonies, would not the change have been made by acts of Assembly approved at home, or an act of Parliament? And if not done when colonies, but supposed to be proper after the Revolution, would not the framers of the Constitution, or of the Judiciary Act, have known it as quickly and fully as this court? And was it not more proper for them to have made such a change than this court? If our political institutions or principles required it, did not they know, and should not they have attended to that rather than we? If such a change had already happened in the then thirteen colonies, and was too well known and acquiesced in, as *to torts and crimes, to need any writ- [*493 ten explanation or sanction, why cannot it be pointed out in colonial laws, or in judicial records, or at least in contemporaneous history of some kind? And if such a change was required and intended, as some insist, by resorting to other than English law for a guide as to what were admiralty cases within the meaning of the Constitution, because something less narrow, geographically or otherwise, as it has been argued, something on a grander scale, and in some degree commensurate in length and breadth with our mighty rivers and lakes, was needed—as if a system which had answered for trade over all the oceans of the globe was

1.—Thus people who go to form colonies "are not sent out to be slaves, but to enjoy equal privileges and freedom." Grotius, De Jure Belli, B. 2, ch. 9, sec. 10. Or "the same rights and privileges as those who staid at home." Or, as in the charter of Elizabeth to Raleigh, "enjoy all the privileges of free denizens or persons native of England.' Part I. of Tucker's Bl., Vol. I., p. 383, App.

2.—As some evidence that the makers of this last law did not suppose it settled that the district courts could, as admiralty courts, have any jurisdiction as to torts, because committed on tide waters within a State, when they felt obliged to pass a special law to confer it on the lakes, it was not conferred there as exercised on "tide waters," which would have been sufficient, if so settled, but on "the high seas, or tide waters within the admiralty and maritime jurisdiction," etc. This statute is also scrupulous to save the trial by jury when desired, and thus avoids treating it as an admiralty power got in torts, unless on the high seas, by a construction contrary to the political opinions and prejudices of our ancestors, and to the whole spirit of our institutions.

not large enough for us—then why not extend it at least over all our navigable waters, and not halt short at the doubtful, and fluctuating, and pent-up limits of tide water? And was a change so much required to go into the bodies of numerous counties and States, to the jeopardy of jury trials, by any increased dislike to them among our jealous fathers? Were they wishing, by mere construction, to let more and more go into the cognizance of the admiralty and be tried without a jury, and without the principles of the common law, when they had been so indignantly remonstrating against any and every the smallest encroachment by England on that sacred trial? And is this guarantee of a jury trial in such cases to be considered of subordinate moment in the views of those living at the era of the formation of the Constitution, and the passage of the Act of 1789, when their eagerness was such to guarantee it fully, that two of the only twelve amendments ever made to it relate to additional safeguards for this trial? And in the Judiciary Act of 1789, there are introduced, ex industria, three separate provisions to secure jury trials.

Indeed, so far from there being anything in our condition as colonists, or in public opinion at the Revolution, which demanded a change enlarging admiralty forms and jurisdiction, the old Congress specially resolved, November 25th, 1775, when recommending to the colonies to institute courts to try captures, or devolve the power on those now existing, that they "provide that all trials in such case be had by a jury," which was going further in their favor, instead of short of what had ever been done in England. And, in 1779, Virginia established admiralty courts, under recommendation of the old Congress, and expressly allowed a jury in all cases where either party desired it, if both were citizens. 10 Hening's Stat. 101. The same is understood to have been done in several other States. See the Federalist, No. 83. In Massachusetts, under the old charter, as long ago as 1673, the court of admiralty was expressly authorized to allow a jury when it pleased. Ancient Charters and Laws, 721, App. Iredell says, also, in the North Carolina Convention, 4 Elliot's Deb. 155: "There are different practices in regard to this trial in different 494*] States. In some cases *they have no juries in admiralty and equity cases; in others, they have juries in them as well as in suits at common law."

And to the objections made against adopting the Constitution, because the trial by jury might be restricted under it and suitors be compelled to travel far for a hearing in ordinary cases (1 Gales's Debates in First Congress), it was argued that Congress would possess the power to allow juries even in cases in admiralty (The Federalist, No. 83), and afterwards, by the original amendments to the Constitution, it was made imperative to allow them in all "cases at common law." Yet now, by considering torts within a county as triable, or as "cases in admiralty," which was not done by the common law, nor when the Constitution was adopted, either in England or here, we produce both the great evils deprecated—an abridgment of the jury trial from what prevailed both here and in England, and *the forcing of citizens to a great distance from their* State tribunals, to defend their rights under a different forum and a different system of laws.

After these additional proofs of the caution of our ancestors to check the usual admiralty power of trial without a jury, and more especially to prevent any extension of it, could they for a moment, when so jealous of the general government and its overshadowing powers wish to extend them further than ever before either here or in England?[1] Did they mean to relinquish their time-honored and long cherished trial for torts on water within a county, and take for a model despotic France, for instance, which knew no trial by jury in any case, and where the boundaries between the admiralty and other courts were almost immaterial, being equally under the civil law, and equally without the safeguard of their peers? And would they be likely to mean this, or wish it, when every such extension of admiralty jurisdiction was at the expense of the State courts, and transferring the controversies of mere citizens of one State to distant jurisdictions, out of their counties and in certain events to the remote seat of the general government, and then to be tried there, not by the common law, with whose principles they were familiar, but by the civil, and when a full remedy existed at home and in their own courts? Much less could they be supposed willing to do this when the trial of facts in this court was not to be by their peers from the vicinage, or on oral testimony, so that the witnesses could be seen, scrutinized, and well compared, but by judges, who, however learned in the law, are less accustomed to settle facts, and possess less practical acquaintance with the subject *matter in controversy. [*495 And what are the urgent and all-controlling reasons which exist to justify the new line urged upon us, in such apparent violation of the Constitution, and with so inauspicious a departure from anything required by our condition, or from what seems to have been the principles and precedents at the Revolution?

It is not the line even of the civil law, any more than of the common law. If this innovation had extended admiralty jurisdiction over all navigable waters, it would have been, at least, less vague, and found some vindication in its analogy to the civil code. Digest, 43, tit. 12, 13; Code Napoleon, B. 2, ch. 2, tit. 556; Zouch's Elements of Jurisp. 382. But the rule of tide water within a county, and not on the sea, conforms to no code nor precedent; neither marching boldly over all which is navigable, nor halting where the ocean meets the land; neither shunning to make wide inroads into the territories of juries, nor pushing as far as all which is nautical and commercial goes. The only plausible apology for it, which I can find, is in a total misconception, before adverted to, of the ancient and true rule, which was tide water, but at the same time tide water without the body of the county, on the high

1.—Indeed in England it has been controverted whether the power in admiralty to punish torts anywhere ever existed, even before Richard II. (3 Mason's C. C. 244), except through a jury, used to settle the facts and assess the damages. See 4 Rob. Ad. 60, note to Rucker's case. The Black Book of Admiralty, art. 12, p. 169, is cited as speaking of the use of a jury twice in such cases. See, also, Roughten De Of Admiralis, 69 note. And at this day, in England, in this class of torts, as hereafter shown, the masters of Trinity House act virtually as a jury.

seas. But instead of the flux and reflux of the tide on the high seas, and without the body of the county or State, and to support which line stood the great pillars of a jury trial and the common law, have been attempted to be substituted, and that without authority of any statute or clause in the Constitution, as to torts, the impulses from the tides at any and every distance from the ocean, sometimes encroaching from one to two hundred miles into the interior of counties and States, and prostrating those great pillars most valuable to the people of the States. And what, let me repeat the inquiry, is gained by such a hazardous construction? Not an adherence to old and established rules, not a respect for State right; not strengthening the Union or its clear powers where assailed, but weakening by extending them to doubtful, irritating, and unnecessary topics; not an extension of a good system, allowing the admiralty to be one for all nautical matters, to all navigable waters and commercial questions, but falling short, in some of our vast rivers or inland seas, near one thousand miles from the head of navigation, and cutting off several cities with twenty, thirty, and even forty thousand population. The late Act of February 26th, 1845, 5 Statutes at Large, 726, was intended to remedy this, but does not include any cases above tide water on the Mississippi, or Cumberland, or Ohio, and many others, but only those on the lakes and their tributaries, and very properly even there reserves, with scrupulous care, not only the right to either party of a trial by jury, but any remedy existing at common law or in the States.

So, looking to results, if we disclaim jurisdiction here, what evil can happen? Only that our citizens in this class of cases will be allowed 496*] *to be tried by their own State courts, State laws, and State juries. While, if we do the contrary, the powers of both States and juries will be encroached on, and just dissatisfaction excited, and the harmonious workings of our political system disturbed. So, too, if our national views have become actually changed so greatly, that a trial by a single judge, and in admiralty, is preferred to a trial by jury in the State tribunals or the circuit courts, then our overruling the jurisdiction in this case will only leave Congress to declare the change, and provide for it, rather than this tribunal.

So the excuse for trying such cases in admiralty rather than in courts of common law, which some have offered, on the ground that the rules of decision are much the same, appears very ill-considered, when, if the civil law in this instance does not differ essentially from the common law, the rules of evidence by it do, depriving us, as triers, of the sight of the witnesses, and their apparent capacity and character, and depriving the defendant of the invaluable trial by jury, and stripping him of the right of being tried, and the State courts of the right of trying controversies between their citizens, in the neighborhood where they occur. "All controversies directly between citizen and citizen will still remain with the local courts," said Mr. Madison in the Virginia convention. *3 Elliot's* Deb. 489.

Now, after all this caution exercised in Eng*land not to extend nor change* admiralty jurisdiction there without the aid of express statute and a reservation of common law remedies —after a refusal to do it here recently as to the lakes and their tributaries, except in the same way, and preserving the trial by jury—after all the sensitiveness of our fathers in not doing it as to seizures for breach of revenue and navigation laws, except by express statute—after their remonstrances and cautions in various ways against abridging the trial by jury—after the jealousy entertained when the Constitution was adopted, that this court might absorb too much power from the State tribunals, and the respect and forbearance which are always justly due to the reserved rights of the States—it certainly seems much wiser in doubtful cases to let Congress extend our power, than to do it ourselves, by construction or analogy.

So far from disturbing decisions and rules of property clearly settled, I am for one strongly disposed to uphold them, stare decisis, and hence I am inclined in this case to stand by the ancient landmarks, and not set everything afloat—to stand, in fine, by decisions, repeated and undoubted, which govern this jurisdiction, till a different rule is prescribed by Congress.

The first doubt as to the jurisdiction in admiralty over the present case is thus sustained, but, being overruled by a majority of the court, I proceed briefly to examine the next objection. It is one founded in fact. It denies that the tide did in truth ebb and flow at Bayou Goula, the place of this collision, in ordinary times.

There is no pretense that the water there is salt, or comes back *from the ocean [*497 or that the tide there sets upward in a current, or ever did, in any stage of the water in the Mississippi. Yet this is the ordinary idea of the ebb and flow of the tide. I concede, however, that it has been settled by adjudged cases, that the tide is considered in law to ebb and flow in any place where it affects the water daily and regularly, by making it higher or lower in consequence of its pulsations, though no current back be caused by it. Rex. v. Smith, 2 Doug. 441.; The Planter, 7 Peters, 343; Hooker v. Cummings, 20 Johns. 98; Angell on Tide Waters, 637. Yet this of course must be a visible, distinct rise and fall, and one daily caused by the tides, by being regular, periodical, and corresponding with their movements. Amidst conflicting evidence on a point like this, it is much safer to rely on collateral facts, if there be any important ones admitted, and on expert or scientific men, who understand the subject, than on casual observers. The sea is conceded to be two hundred and three miles distant; and the current of the Mississippi so strong as to be seen and felt far out to sea, sometimes quite forty miles. The tides on that coast are but eighteen or twenty inches high. The velocity of the current of the river is ordinarily three to four miles an hour in high water, and the river is two hundred feet deep for one hundred miles above New Orleans. Stoddard's Hist. of Louisiana, 158. It therefore becomes manifest that on general principles such a current, with its vast volume of water, could not only never be turned back or overcome by the small tides of eighteen inches, as the fact of its influence forty miles at sea also demonstrates, but would not probably, in ordinary times, be at all affected in a sensible

and regular manner two hundred and three miles distant, and weakened by all the numerous bends in that mighty river. From New Orleans to St. Louis, the bends are such, that a boat must cross the stream 390 times. Stoddard's Hist. of Louisiana, 374.

Again, the descent in the river from the place of this collision to the ocean is quite a foot and a half, all the usual rise of the tide on the coast; and hence, at a low stage of water in the river, much more at a high one, thirty feet above the lowest, no tides are likely to be felt, nor would they probably be during the whole season of a full river, from November to June.

In the next place, several witnesses testify as to their observations in respect to the tides, and confirm what might be expected from these collateral facts. The most scientific among them took frequent observations for two years, at or nigh Jefferson College, thirty-seven miles nearer the sea than the place of this collision, to ascertain this very fact, and testifies that no regular daily influence is felt there from the tides. Oscillations may occur, but not regularly, nor as tides. They happen in that way even near the foot of the falls of Niagara, but of course are produced by causes entirely dis-
498*] connected *from the tides of the ocean. So they happen, from other causes, on most of our interior lakes.

Sometimes continued winds in one direction make a great difference in the rise of the water at different places; and sometimes, the emptying in, near, of large tributary streams, changeable in their size at different seasons. Both of these are testified to occur in the Mississippi in its lower parts. At high water, which prevails over half the year, from rains and the dissolving of snow, it also deserves notice, that the fall of the river towards the ocean is near one and two thirds of an inch per mile; and the difference between high and low water-mark near Bayou Goula is also, as before noticed, from thirty to thirty-three feet.

From all this it is easy to see, that, during more than half the year, it is hardly possible that a regular tide from the ocean should be felt there, though it is admitted that, in conflict with this, some witnesses testify to what they consider such tides there, and indeed as high up as Bayou Sarah. But their evidence is insufficient to overcome, in my mind, the force of the other facts and testimony on this subject.

In connection with this point, it seems to be conceded, also, that, in order to give admiralty jurisdiction, the vessels must be engaged in maritime business, as well as the collision have occurred where the tide ebbs and flows. There might be some question, whether the main business of either of these boats was what is called maritime, or touching the sea—mare—so as to bring them and their business within the scope of admiralty power. If, to do that, they must be employed on the high seas, which is the English rule, neither was so engaged in any part of its voyage or business. Or if, for that purpose, it is enough, as may be contended in this country, that they be engaged exclusively on tide waters, neither was probably so employed in this instance. And it is only by holding that *it is enough for one end of the voyage to be* in tide water, however fresh the water or slight the tide, that their employment can be considered maritime.

In The Thomas Jefferson, 10 Wheat. 428, the court say, the end or beginning of the employment may be out of tide water, if "the service was to be substantially performed on the sea or tide water." So in The Phœbus, 11 Peters, 183. But in the case of The Thomas Jefferson, as well as The Phœbus, the service, being in fact chiefly out of tide waters, was not considered as maritime.

In the case of The Planter, 7 Peters, 324, the whole service performed was in tide waters, and was a contract, and hence deemed maritime. Here the boats were employed in the trade between New Orleans at one point, and Bayou Sarah at the other, a distance of one hundred and sixty-five miles. If the tide ebbs and flows as high as Bayou Goula, or ninety-seven miles above New Orleans, which we have seen is doubtful, it is only a small fraction *above half the distance, but not enough [*499 above half to characterize the main employment of the vessel to be in tide waters, or to say that her service was substantially on the sea, or even tide water. The De Soto made trips still higher up than Bayou Sarah, to Bayou Tunica, twenty seven miles farther from New Orleans, The testimony is, also, that both these boats were, in their construction, river, and not sea, boats; and the De Soto was built for the Red River trade, where no tides are pretended to exist, and neither was ever probably on the ocean, or within a hundred miles of it.

It is doubtful if a vessel, not engaged in trade from State to State, or from a State abroad, but entirely within a State, comes under laws of the general government as to admiralty matters or navigation. It is internal commerce, and out of the reach of federal jurisdiction. Such are vessels on Lake Winnipiseogee, entirely within the State of New Hampshire. In the Luda and De Soto they were engaged in internal commerce, and not from State to State, or from a State to a foreign country. 1 Tucker's Bl. Com. 250, note.

In most cases on the Mississippi, the boats are engaged in the coasting trade from one State to another, and hence are different, and assume more of a public character. So on the Lakes the vessels often go to foreign ports, as well as to other States, and those on the seaboard engaged in the fisheries usually touch abroad, and are required to have public papers. But of what use are custom-house papers or admiralty laws to vessels in the interior, never going from State to State, nor from a State to a foreign country, as was the situation and employment at the time of these two boats?

These are strong corroborations that this is a matter of local cognizance—of mere State trade—of parties living in the same county, and doing business within the State alone—and should no more be tried without a jury, and decided by the laws of Oleron and Wisbuy, or the Consulat del Mare, or the Black Book of Admiralty, than a collision between two wagoners in the same county.

The second objection, then, as a whole, is in my view sustained; and, being one of mere fact rather than law, it is to be regretted that

the court could not have agreed to dismiss the libel on that ground, without settling the other points, and without prejudice to the rights of either party in a trial at common law. The plaintiff would then be enabled to have all the facts on the merits examined and adjudicated by a jury from the valley of the Mississippi; much more skillful than this court, from their residence and experience, in judging upon accidents and negligences in navigation on that great thoroughfare.

The only good reason that the admiralty judge was ever intrusted with the decision of facts, rather than a jury, was, that originally he was but a deputy of the admiral, and often a nautical man—acquainted with nautical matters, and acting only on them; and now in Eng- 500*] land *he calls to his aid on facts the experienced nautical officers or masters of the Trinity House—"a company," says Coke, "of the chiefest and most expert masters and governors of ships." 4 Inst. 149. He takes their opinion and advice on the facts as to collisions of vessels before he himself decides. 2 Bro. Civ. and Ad. Law, 112; 6 D. & E. 766; The Celt, 3 Hagg. Ad. 327. The case is often fully argued before them first. 1 Wm. Rob. 133–135, 273, 314; Hall's Ad. Pr. 139; 5 Rob. Ad. 347. But everything here is so different, and so much against the skill of judges of this court in settling such facts, that in cases of doubt we are very likely, as has now happened, to disagree, and it is far better they should be examined by a jury in the vicinage of the collision.

Perhaps it was a consideration like this that led to the doctrine, both abroad and here, in favor of the common law courts having concurrent jurisdiction in these cases of collision, even when they happen on the high seas. 1 Chitt. on Pl. 152, 191; 15 Mass. 755; 3 East, 598; Percival v. Hickey, 18 Johns. 257; 14 Johns. 273; Curtis's Merch. Seamen, 367; 9 Johns. 138; Smith v. Condry, 1 Howard, 36; Gilp. 483; 4 Mason, C. C., says it is claimed; 2 Gall. 343, on precedent.

Indeed, the laws of Louisiana are quoted as pertaining to and regulating the conduct of boats when passing on the Mississippi within that State. 1 Bullard & Curry's Dig. sec. 794. But so far from their being a guide to us in admiralty, if having jurisdiction in that way over these boats at this place, the rights of parties, as before seen in such questions, are to be settled by the laws existing in some undescribed part of the world, but not England in A. D. 1776 or A. D. 1789, or Louisiana in A. D. 1845. If England, this case would not be tried at all in admiralty, as we have seen; and if Louisiana, then the case would not be settled by admiralty law, but by the laws of Louisiana, and in the State tribunals.

Again, whoever affirms jurisdiction to be in the courts of the United States must make it out, and remove all reasonable doubts, or the court should not exercise it. Bobyshall v. Oppenheimer, 4 Wash. C. C. 483; 7 Peters, 325; Peters' C. C. 36. Because these courts are courts of limited jurisdiction, and acting under *express* grants, and can presume nothing be*yond the grant, and* because, in respect to ad*miralty power, if anything* is presumed when *not clear, it is presuming* against the trial by jury, and the State tribunals, and their reserved rights. Where a jurisdiction is of a limited nature, "they [claiming it] must show that the party was brought within it." 1 East, 650. And where a case is in part dependent on common law, and in part on admiralty, it must be tried in the courts of the former. Bee's Ad. 470.

But the second objection to our jurisdiction being also considered by the court untenable, this case is to be examined on the *merits; [*501 and as to these it seems to me not free from difficulty, though in my view indicating some fault in both the boats.

From the very nature of navigation—as vessels cannot be always turned quick, and as a constant lookout is hardly practicable both night and day—collisions on rivers with frequent bends in them, like the Mississippi, and during darkness, are occasionally almost inevitable, and often are attended by no blame. The danger and injury to both vessels is so great in almost every case, one or both not unseldom going down, with all on board, that the strongest motives exist with all to use care and skill to avoid collisions. The want of them, therefore, is never to be presumed, but is required to be clearly proved. To presume otherwise would be to presume men will endanger their own lives and property, as well as those of others, without any motive of gain or ill-will.

Hence our inquiries must start with the probability, that, in such collisions, accident and misconception, as to courses and distances cause the injury, rather than neglect or want of skill. Indeed, in these cases it is laid down as a rule by Sir Christopher Robinson, in The Ligo, 2 Hagg. 356, that "the law requires that there shall be preponderating evidence to fix the loss on the party charged, before the court can adjudge him to make compensation." 2 Dod. 83. I am unable to discern any such clear preponderance in this case in favor of the Luda. It is true that some allowance must be made as to the testimony of the officers and men in each boat. In both they would naturally be attached to her character or interests, and desirous in some degree of vindicating themselves or friends. And it happens that, from such or some other cause, those on each side usually testify more favorably as to the care and skill with which the boat was conducted in which they were employed at the time. Hence resort must be had to some leading and admitted facts as a guide, when they can be distinctly ascertained, to see whether the collision was from any culpable misconduct by either. For like reasons, we should go to witnesses on shore and passengers, where they had means of knowledge, rather than to the officers and crews implicated on either side. Taking these for our guidance chiefly, and so far as it is possible here to decide with much accuracy, most of the case looks to me, on the facts, quite as much like one of accident, or one arising from error of judgment and mutual misapprehension, as from any culpable neglect on the part of the officers of the De Soto alone.

It is to be remembered that this collision occurred in the night; that neither of the regular captains were on the deck of either boat, though both pilots were at their stations; that

being near a landing, the De Soto supposed the Luda was going to stop there, and hence pursued a different course from what she would if not so supposing; and that the Luda supposed the De Soto would not stop there, and hence did not pursue the course she would if believ- 502*] ing she was *about to stop. That both boats in the darkness seemed, till very near, to believe each other farther off than they in truth were, and hence did not use so early the precautions they otherwise might have done. It is to be remembered, also, that not one of the usual sources of blame in the adjudged cases existed here clearly on the part of the De Soto. Some witnesses swear to the De Soto's having her light hung out, and several, including a passenger, that if the Luda had not changed her course unexpectedly, and when near, she would not have been struck by the De Soto; and that the De Soto, if changing hers, and going lower down than her port, did so only to round to and lay with her head up in the customary manner. Nor was there any racing between rivals, to the peril of the vessels and life, which led to the misfortune, and usually deserves condign punishment. Nor was any high speed attempting for any purpose; and the movement of the De Soto, though with the current, is sworn to have been slowest, and hence she was less bound to look out critically. The Chester, 3 Hagg. Ad. 319. Nor is there any law of admiralty requiring a descending boat on a river to lie still till an ascending one approaches and passes, though an attempt was made to show such an usage on the Mississippi, which was met by counter evidence. Again, the Luda was not at anchor, so as to throw the duty on the De Soto to avoid her, as is often the case on the sea coast. The Girolamo, 3 Hagg. Ad. 169; the Eolides, Ibid. 369. Nor was the Luda loaded and the other not, but in ballast and with a wind, and hence bound not to injure her. The Baron Holberg, 3 Hagg. Ad. 244; The Girolamo, Ibid. 173. Nor was one moved by steam and the other not, and hence the former, being more manageable, obliged to shun the latter. The Shannon, 2 Hagg. Ad. 173; The Perth, 3 Hagg. Ad. 417. Nor is there a rule here, as in England, issued by the Trinity House in 1840, and to be obeyed or considered bad seamanship, that two steamboats approaching, and likely to hit, shall put their helms to port, though the principle is a sound one on which it rests. 1 Wm. Rob. 274, 275; 7 Jurist, 380, 999. Under considerations like these, if any blame rests on the De Soto, and there may be some, certainly quite as much seems to belong to the Luda. Neither put the helm to port. Both boats were in my view too inattentive. Both should have stopped their engines earlier, till the course and destination of each other were clearly ascertained; and both should have shaped their courses wider from each other, till certain they could pass without injury. 7 Jurist, 380; 8 Ibid. 320. The Luda certainly had more conspicuous lights, though the De Soto is sworn not to have been without them, and is admitted to have been seen by the Luda quite half a mile off, though in the night. On the contrary, the movements of the De Soto were slowest, which is a favorable fact in such collisions (7 Jurist, 381), though she *did not lie by, as she should have done, under the law of Louisiana, if that was in force, *and she wished to throw [*503 all the risk on "the ascending boat;" for throwing that risk so is the only gain by conforming to the statute. 1 La. Dig. 528, art. 3533, by Grimes.

But I do not propose to go more fully into this, as it is not the point on which I think the case should be disposed of. I merely refer to enough to show it is a question of difficulty and doubt whether the injury did not result from casualty, or mutual misapprehension and blame, rather than neglect, except in particulars common to both, or at least in some, attached to the plaintiffs, if not so great as those in respect to which the original defendants erred. Any fault whatever in the plaintiffs has, it is said in one case, been held to defeat his action. Vanderplank v. Miller, Moody & Malk. 169. But in any event, it must influence the damages essentially. For though, when one vessel alone conducts wrongfully, she alone must pay all damages to the extent of her value (5 Rob. Ad. 345), and this agrees with the laws of Wisbuy if the damage be "done on purpose" (2 Peter's Ad, 84, 85, App.), and with the laws of Oleron (2 Ibid. 28); yet if both vessels were culpable, the damage is to be divided either equally between them (3 Hagg. Ad. 328, note; 4 Adolph. & Ell. 431; 9 Car. & P. 613; Reeves v. The Constitution, Gilpin, 579), or they are to be apportioned in some other more appropriate ratio, looking critically to all the facts. The Woodrop Sims, 2 Dod. Ad. 85; 3 Scott, N. R. 336; 3 Man. & G. 59; Curtis's Admiralty, 145, note. So in England, though no damages are given, when there is no blame on the part of the defendant. The Dundee, 1 Hagg. Ad. 120; Smith et al. v. Condry, 1 Howard, 36; 2 Browne's Civ. and Ad. Law, 204. Yet, by the laws of Wisbuy, 1 Peters's Ad. 89, App., "If two ships strike against one another, and one of them unfortunately perishes by the blow, the merchandise that is lost out of both of them shall be valued and paid for pro rata by both owners, and the damage of the ships shall also be answered for by both according to their value." See Laws, 141. This is now the law in Holland, and is vindicated by Bynkershoek, so as to cover cases of doubt and equalize the loss. 2 Browne's Civ. and Ad. Law, 205, 206. So now on the Continent, where a collision happened between vessels in the River Elbe, and it was not the result of neglect, the loss was divided equally. Story's Conflict of Laws, 423; Peters et al. v. Warren Ins. Company, 14 Peters, 99; 4 Adolph. & Ell. 420.

Hence, whether we conform to the admiralty law of England on this point, though refusing to do it on other points, or take the rule on the Continent for a guide, the amount of damages allowed in this case is erroneous, if there was any neglect on the part of the original plaintiffs, or if the collision between the boats was accidental.

Judge Daniel requested his dissent to the judgment of the court to be entered on the record, and for reasons concurring generally with those offered by Judge Woodbury.

*Mr. Justice Grier concurred with [*504

Mr. Justice Woodbury in the opinion delivered by him so far as it related to the question of the jurisdiction of courts of admiralty, and also that the weight of evidence in this case was against the existence of a tide at the place of collision, but concurred with the majority of the court that the De Soto was in fault, and justly holden for the whole loss occasioned by the collision.

SAMUEL THURLOW, Plaintiff in Error,
v.
THE COMMONWEALTH OF MASSACHUSETTS.

JOEL FLETCHER, Plaintiff in Error,
v.
THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

ANDREW PEIRCE, Jr., and Thomas W. Peirce, Plaintiffs in Error,
v.
THE STATE OF NEW HAMPSHIRE.

License laws of Massachusetts, Rhode Island, and New Hampshire, declared not repugnant to U. S. Const. or laws.

Laws of Massachusetts, providing that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that nothing in the law should be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted;

Of Rhode Island, forbidding the sale of rum, gin, brandy, etc., in a less quanitty than ten gallons, although in this case the brandy which was sold was duly imported from France into the United States, and purchased by the party indicted from the original importer;

Of New Hampshire, imposing similar restrictions to the foregoing upon licenses, although in this case the article sold was a barrel of American gin, purchased in Boston and carried coastwise to the landing at Piscataqua Bridge and there sold in the same barrel;

All adjudged to be not inconsistent with any of the provisions of the Constitution of the United States or acts of Congress under it.

THESE cases were all brought up from the respective State courts by writs of error issued under the twenty-fifth section of the Judiciary Act, and were commonly known by the name of the License Cases.

Involving the same question, they were argued together, but by different counsel. When the decision of the court was pronounced, it was not accompanied by any opinion of the court, as such. But six of the justices gave separate opinions, each for himself. Four of them treated the cases collectively in one opinion, whilst the remaining two expressed opinions in the cases separately. Hence it becomes necessary for the reporter to make a statement in each case, and to postpone the opinions until the completion of all the statements. The arguments of counsel in each case will of course follow immediately after the statement in that case. They are placed in the order in which they are put by the Chief Justice in his opinion, but where the justices have given separate opinions in each case, the order is observed which they themselves have chosen.

To begin with the case of

Thurlow v. The Commonwealth of Massachusetts.

This case was brought up from the Supreme Judicial Court of Massachusetts. The plaintiff in error was indicted and convicted, under the Revised Statutes of the State, for selling liquor without a license. The indictment contained several specifications, but they were all similar to the first, which was as follows:

"The jurors for the Commonwealth of Massachusetts, upon their oath present, that Samuel Thurlow, of Georgetown, in said county, trader, on the first day of May, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the Revised Statutes of said Commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum, and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said Commonwealth and the form of the statute in such case made and provided."

It becomes necessary to insert the forty-seventh chapter of the Revised Statutes, and also an Act passed in 1837. They are as follows:

Revised Statutes of Massachusetts, Chap. 47.—The Regulation of Licensed Houses.

"Section 1. No person shall presume to be an innholder, common victualler, or seller of wine, brandy, rum, or any other spirituous liquor, to be used in or about his house, or other buildings, unless he is first licensed as an innholder or common victualler, according to

NOTE.—As to power of Congress to regulate commerce and State license laws, see notes to 6 *L. ed. U. S. 23*; 6 L. ed. U. S. 678; 29 L. ed. U. S. *168; 32 L. ed. U. S. 229*; 37 L. ed. U. S. 216; *and 38 L. ed. U. S. 1041.*

the provisions of this chapter, on pain of forfeiting one hundred dollars.

"Sec. 2. If any person shall sell any wine 506*] or spirituous liquor, *or any mixed liquor, part of which is spirituous, to be used in or about his house or other buildings, without being duly licensed as an innholder or common victualler, he shall forfeit for each offense twenty dollars.

"Sec. 3. No person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is [at] first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offense.

"Sec. 4. If any person, licensed to be a retailer as aforesaid, shall sell any of the above liquors, either mixed or unmixed to be used in or about his house or shop, he shall forfeit for each offense twenty dollars.

"Sec. 5. Every innholder shall at all times be furnished with suitable provisions and lodging for strangers and travelers, and with stable room, hay, and provender for their horses and cattle; and if he shall not be at all times so provided, the county commissioners may revoke his license.

"Sec. 6. Every common victualler shall have all the rights and privileges, and be subject to all the duties and obligations, of innholders, excepting that he shall not be required to furnish lodgings for travelers, nor stable room, hay, and provender for horses and cattle.

"Sec. 7. Every innholder and common victualler shall at all times have a board or sign affixed to his house, shop, cellar, or store, or in some conspicuous place near the same, with his name at large thereon, and the employment for which he is licensed, on pain of forfeiting twenty dollars.

"Sec. 8. If any innholder shall, when requested, refuse to receive and make suitable provisions for strangers and travelers, and their horses and cattle, he shall, upon conviction thereof before the Court of Common Pleas, be punished by a fine not exceeding fifty dollars, and shall also, by order of the said court, be deprived of his license; and the court shall order the sheriff or his deputy forthwith to cause his sign to be taken down.

"Sec. 9. No innholder or common victualler, shall have or keep in or about his house, or other buildings, yards, and gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or other implements used in gaming, nor shall suffer any person resorting thither, to use or exercise any of said games, or any other unlawful game or sport within his said premises, on pain of forfeiting ten dollars for every such offense.

"Sec. 10. Every person convicted of using or exercising any of the games aforesaid, in or about any such house or building of an innholder or common victualler, shall forfeit ten dollars.

"Sec. 11. No innholder or common victualler 507*] shall suffer any *person to drink to drunkenness or excess in his premises, nor suffer any minor or servant, travelers excepted, to have any strong drink there, on pain of forfeiting five dollars for each offense.

"Sec. 12. If any innholder or common victualler shall trust or give credit to any person for liquor, he shall lose and forfeit all the sums so trusted or credited, and all actions brought for such debt shall be utterly barred; and the defendant in such action may plead the matter specially, or may give it in evidence under the general issue.

"Sec. 13. If any common victualler shall keep open his house, cellar, shop, store, or place of business on any part of the Lord's day or evening, or at a later hour than ten o'clock in the evening of any other day of the week, and entertain any person therein by selling him any spirituous or strong liquor, he shall forfeit for each offense ten dollars.

"Sec. 14. When any person shall, by excessive drinking of spirituous liquors, so misspend, waste, or lessen his estate as thereby either to expose himself or his family to want or indigent circumstances, or the town to which he belongs to expense for the maintenance of him or his family, or shall so habitually indulge himself in the use of spirituous liquors as thereby greatly to injure his health or endanger the loss thereof, the selectmen of the town in which such spendthrift lives shall, in writing under their hands, forbid all licensed innholders, common victuallers, and retailers of the same town, to sell to him any spirituous or strong liquors aforesaid for the space of one year; and they may in like manner forbid the selling of any such liquors to the said spendthrift by the said licensed persons of any other town to which the spendthrift may resort for the same; and the city clerk of the city of Boston shall, under the direction of the mayor and aldermen thereof, issue a like prohibition as to any such spendthrift in the said city.

"Sec. 15. The said mayor and aldermen, and said selectmen, shall, in the same manner, from year to year, renew such prohibition as to all such persons as have not, in their opinion, reformed within the year; and if any innholder, common victualler, or retailer shall, during any such prohibition, sell to any such prohibited person any such spirituous liquor, he shall forfeit for each offense twenty dollars.

"Sec. 16. When the said mayor and aldermen, or selectmen, in execution of the foregoing provisions, shall have prohibited the sale of spirituous liquors to any such spendthrift, if any person shall, with a knowledge of said prohibition, give, sell, purchase, or procure for and in behalf of such prohibited person, or for his use, any such spirituous liquors, he shall forfeit for each offense twenty dollars.

"Sec. 17. The commissioners in the several counties may license, for the towns in their respective counties, as many persons to *be [*508 innholders or retailers therein as they shall think the public may require; and the mayor and aldermen of the city of Boston may, in like manner, license innholders and retailers in the said city; and the Court of Common Pleas in the County of Suffolk may, in like manner, license innholders and retailers in the town of Chelsea; and every license, either to an innholder or retailer, shall contain a specification of the street, lane, alley or other place, and the number of the building, or some other particular description thereof, where such licensed person shall exercise his employment; and the

license shall not protect any such person from the penalties provided in this chapter for exercising his employment in any other place than that which is specified in the license.

"Sec. 18. The mayor and aldermen of the city of Boston may license, for the said city, as many persons to be common victuallers as they shall think the public good may require; and every such license shall contain such a specification or description, as is mentioned in the preceding section, of the street or other place, and of the building where the licensed person shall exercise his employment; and the license shall not protect him from the penalties provided in this chapter for exercising it in any other place.

"Sec. 19. All licenses to any innholder, retailer, or common victualler shall expire on the first day of April in each year; but any license may be granted or renewed at any time during the preceding month of March, to take effect from the said first day of April, and after that day they may be granted for the remainder of the year, whenever the officers authorized to grant the same shall deem it expedient.

"Sec. 20. Every person, who shall be licensed as before provided in this chapter, shall pay therefor to the clerk of the city of Boston, the clerk of the Court of Common Pleas for the County of Suffolk, or to the clerk of the commissioners of the respective counties so licensing said person, one dollar, which shall be paid by said clerks to the treasurers of their respective counties for the use of said counties; and such persons shall also pay twenty cents to the use of the said clerks respectively; and no other fee or excise whatever shall be taken from any person applying for or receiving a license under the provisions of this chapter.

"Sec. 21. Any license to an innholder, retailer, or common victualler may be so framed as to authorize the licensed person to sell wine, beer, ale, cider, or any other fermented liquors, and not to authorize him to sell brandy, rum, or any other spirituous liquor; and no excise or fee shall be required for such a license.

"Sec. 22. The clerk of the commissioners in the several counties shall seasonably, before the time for granting licenses in each year, transmit to the selectmen of every town within the county a list of the persons in such town who were licensed as innholders or retailers the preceding year.

509*] *"Sec. 23. No license shall be granted or renewed to any person, unless he shall produce a certificate from the selectmen of the town for which he applies to be licensed, in substance as follows, to wit: We, the subscribers, a majority of the selectmen of the town of ———, do hereby certify that ——— has applied to us to be recommended as (here expressing the employment, and a particular description of the place for which the license is applied for) in the said town, and that, after mature consideration had thereon, at a meeting held for that purpose, at which we were each of us present, we are of opinion that the petition of said ——— be granted, he being, to the best of our knowledge and behalf, a person of good moral character.

"Sec. 24. Any person producing such certificate of the selectmen, shall be heard, and his application decided upon, either on a motion made orally by himself or his counsel, or upon a petition in writing, as he shall elect.

"Sec. 25. If the selectmen of any town shall unreasonably neglect or refuse to make and deliver such a certificate, either for the original granting or the renewal of a license, the person aggrieved thereby may apply for a license to the commissioners, first giving twenty-four hours' notice to a majority of the said selectmen of his intended application, so that they may appear, if they see fit, to object thereto; and if on such application it shall appear that the said selectmen did unreasonably neglect or refuse to give the said certificate, and that the public good requires that the license should be granted, the commissioners may grant the same.

"Sec. 26. All the fines imposed by this chapter may be recovered by indictment, to the use of the county where the offense is committed; and when the fine does not exceed twenty dollars, the offense may be prosecuted before a justice of the peace, subject to the right of appeal to the Court of Common Pleas, as in other cases.

"Sec. 27. When any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court or justice before whom the trial may be had.

"Sec. 28. All prosecutions, under the provisions of this chapter, for offenses committed in the city of Boston (excepting where the fine exceeds twenty dollars), may be heard and determined in the Police Court, subject to the right of appeal to the Municipal Court; but the said Police Court shall not have power, in any such case, to sentence any person to imprisonment, except as provided in the preceding section.

"Sec. 29. Any person, licensed under the provisions of this chapter, who shall have been twice before convicted of a breach of any of the said provisions, shall thereupon, in addition to the penalties *before provided, be [*510 liable to a further punishment, by imprisonment in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had."

Acts of 1837, Chapter 242.

"An Act concerning Licensed Houses, and the Sale of Intoxicating Liquors.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"Sec. 1. No licensed innholder or other person, shall sell any intoxicating liquor on Sunday, on pain of forfeiting twenty dollars for each offense, to be recovered in the manner and for the use provided in the twenty-sixth section of the forty-seventh chapter of the Revised Statutes.

"Sec. 2. Any license to an innholder, or common victualler, may be so framed as to authorize the licensed person to keep an inn or victualling house without authority to sell any intoxicating liquor, and no excise or fee shall be required for such license: Provided, that nothing contained in this act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county com-

missioners to grant any licenses, when in their opinion the public good does not require them to be granted.

"Sec. 3. Any person who shall have been licensed according to the provisions of the forty-seventh chapter of the Revised Statutes, or of this act, and who shall have been twice convicted of a breach of this act or of that chapter, shall, on such second conviction, in addition to the penalties prescribed for such offense, be adjudged to have forfeited his license.

"Sec. 4. Any person who shall have been three times convicted of a breach of this act, or of the forty-seventh chapter of the Revised Statutes, shall, upon such third conviction, in addition to the penalties in this act and said chapter provided, be liable to be imprisoned in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had.

"Sec. 5. The secretary of this Commonwealth shall cause a condensed summary of all laws relating to innholders, retailers, and licensed houses to be printed for the use of this Commonwealth, and he shall supply the county commissioners for the several counties, and such other officers as by law are authorized to grant licenses, with the same; and the said commissioners, or other officers, whenever they grant any license, shall furnish each person so licensed with one copy of said license laws, to the end that such person may know to what duties, restrictions, and liabilities he is subjected by law."

[Approved by the Governor, April 20, 1837.]

511*] *A conviction having taken place under the indictment upon these statutes, the defendant filed several exceptions, of which it is material to notice only the following:

"2. It appeared upon the trial that some of the sales charged in the indictment were of foreign liquors, and his honor directed the jury that the license law of this Commonwealth applied as well to imported spirits as to domestic, and that this Commonwealth could constitutionally control the sale of foreign spirits by retail, and that said law is not inconsistent with Constitution or revenue laws of the United States. To this ruling also the defendant excepts."

The court below allowed this exception, together with all the others, upon which the case was removed to the Supreme Judicial Court. But that court overruled the exceptions, and ordered judgment to be entered upon the verdict.

Mr. Hallett, the counsel for Thurlow, then applied for, and obtained, a writ of error to bring the case to the Supreme Court of the United States, upon the following allegation of error, viz:

"That the several acts of the Legislature of Massachusetts concerning licensed houses and the sale of intoxicating liquors, and especially the acts which are hereto appended and set out as part of the record in the said cause, upon which said judgment was founded, and also the opinion and judgment of said Supreme Judicial Court of Massachusetts, in the application and construction of said acts to the sales of imported foreign liquors and spirits by the said Thurlow, are repugnant to, and inconsistent with, the provisions of the Constitution, treaties, and laws of the United States, in so far as the said acts, and the construction thereon by the said Supreme Judicial Court of Massachusetts, prohibit, restrain, control, or prevent the sale of imported wines and spirituous liquors, by retail or otherwise, in the said State of Massachusetts, and are therefore void."

Upon the writ of error thus issued, the case came up to this court.

It was argued in January, 1845, by Mr. Choate and Mr. Webster for the plaintiff in error, and Mr. Huntington for the State. Being ordered to be re-argued, it was now argued by Mr. Webster alone for the plaintiff in error, and Mr. Davis for the State.

Mr. Webster opened the case. The best mode of presenting his views of the points which arose will be, to repeat the brief filed by himself and Mr. Choate in the former argument. It was as follows:

The plaintiff in error, a citizen of the United States, living in Massachusetts, was convicted, under the Revised Statutes of that State, ch. 47, and the Statute of that State of 1837, ch. 242, of sales of foreign spirits made in 1841 and 1842, without a license. He seeks to reverse the judgment, upon the general ground that those statutes are repugnant to constitutional acts of Congress, and to the Constitution of the United States; and contends—

*1st. That they prohibit even the [*512 importer of foreign spirits from selling them in the bottle, keg, or cask in which he imports them, either for consumption at the place of sale, or for carrying away; and are therefore unconstitutional, within the case of Brown v. Maryland, 12 Wheat. 419.

2d. That they are void, as being repugnant to the legislation of Congress, in their application to purchasers from importers, of whom the plaintiff is one; and hereunder he submits the following analysis of his arguments:

1st. The statutes of Massachusetts are not auxiliary to, co-operative with, and merely regulative of, the legislation of Congress, which admits foreign spirits to importation under prescribed rates of duty, but are antagonistical to and in contravention of it, since they seek to diminish and discourage the sales of imported spirits to a greater degree than the legislation of Congress seeks to do it, upon the ground that the policy of Congress in this behalf is an erroneous policy.

To maintain this, the object and operation of the Massachusetts statutes, and the policy and the principle of constitutional power upon which they proceed, are to be considered.

Without a license, no one can sell, in a single instance, spirits to be used on the premises of the vendor, and no one can sell them for the purpose of being carried away, in a less quantity than twenty-eight gallons, which must be bought and removed all at one time.

The result, therefore, is, that without a license no one can sell spirits to be used, or to be carried away for use, since no one purchases for use so large a quantity as twenty-eight gallons to be carried away at one time.

Without a license, therefore, no one can sell at all by retail; and the retail trade in spirits, the sale of spirits for use, is suppressed.

2d. No one is entitled to a license, or can

exact it, whatever be his character of fitness to trade.

No court or person is required to give a license. A tribunal called county commissioners, chosen by the people of the counties, may, if in its judgment the public good requires it, grant licenses; but even in such case it is not required to grant them.

For the last six years none have been granted in the county of the plaintiff's residence, containing more than one hundred thousand inhabitants.

This withholding of licenses is no fraud on the Massachusetts statutes, but in perfect conformity with them.

In conformity with the law, then, all sales of spirits for use may be totally prohibited in Massachusetts.

These laws design to do just what can be legally, and without defrauding them, done under them.

The design, then, to restrain all sales of spirits for use; and they do this upon a general principle of policy, to wit: that such sales, for such purpose, by whomsoever made, are a public evil.

513*] *The difference, therefore, between them and all laws of mere policy, of quarantine, health, horbors, storage of gunpowder, and the like, is, that those laws are auxiliary to, in aid and furtherance of, co-operative with, the Congressional legislation, while these deny its policy, and thwart and restrain its operations.

These statutes do not confine themselves to providing for suitable persons, places, and modes of selling foreign spirits, so as to secure the largest amount of traffic in the most expedient and prudent manner; but they mean, substantially and effectually, to put an end to the traffic.

The plaintiff in error, therefore, will discuss these laws, as if they did, in terms, prohibit all persons who buy of importers from reselling, since they do substantially so operate; and they assert a principle of power broad enough to go to that extent.

The general question, therefore, is this: Is a State law, prohibiting purchasers of spirits from importers to resell, on the ground, that, for moral, medical, economical, or other reasons, the public good will not be promoted by such sale, repugnant to the acts of Congress, and to treaties authorizing importations of such spirits?

These sales were in 1841, and subsequent. The acts of Congress are, 1832, ch. 227, 4 Statutes at Large, 583; 1833, ch. 55, 4 Ibid. 629; 4 Ibid. 25; 3 Ibid. 310.

These authorize importations in casks of fifteen gallons.

2d. What is the extent of the effect of an act of Congress authorizing importations?

1. Regarded as a license to, or contract with, the importer, communicating a right to sell, according to the view in Brown v. Maryland, 12 Wheat. 447, what is its extent?

The plaintiff contends that it would be repugnant to, and in fraud of, the license, either to ordain that no one shall buy of the importer, or to ordain that no one, having bought, shall resell, because either prohibition would totally *defeat the license itself.* The license is a license *to carry the article to market,* to trade in it, to have access with it to the consuming capacity of the country.

The grounds on which Congress legislate, in passing such an act, and the just expectations and reasonings of the importer, prove this.

The interception of the article in the hands of the first buyer, on its way to a market, excludes it from market, and shuts the importer from the country as really as if he were prohibited to sell.

2. Regarded as Congressional legislation, an act authorizing importations of spirits is a legislative determination that the foreign article may properly, and shall, enter into the consumption of the country, and be sold in the interior market thereof; and the Massachusetts statutes are intended to contravene that determination, upon a directly opposite view of policy.

3. Congress has the constitutional power to determine, on general grounds of policy, what foreign articles shall enter into the consumption *of the country, and be sold in [*514 the domestic market, and to what extent; and it exercises this power by an act laying duties. It determines that all which can be introduced and sold under such a rate of duties shall be, and the power of the States is merely auxiliary, co-operative, and regulative, securing proper persons by whom the traffic shall be conducted, but not discountenancing and discouraging the traffic itself. That power these statutes transcend.

It may be proper, also, in this connection, to reprint the abstract of the argument of Mr. Hallett, upon the same side, to show the reasons given for the doctrine sustained by the counsel for the plaintiff in error. Mr. Hallett's abstract was as follows:

Are the laws of Massachusetts concerning the sale of imported wines and spirits constitutional and valid?

We contend they are not, because—

1. No State can prohibit, by wholesale or retail, the sale of merchandise authorized by a valid law of Congress, or by treaties, to be imported into its markets; the retail sale being as indispensable to the object of importation, viz., use and consumption, as the wholesale.

2. The laws of the United States nowhere recognize any distinction between the wholesale and retail of imported merchandise, as connected with the right of the importer to introduce such merchandise, for use and consumption, into the markets of the United States.

3. Every concurrent or other power in a State is subject in its exercise to this limitation, that in the event of collision, the law of the State must yield to the law of Congress, constitutionally passed. New York v. Miln, 11 Peters, 102; Commonwealth v. Kimball, 24 Pick. 359.

4. If Congress has the power to regulate a subject matter, a State cannot interfere to oppose or impede such regulation. The general government, though limited, is supreme as to those objects over which it has power. Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 384; Prigg v. Pennsylvania, 16 Peters, 539.

5. The commerce which Congress may regulate is something more than traffic. It is every species of commercial intercourse be

tween the United States and foreign nations, and among the several States. "These words [regulate commerce] comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and another to which this power does not extend." Gibbons v. Ogden, 9 Wheat. 189, 193, 194.

6. The exercise of the power of a State to regulate its internal commerce must not conflict with, and cannot control, the power of Congress to regulate foreign commerce, and commerce among the States. The internal commerce on which a State can act, independ-
515*] ent *of a law of Congress affecting the same, must be trade, or dealing in articles not connected with the operation of a valid law of the United States. It must be "completely internal," local, and not connected with the United States government, in the exercise of its power to regulate commerce, and to lay and collect duties and imposts.

7. "The power [of the United States] to regulate commerce, must not terminate at the boundaries of the State, but must enter its interior. The power is co-extensive with the subject on which it acts." Brown v. Maryland, 12 Wheat. 446.

8. If a State, under the power of regulating her internal commerce, can exclusively regulate or control (to the extent of prohibition) commerce in imported merchandise, up to her boundaries, or the instant it shall pass, in bulk, from the hands of the importer, she can thereby exclude foreign commerce, and deny her markets to foreign nations.

9. If a State has no such power of prohibition, she cannot empower her officers or agents to do what she cannot do herself, viz., prohibit internal commerce in foreign merchandise. Suppose the Legislature of Massachusetts, instead of conferring this power of prohibition upon the county commissioners, to be exercised in their uncontrolled discretion, should retain it, to be exercised by herself; it would be unlawful legislation, and collision of a State law with a law of the United States.

10. The laws of Massachusetts, of which the plaintiff in error complains as unconstitutional, are, in respect to commerce and trade in this description of imported merchandise, a law of prohibition, because they assume to provide for licenses to persons to sell, and then empower the agents they create to refuse all such licenses, without cause; and it punishes all sellers in quantities less than twenty-eight gallons, without such license; and, in fact, no such license can be obtained. Both the intent and the operation of these laws are, therefore, prohibitory.

11. If it be said that it depends upon the administration of this law, whether it be constitutional or not, and therefore a law may be constitutional though its operation may be unconstitutional, the answer is, that a State cannot so frame a law as that under one sort of administration it is constitutional, and under another unconstitutional, and both operations be lawful, and thus the law be valid.

12. If a law of a State provides for and contemplates collision with a law of the United States, the former is invalid, and must yield whenever the collision arises.

13. The counsel for the Commonwealth of Massachusetts admits that the law complained of becomes prohibitory against this description of imported merchandise, whenever the public sentiment of a majority electing the county commissioners requires prohibition. If this be valid State legislation, then the power of Congress to regulate *commerce in [*516 imported merchandise is subordinate to the disposition of the Legislature of a State to exclude it from their markets.

14. The laws of Congress make no distinction between commerce in imported wines and spirits and other foreign merchandise. A recognition of the power of a State to exclude the first from its markets, whenever public sentiment requires it, must embrace the like power in respect to all other descriptions of imports, whenever the public sentiment in a State demands its exercise.

15. There is no pre-eminence given to that class of State legislation denominated police laws over other laws, whenever they come in collision with the lawful exercise of a power of Congress; and in such case the latter, by the terms of the Constitution, shall be the supreme law of the land.

16. The law of Massachusetts in question is not a health law against contagion or infection in the article imported; it aims to keep it out of the hands of the consumer, on the ground of its abuse in excess of use. Health laws may exclude all such portions or cargoes of an article of commerce as are infectious; but they cannot exclude a whole class of imported merchandise, on the ground that infected portions or cargoes of it have been, or may be, imported.

17. Infected articles of commerce may rightfully be excluded from passing the boundary of a State, and reaching the hands of the importer, as well as the consumer. But a State cannot, under Brown v. Maryland, 12 Wheat. 419, exclude imported wines and spirits, or any sound article of commerce, from reaching the importer; and this is an obvious distinction between health laws and a law of prohibition to cut off the transfer of a sound article from the importer to the consumer.

18. The point where regulation ceases and prohibition begins is the point of collision, and of unconstitutional operation, of a State law affecting foreign commerce. In this respect a State law becomes a law of prohibition when it punishes all who sell without license, and confers the whole power of licensing on agents, with express authority to withhold all licenses.

19. In any and all cases, the power to deny sale includes the power to prohibit importation; and the question of power is the same, whether exercised directly by the Legislature, or indirectly by its agents thereto authorized.

20. The operation of the law of Massachusetts on foreign wines and spirits deprives imported articles of their vendible quality. This such law cannot rightfully do, for the whole course of legislation by Congress shows that the right to sell is connected with the payment of duties, and the right to sell must extend beyond the importer, or it is an inoperative right.

21. The argument on the other side is, that if the power to *regulate commerce can [*517 follow the imported article, with its vendible

quality attached, into a State, it can compel consumption by the citizens of that State. This confounds the mere commercial right to offer for sale with the power to force purchase. All the law of Congress requires in the markets of the United States is a right to sell and buy; and when this right ceases, commerce ceases.

22. The counsel on the other side further argues, that the State has a right to deny this commerce, whenever her citizens do not wish to deal in it. But if they do not desire to purchase, there would be no need of a prohibition of sale. The law of prohibition proceeds on the ground, that if commerce in this article were not denied, there would be such commerce; and therefore it directly interferes with the law of Congress regulating that commerce.

23. A State may pass all such laws as she pleases for the safety, health, or morals of her people, and may use whatever means she may think proper to that end, subject only to this limitation, that in the event of collision with a law of Congress, the State must yield. Commonwealth v. Kimball, 24 Pick. 363.

24. Now, Congress, by law and by treaties, authorizes foreign commerce with the States in wines and spirits. By the treaty of indemnity with France, in 1832, the wines of France were "admitted to consumption in the markets of the United States." The law of Massachusetts shuts her markets against the fair and just operation of these laws and treaties of the United States, and renders them so far inoperative.

25. The general view as to the prohibitory provisions of the laws of Massachusetts in this matter, taken together, is, that it is a blending of two powers to be exercised at pleasure under the statute: one legitimate—to regulate; the other unconstitutional—to prohibit, whenever the public sentiment of the State comes up to that point.

26. Massachusetts assumes to abolish foreign commerce in her markets in imported spirits, on the ground of thereby preserving the health and morals of the people; but at the same time, in her internal commerce and exports, she encourages; without tax or excise, an annual manufacture by her citizens of 5,177,910 gallons of domestic spirits; which is one eighth part of the whole product of the United States in spirits distilled from molasses and grain.

27. Congress has not changed its policy in this respect, but Massachusetts has changed hers, in opposition to the laws of Congress. Until 1837, the laws of Massachusetts uniformly provided for the sale and consumption of wines and ardent spirits imported into her markets. The Act of 1786, ch. 68, 1 Mass. Laws, 297, was in force with additional acts till 1832. By section fifteen, the general sessions were not to license more persons in any town than they shall judge necessary for re-
518*] freshment of travelers, *or are necessary for the public good, by which was meant the public convenience. Act of 1792, ch. 25, p. 417, required all persons to be licensed, on satisfactory evidence of fitness, and that such license will be subservient to the public good. Additional Acts, 1807, ch. 127; 1816, ch. 112; *118, ch. 65.*

The Act of 1832, ch. 166, reduced the maximum to ten gallons, and provided for a new class, victuallers. The commissioners to license, as innholders and retailers, as many applicants as they shall decide the public good may require. The law now in force (Rev. Stat. ch. 47, 1835) altered this provision to power to county commissioners to license as many persons as they shall think the public good may require.

Then followed the declaratory Act of 1837, ch. 242, that the commissioners might withhold all licenses in their discretion.

The Act of 1838, ch. 157 (commonly called The Fifteen-gallon Law), made penal all sales of spirituous liquors less than fifteen gallons; licensed only apothecaries to sell for medicine and the arts, and punished the sale by them, if to be drank; and repealed all laws inconsistent with this act.

This brought up the question of prohibition. The act was contested in the courts of Massachusetts as unconstitutional, but was not decided there before it was repealed, in 1840, without any reservations. The Supreme Court of that State thereupon decided, in 1840, that the repeal revived the pre-existing laws, chap. 47 of Rev. Stat. and chap. 242 of 1837. Commonwealth v. Churchill, 2 Metcalf, 118. Since then no licenses have been granted. The plaintiff's first sale in the case at bar was in May, 1841, and this case has been brought up on writ of error as soon as the laws of Massachusetts and the decisions of her highest court have established prohibition as the law of that State.

28. The law of Massachusetts comes in collision with the power of Congress over revenue, which is a supreme power, used as a substitute for taxation. With this view, the Constitution requires that "all duties shall be uniform throughout the United States."

If Massachusetts, by her laws, can exclude one or more articles of import, she pays so much less revenue than other States that admit all. This makes the operation unequal so far, arising from the legislation of Massachusetts adverse to the power of Congress to collect revenue in all the States. Suppose the duty on foreign wines and spirits to be one fourteenth part of all the revenue, the States can cut that off, if this legislation is valid; and, by the same rule, all other sources to collect revenue are wholly destroyed.

29. So of the treaty making power. The United States has power to reciprocate its markets with the markets of foreign nations; but if a State can shut its markets against any one or more of the articles admitted, by denying sale, the United States cannot in good faith perform any such reciprocal engagement.

30. *The laws of Massachusetts, there- [*519
fore, which, by their provisions, and their operation in conformity to such provisions, prohibit all commerce in wines and spirits in quantities under twenty-eight gallons, are repugnant to the Constitution and laws of the United States—

1st. In the power to regulate foreign commerce.

2d. In the power to collect revenue on imports into the several States.

3d. In the equal apportionment of taxes and duties in all the States; and,

4th. In the power to make treaties.

Mr. Davis, for the State: The following is

a sketch of the argument, and shows the positions assumed and maintained by him for the defendant in error:

The broad ground assumed by the plaintiff's counsel is, that the statute of Massachusetts is unconstitutional, because it "prohibits, restrains, controls, or prevents the sale of imported wines and spirituous liquors, by retail or otherwise, in the State."

To make the policy of Massachusetts, in restraining an indiscriminate traffic in intoxicating drinks, intelligible, we must understand its history, and the state and condition of things when the Constitution of the United States was made.

The court has often declared, that in a complicated system, which establishes two governments over the same people, it is necessary, in considering questions of power, to look into contemporaneous facts; that the objects designed to be secured by the federal Constitution may be understood, and, if possible, carried into effect.

The context of the instrument is not alone to be regarded, but the whole machinery of government; and care must be taken, in carrying out the fundamental principles, that the purpose of the framers is not frustrated.

As the power of Massachusetts to make laws restraining traffic in intoxicating drinks is denied, I shall, as a preliminary step, briefly state the history of her legislation upon this subject, and point out the consequences which will follow if this doctrine is maintained.

The law of Massachusetts was revised in 1836; but acts similar in principle, and nearly so in detail, have existed for more than two centuries, and been enforced by her judicial tribunals. Ancient Charters, 135, 314, 433, Laws of Mass. 1786, ch. 68; Revised Statutes, ch. 47, and several other statutes.

The law, substantially as it now is, forbidding a sale without a license in less quantities than twenty-eight gallons, was made in 1786, and was in force when the federal Constitution was ratified, and has, with immaterial modifications, remained so from that time to this.

From thence till this time, the revenue sys-
520*] tem of the United *States has been in force; and the laws which are now supposed to conflict have during all that time worked harmoniously together.

After a lapse of fifty-six years, it is now first discovered that the State is trenching upon the power of the United States, and impairing the revenue by restraining the sale of imported wines and spirits.

Let it be remembered, however, that the United States do not and have not complained of any wrong done by the State; nor has any question ever been agitated in that quarter, in regard to the diminution of the revenue; which makes it quite apparent that no serious inconvenience is felt.

While, however, I admit the right of the plaintiff to appeal to this court, I must observe, that, although this long acquiescence may not prove the law of the State to be constitutional, it establishes the fact that it has produced no noticeable or sensible influence upon the revenue or the revenue power of the United States. It would seem, also, to be a clear indication that the federal *government is not* hostile to the policy of Massachusetts, or anxious to promote drinking to increase the revenue.

It also proves that the State has at all times during its organization as a body politic considered restraint in the traffic of spirits as essential to the public welfare.

But the State is not an exception to other communities in this respect, but has followed out a principle which has been maintained and enforced through all ages among the civilized nations.

Mr. Davis then proceeded to prove, from historical authority, that the ancient Egyptians, the Greeks, the Romans, and the more Eastern nations did, through most periods of their existence, maintain rigid and severe restrictions upon the use of wine, and that excessive indulgence at all times was esteemed criminal.

He referred also to China, and the bordering nations, where abstinence from intoxicating drinks was enforced as a religious duty. He referred also to the western nations of Europe, whose opinions and laws were equally condemnatory of excessive indulgence, and remarked that but one opinion prevailed through all ages.

He said that the common law of England and this country frowned upon intemperance, and held it to be without apology; for, while mental alienation by the province of God was a justification of crime, when it occurred by drink it was not; but the party was held answerable, because his insanity was occasioned by his own folly.

Even in the new settlement of Oregon, made up of people, congregated from different parts of the earth, the sale and manufacture of spirits was forbidden by law.

But there was no occasion to multiply proofs of public opinion, for intemperance was everywhere deprecated and lamented, and had almost everywhere fallen under the condemnation of legal restraint, *by enactments for that [*521 purpose, or by taxation. Experience had everywhere proved that there was a proneness in the human appetite to excess which requires control.

It should be observed, that the ancients were unacquainted with alcohol, and used wine in its simplest and most unobjectionable forms; while upon the moderns the double duty is devolved of contending against the demoralizing effects of both.

The train of evils which mark the progress of intemperance is too obvious to require comment. It brings with it degradation of character, impairs the moral and physical energies, wastes the health, increases the number of paupers and criminals, undermines the morals, and sinks its victims to the lowest depths of vice and profligacy.

In proof of this, there were in New York, in 1845, 26,114 paupers, 6,245 of whom were reduced to that condition by intemperance. In the same year there were in Massachusetts 14,308, and 6,740 were addicted to excessive drinking.

In the Sing Sing penitentiary, in 1845, there were 861 convicts, and 504 of these had been intemperate. The returns of other poor-houses and penitentiaries are equally startling.

These facts prove that intemperance is an evil of all-prevading magnitude, and that all ages and communities have set upon it the seal of disapprobation.

Such being its character, and such the evils which it engenders, the Colony, the Province, and the State of Massachusetts held it to be an imperative duty to check its progress by suitable restraint, and to promote sobriety and temperance by wholesome regulations.

Her law stood upon her statute book when the federal Constitution was made, and there it still remains.

No argument can make the fact clearer, that she has at all times esteemed legal restraint as indispensable to the public welfare.

Suppose, then, that the law of the State should be held unconstitutional, and she should be denied the power to legislate upon the subject; what consequence would follow?

It will appear in the progress of this inquiry, that the United States have no power to regulate the traffic in wines and spirits within the States; and if the State has no such power, then the right is abrogated.

Is not such a result hostile to the intent of all parties to the Constitution? The framers did not intend it, and the States could not have contemplated it.

The United States are as much interested in the preservation of life, health, and morals as the States can be, and the motive to avert pauperism, crime, and profligacy must, with them, be equally presuasive. The policy and duty of the federal and States governments must obviously be concurrent, and cannot be arrayed in hostile attitude without violence to both.

522*] *Neither the United States, nor the State of Massachusetts, could, therefore, when making the Constitution, have anticipated the abrogation of this power; and if it has been done, it is contrary to the intent of the parties. This is inferable, not only from what has been stated, but from the fact that these parties have moved on in their respective spheres for fifty-six years, in the exercise of their respective claims to power, without conflict and without entertaining a suspicion that the State has been enforcing laws without authority and in violation of right.

It would be a singular result, and one to be deprecated, if, in giving construction to the Constitution, the court should arrive at a conclusion injurious both to the United States and the States; a result which both would deplore as hostile to their best interests, and subversive of the purposes which they had in view when they entered into the constitutional compact.

Nothing but a commanding necessity can sanction such a step, and it never will be taken unless under an imperiously pressing sense of duty.

With such facts and circumstances as these surrounding it, we come to the consideration of the question, whether the law of Massachusetts is constitutional.

The plaintiff in error assumes the affirmative, and must establish the fact that it is incompatible with, or repugnant to, the Constitution and laws of the United States.

It will not be denied that the federal government has no powers except such as are granted to it and are enumerated in the Constitution.

On the other hand, it is equally clear and *indisputable, that the States* retain in themselves *all powers not so granted* or prohibited by the Constitution. This is an irresistible inference; but the State made it doubly certain, by declaring in amendment the fact, in the most clear and explicit terms.

While, therefore, the United States hold the powers which are granted, the States hold those which are not granted or prohibited, and both are fully sanctioned and maintained by the Constitution.

The plaintiff, therefore, must maintain that Massachusetts has, in making her law, exercised a power not reserved to her.

He makes it a question concerning commerce. He contends that the law, in effect, regulates foreign trade, the power to do which is confided to the United States.

The ground assumed is, that the United States authorize importations, and levy upon them a duty for revenue; that the right to sell is incident to the right to import, and cannot be controlled or regulated by the State in such a manner as to diminish the sales or to impair the revenue.

The Constitution declares, that Congress has power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

*These words give all the authority [*523 which the United States have over commerce.

The power is manifestly limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. The grant covers these three kinds of commerce, and nothing more.

In this case, commerce with foreign nations alone is to be considered. The domestic commerce is necessarily excluded; for it is neither foreign, nor is it trade among the States, nor with the Indian tribes.

This inference is not only apparent from the language of the Constitution, but is fully sustained by authority.

In Gibbons v. Ogden, 9 Wheat. 203, the court, in commenting on inspection laws, employ the following language: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are component parts of this mass. . . . No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation."

Again, in the same case the court speak of the power to regulate the internal trade and commerce of a State as an acknowledged power of the State.

It is therefore judicially settled that the power to regulate the internal commerce of a State is reserved to and resides in it.

Such being the partition of powers between the States and the United States, I come to the inquiry, What is the character of the law of Massachusetts? Upon what basis does it stand, and from what power or right in the State is it derived? And I shall contend that it is a regulation of the internal commerce of the State, having for its object the preservation of order, morals, and health, and intended to dis-

courage intemperance and to promote sobriety. And such being its general characteristics, I shall also contend further that it falls within that class of laws generally called police regulations.

The trade intended to be regulated is completely internal, and spread over the whole territory of the State. That the regulation of such a commerce belongs to the State is evident, not only from the authority cited, but from the language of the court at page 195 of the same case. "The completely internal commerce of a State," says Chief Justice Marshall, "then, may be considered as reserved for the State itself."

The State has furthermore a right to provide for the health of its citizens by police regulations. In Gibbons v. Ogden, 9 Wheat. 205, 524*] *the court say of quarantine and health laws, "They are considered as flowing from the acknowledged power of the State to provide for the health of its citizens"; again, at page 208, "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens," is spoken of as unquestioned.

It may, then, be assumed on authority which does not admit of doubt, that a State has a right to regulate its internal commerce, and to provide for the health and government of its citizens by suitable laws. That such regulations are considered by this court to be police laws will not be doubted.

These propositions are sustained by high authority. The State possesses the undeniable right to regulate its internal trade, and to maintain municipal or police regulations to protect and promote the welfare of the people.

That a law restraining an indiscriminate traffic in wines and spirits, and designed to protect life and health by promoting temperance and sobriety, is a police law cannot be questioned.

The law of Massachusetts being, then, a measure relating to a trade completely internal, and a police regulation, is, in all its aspects, founded on an acknowledged power which is vested in the State by the provisions of the Constitution.

This being the highest source of authority, it would seem sufficiently to justify and maintain the law.

But it is contended that even this foundation may fail a State in cases of conflict; for the law of the United States is supreme, and must, in such cases, prevail against the admitted right of a State.

Our system is obviously complicated, because the federal and State governments extend over the same territory and people, and act upon the same persons and things. For example, foreign commerce is destined to become internal, and internal to become foreign. This flux and reflux from jurisdiction to jurisdiction brings the laws into contact, and the jurisdictions impinge upon each other.

This opens the question, Which in such cases shall prevail? The answer has been, that federal power in such cases is paramount and supreme. This is sometimes said to be an axiom to which State authority must bow in submission. But if we admit the authority, the question still *remains. How far does this implied* supremacy extend over the acknowledged powers of the States? Is it unlimited, and must a State yield to its touch whenever felt? No one, I believe, will urge the doctrine to this extremity.

The decision of this tribunal will establish the fact that the supremacy of federal power in cases of conflict has boundaries and limits, and that the action of State laws derived from powers reserved to the States is never unconstitutional until it becomes incompatible with, or repugnant to, the federal laws.

But what is incompatibility? What is repugnancy? This inquiry often presents [*525 perplexing considerations, because no fixed, determinate rule can be laid down by which cases can be tested; but each case, as it comes up, is left to be decided by the facts which surround it. Whenever State power touches that of the United States, whoever may profit by it is anxious to make out a case of incompatibility or repugnancy, and thus every seeming conflict is liable to become a matter of judicial investigation; and there is a constant disposition manifested to expand the power of the general government, and to contract that of the States.

We are not, however, without authority which throws no inconsiderable light on this inquiry. The learned commentator upon the Constitution (1 Com. 432), after an examination of all the authorities, sums up the result: "In cases of implied limitations or prohibitions of power [and this is one] it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme inconvenience, leading irresistibly to the same conclusion."

Under this rule a State may exercise its power in any way or form, and to any extent, if its action upon federal power does not amount to manifest incompatibility or direct repugnancy. The fact of incompatibility or repugnancy must not be equivocal, but clear and certain. In cases of incompatibility, it must be apparent that the laws of the United States and a State supposed to be in conflict cannot stand together, or be reconciled or harmonized with each other. The whole doctrine of repugnancy and incompatibility is confined within these narrow limits. It is applied, in fact, only to cases where the power of a State so acts upon a power of the United States as substantially to subvert or defeat it. In such cases only has the supremacy of the federal law been maintained over constitutional State power. The rule clearly implies, in all cases of doubt, that the power of the State is to prevail against this implied right of supremacy. Even potential inconvenience is not to be regarded, but must be tolerated as long as it falls short of incompatibility or repugnancy.

It requires but little consideration of the subject to justify these cautious limits of power; for if the laws of the State must recede before those of the United States whenever they come in contact, it is manifest that State power would be in imminent danger of being obliterated; for, as State power yields, federal power must follow and press upon it. The dangers which beset the exercise of power by sovereignties whose limits of authority are not ascertainable cannot be more forcibly described than in

the language of the late Chief Justice, in McCulloch v. Maryland, 4 Wheat. 316, 430. After stating the grounds upon which the decision rested, the learned judge says: "We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from repugnancy between a right in one government 526*] to pull down what there is an *acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve; we are not driven to the perplexing inquiry, so unfit for the Judicial Department, what degree of taxation is the legitimate use, and what degree the abuse, of power." The court congratulated itself upon having discovered the limits of sovereignty without resorting to the implied right of supremacy on the part of the United States, which necessarily involved the most conflicting and dangerous considerations.

This case is but one among the many proofs given by this court of an uniform and anxious desire to give full and free scope to the powers of the respective governments, and to harmonize, if possible, their action, without asserting the supreme authority of the federal Constitution over the acknowledged powers of the States. This can never be done when it subverts the lawful power of the States without creating alarm, and impairing the stability of the Union.

The cautious and almost reluctant manner in which this court have applied this doctrine of supremacy over acknowledged State power is manifest in many of its decisions, which prove incontestably its disposition to avoid such conflict if possible.

It has already been shown from Gibbons v. Ogden, "that inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," originate from powers which are reserved to the States. What is the character of those laws, and how are they executed? The answer will show how far the power of a State may be carried without incompatibility or repugnancy.

They deal with foreign commerce, asserting, as will appear by their provisions, absolute control over it for certain purposes which are connected with the public welfare and safety.

The inspection laws authorize the detention and examination of merchandise, and the imposition of marks which denote its true character, and often affect its value.

Quarantine laws direct possession to be taken of vessels arriving, and require them, with their crews, passengers, and cargoes, to be detained, and forbid intercourse with the shore.

The health laws carry with them a similar authority, and provide not only for detention, but for the purification, and, if necessary, the destruction of the cargo.

In Brown v. Maryland, 12 Wheat. 443, the court observed, "that the power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the States." They add, *also, that* "the removal or destruction of *infectious or unsound articles* is undoubtedly a *branch of the same power.*"

These laws interfere directly with foreign commerce, asserting a right to control men, vessels, and cargoes, before a voyage is completed.

*Harbor laws, ballast laws, etc., are [*527 of a similar character, hence it has been supposed that they are regulations of foreign commerce.

But this court repel this conclusion, and maintain their constitutionalty, because they are police regulations of the States, and derived from a right reserved to make and execute such laws; and are not, therefore, regulations of foreign commerce, though, for the purposes of protecting life, health, and property, they necessarily deal with it. The court go farther, and also maintain that such laws are not incompatible with or repugnant to the laws of the United States which relate to foreign commerce, and therefore no objection exists to the exercise of such power by the States over foreign commerce.

It is manifest from these authorities, that State power, and especially police power, may be exercised upon matters within the jurisdiction and under the control of the United States without incompatibility or repugnance. The protection of life, health, and property demand it. The right to do it is acknowledged, and cannot be questioned, unless its exercise defeats or subverts the power of the United States; then, and in such cases only, it is viewed as incompatible or repugnant.

This brings the doctrine of repugnancy and incompatibility, when asserted against the rightful power of a State, into narrow limits; and it is believed that no case has yet occurred before this court, in which the power of the United States, because it is supreme, has been extended by implication so as to defeat or overrule the acknowledged authority of a State, unless concurrent powers constitute an exception.

It is further manifest, that the right of a State to make police laws is unquestioned, because, as the court declare, it is among the reserved rights. This power, I have shown, has been and is exercised in a great variety of ways, and in many forms, over foreign commerce.

It is obvious, therefore, that it constitutes the boundaries of sovereignty, and is paramount to the power of the United States in all cases, except where it defeats or subverts the granted powers of the United States.

It is further obvious, that the court will not consider a State law, made in the exercise of lawful authority, and in the exercise of a power belonging to the State, a law regulating foreign commerce, though it may act upon and influence such commerce.

It is also obvious, that the court has never denied, but, on the other hand, has always admitted, the right of a State to make police regulations, to protect life, health, and the property of the citizens, and the right to extend this protection against the dangers incident to foreign commerce has uniformly been distinctly recognized.

It can neither be admitted nor maintained that the United States, *under a general [*528 power to regulate foreign commerce, has a right, without restraint, and in defiance of State powers, to import disease and pestilence,

to fill the country with infamous persons, or to debauch the public morals. Such is not the design of the Constitution; and if such a right shall be successfully asserted, it will soon prove that the federal and State governments cannot exist together.

Such are the restraints which oppose the extension of federal power, in cases of apparent conflict, on the ground that it is supreme.

A careful examination of the many decisions will prove that the court has anxiously studied to fix, as far as circumstances will permit, definite boundaries to sovereignty, leaving them to depend as little as possible upon questions of incompatibility or repugnancy.

The police laws of the State have uniformly been maintained, on the ground that the States have a right to make them, and this right is not to be questioned, although in the exercise of it the laws and power of the United States are and must be affected, or the remedy against alarming evils be incomplete. It seems to me that the court have practically, and for the best of reasons, placed such laws on the ground that they emanate from exclusive and independent powers enjoyed by the States.

This position has been gradually approached, with a watchful solicitude at every step taken in advance.

In New York v. Miln, 11 Peters, 102, a reexamination of the authorities was made, and the grounds of the opinion there delivered are stated with great clearness (p. 139). After discussing the principles so ably laid down in Gibbons v. Ogden, the learned judge says: "We do not place our opinion upon this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these, that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the happiness, the safety, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may, perhaps, be more properly called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

This authority defines the great question of boundary between the sovereignties with an accuracy which cannot be mistaken, so far as regards police laws.

The powers not conceded or prohibited by the 529*] Constitution remain *in the States unchanged, unaltered and unimpaired, and as fully in force as if no Constitution had been made.

None of those powers which relate to municipal legislation or internal police have been surrendered or restrained, but are complete, unqualified, and exclusive.

If they are complete, the State has the whole and the sole *enjoyment*.

If they are unqualified, they remain as they were, unaltered and unchanged.

If they are exclusive, there can be no participation in them by another.

The inference is irresistible, that such powers are independent of and paramount to the Constitution of the United States, and therefore not subject to any supreme power of the federal government in cases of conflict.

This is but carrying out the provisions of the instrument, as they apparently stand.

It is manifest, that the laws of the two governments must meet and mix, because the jurisdictions commingle, and the question is, Did not the framers of the Constitution intend it should be so?

When they made that instrument, and gave to the United States the control over foreign commerce, and reserved to the States the police powers, they knew that life and health and property in the States must be provided for; and they knew then, as well as we do now, that it could not be done without an interference with foreign commerce. Did they not intend, then, when they granted this power to the United States, that it should be held and enjoyed subject to the exercise of these reserved powers in the States?

Such at least is the effect of this decision, if language has any meaning; and this case does little more than carry out the principles which had been previously maintained in practice.

The police laws had in fact everywhere been maintained against the supreme power of the United States, notwithstanding this obvious interference.

The pressure of this principle of supremacy was forced upon the States with such zeal, and the supposed cases of incompatibility became so frequent, that the exigencies of the times demanded a positive rule to the extent that it could be safely established.

The step was taken eleven years ago, and what inconvenience has been experienced? In what has the power of the United States been impaired or disturbed? Who has sensibly felt any change? Whose interests have not been well provided for, and safely protected? Much has been said and sung by the theorists; but the laws have been well harmonized, and the public have been well satisfied.

In regard to constitutional principle, this case is decisive of the one under consideration, as it admits the authority of a State to maintain *police regulations in regard to its [*530 internal affairs, whatever may be their effect or influence upon the laws of the United States.

All this is conceded when the power of the State is declared to be complete, unqualified, and exclusive. Commonwealth v. Kimball, 24 Pick. 365; Pierce, in error, v. New Hampshire, Law Reporter, Sept. 1845.

I have thus far, in speaking of constitutional power, assumed that the law of Massachusetts is a police measure, made in good faith, to regulate the traffic in intoxicating drinks.

This has however, been questioned, on the supposition that it is, in fact, a regulation of foreign commerce.

It becomes necessary to look into its provisions, to ascertain whether they are adapted to the professed object, or designed to cover up a specious fraud.

The act requires all retailers, who sell in less quantities than twenty-eight gallons at a time, to first obtain a license from the proper authority.

The retailers are tavern keepers, and small grocers, living wherever there is travel and population.

The design of the law is manifestly to prevent tippling and disorder, by promoting temperance and sobriety; and, whether it be a regulation of trade or police, or both, relates to affairs completely internal.

Is this a suitable matter to engage legislative attention? Does such a traffic demand restraint, or does the Legislature employ it as a pretext to regulate foreign commerce?

I have already dwelt sufficiently on this point, and have proved that intemperance is everywhere deprecated and deplored, that the world has raised its voice in remonstrance against an indiscriminate traffic in wines and spirits, and it seems to me that if health, morals, usefulness, and respectability are worthy of public consideration, and merit protection against an insidious foe, the Legislature would be criminally guilty in wholly disregarding a matter of such obvious importance; and that the exercise of the power needs no justification.

But are the provisions of the law suited to the professed object? The evident end in view is to place the trade in safe and suitable hands, in the custody of those who will use without abusing it, and mitigate, instead of aggravating, the evils incident to it.

To carry this principle out, the law authorizes the county commissioners, who are elected by the people, and supposed to be an exponent of public opinion, to license as many innholders and retailers as the public good requires. Can anyone desire more?

If suitable persons are to be selected, the mode is probably as unobjectionable as any which can be devised; but if no selection is to be made, as is contended, and all persons are to have a right to demand a license, a law, with such provisions, would cease to be a regulation, and had better be abolished.

531*] *Another feature of the law is, that it makes no discrimination between foreign and domestic wines and spirits, but deals with all alike. This would seem to furnish sufficient proof that it has no special reference to the importing trade, but aims at a general regulation, and is designed to promote temperance and not to regulate foreign commerce.

When these facts are taken in connection with the antiquity of the policy, no reasonable doubt can exist as to the good faith and sincerity of purpose in the Legislature.

But it is objected to the law, that the commissioners may so exercise their discretion as to impair or defeat the revenue.

This argument supposes that judicial officers will abuse their authority. But it is not a question as to the matter of using power, but of right.

A discretion is reposed in all judicial tribunals, where facts are to be ascertained as the foundation of a judgment. In all such cases, the law may be perverted; but the abuse is proof of misconduct in the officer, and not of the unconstitutionality of the law.

Whether an applicant for a license is a suitable person, and whether the public good re-

268

quires the grant to be made, are facts to be ascertained, which must depend upon evidence; and the questions cannot be decided without an exercise of judgment.

It is difficult to comprehend how a selection of suitable persons, or of suitable places, can be made, without the exercise of so much discretion as such a decision implies. There is, in fact, no intermediate ground between this and indiscriminate traffic.

But it is further objected to this system, that its whole tendency is to reduce consumption, and to diminish the revenue.

The State has a right to regulate its internal trade, and to maintain police laws. No condition is annexed to this right, which requires the State to exercise the power without impairing the revenue upon imports. The law may have some remote effect on the revenue; but what law or principle of the Constitution forbids it? There can be no repugnancy or incompatibility till the powers of the United States to raise revenue is substantially defeated.

Of such a state of things there is no proof. On the contrary, the license laws have been in operation for fifty-six years with the revenue system, and no sensible or noticeable effect has been produced; not enough even to make it a topic of discussion.

If the whole revenue from this source were dried up, it could have little tendency to defeat or control the financial power of the United States, which is too broad and ample in resources to be materially affected by any such legislation.

But the argument proves too much—it denies to a State the right to make a law which tends to impair the revenue of the United States.

The right of taxation is concurrent, and may be and is exercised *by both govern- [*532 ments upon the same persons and property. This is an undeniable right in a State, and yet it is manifest that it cannot be exercised without impairing the resources of the United States.

Slaves are taxable property, and cannot be emancipated without diminishing the resources of revenue; but will it be contended that a law of emancipation is unconstitutional for that cause?

So, too, laws which establish market days, and forbid sales upon the Sabbath, have a tendency to restrain indiscriminate traffic.

Without, however, pursuing this reasoning, which might be easily extended, I deny that a diminution in the consumption of wines and spirits raises any presumption that the general revenue is impaired by the process. On the contrary, my belief is, that, if the facts were to undergo the severest scrutiny, it would turn out quite otherwise. It has never been maintained that a free use of wines and spirits has any tendency to promote public prosperity, nor is it denied that an excessive use is manifestly prejudicial. There can be no doubt, that where abstinence or severe temperance prevails accumulation is increased and the means of subsistence enlarged. These ordinarily go to support existence, and, creating a greater expenditure in the necessaries and comforts of life, contribute in other forms to the revenue, giving a gain instead of a loss.

But it is urged that the commissioners may

press their powers so far as to exclude consumption; and if they should, the revenue would probably suffer in no respect, as the general prosperity would be improved.

But, aside from this consideration, I apprehend there is no objection to such a step. Police laws may be carried to any extent which the public welfare demands. If the health, the morals, and the welfare of the public demand the exclusion of an evil, there is a right to shut it out, regardless of revenue and of private interests. This power may and should be exercised just to the extent which the public exigency demands.

Such is the long established practice in regard to health. If the cargo of a vessel is infected and dangerous, it is destroyed; and all revenue and private interests are sacrificed for the public safety. Gunpowder is required to be landed and stored in a way which saves life and property from jeopardy. Ballast is required to be deposited where it does no mischief to navigation. The publication, by sale or otherwise, of obscene books, prints, pictures, etc., is an indictable offense.

Yet all such laws are undeniably constitutional, and are maintained as police regulations on the ground that the public health, morals, and property demand protection. The right to give this protection has never been successfully questioned; and it is evident that legal provisions in such behalf must be such as to meet the emergency. If excessive indulgence in the use of intoxicating drinks be an evil—and no one will question it—it is the right 533*] of the Legislature to guard *against it by wise and prudent regulations; and such regulations obviously fall within the principle which sustains the laws referred to. If the evil be such as to demand stringent provisions, reaching to exclusion, there is no constitutional objection to such legislation.

But it is further urged, and some reliance seems to be placed upon it, that the county commissioners of Essex do in fact suppress sales by refusing to grant any licenses.

If such were the fact, the presumption would be, that they have done it because their duty required it, unless the contrary is proved. In New York v. Miln, the court pronounce pauperism to be a moral pestilence; but pauperism is but one of the many plagues which follow intemperance.

In this case, however, there is no proof of such an exercise of power by the commissioners. It does not appear that the plaintiff in error, or anyone else, ever applied for and was refused a license, and an alleged abuse of power cannot be presumed in the absence of all proof. Before the plaintiff can lay any foundation for just cause of complaint, he must prove that he applied, being a suitable person for such an employment, and was refused, when the public good demanded that a license should be granted.

He makes no such case on the record, but places the law itself on trial, instead of the administration of it, and relies upon the proof which it contains on its face of its unconstitutionality.

The commissioners are not and cannot be placed on trial by this record, and whenever their conduct shall *be arraigned in a proper*

12 L. ed.

manner, I have no doubt they will justify their decisions, whatever they may be.

Another objection which has been urged against the law of Massachusetts is hostility to the policy of the United States.

What is the policy of the United States on this subject? Are we to infer, without proof, that the United States are not equally interested with the State in promoting good morals, in protecting health, in preventing the waste of property and the increase of crime? How can the United States have less at stake than the State, or be less interested in cherishing the virtues which make a good population, or in discouraging the vices which lead to the opposite result?

On what ground can the promotion of sobriety and temperance be hostile to the policy of the United States. Is it their purpose to debauch public morals, to encourage a lavish waste of property, and to multiply crimes, from the mercenary consideration of deriving revenue from a process of degredation?

Does the policy of the United States war with the best interests of society, and are they anxious for revenue at such sacrifices? What proof is there of such an unnatural state of things?

It is supposed that the United States countenance an indiscriminate traffic, because they permit wines and spirits to be imported, and *lay upon them a duty. This naked [*534 fact is alleged to be evidence of a declared purpose to raise the utmost revenue which can be realized, and that a law interfering with this design is unconstitutional?

If this be so, then the law of Massachusetts which punishes habitual drunkenness is unconstitutional, for it diminishes consumption; and the law which authorizes the appointment of guardians over such persons must share the same fate, as well as all other laws which in any way regulate trade so as to impose any restraint upon it.

But there is more decisive and satisfactory evidence of the policy of the United States than such remote, uncertain inferences.

In 1838, Congress invited the army to abandon the use of the spirit ration, and offered by law a substitute to all who would accept it, in sugar and coffee; and the same principle has been carried into the navy, and has met with approbation in both branches of the service.

In 1813, Congress passed a law (3 Stat. at Large, 73), in which there is a clear and decisive expression of opinion. This law imposed internal taxes, and the collectors are authorized to grant licenses to sell at retail, wines, distilled spirits, or merchandise, "provided always that no license shall be granted to any person to sell wines, distilled spirituous liquors, or merchandise as aforesaid, who is prohibited to sell the same by any State."

Here is a clear expression of the views of Congress in regard to State legislation and State policy. It shows the deference and respect which is considered to be due to so important and delicate a subject, by conforming its legislation to that of the States, and adopting this policy. The law is now repealed, because the tax is abolished, but the opinion loses none of its weight or importance from that consideration.

Again, it has been suggested that the revenue laws, which permit wines to be imported in bottles, and brandy in kegs of fifteen gallons, are evidence that Congress intended to confer a right to sell in such quantities, and therefore the law of Massachusetts is repugnant to them.

This argument rests on the supposition that Congress has the right to regulate the internal trade of a State, while it is admitted that States alone possess this right. If, therefore, such were the intention of Congress, the acts would be void for unconstitutionality; for the federal government cannot claim a power denied to it.

But there is no reason for believing that those provisions were made with reference to any such object. They relate wholly to the custom-house and to exportation. Such is known to be the history of the fifteen gallon kegs, and the same is doubtless true of wines.

It is a regulation of convenience, and de-
535*] signed to keep the import *trade in a form to prevent smuggling and frauds, either in importation or exportation.

These considerations go to maintain the conclusion that the law of Massachusetts was made in good faith, and for the purposes indicated by it; that it is derived from powers distinctly reserved to the State, and is a regulation both of the internal commerce and police; that its provisions are adapted to the purposes for which they are designed; that it is not a regulation of foreign commerce, or of the revenue system, and does not affect either unawfully; and that it is not hostile to the policy or interests of the United States.

It is evident, also, that it is sustained as a police measure by the whole current of authority antecedent to, as well as by, the case of New York v. Miln.

The plaintiff in error next contends, that an importer of wines and spirituous liquors has a right to sell them in the same vessels in which they are imported. He then alleges that wines may be imported in bottles, and brandy in kegs of fifteen gallons, while the law of Massachusetts prohibits the sale in less quantity than twenty-eight gallons, without a license.

For the purposes of this case I might concede the position, for the plaintiff is not indicted for selling wines in the original bottle, or brandy in the original keg; but for dealing out spirituous liquors by retail in small quantities, from a quart or pint to a gallon.

The record does not show that he is an importer and vender in the original package or vessel, or that he ever had wine in bottles or brandy in kegs of fifteen gallons. If, therefore, the original importer has such a privilege, this plaintiff can make no pretension of right to it.

But from what authority is this right to sell in the original vessel derived?

The laws of the United States do permit the importation of wines in bottles, and brandy in kegs of fifteen gallons. Formerly, brandy could not be bought in, in vessels of less capacity than ninety gallons; but the quantity was reduced, as is well known, to favor the export to Mexico, where so large a quantity could not be taken into the interior upon pack horses.

But if these laws were intended, as is supposed, to regulate the internal trade of the States, they could not be sustained, as Congress has no power or right to regulate that traffic. They have, however, never been understood to have any such bearing; but to be what they purport, regulations of imports and exports.

But the case of Brown v. Maryland, 12 Wheat. 419, is supposed to give some support to this position.

A law of Maryland forbids importers and venders in the original package the right of selling without first obtaining a license, for which fifty dollars were exacted. Brown, being such an importer *and vender, violated [*536 the law, was prosecuted, and the case finally decided by this court.

The court held, first, that the law of Maryland was a revenue act imposing a tax:

Second, that such a tax, imposed upon the importer as such, and before any right of sale could be exercised, was a duty on imports, and expressly prohibited by the plainest terms of the Constitution, which forbids the States the right to lay duties on imports;

Third, that such a duty, so levied, is a regulation of foreign commerce, and for that reason also unlawful.

The decision goes no further than to deny the power of a State to impose a tax upon the importer, as such, before he has made a sale; because this is, in effect, a duty on imports.

There is nothing in the case which questions the right of a State to exercise police power over imports and importers, for any of the great purposes to which such legislation is directed.

The principles which govern the decision are laid down with a clearness which cannot be mistaken.

The exemption from taxation is limited to the importer, and to a sale by him in the original package. The mischievous consequences of a more extended exemption were foreseen and guarded against, in order to leave the internal affairs of the States, untouched.

The court, to prevent all misapprehensions, declare that a sale of such goods, a breaking up of the packages, or an appropriation of the articles to use, or any similar act, mixes the goods with the mass of property in the State, and extinguishes the privilege.

The exemption is therefore limited to the importer and vender by the original package, and is denied to all others.

The authority, consequently, furnishes no support or countenance to the case under consideration, as the plaintiff was neither an importer or vender by the original package.

But if the plaintiff were an importer, instead of a retailer, the case of Brown v. Maryland would furnish no justification for a violation of the law of Massachusetts.

The law is not a revenue act, but a police measure. It imposes no tax upon imports, and therefore does not fall within the prohibitory clause of the Constitution.

The difference between the law is this: the State of Maryland exercised a power prohibited, while the State of Massachusetts founds its legislation upon one which is conceded.

The health laws, quarantine laws, ballast laws, etc., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it. If I am

right, therefore, in asuming that the traffic in wines and spirits is a suitable object for regulation, the power of the State cannot be successfully questioned by importers and venders in the original package or vessel.

537*] *If, then, the plaintiff had proved all the facts which have been assumed, they would avail him nothing.

All the important questions which have been raised in the case have now been considered, imperfectly, no doubt; but, having been brought to the notice of the court, they will receive the consideration which their importance deserves.

The course of reasoning pursued is intended to establish the following positions:

1. That the traffic in wines and spirituous liquors has, in the public judgment, as expressed through ages and centuries, demanded restraint and regulation.

That, the United States having no powers to impose such restraint, if it be denied to the States, the right is abolished.

That such a result would be alike injurious to both parties, and desired by neither.

That, under such circumstances, the court would be justified in declaring the law void only by commanding necessity, and that no such emergency exists.

2. That, in the partition of powers between the federal and State governments, the rights of the former are granted and enumerated in the Constitution, while the latter retain all powers not granted or prohibited by that instrument.

That the grant of a right to regulate foreign commerce excludes the right to regulate domestic commerce, which is left in the States.

That the right to make police regulations is also left in the States.

That the law of Massachusetts belongs to these classes, and is derived from lawful, constitutional power vested in the State.

3. That, if the right of a State to maintain police laws is complete and unqualified, there can be no constitutional conflict with the laws of the United States, as the power is absolute and supreme.

But whether this be so or not, the right of the State to regulate its internal traffic and police is acknowledged, and can never be questioned, except in cases of manifest incompatibility or direct repugnancy, and there is no proof that the law of Massachusetts has any such action, effect, or influence on the powers or laws of the United States.

4. That the United States having a right to regulate foreign commerce is bounded by the point where such commerce becomes internal, and cannot follow it for the purposes of regulation or control after it becomes subject to State authority, without usurping the constitutional power of the State.

5. That the plaintiff in error was indicted and convicted for retailing spirits without a license, being neither an importer nor vender of such spirits in the same vessels and quantities as imported.

That if he had been such an importer and vender, it would avail him nothing, as the question before the court does not relate to taxation, or fall within the prohibitory clause of the

538*] Constitution, *but *regards the right of* the State to regulate its internal commerce and police after the work of the United States is completed, so far as foreign commerce is concerned, and their power exhausted.

6. That, in whatever aspect this case is viewed and considered, the law of Massachusetts cannot be drawn into doubt by the severest scrutiny; nor can the power of the United States be made to reach or control it without a manifest invasion of the rights reserved to the State by the terms of the Constitution.

The counsel then closed his remarks by adverting to the importance which the question had acquired by being long a subject of earnest controversy and agitation. Many prosecutions were now pending, and, the public being anxious to be relieved from this state of suspense, he hoped the matter would be brought to a speedy and final issue. What that issue would be, it did not become him to anticipate; but he would venture to give assurance that the people of Massachusetts would acquiesce in it, and give their support to the law as expounded by this tribunal, to which they looked at all times with the deference and respect due to those who settle the greatest of all questions, the boundaries of power.

Mr. Webster, in reply, said that he agreed with the learned counsel who had just concluded his argument in many of the positions which he laid down. It was true that the retail trade should be regulated, and that intemperance was a great evil. Even if he differed from the State in the policy of these laws, he claimed neither for himself nor the court a power to review her decision upon that point. The State was the sole and uncontrolled judge of her policy. But the question here was one of authority, and not policy. Has Massachusetts the power to pass such laws? Whether she has or not, it is useless to inquire into her motives for passing them. It is admitted by all, that the United States have power to regulate commerce; and it is also admitted by all, that the States have certain police powers. So far, there is no difference of opinion. But the learned counsel says that these powers stand upon equal ground, both resting on sovereignty; and his inference is, that, in case of conflict, one has as much right to stand as the other. Here our difference of opinion commences. We say that these powers do not stand upon equal elevation, but, if there be a conflict between them, the State law must yield; because the Constitution says that acts of Congress, passed within the scope of the constitutional power of Congress, are the supreme law of the land. There can be no conflict. The State law must recede. It has been so settled by this court. In 3 Wheat. 209, 210, it is so laid down, in the very terms which I use. Let us see, therefore, whether both laws, that is to say, the State law and the acts of Congress, can stand. What are they?

The former laws of Massachusetts made it obligatory to grant *licenses. The phrase [*539 was "authorized and directed" to grant, etc. But under the Act of 1837 they may be withheld altogether, and the fact is, that for some years past none have been granted. Now, there is no difference, in substance, between an absolute prohibition of licenses by law, and a grant of power to another body to withhold them. In both cases, the same result is pro-

duced by the action of the same authority, namely, the State. What is this result? It is, that no person can sell liquor in a less quantity than twenty-eight gallons.

What are the laws of Congress? They are, that brandy can be imported in casks of fifteen gallons. 4 Statutes at Large, 235; Ibid. 373.

What is the right of the importer after complying with these laws? Does the right to sell follow the right to import? This court has already answered the question. In 12 Wheat. 433, it is said: "There is no difference between the power to prohibit sales and the power to prohibit importation. None would be imported if it could not be sold." There is no exemption, by the law of Massachusetts, in favor of the importer himself. He cannot sell without a license. All are included within the law. It was said by the counsel on the other side, that the United States have not complained of any infringement upon their authority. But this makes no difference. Cases are always brought here by individuals who complain of a violation of their rights. It was also said that Congress was bound to preserve and enforce the observance of moral duties. But if Congress does not prohibit a particular act, the inference is, that it does not think proper so to do. It remains to be shown that penalties are the best mode of enforcing temperance. Father Matthew does not think so. The states may pursue this policy if they choose, provided they do not interfere with vested rights. There are two things which Massachusetts has not done, both of which it may be wished that she had:

1. She has not presented a memorial to Congress to prohibit the importation of liquor in small quantities.

2. She has not prohibited the domestic distillation of spirits. In 1840, five millions of gallons were distilled within her limits. Of this we do not complain. But if she has a right to pass the law now under consideration, she has also a right to exempt domestic distilled spirits from its operation. What, then, will be the condition of things? It will be, that her restrictions will be placed exclusively upon that article which Congress have said shall be subject to no restriction.

540*] Joel Fletcher, Plaintiff in Error, v. The State of Rhode Island and Providence Plantations, Defendant in Error.

This case was very similar to the preceding one. The principal difference was in the admission of the fact that the brandy, for the sale of which the plaintiff in error was indicted, was duly imported into the United States, the duty upon it paid, and that it was purchased by Fletcher from the original importer.

The following admission of facts was filed in the cause:

"It is admitted, in the above case, that the liquors alleged in said indictment to have been sold by the defendant, in violation of the Act of this State, entitled, 'An Act enabling town councils to grant licenses for the retailing strong liquors, and for other purposes,' was *brandy, the growth, produce*, and manufacture *of the kingdom of France*; which said brandy *was duly imported into* the United States at the port of Boston, in the district of Massachusetts, for the purpose of sale in the markets of the United States, and the duties levied thereon by virtue of the Act of Congress of the United States, approved the 30th day of August, A. D. 1842, entitled, 'An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes,' were duly paid to the collector of the said port of Boston; that said defendant bought said brandy of the importer thereof for the purpose of sale; and, in pursuance of said purpose, did, at the times alleged in said indictment, sell the same, at said Cumberland, without license first had and obtained from the town council of the town of Cumberland.

"It is further agreed that the town council of said town of Cumberland have refused to grant any license for the year ensuing the Thursday next following the first Wednesday in April, A. D. 1845, for retailing strong liquors in any quantities, having been instructed by the electors of said town, in town meeting assembled, not to grant any licenses for the purpose aforesaid."

It is not necessary to recite the whole of the laws of the State, as they were very similar to those of Massachusetts. The following one will be sufficient:

"An Act in Addition to an Act, entitled, 'An Act enabling the Town Councils to grant licenses, and for other Purposes.'

"It is enacted by the General Assembly as follows:

"Section 1. No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this State, when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year."

*Fletcher was indicted upon two [*542 counts. The first was for selling strong liquor, to wit, rum, gin and brandy, by retail, in a less quantity than ten gallons, without license; and the second, for selling, and suffering to be sold, in his possessions, ale, wine, and other strong liquors, by retail, etc., etc.

Upon this indictment he was convicted, and the case brought from the Supreme Court of Rhode Island to this court. The assignment of errors by the counsel of Fletcher was as follows:

Assignment of Errors.

"United States of America, Supreme Court:—Joel Fletcher, Plaintiff in Error, v. State of Rhode Island and Providence Plantations, Defendants in Error.

"On a judgment of the Supreme Court, begun and holden at Providence, within and for the County of Providence and State of Rhode Island and Providence Plantations, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty-five, wherein the said State of Rhode Island and Providence Plantations, by Joseph M. Blake, Attorney-General of said State, is prosecutor, and the said Joel Fletcher is defendant, the said Joel Fletcher, upon a writ of error upon said judgment, returnable to the next term of the Supreme Court for the United States, to be begun and holden at the city of Washington, in

the District of Columbia, on the first Monday of December, in the year of our Lord one thousand eight hundred and forty-five, assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said State of Rhode Island and Providence Plantations, and the construction thereof by the said Supreme Court, the following, to wit: That the judgment rendered in the Supreme Court of said State in this case, it being the highest court of law and equity of the said State in which a decision could be had in said case, should be reversed, for the reasons following, viz.: That the Act of the General Assembly of said State of Rhode Island and Providence Plantations, entitled, 'An Act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and the Act entitled, 'An Act in addition to an Act, entitled, An Act enabling town councils to grant licenses for retailing strong liquors, and for other purposes,' and appended hereto and set out as a part of the record in the said cause upon which said judgment was founded, and also the opinion and judgment of said Supreme Court of said State of Rhode Island and Providence Plantations, in the application and construction of said acts to the proofs submitted in said cause, are void, the same being repugnant to that clause of the eighth section of the Constitution of the United States which provides, 'That the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the 542*] common defense and general *welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States'; and are also repugnant to that clause of the said eighth section of said Constitution which provides as follows: 'The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes'; and are also repugnant to that clause of the tenth section of said Constitution of the United States which provides as follows: 'No State shall, without the consent of Congress, lay any imposts or duties on imports and exports except what may be absolutely necessary for executing inspection laws.' and the acts of Congress, in pursuance of the aforesaid several clauses of said Constitution of the United States now existing in full force which objections were, at the trial of said cause before said court, taken by the said Fletcher in his defense, and were overruled by said court. There is error also in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said State of Rhode Island and Providence Plantations against the said Joel Fletcher; whereas, by the law of the land, the said judgment ought to have been given for the said Fletcher against the said State; and the said Joel Fletcher prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment. Joel Fletcher,

"By John Whipple, and Samuel Ames,
"*His Attorneys.*"

The cause was argued by Mr. Ames and Mr. Whipple for the plaintiff in error, and Mr. R. W. Greene for the State.

Messrs. Ames and Whipple, for the plaintiff in error, read and commented on the various acts of the General Assembly of the State of Rhode Island, in relation to the licensing of taverns, ale houses, and the like, and the sale of spirituous liquors therein, commencing in the year 1647, and coming down to the year 1824, for the purpose of showing, that, from the earliest period in the history of the colony to the last named period in the history of the State of Rhode Island, her policy had been uniform on this subject, and similar to that of most Christian and civilized countries, and of all the colonies and States of the Union—that is, to license and regulate the sale of spirituous liquors, that it might be consistent with the preservation of good order, and with the Christian virtue of temperance, and not to inhibit it, in enforcement of the Mahometan rule of abstinence. They showed that the licenses granted by the municipal authorities of the various towns of Rhode *Island for the [*543 keeping of taverns and the retailing of strong liquors had been a source of revenue to the towns and to the State, to aid in the maintenance of the police of the State; and insisted, that, in the fair construction of the acts empowering the town officers to grant them, the words "may grant" were legally construed "must or shall grant," according to the well known general rule of so construing the word "may," when used in a public act or municipal charter to impart an authority to public officers, in the exercise of which the public interest or private rights were concerned; and that the practice of the authorities of the towns of Rhode Island had always concurred with this well known rule of legal construction. To this point they cited, Blackwell's case, 1 Vernon, 152; Rex v. Barlow, 2 Salk. 609; S. C., Carthew, 293, 294; King v. Inhabitants of Derby, Skinner, 370; Magdalen College case, 3 Atk. 166; King v. Mayor and Jurats of Hastings, 1 Dowl. & Ryl. 149; Newburgh Turnp. Co. v. Miller, 5 Johns. C. R. 101, 113, 114; Ex-parte Simonton, 9 Porter's Ala. R. 390.

They then showed, that, under the influence of what is called the temperance reform, a new principle had been introduced into the legislation of Rhode Island on this subject, which, after numerous fluctuations had, in January, 1845, settled the law, if indeed it was settled, in the shape of the Act of January, 1845, which in substance forbids in any town the sale of all strong liquors in less quantities than ten gallons, without license first had from the town council of the town, and provides, that if, on the day appointed for the election of town officers, a majority of the electors of a town voting on the subject shall vote to grant, or not to grant, licenses for the ensuing municipal year, the town council of the town were irrevocably bound during the year to obey the instruction.

They admitted that a law regulating the sale of strong liquors under a license for the sale, even though a bonus was required for the license, was valid; but that a law like the present, in its purpose, end, and operation, as well as in its form, substantially and practically

prohibitory of the sale, was, in its application to the case at bar—in which the liquor sold was brandy imported from France, upon which, under the Act of Congress of 1842, entitled, "An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," the duties had been regularly levied and paid—void, as repugnant to that act, both as a revenue measure upon which the expenditures of the government of the United States were based, and as a regulation of the commerce of the United States with France.

Though they maintained the exclusive power of Congress, under the Constitution, to regulate commerce with foreign nations, as well as among the States and with the Indian tribes—as required by the necessities of the country at the time of its formation and adoption as 544*] *new—to preserve proper commercial relations abroad, and for the prosperity and peace of the several States, as well as that an adequate revenue might be derived from duties on imports, they waived the discussion of the exclusiveness of this power as an abstract power in Congress, in the present case, for a double reason: because Congress had exercised it in the subsisting Act of 1842, and because the act of Rhode Island could in no proper sense be said to be an exercise of the power to regulate foreign commerce.

They admitted that an act of a State, to come in conflict with the exclusive power of Congress to regulate foreign commerce, when not exercised, must of itself be an exercise of that power; but maintained, that any law pertaining to the mere police of a State might come in conflict with a commercial regulation of Congress; and, if it did, must, so far as it did, yield to the law of Congress, as the supreme law of the land, when passed in pursuance of the Constitution. They were not aware, until the doctrine had been boldly advanced by the counsel for Massachusetts, in the preceding case—tried with this by order of the court—that it had been "a growing opinion," and still less, that by the decision of this court in New York v. Miln, 11 Peters, 139, 141, it had become "the second law" of this court and of the land, that in all such cases of conflict the rule of the Constitution was reversed, and that the law of Congress became subject to the law of the State, as to the supreme law of the land, and that the clause of the Constitution asserting the supremacy of the Constitution, and of the laws and treaties of the United States made under it, applied only to the case of concurrent powers; nor did they so understand that case. They maintained that the doctrine thus announced was little short of absurdity, since it admitted the supremacy of the law of Congress in the case of concurrent powers—in the exercise of which the governments of the States and the government of the United States enjoyed, as it were, a joint empire, and where, from the very fact that the powers were concurrent, they could never, in a constitutional sense, be said to conflict, and so there was no room for the supremacy in question—and denied the supremacy of the United States in the legitimate exercise of its exclusive powers, making the *United States the slave of* the States in its own *exclusive dominions*, under a Constitution which declared, without limitation or reserve, that its just power should be supreme, not only over the laws, but even the constitutions, of the States. Upon this question they appealed from conservative Massachusetts to democratic Virginia, and cited the 44th Paper of the Federalist, p. 183, Gideon's edition, in which Mr. Madison, in commenting upon the clause of the Constitution in question, concludes his defense against the only objection that was made to it—that it rendered the Constitution, laws, and treaties of the United States supreme over the constitutions of the States—with this statement of the result *if this supremacy [*545 had not been given: "In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." In this case, a supremacy over the Constitution, laws, and treaties of the United States was claimed for every, even the most petty, police law of a State, or even a town or city, when that Constitution and those laws and treaties were made supreme over the constitution of the State by which, or under the authority of which, the police law was passed. They commented upon the case of New York v. Miln, for the purpose of showing that the general language there used by Mr. Justice Barbour in delivering the opinion of the court, from which the strange doctrine in question had been inferred, should, according to the rule in this respect laid down by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 399, be restrained to the case before the court, which, by the decision of the court, involved no conflict of the powers of the government of the State of New York with those of the government of the United States, and, by the illustrations given of the meaning of the language, could be fairly applied only to cases where no conflict existed. Upon this point, they cited also the opinions of Mr. Chief Justice Taney, and of Mr. Justice McLean, in the subsequent case of Groves et al. v. Slaughter, 15 Peters, 505, 509, members of the court at the time the opinion in New York v. Miln was delivered, and concurring in that opinion, for the purpose of showing that they could not have understood the language in question in the sense contended for.

[Mr. Justice Wayne here declared his entire dissent from the general opinion expressed in the language in question, and even declared that he had no recollection that such language was in the opinion of the court in that case at the time it received his concurrence.]

They concluded upon this point, that if any persons really held the doctrine in question, upon the supposition that it was necessary for the maintenance of certain peculiar institutions of some of the States, which, though guaranteed by the Constitution, were at war with its whole spirit, as well as with the principles of the Declaration of Independence, which the Constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of "a blunder"—in the opinion of a great but unprincipled poli-

tician, in such matters, always worse than "a crime." The clauses in the Constitution guaranteeing these institutions were an anomaly in it. It was better, then, to treat those institutions and everything fairly relating to them as anomalous—to be governed by peculiar rules—than, by converting an anomaly into a general 546*] rule, to *pervert the whole spirit, and invert the whole order, of the Constitution, and, by thus stripping the general government of all its powers, deprive the States, and especially the smaller States, of all the rights and protection guaranteed by the United States. They who were willing, and all sensible people were, to stand by the compromises of the Constitution, would do much to redeem the pledge thus given for them; but it was both unjust and impolitic to require this of them.

They came, then, to the only real question in the cause, whether the law of Rhode Island in question was in conflict with the tariff law, as it was called, of 1842.

The act of Congress admits brandy by name to sale and consumption in the States, at one dollar per gallon, both for revenue and as a regulation of commerce with France; and they cited the Federalist, Pap. 12, p. 46, to show that no inconsiderable revenue was originally anticipated from spirits.

Congress might have prohibited the importation of brandy, as it did in the same act the importation of obscene prints, etc.; but it licensed the importation, and, by necessary intendment, the sale and consumption, of brandy by the above act, as the United States did, by the Treaty of July 4, 1831, with France, the admission of wines at certain rates "to consumption into the States." Right or wrong, Congress had said, by the act in question, to the foreign producer, to the importer, retailer, consumer, pay us one dollar per gallon, and you shall have brandy from France for sale and consumption. Upon this offer all parties had acted, produced, imported, bought of the importer, and in the price of the article had paid the duty; and after this it was something worse than illusory, that we should be told that the importation only was licensed, or at most the sale of the original package or cask, and that the States might destroy the whole value of the import by prohibiting its sale and consumption, and thus effectually countervail the legislation of Congress in one form, which it was agreed they could not do in another. This would be to make the Constitution deal in mere forms and names, and not in things.

The law of Rhode Island proceeds upon this formal distinction. It says to Congress, you may license the importation of brandy, but not a drop of it shall be sold or consumed in any town of ours, if the voters of the town choose to prohibit it. You may expect revenue from it; but so far as our citizens are concerned, not a penny shall they pay. We forbid it by law.

The law in question is most skillfully devised to effect its purpose. It does not in form prohibit altogether the sale and consumption of foreign brandy, but only really and substantially. It says, you shall not sell in less quantities than ten gallons, and might as well have said in less quantities than twenty-eight gallons, or one hundred gallons, or one thousand gallons. *It cuts off, strikes out, one link between the*

importer and consumer, and might as [*547 well destroy, and does thus practically destroy, the whole chain; for there can be no importation without sale, no wholesale without retail—and these are arbitrary terms—no retail without consumption.

In case of a direct prohibition of sale like this, there can be no metaphysical subtlety necessary to ascertain the degree of conflict between the State law and the law of Congress; whether it amounts to "a possible or potential inconvenience," or "an extreme inconvenience," or "a direct repugnancy," or "plain incompatibility." Incidental diminution of consumption from licenses, taxation, charters of temperance societies, prohibitions of sales to drunkards, children, slaves, etc., is another thing. Here the prohibition is both direct and substantial. To prohibit and prevent the sale of the imported article is both the purpose and effect of the law; and upon the ground that, by the Act of 1842, Congress had licensed what was wrong.

The very test proposed by this court in New York v. Miln, 11 Peters, 143, is thus met precisely by the law in question.

It is said that the sale of liquor is immoral. Then let Congress prohibit, not seek a revenue from its importation. Let reform in this respect begin constitutionally with Congress; for in no cause, however sacred, can a State be said to act rightly, when acting unconstitutionally.

In application to any other article of commerce between the United States and foreign countries, or between the States, but liquor, it would be admitted that such a law was void as to rice, sugar, cotton, tobacco, flour, cotton goods, French silks, woolen cloths, etc. What is the ground for distinction? It is as much within the police power of a State to pass laws to encourage or compel household manufactures, or the raising of certain agricultural products, by forbidding the sale of cotton, woolen, or silk fabrics, in less quantities than ten, or twenty, or one hundred pieces—or of cotton, rice, flour, tobacco, by forbidding the sale of these articles in less quantities than ten, twenty, or one hundred bales, casks, bundles, or barrels—as to prevent the use of imported liquor, by forbidding the sale in less quantities than ten, twenty, or one hundred gallons; and yet all will agree that a law like that supposed would be clearly void, in its application to such articles imported from foreign countries, or another State. Let some casuist mark the difference between the cases if he can.

The law in question is no more entitled to be called "a police law" than the law supposed, if there was anything in such a mere name. Any law relating to the internal government or police of a State or city is a police law, whether civil or criminal, and it would be absurd to contend, that constitutionally one police law was more sacred than another; since the State or city is the sole judge of the necessity or fitness of either, provided always, that in passing such *laws it does not interfere with [*548 those constitutions or laws which control its powers of legislation.

They contended that the fact that the sale in the case at bar was not of the article in the cask in which it was imported, could not affect the question; the notion suggested obiter, not

adopted, by Mr. Chief Justice Marshall, in Brown v. Maryland, that the importation licenses the sale only in the original package, being false in theory, and destructive to the constitutional powers of Congress in practice. As the governments of the United States and of the States operate upon the same men and things, within the same territory, at the same time, it is obvious that all material barriers between them are broken down, and that in general we must look for the boundary line of the two jurisdictions in the relation and condition of the men and things upon which they operate. This is certainly true of the power to tax imports, or things which have been imported, and of the prohibition to tax exports, or things to be exported. It is obvious, that the States may and do every day tax residents for their personal property, whether in the form in which it has been imported, and even lying in the custom-house, or in which it is to be exported, on the wharf, or in the vessel, just as if the import or export was confused with the mass of property in the State; and no one deems such a tax as a tax upon imports or exports, in the sense of the prohibition of the Constitution, or in any proper sense whatever. Nor would such a general exercise of the taxing power by the United States upon all personal property of its citizens, including imports and exports, be a tax or duty upon imports or exports, but merely a tax upon personal property, and upon the import or export as such property. Any discriminating tax, however, upon a thing imported, as such, at any time, in any form, either of the law or the import, would certainly be a tax or duty upon imports forbidden to the States; and any discriminating tax or duty upon a thing to be exported, as such, would be a duty upon exports forbidden to the United States, and to the States, except under the control of Congress, for the purpose of executing their inspection laws. There is nothing in the nature or form of an article which makes it an import, only something in its history; there is nothing in the nature or form of an article which makes it an export, only something in its destination; and if anything be specifically taxed as imported, or to be exported, it is a tax upon an import, or upon an export, within the letter and spirit of the Constitution. Once allow that the States may levy discriminating duties upon things imported from foreign countries, or other States, the moment they have lost their original form, or have been taken out, as they must be for sale and use, of the package or cask, and the commercial power of Congress, and the revenues of the United States from this source, are lost together. Once allow that the United States may levy discriminating 549*] duties upon things to be exported *from the States, as such, in any form or package, or in the process of growth or manufacture, and it is obvious that the agriculture and manufactures of the States are directly at the mercy of the general government. This "package notion," as it is called, is one of those vain but natural efforts of the mind to attach itself to something material to rest upon, even in matters which do not admit of such helps and *rests.*

The taxing power is a sovereign power, necessary for the support of government, and never in its nature or effect treated as a repugnant power. Providence Bank v. Billings, 4 Peters, 514; Groves v. Slaughter, 15 Peters, 505. When exerted by the State over personal property in general, including imports, it cannot affect foreign commerce, or the revenues of the United States, since it bears equally upon all articles, and thus keeps their relative value the same. To become mischievous, either constitutionally or practically, to foreign commerce, a tax law must discriminate as to the subjects of it.

This, however, is not true of prohibitory laws, like the law in question. If practically such a law forbids the sale, destroys the vendible character of an imported article, which constitutionally it cannot do, it does not help the law in relation to such articles, that it also destroys the vendible character of the like article manufactured in the State, which constitutionally it may do. It is void pro tanto imports, in any form or shape.

There is also this plain distinction between such a law and an ordinary license law: that the latter does not, like the former, destroy the vendible character of the article, but, admitting this, restricts the power of sale to certain selected persons licensed to sell the article; and practically the difference is just as great as the different terms "license" and "prohibition" import.

No one denies the right of the States to regulate the sale or punish the improper use of any article, domestic or imported, within their territories, under such customary and proper restrictions as substantially leaves to the article its vendible character. It is the taking away of this character from imported brandy, upon which the duties have been levied and paid, of which we complain in this case.

Thus, the States may and do prohibit sales of all articles on the Lord's day, in enforcement of a divine command; of liquor to drunkards, children, etc., to prevent riot and intemperance; and they tax and license hawkers and peddlers, and auctioneers of all articles, and retailers of things dangerous in their use, to prevent fraud, regulate domestic trade, raise revenue, and insure public safety and social order. All this, so far from injuriously affecting the sale of things, aids and assists it, by making it safe, regular, profitable, and consistent with the well-being of the community. The same remark applies to quarantine laws, and sanitary regulations *in general. [*550 They may delay the infected ship, or stop the infected person, or even destroy the infected article; yet who does not see that in this very way they aid foreign commerce, by making it safe to the community which carries it on, and promote traffic in imports, by preventing all danger in handling, using, or consuming them? Even these, however, may be so needlessly restrictive, or, still worse, totally prohibitory in their character, as obnoxiously to interfere with foreign commerce, and in such case would merit no more favor, on account of the professed purpose of the law, than it avowedly passed to prevent foreign commerce in certain articles, or to prevent it altogether.

The point where regulation ends and prohibition commences may in some cases be difficult to determine, as many practical questions

are. The cases must be decided as they arise, and, as Mr. Chief Justice Marshall suggests in Brown v. Maryland, experience will assist and develop the true tests of decision.

It is sufficient that in the case at bar there is no such difficulty, the design, end, and effect of the law in question being to prohibit the sale of an article made vendible in the States by a law of Congress.

The law is deemed more objectionable because in effect it prohibits the sale of the same article in some towns in the State, and licenses it in others; thus making the law of Congress operate unequally within the territory of the same State.

Finally, the record shows that the only proof against the plaintiff in error was of the sale of brandy imported into Boston, upon which the duties had been duly levied and paid. He was willing to take a license and to pay for it, or to sell his import through any person who was licensed to sell it; but the law forbade all sale in any practicable shape in the town in which he lived, in derogation of the right of sale attached to an article imported under the laws of the United States. In its application to his case the law is void, inasmuch as it derogates from a right secured to him by a law of Congress.

Mr. R. W. Greene, for the State:

The law of Rhode Island is strictly a police law, having for its object the suppression of drunkenness. It was not intended to carry out any object of commercial policy. It was not intended to secure to the citizens of Rhode Island, within her own territory or elsewhere, any advantages of commerce or manufactures beyond what are enjoyed by the citizens of all the other States. It was not intended to countervail any commercial policy of the federal government.

It is a law intended to aid in the accomplishment of a great moral reform, and indispensable to its success. The federal government have adopted similar views with the General 551°] Assembly °of Rhode Island, in a case coming within the sphere of their constitutional power. An act of Congress authorizes the substitution of tea and coffee for the spirit rations both in the army and navy.

I shall endeavor to show that the Rhode Island law does not present a case of conflict, upon any sound construction of the Constitution. What are the provisions of the Rhode Island law? It allows importation, and sale by the importer, and everybody else, in bulk, as imported. It goes further, it allows a retail trade to the importer and everybody else in the article after bulk broken, and that as low as ten gallons. It goes still further, and vests in the towns a discretionary power to decide at their April town meetings, whether they will grant licenses to sell in quantities under ten gallons for the coming year. The inhabitants of the towns are most interested in the decision, and most able to decide right. Not by caprice, but by sober and enlightened judgment. There is a propriety in leaving the decisions to the towns.

An objection to the law is, that practically, it is said, the prohibition of sales under ten gallons is a total prohibition. The object in fixing this amount was to prevent sale by the glass.

It is said by *the counsel for the plaintiff in error, that this law is prohibitory.* But it is not necessarily so, nor probably so. Discretion implies not only the power to decide either way, but the probability of such decisions. If all the towns had been opposed to granting licenses, then the General Assembly would have passed a general prohibitory law.

It is agreed that, if a conflict results from the practical operation of a law, it must be decided as if such conflict had been intended by the Legislature. But the necessary effect must be to conflict, and not the possible, or even the probable effect.

There is no evidence before the court that every town in the State, except Cumberland, has not granted licenses, which are now in full effect. And yet the court is called upon to pronounce this law unconstitutional, upon the ground of this possible prohibition, when the prohibition may not exist in any town in the State, except Cumberland. The power vested in the towns under this law is the same as that vested in the town councils under previous laws. A power to grant licenses is a political power in town councils, and not at all analogous to the cases cited by the counsel for the plaintiff in error. Those were cases of private right, where a mandamus would go to enforce it. Would such a proceeding lie against a town council by a party to whom a license had been refused? But erase from the statute the entire provision vesting any power in the towns to grant licenses, and leave the prohibition upon all sales under ten gallons absolute. This would not be a case of conflict, because it allows of sales at retail as low as ten gallons.

It is admitted that States have a right to pass license laws. All °had license laws [°552 when the Constitution was adopted; no change took place. What is a license law but a prohibition upon everybody else, except the party licensed? The difference between a license law and the Rhode Island law is in the degree of prohibition, not the principle. Both are prohibitory; the Rhode Island law may become and probably would become more prohibitory than an ordinary license law. Does this difference render the one law void, when the other is valid? How much more prohibitory must a law be than an ordinary license law, in order to render it void?

What rule or principle can the court adopt in relation to such a subject? How much must be the restriction upon sales, after the article is broken up, and out of the hands of the importer, in order to render the law void? What means has the court to ascertain the practical effect of restrictions? And yet it is said the effect is to determine the law.

All license laws, like the law under consideration, diminish importations and revenue by checking sales. Their object, like the object of the Rhode Island law, is to prevent drunkenness. In other words, to prevent consumption. The check upon importation, and the diminution of the public revenue, is a consequence of both laws, but not their object.

If we were to compare the amount of sales, there being no regulation by license, and the amount of sales under a well guarded license law, it would be very great, undoubtedly; but no one can ascertain it with any accuracy—certainly this court cannot. A plain case of conflict must be proved.

This court, in the exercise of its high authority, has always acted upon this subject with caution. It has always required a plain case of unconstitutionality to be made out.

The plaintiff in error says, the question of conflict is a question of fact; but it is not shown that any town, except Cumberland, has refused to grant licenses.

Again, to render a license law valid, how many licenses must it provide for? One in each town, or how many, or one in each county? All license laws materially check importation, by diminishing consumption. What degree of check and restriction will render the law void, on the ground of conflict? Suppose the Rhode Island law prohibited sales as low as five gallons, or one gallon, or a quart; what principle will the court adopt?

License laws were in force in all the States at the time of the adoption of the Constitution. No alteration of these laws has been made by the States, and they have never been, and are not now, complained of by the federal government. This shows that, by the understanding of all the parties to that instrument, these laws do not interfere with any of the powers of the federal government.

The true rule as to conflict is, not a partial check upon sales, or a partial diminution of the revenue. This involves the in-
553*] quiry, how *much check, how much diminution? Conflict is a prohibition of all sales. It is said the importation and payment of duties imply the right to sell, that the retail sale is indispensable to give value to the wholesale trade, and therefore a prohibition of the retail sale is void. Payment of duties gives no greater right than importation of a free article, tea or coffee.

But a license law prohibits the retail sale to everybody but the party licensed, and this is agreed to be valid. The fact of prohibition, therefore, does not render the law void, but the extent of it. What must that extent be? How can the court ascertain the effect upon sales and importations, except the effect which is a necessary consequence of the law? Or, in other words, how can they judge, except of an absolute prohibition of all sales? What means have they to ascertain the difference between the practical effects of one law and another, both being prohibitory, but prohibitory in different degrees?

In Brown v. State of Maryland, the true rule is laid down. When an import has been broken up, or has passed from the hands of the importer, it ceases to be an import. It has then passed into the mass of property of the State, and is subject to its authority for purposes of police, internal trade, and taxation.

Unless this be so, Congress may prescribe the police regulations of the States. They may prescribe the extent to which a restrictive regulation may be carried, in order to be constitutional.

We cannot overrate the importance of police powers to the States. The means of social improvement, the success of all institutions of learning and religion, depend on the preservation of this power. We look to the States for *the exercise* of their authority in aid of all in-*stitutions which tend to* improve and elevate the *moral and intellectual* character of the people.

The doctrine of conflict must be expounded with reference to the principle of compromise on which the Constitution is founded.

Congress may authorize the importation of an article which is very injurious to the health or morals of a State. The importer may perhaps sell in bulk; then the power of Congress is exhausted, and the power of the State begins. Upon such sale the property is mingled with the mass of the other property of the State, and subject to the State power, either to tax, to prohibit, or regulate, as its purpose of police or internal trade may require.

What does the internal trade consist in? In its own products, products of other States, and products of foreign nations. If the doctrine is true with regard to foreign products, it is equally so with regard to products of other States. Then the State power over the property of its own citizens, within its own territory, is limited to products of its own. There will be two kinds of property; one subject to the power of the State, and the other exempt from it.

*Unless this be done, it is said the [*554 policy of Congress may be countervailed. We answer this by saying that, on the other hand, the police power of the States and the power over internal trade will be destroyed. It is not to be supposed that the States will countervail the policy of Congress merely to countervail it. The compromise of the Constitution goes upon a different principle, and at all events the limit of the power of Congress cannot be exceeded in order more effectually to carry out its own policy. If this were a consolidated government, the difficulty would not exist. But it is a confederation of States; external relations are confided to federal government, whilst all domestic relations belong to the States. External policy may be affected by regulations of internal trade or police of the States. This results from the confederacy. Foreign commerce must be affected by internal commerce. Property becomes the subject of internal commerce when it has become incorporated with the mass of the property of the State. Regulations of internal commerce may affect foreign commerce, and foreign commerce may affect internal commerce. Both are valid, nevertheless. Regulations of internal trade may check importation of foreign goods, and the introduction of foreign goods may affect the internal trade and policy of the State. If both governments keep within their constitutional limits, there can be no collision or conflict. The laws of one may affect the operation of the laws of the other. Thus, the police laws of the States in restraining and partially prohibiting the sale of spirituous liquors may affect the operation of the act of Congress under which they are admitted. But this is no conflict. On the other hand, the act of Congress admitting spirituous liquors may countervail the policy of the States. But still there is no conflict. A case of conflict must arise from one government or the other exceeding its limits, and then the law of that government must yield which has exceeded its authority, whether federal or State. The provision of the Constitution as to its supremacy, and the laws passed under it, is confined to laws passed in conformity to its powers.

Andrew Peirce, Junior, and Thomas W. Peirce, Plaintiffs in Error, v. The State of New Hampshire.

This case originated in the Court of Common Pleas for the County of Strafford, and was carried to the Superior Court of Judicature for the First Judicial District of New Hampshire. The plaintiffs in error were indicted for that they did unlawfully, knowingly, willfully, and without license therefor from the selectmen of said Dover, the same being the town where the defendants then resided, sell to one Aaron Sias one barrel of gin, at and for the price of $11.85, contrary to the form of the statute, etc.

555*] *The counsel for the State introduced evidence to prove the sale of the gin, as set forth in the indictment; and it was proved, and admitted by the defendants, that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin, for the price of $11.85, and took from said Sias his promissory note, including that sum. It appeared that it was part of the regular business of the defendants to sell ardent spirits in large quantities.

To sustain the prosecution, the counsel for the State relied on the statute of July 4, 1838, which is in these words viz.:

"An Act regulating the Sale of Wine and Spirituous Liquors.

"Sec. 1. Be it enacted by the Senate and House of Representatives in General Court convened, That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person, so offending, for each and every such offense, on conviction thereof, upon an indictment in the county wherein the offense may be committed, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of such county.

"Sec. 2. And be it further enacted, that the third section of an act, passed July 7, 1827, entitled, 'An Act regulating licensed houses,' and other acts or parts of acts inconsistent with the provisions of this act, be, and the same hereby are repealed.

"Approved July 4, 1838."

The counsel for the defendants moved the court to instruct the jury, that if the law of 1838, under which the respondents were indicted, was constitutional, the sale here was contrary to law, and the note of Sias was void, and that such a payment by note was no payment, and therefore there was no sale. But the court refused so to instruct the jury, but directed them, that, on the supposition the defendants could not recover the contents of the note, they might notwithstanding have violated the statute. The defendants' counsel then introduced evidence that the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store, in Dover, and afterwards sold the Sias in the same barrel and *in the same condition in which it was pur-*

chased in Massachusetts. And the defendants' counsel contended that the aforesaid statute of July 4, 1838, was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States, and because it is repugnant to the two following clauses in the Constitution of the United States, viz.:

"No State shall, without the consent of the Congress, lay any *imposts or duties [*556 on imports or exports, except what may be absolutely necessary for executing its inspection laws." "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

And the defendants' counsel contended that the jury were the judges of the law as well as the fact in the case; that it was their duty to judge of the constitutionality of the Act of July 4, 1838, and to form their own opinion upon that question; and that the court were not to instruct the jury relative to questions of law, as in civil cases, but were merely to give advice to the jury in matters of law. The court instructed the jury, that the position that the jury were judges of the law as well as of the fact, as contended for by the defendants' counsel, was not correct, to the extent of the general terms in which it was stated; that the same rule existed in this respect in criminal cases which prevailed in civil cases; that it was the duty of the court to instruct the jury in relation to questions of law, and that the court was responsible for the correctness of the instructions given; and in case of conviction, if the instructions were wrong, the verdict might be set aside for that cause; but that the jury had the power to overrule the instructions of the court, and decide the law contrary to those instructions, through their power to give a general verdict of acquittal; and that if they did so, and acquitted the defendants, the court could not correct the matter if the jury had erred, because the defendants could not in such case be tried again; and that the circumstance, that the jury had thus the power to overrule the instructions of the court, in case of an acquittal, did not show that they had a right to judge of the law. The court further instructed the jury, that the statute of July 4, 1838, was not entirely void, if it might have an operation constitutionally in any case; and that, as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin. The court further instructed the jury that this statute, as it regarded this case, was not repugnant to the clause in the Constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States. The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another

State with such a view, nor prohibit a sale of them with such a purpose, but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries or from other States; that she might tax them the same 557*] *as other property, and might regulate the sale to some extent; that a State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional. And the court further said, in conclusion (the sale being admitted, and the instructions of the court that the law, as applicable to this case, was constitutional, having been given), that nothing farther remained in this particular case, unless the jury saw fit to exercise the power that they possessed of overruling the instructions of the court, and giving a verdict contrary to those instructions; and that if they did so, and acquitted the defendants, the court could not set aside the verdict, even if an error had been committed.

The jury having returned a verdict, that the defendants were guilty, the defendants excepted to the foregoing instructions, and to what is said in conclusion of the charge as aforesaid, and filed this bill; which was sealed and allowed. Joel Parker.

This judgment having been affirmed by the Superior Court of judicature, a writ of error brought the case up to this court.

It was argued at a prior term, by Mr. Hale for the plaintiffs in error, and Mr. Burke for the State, and held until now under a curia advisare vult.

Mr. Hale, for the plaintiffs in error:

As the questions relating to the several interrogatories which were propounded to the jurors, and those which the court below refused to have put to them, and the question whether, in criminal cases, the jury are judges of the law as well as the fact, and every other question raised in the bill of exceptions to the ruling of the judge who tried the case, save the single one of the constitutionality of the law of New Hampshire, entitled "An Act regulating the sale of wine and spirituous liquors," passed July 4, 1838, belonged appropriately to the Superior Court of that State finally to adjudicate upon, and are not supposed in this case to appertain to the jurisdiction of this court, I shall pass them over entirely, and proceed at once to the consideration of the only question which this case presents to this tribunal for decision. That question is, "Is the act of the Legislature of New Hampshire, above mentioned, in accordance with, or in contravention of, the Constitution of the United States?"

The plaintiffs in error contend that it is repugnant to that clause of the Constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" also, because it is repugnant to that clause which declares 558*] that "the Congress shall have *power *to regulate* commerce with foreign nations, and *among the several States*, and with the Indian *tribes.*"

Believing that the whole ground covered by this case has been more than once considered by this court, fully and ably argued by eminent and distinguished counsel on both sides of the question, and so palpably and distinctly decided in divers cases, especially in Brown v. Maryland, 12 Wheat. 419, that it is not in the power of sophistry even to withdraw this law from that sphere of legislation which the decision in that case prohibited to the States, I trust I shall be considered as having fully discharged my duty to my clients, when I have briefly adverted to a very few of the many palpable reasons assigned by the court for the ground they then assumed, and which, it is confidently believed, will avail to the plaintiffs in error in the present case.

If this barrel of gin had been imported from a foreign country, could the State of New Hampshire have prohibited its introduction into their territory? The answer to this interrogatory is obvious and palpable. It will not for a moment be contended, that, while the Constitution prohibits any State from laying any imposts or duties on imports or exports, the right is left to the several States to prohibit importations altogether. The power of regulating imports from foreign countries falls so directly and inevitably under the power to regulate commerce, that it has never been denied to belong to Congress. I shall proceed upon the assumption, that no one can controvert this plain proposition. If the State could not prohibit its importation from a foreign country, could the State prohibit its sale? Clearly not. Justice Story, in his Commentaries, Vol. II. sec. 1018, says: "There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

Chief Justice Marshall, Brown v. Maryland, 12 Wheat. 446, says: "If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is an essential ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress *has a right, not only to authorize im- [*559 portation, but to authorize the importer to sell."

Upon these authorities, I take it to be clear, that, if this barrel of gin had been imported from a foreign country, the State of New Hampshire neither could have prohibited its introduction into their territory, nor its sale while it remained in the situation in which it was imported.

The next question is, whether, it being an importation from a sister State instead of a foreign country, it is not equally protected by the Constitution and laws of the Union; or, in other words, is commerce with foreign nations put on a better foundation by the Constitution than commerce between the several States? There surely is nothing in the words of the Constitution, nothing in the manner in which the Constitution is expressed, to warrant such a position. The provisions applicable to both species of commerce are found in the same sentence, the one immediately following the other. But we are not left to conjecture on this subject. Chief Justice Marshall, in delivering the opinion of the court in the case, Brown v. Maryland, before cited, says: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State." Justice Story, in his Commentaries, Vol. II. sec. 1062, says: "The importance of the power of regulating commerce among the States, for the purposes of the Union, is scarcely less than that of regulating it with sovereign States. The history of other nations furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide, that each canton shall be obliged to allow a passage to merchandise through its jurisdiction, without an augmentation of tolls. In Germany, it is a law of the empire, that the princes shall not lay tolls on customs or bridges, rivers or passages, without the consent of the emperor and Diet. But these regulations are but imperfectly obeyed, and great public mischiefs have followed. Indeed, without this power to regulate commerce among the States, the power of regulating foreign commerce would be incomplete and ineffectual. The very laws of the Union in regard to the latter, whether for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits, might be evaded at pleasure, or rendered impotent. In short, in a practical view, it is impossible to separate the regulation of foreign commerce and domestic commerce among the States from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other."

If these authorities can establish a position, then is an importation like the one in the case under consideration entitled to the same privileges and immunities, including, of course, the 560*] right to *sell, that would have belonged to it if it had been an importation from a foreign country.

This law of New Hampshire has sometimes been supposed to be saved from the operation of the constitutional principles, as laid down by the court in the case of Brown v. Maryland, by the decision in New York v. Miln, 11 Peters, 102. An attentive examination of that case so far as any analogy is found to exist between that and the present, will furnish no foundation upon which to base any such conclusion. Instead of overruling the doctrines sanctioned by the court in the cases of Gibbons v. Ogden, 9 Wheat. 1, and Brown v. Maryland, the court say, that the question involved in the *case of New York v. Miln is not the very point* decided in either of the cases above referred to; but, on the contrary, the prominent facts of that case were in striking contrast with those which characterized the case of Gibbons v. Ogden; nor, say the court, is there the least likeness between the facts of this case and those of Brown v. Maryland. And the reasons upon which the decision in the last named case rests are repeated and re-affirmed in the case of New York v. Miln. The court, in stating the difference between the two cases, say: "Now, it is difficult to perceive what analogy there can be between a case where the right of a State was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not. The court did, indeed, extend the power to regulate commerce, so as to protect the goods imported from a State tax after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce, and because, as the power to regulate commerce, under which the importation was made, implied a right to sell, that right was complete, without paying the State for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods." Keeping this palpable and most obvious distinction in view, and ascertaining what were the points raised and settled in the case of New York v. Miln, there is no danger of the mind being misled by any of the remarks of the court in delivering their opinion in that case. The State of New York passed a law, requiring the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States other than New York, under certain penalties, to make a report in writing, containing the names, ages, and last legal settlement of every person who shall have been on board the vessel commanded by him during the voyage. It was contended by the *defendant in that case, that [*561 "the act of the Legislature of New York aforesaid assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

The court decided that it was not a regulation of commerce; that persons were not a subject of commerce, and that it did not come within the principles settled in Gibbons v. Ogden, or Brown v. Maryland.

Nor can a distinction be found between this case and that of Brown v. Maryland, from the fact that in Maryland the importer was compelled to pay fifty dollars for his license, and in New Hampshire it does not appear that he is compelled to pay anything. Chief Justice Marshall, in stating that case, says: "The cause depends entirely on the question, whether the Legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported."

To that inquiry the court by its decision gave a negative answer. and when they add, as the Constitution most palpably authorized them to, that "the principles laid down in this case apply equally to importations from a sister State," it seems that they decided every principle involved in the case at bar, unless there be something peculiar in the subject matter upon which the Legislature of New Hampshire has legislated, viz., wine and spirituous liquor; upon which I propose to submit a few suggestions presently. The question was not as to the amount to be paid for the license, nor whether anything was to be paid, but as to the right of the State to require it under any circumstances.

Now let us see what this act of the Legislature of New Hampshire undertakes to do. It assumes that the State may prohibit, under severe penalties to every one within her limits, the entire commerce in wines and ardent spirits. No matter that we have treaties with foreign powers authorizing their importation and sale into the country; no matter that Congress have admitted them into the country under the general laws of the whole Union, and, to encourage the manufacture, have made such as are produced from certain specified substances entitled to debenture upon exportations; no matter that the government of this Union at this moment derives no inconsiderable portion of its revenue from the duties levied upon these prescribed articles of commerce; this act of New Hampshire subjects every individual who sells a barrel, hogshead, cargo, or any quantity, great or small, without a license from the selectmen of some one of her towns, to the ignominy and expense of a criminal prosecution, conviction, and fine or imprisonment.

Is there anything in the nature of the object concerning which New Hampshire has legislated to constitute it an exception from these general provisions? It is worthy of notice, that a large proportion of the articles for the sale of 562*] which the laws of Maryland *required a license, and which laws this court pronounced unconstitutional, consisted of various kinds of distilled spirituous liquors; and it did not occur to the distinguished counselors engaged in that case, that there was anything in that circumstance to call for the application of a rule of construction different from what was applied to other subjects of commerce.

The court below, in the case at bar, admit that the State of New Hampshire cannot regulate commerce between that and the other States; that they cannot prohibit the introduction of articles from another State, with such a view, nor prohibit the sale of them for such a purpose; but that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The doctrine of the right of a State to pass health and police laws, carried to the extent here claimed, would be a virtual abrogation of the Constitution, and a total nullification of that power in the general government to regulate commerce, which was one of the chief objects proposed to be attained by the establishment of the federal Constitution. Let us test this principle by some subject other than wine and ardent spirits. Many philanthropists and physicians contend that the use of tobacco is as injurious as that of intoxicating drink. Will it for a moment be supposed that therefore a State, or any number of States, may prohibit the introduction of tobacco within their borders, and make the selling of it an indictable offense? May one or more of the wool-growing States of this Union, under the right to make health and police regulations, prohibit the introduction of cotton into their limits, and make him who would sell it a felon, and then escape the condemnation so justly due to such an unwarrantable assumption of power, on the ground that it was more healthful for their citizens to be clad in woollen than in cotton garments? Not a few reformers of the present day believe and affirm that the use of tea and coffee is, in all cases, injurious; and if such a sect should momentarily acquire the ascendency in any of the State Legislatures, may they render commerce in those articles criminal?

Another sect of reformers, by no means despicable in point of numbers or talents, honestly believe, and strenuously assert, that the use of animal food is an evil which ought not to be tolerated; but may a State, a majority of whose citizens entertain such an opinion, punish with fine and imprisonment the act of selling beef and pork, imported from a sister State?

May a State engaged in the whale fishery prohibit the introduction of tallow candles, and make the sale of them criminal on any such pretense, or a State interested in the manufacture of the latter article prohibit the introduction of oil, or sperm candles?

It may be urged that no such abuse of this power is to be apprehended. *But an [*563 answer to such a suggestion is found given by that eminent and learned judge who delivered the opinion of the court in the case of Brown v. Maryland, where he says: "All power may be abused. It might with equal justice be said, that no State would be so blind to its own interest as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise." And Justice Story, in his Commentaries, Vol. II. sec. 1066, lays down this express limitation to the power of a State to pass inspection laws, health laws, etc., "that they do not conflict with the powers delegated to Congress." And Chief Justice Marshall says expressly, "That it cannot interfere with any regulation of commerce."

Let it not be forgotten that the oppressed and degraded condition of commerce was one of the most urgent and pressing reasons which induced the formation of the Constitution. "Before that time each State regulated it with a single view to its own interest; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government.

It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce between the States." 2 Story's Commentaries, sec. 1054. This power, if it be permitted to the States, will be abused. There is no safety for the whole people in placing it anywhere save in those hands where the Constitution has placed it. If, on any pretense, however specious, for the purpose of advancing any cause, however popular or praiseworthy, this function of the general government, so vital to its character, may be usurped by a State Legislature, the barrier between the two powers is broken down, and the purposes of the Union itself defeated. Fanaticism never proposed a measure so wild and absurd, that specious and plausible arguments have not been devised to sustain the measures by which it would affect its object.

This case finds that the plaintiffs in error purchased this barrel of gin in Massachusetts. No law of any State, or of the Union, was violated by that act. They were, thus far, in the pursuit and prosecution of a lawful commerce. They brought it coastwise to the landing at Piscataqua Bridge (in New Hampshire), and from thence to their store in Dover. No law is yet broken. And then, in the same barrel, and in the same condition in which it was pur-564*] chased *in Massachusetts, and in which they imported it from a sister State, they sold it to Sias. If, as this court has already decided, the same principles apply to commerce between the States that apply to commerce with foreign nations, may it not, without arrogance or presumption, be asked, if human ingenuity can honestly distinguish this case from the one already decided by this court, and so often referred to?

Perhaps I owe an apology to this honorable court for urging upon them arguments so familiar and principles so well settled; but believing, as my clients do, that, instead of receiving, as they were entitled to, the protection of the government in their lawful business, they have been branded as criminals, their property taken, and their constitutional rights trampled upon, they have, in the last resort, appealed to this tribunal for that redress and protection against unconstitutional State legislation, to afford which so eminently belongs to this honorable court.

They rely with confidence upon the assurance that here, at least, law may be administered, right defended, and justice maintained, uncontaminated by the breath of a local and temporary diseased sentiment, which, in its misguided and abortive attempts at reform, essays to eradicate physical and moral evil from society, and corruption from the human heart, by the wondrous efficiency of legislative enactment. They rely with confidence upon that protection to commerce which this court, on divers occasions, have extended, though, in so doing, they have been under the necessity of pronouncing the legislation of more than one State invalid and unconstitutional. It was to protect commerce that this Union was established. Take away that power from the general government, and the Union cannot long survive.

Having thus referred the court to the positions which I suppose sustain my clients—positions occupied and illustrated by the profound learning, deep research, and luminous reasoning of Marshall and Story, in their expositions of this branch of the Constitution—I leave this case, in the confidence that my clients, in common with all the other citizens of this whole country, will ever find (as they ever have in times past) in this court, a full and ample protection for their constitutional rights, against which the waves of fanaticism, as well as of faction, may beat harmlessly.

Mr. Burke, for the State:

[The argument upon the two first points, respecting the rights of the jury, is omitted.]

III. The third and last point raised in this case is the following, viz:

That the court by whom this cause was tried instructed the jury that the Act of the Legislature of the State of New Hampshire, approved July 4, 1838, under which the plaintiffs in error were indicted, *was not repugnant [*563 to the Constitution of the United States, nor to any treaty between the United States and foreign nations.

The provisions of the Constitution of the United States, to which the law of the State of New Hampshire is alleged to be repugnant, are in the following words:

1. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. 1, sec. 10, part of 2d clause.

2. "The Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." Art. 1, sec. 8, clause 3.

The act before mentioned is also alleged to be repugnant "to certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States."

By the admission of the plaintiffs in error on the trial, it appears that the "gin" alleged in the indictment to have been sold by them was "American gin."

Therefore, taxing the gin, or prohibiting its sale, except upon the terms of the act of the State of New Hampshire, before referred to, did not conflict with the clause of the Constitution of the United States first cited above; because it was not an "import," nor an "export," in the sense of that provision of the Constitution.

And for the same reason, taxing, or restricting its sale, did not conflict with the first member of the second clause of the Constitution, above cited, which clothes Congress with the power "to regulate commerce with foreign nations"; nor with the last member of the clause, which empowers Congress to regulate commerce "with the Indian tribes"; nor with the public treaties of the United States with foreign nations.

If it conflict with any provision of the Constitution, it is with the second member of the second clause above cited, which gives Congress the power to regulate commerce "among the several States"; and that, it is apprehended, is the only question of which this tribunal has cognizance in this case. But, before proceeding to the argument of this question, the

supposed ground on which the plaintiffs in error rely will be briefly examined.

It is anticipated that the plaintiffs in error will rely mainly on the case of Brown v. The State of Maryland, reported in 12 Wheat. 419; 6 Cond. Rep. 554. It therefore becomes necessary to compare the facts of that case with the present, and to examine the principles laid down by Chief Justice Marshall in giving the opinion of the court.

That case was an indictment for selling "one package of foreign dry goods," contrary to an act of the Legislature of the State of Maryland, requiring all "importers" of "foreign goods and commodities," selling the same by wholesale, in bulk, to take out a license, under 566*] *a penalty of one hundred dollars, and the forfeiture of the amount of the license tax, which was fifty dollars, for a neglect to comply with the provisions of the act. The act of the Legislature of Maryland was a revenue law, and a tax imposed upon the importer under the form of a license tax, a revenue tax, and not a police regulation to restrain the sale of an article which was deemed injurious to the health and morals of the people of that State. The persons taxed were the importers of foreign goods, and not the dealers in articles of domestic manufacture or production. The case, therefore, of Brown v. The State of Maryland is different in all its features from the case at bar. It differs from it in two most prominent features;

1. The act of the Legislature of New Hampshire under which the plaintiffs in error were indicted, was a police regulation, and not a revenue law.

2. The commodity sold was not an article of foreign production, nor an "import," but was an article of American manufacture.

These two circumstances distinguish the case at bar widely from the case relied on by the plaintiffs in error. The reasoning, therefore, of the court in Brown v. Maryland will not apply to this case.

But it is apprehended, that, if the "gin" sold by the plaintiffs in error had been imported, themselves not being the importers, they could not sustain their side of the case on the principles laid down by the court in Brown v. Maryland. Chief Justice Marshall says, the article is exempt from the taxing power of a State "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported." "This state of things," he adds, "is changed if he [the importer] sells them, or otherwise mixes them up with the property of the State, by breaking up the packages and traveling with them as an itinerant peddler." In which case "the tax finds the article already incorporated with the mass of property by the act of the importer." He "has himself mixed them up in the common mass; and the law may take them as it finds them."

From these principles two deductions follow:

1. That the article is exempt from the taxing power of the State while it is in the possession of the importer in bulk, and has not *become* incorporated with the general mass of *property in the State.*

2. *When it has thus* become incorporated with the mass of property in a State, it is subject to all the laws, restrictions, regulations, and burdens to which other descriptions of the mass of property are subject.

In the case at bar, on the supposition that the gin was originally imported, the sale of it by the importer to the plaintiffs in error, and its subsequent transportation into New Hampshire, was such an incorporation of it with the mass of property in the State of New Hampshire as to subject it to the taxing power and police regulations *of the State, in the [*567 same manner and to the same extent to which all property within its jurisdiction was subject.

Again, it is admitted by the court, in Brown v. Maryland, that the "police power" remains with the States. The act of the Legislature of New Hampshire, under which the plaintiffs in error were indicted, is a portion of the police system of that State, and, according to Chief Justice Marshall, is not repugnant to the Constitution of the United States.

But the plaintiffs in error may rely upon the obiter dictum of the court in Brown v. Maryland, that "we [the court] suppose the principles laid down in this case to apply equally to importations from a sister State." It cannot be supposed, however, that a remark thus casually and loosely expressed can be regarded as authority in the case at bar. If the gin had been foreign gin, and had been purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire, would it have been such an "importation from a sister State" as to exempt it from the taxing power or police regulations of the State of New Hampshire? And can the fact of its being "American gin," and of having been purchased in Massachusetts (whether manufactured there or not does not appear), give it greater privileges and exemptions in the State of New Hampshire, than if it had been manufactured in New Hampshire, carried to Massachusetts, and there purchased by the plaintiffs in error, and brought back by them to New Hampshire, and sold in the same vessel in which it was originally put up by the manufacturer? But this point will be more fully considered hereafter.

It may also be said, that the "gin" was purchased in Boston in the same barrel in which it was afterwards transported from Massachusetts to New Hampshire, and there sold. In other words, it was sold by the plaintiffs in error "in bulk," and therefore comes within the principles of the case of Brown v. Maryland, and could not be taxed by the laws of New Hampshire, nor its sale in any way regulated or restricted.

This position is not believed to be tenable. If it were, it would be impossible to prevent the evasion of the license laws of the State of New Hampshire. Ardent spirits could not be purchased in Massachusetts in vessels containing a less quantity than one barrel—in vessels containing no more than a gallon, a quart, or a pint, and in that form carried into the State of New Hampshire, and sold in spite of the laws regulating the sale of spirituous liquors. It is believed that no such quibbling with, or evasion of, the laws of a State, can shelter itself under the provision of the Constitution which grants to Congress the power "to regulate commerce among the several States."

But the case of Brown v. Maryland does not turn on the principle contended for. The taxing power of Maryland in that case seized hold of the commodity while it retained the character of an "import," and before it became in- [*568] corporated with the general mass of property in the State. In that state of the commodity, the court held that the taxing power of Maryland could not reach it. And one of the reasons assigned for the decision was, that the importer, by paying the duty upon the article to the United States, had purchased the right of selling it, of which he could not be deprived by the legislation of a State. In the case at bar, the plaintiffs in error had purchased no right to sell their gin by the payment of duties upon it; and, furthermore, it had become incorporated with the general mass of property in the State of New Hampshire.

But the true and only question involved in the case, and which is presented for the decision of this tribunal, is now approached.

Is the Act of the Legislature of New Hampshire regulating the sale of spirituous liquors, approved July 4, 1838, repugnant to that provision of the Constitution of the United States which clothes Congress with the power "to regulate commerce among the several States?"

If it should be regarded as a law whose object was revenue alone, it is believed then not to be repugnant to the provision of the Constitution just cited. But, before proceeding further, it becomes necessary to inquire into the meaning of this provision of the Constitution, and the extent of the power which it delegates to Congress. And, in order to comprehend it clearly, it will be necessary to recur to the circumstances in the history of the country, prior to the adoption of the present Constitution, which led to the investment of this power in Congress. Previous to that time, it is well known that the States comprising the Union had separate and independent systems of revenue, commerce, and navigation. One of their sources of revenue was the levying of duties on foreign imports. They had the same power over the products of other States, when imported into their jurisdictions. Each State legislated for itself, in relation to duties, tonnage, and navigation. Of course the exercise of this right to regulate commerce, which each State then possessed, led to numerous conflicts with the legislation and the interests of other States, which did not fail to engender deep and malignant animosities, as the history of the times abundantly proves. Trade was restricted between the States, and the interchange of commodities, so essential to the interests and advancement of all, was greatly embarrassed. Hence was there an imperative necessity to wrest this dangerous power from the individual States, and vest it in the general government, in order to secure a uniformity of its exercise. In Gibbons v. Ogden, 9 Wheat. 1, this power is assumed by the court to be exclusively vested in Congress. The extent, therefore, of the power embraces the whole of it, subject, however, to the inspection laws, health laws, police regulations, etc., etc., which the court, in the case last cited, admit belong to the great mass of general legislation reserved to the States.

But this power extends only to the transportation and introduction of articles of com- [*569] merce from one State into the limits of another. When a commodity is introduced within the jurisdiction of another State, it becomes subject to the laws of that State. In other words, each State has the power to regulate the internal traffic within its limits. This position is sustained in Gibbons v. Ogden, 9 Wheat. 1; Brown v. The State of Maryland, 12 Wheat. 419; City of New York v. Miln, 11 Peters, 102.

The power to regulate commerce among the States is supervisory. It was designed by the framers of the Constitution to secure to the several States of the Union a free interchange of their products, and their transit through the territories of each, unencumbered with any burdens, duties, or taxes, except such as grow out of the inspection, health, and police regulations of the respective States. In other words, it was designed to secure free trade among the States. And in accordance with this view of the power of Congress to regulate commerce between the States is that provision in the Constitution which prohibits to the States the power "to law any duty on tonnage;" and also that provision of the Constitution which prohibits any "regulation of commerce or revenue, which shall give preference to the 'ports of one State over those of another.'" Thus it is the manifest intention of the Constitution that the power of Congress over commerce between the States shall be supervisory merely, and exerted only to secure perfect freedom of trade and intercourse between the States. See the Federalist, No. 42, p. 182, Wash. edition, 1831. With this view, Congress has passed navigation laws, which secure to the vessels of one State the same privileges in the ports of another State which the vessels of the latter enjoy in its own ports.

But does the act of the Legislature of New Hampshire interfere with this power of Congress "to regulate commerce among the States," as above defined? Does it prevent the unrestricted introduction of articles from other States into the State of New Hampshire, or their free transit through its territories? It may be safely affirmed that it does not.

It is stated in the bill of exceptions, that the gin sold by the plaintiffs in error was brought from Boston, the place of its purchase, "coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store in Dover." But can the mode by which the article was transported from Massachusetts, and introduced into the territory of New Hampshire, secure to it any constitutional protection? It will not be pretended. The gin would have been entitled to the same privileges and immunities if it had been transported by railroad, or by one of the numerous baggage wagons which run to and from Massachusetts and New Hampshire. It cannot be a privileged article, because it was carried "coastwise" into the State of New Hampshire. But it may be confidently affirmed that Congress, under the general power "to regulate commerce among the several [*570] States," cannot secure to the productions and manufactures of one State, imported into another State for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter would enjoy

within its own jurisdiction. Congress cannot give to the productions and manufactures of Massachusetts, which are carried into New Hampshire for sale and consumption, greater privileges and exemptions than the productions and manufactures of the latter State would possess within the limits of its own territories. The "barrel of gin" purchased by the plaintiffs in error in Massachusetts, and carried to New Hampshire for sale and consumption, could not claim greater privileges and exemptions than a "barrel of gin" manufactured in the State of New Hampshire. The former must be subject to the same laws and regulations to which the latter would be subject. And it will hardly be pretended that the Legislature of New Hampshire could not pass laws regulating the sale, within its own limits, of spirituous liquors, or of any other article manufactured within its own jurisdiction. And if Congress should attempt to interfere in such a case it would be a most gross and palpable invasion of the reserved rights and the internal police of New Hampshire.

But it may be contended that the license law of the State of New Hampshire conflicts with the provision of the Constitution which gives Congress power to regulate commerce among the States, because it is general and sweeping in its provisions, and prohibits the sale of wines and spirituous liquors in any quantity. Such a position, if assumed, cannot be maintained by any sound argument. It would make the constitutional question involved in this case depend upon the quantity of liquor sold, and not the thing itself. And where should be the limit of the law as to the quantity the sale of which it would be constitutional to prohibit? Would it be confined to a pint, a quart, or a gallon? And could the grave constitutional question raised in this case depend upon an absurdity so palpable, not to say ridiculous?

But the subjection of the productions of one State, when introduced for the purpose of sale and consumption within the territories of another to the internal laws and regulations of the latter State, finds an analogy in the case of the citizens of one State going into the jurisdiction of another.

The Constitution provides, that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." Citizens of one State, going into the jurisdiction of another State, can claim no exemption from its laws under this clause. If they enter the territory of another State merely to pass through it, the power of the law surrounds them to protect them from violence and to restrain them from crime. If they violate the laws of the State into whose territory they 571*] pass, they are subject, *like all the citizens of that State, to all the penalties which the laws impose. If they remain in the State, they become subject to the taxing power, and all the burdens and restraints which its laws impose upon its own citizens. Can an article of commerce, produced in one State and carried into another, for sale and consumption, claim greater privileges and exemptions in the latter State than citizens of the same State *passing into another can* claim? Such a position *will hardly be ventured upon.*

But, finally, it is contended for the State of New Hampshire, that the Act of July 4, 1838; under which the plaintiffs in error were indicted, is a police regulation, which it was within the competency of the Legislature of that State to enact, and is therefore not repugnant to the Constitution of the United States.

In the case of Gibbons v. Ogden, 9 Wheat. 203, the court say, that "inspection laws, quarantine laws, health laws, of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government."

The law of the Legislature of New Hampshire under consideration is a police regulation. Its design and object are to preserve the public morals and health of the State, and it is clearly within the recognized constitutional authority of the Legislature of that State to enact. This power, it is admitted by the court, in the cases of Brown v. Maryland, Gibbons v. Ogden, and The City of New York v. Miln, all before cited, the States may exercise, even if it interfere with foreign commerce. The States may pass laws regulating the sale of gunpowder, which is clearly a police regulation, and necessary for the safety of the people, particularly in large cities. They may, also, by their health laws, intercept and prohibit the sale of an infected article, notwithstanding the duty may have been paid on it, and it may yet remain in the hands of the importer, in bulk, in the character of an import; a fortiori may they intercept and prohibit the sale of an infected article, produced in another State, and transported within the jurisdiction of the former for sale. For the same reason may the States, by their police regulations, prohibit the sale of obscene books, imported from a foreign country, notwithstanding the duty may have been paid on them, and they may remain in the original package. So, also, may they prohibit the sale of an obscene book written in this country, on which the copyright has been secured from the government of the United States, notwithstanding the fee required in such cases has been paid. Such cases, it is believed, would be analogous in principle to the power to regulate or prohibit the sale of spirituous liquors. On this point the following cases are relied on: Lunt's case, 6 Greenleaf's Maine Rep. 412; Beal, Plaintiff in Error v. The State of Indiana, *4 Blackford, 107; [*572 King v. Cooper, Plaintiff in Error, 2 Scammon, 305.

And in confirmation of the authorities cited on this point, it may be observed that the license system was adopted in England at a very early period of her history, and has ever since composed a part of the police system of that kingdom. See Crabbe's History of English Law, London edit. p. 477; see, also, the different enactments of the British Parliament, in 7 Evans' Statutes, pp. 1–32, title Ale Houses. Many of the English statutes relate to the sale of imported as well as domestic liquors. They, of course, conflict with the import as well as excise systems of that government; and yet, it is believed, they never have been called in question.

License regulations were also adopted by the Provincial Legislature of New Hampshire at an early period. See Provincial Laws of New Hampshire, edit. of 1761, pp. 64, 143.

Similar legislation, it is believed, has been adopted in nearly every State in the Union.

But if the law of the Legislature of New Hampshire, now under consideration, shall not be regarded as a police regulation, it is clearly a law regulating the internal commerce of the State, and therefore constitutional, according to the doctrine laid down in Gibbons v. Ogden, before cited. It may also claim analogy with the laws relating to hawkers and peddlers, which, it is believed, have been enacted in some form in every State in the Union.

And, in conclusion, the remark will be ventured upon (although, perhaps, not appropriate in a mere argument), that the people of the State of New Hampshire, almost without distinction of age, sex, or condition, feel a deep and absorbing interest in the final issue of this question. Their sentiments concur with the sense of nearly the whole civilized world, which now concedes that the traffic in intoxicating liquors is a crime against society. It is disapproved by man, and stands condemned by the great moral Judge of the universe, whose purity cannot countenance such manifest and admitted wrong. It is the foul parent of immorality and crime, and the prolific source of unspeakable misery and sorrow to innumerable individuals and families. And is it to be contended that it is repugnant to the Constitution of the United States to restrain and prohibit such inhuman traffic?—to extirpate a moral crime, which grows blacker and more hideous the longer it is contemplated, and the more its horrible effects become visible? And deeply anxious are the people of New Hampshire that this vicious trade shall receive no countenance from the judgment of the august and enlightened tribunal to whose arbitrament this cause is now most respectfully submitted.

573*] *Mr. Chief Justice Taney:

In the cases of Thurlow v. The State of Massachusetts, of Fletcher v. The State of Rhode Island, and of Peirce et al. v. The State of New Hampshire, the judgments of the respective State courts are severally affirmed.

The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. The first two of these cases depend precisely upon the same principles; and although the case against the State of New Hampshire differs in some respects from the others, yet there are important principles common to all of them, and on that account it is more convenient to consider them together. Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the Constitution of the United States *which confers upon Congress the power to regulate commerce with foreign nations and among the several States.*

The cases have been separately and fully and ably argued, and the questions which they involve are undoubtedly of the highest importance. But the construction of this clause in the Constitution has been so fully discussed at the bar, and in the opinions delivered by the court in former cases, that scarcely anything can be suggested at this day calculated to throw much additional light upon the subject, or any argument offered which has not heretofore been considered, and commented on, and which may not be found in the reports of the decisions of this court.

It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the Constitution for which they are respectively contending. And I am the less inclined to do so because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court.

The Constitution of the United States declares that that Constitution, and the laws of the United States which shall be made in pursuance *thereof, and all treaties made, [*574 or which shall be made, under the authority of the United States, shall be the supreme law of the land. It follows that a law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States.

It is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens.

I am not aware that these principles have ever been questioned. The difficulty has always arisen on their application; and that difficulty is now presented in the Rhode Island and Massachusetts cases, where the question is how far a State may regulate or prohibit the sale of ardent spirits, the importation of which from foreign countries has been authorized by Congress. Is such a law a regulation of foreign commerce, or of the internal traffic of the State?

It is unquestionably no easy task to mark by a certain and definite line the division between

foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution.

This question came directly before the court for the first time in the case of Brown v. The State of Maryland, 12 Wheat. 419. And the court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, 575*] *and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of Brown v. The State of Maryland, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. *Indeed, goods imported, while they remain in the hands of the importer,* in the form and shape in which they were brought into the country, can in no just sense be regarded as part of the mass of property in the State usually taxed for the support of the State government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely in transitu, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle *than a transit duty upon the [*576 merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from the tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

Adopting, therefore, the rule as laid down in Brown v. The State of Maryland, I proceed to apply it to the cases of Massachusetts and Rhode Island. The laws of Congress regulating foreign commerce authorize the importation of spirits, distilled liquors, and brandy,

in casks or vessels not containing less than a certain quantity, specified in the laws upon this subject. Now, if the State laws in question came in collision with those acts of Congress, and prevented or obstructed the importation or sale of these articles by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void.

It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, or pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although [*577] *sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction.

But I do not understand the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and is in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon *that subject, each State must decide for itself.* I speak only of the restrictions which the Constitution and laws of the United States have imposed upon the States. And as these laws of Massachusetts and Rhode Island are not repugnant to the Constitution of the United States, and do not come in conflict with any law of Congress passed in pursuance of its authority to regulate commerce with foreign nations and among the several States, there is no ground upon which this court can declare them to be void.

I come now to the New Hampshire case, in which a different principle is involved—the question, however, arising under the same clause in the Constitution, and depending on its construction.

The law of New Hampshire prohibits the sale of distilled spirits, *in any quan- [*578 tity, without a license from the selectment of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it. And, according to the doctrine in Brown v. Maryland, the article in question, at the time of the sale, was subject to the legislation of Congress.

The present case, however, differs from Brown v. The State of Maryland in this, that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation.

The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void. This is the question

upon which the case turns; and I do not see how it can be decided upon any other ground, provided we adopt the line of division between foreign and domestic commerce as marked out by the court in Brown v. The State of Maryland. I proceed, therefore, to state my opinion upon it.

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I *do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such, evidently, I think was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States. [*579]

The language in which the grant of power to the general government is made certainly furnishes no warrant for a different construction, and there is no prohibition to the States. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the Constitution to the general government. On the contrary, in many instances, after the grant is made, the Constitution proceeds to prohibit the exercise of the same power by the States in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the States from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the State over the same subject was intended to be entirely excluded. But if, as I think, the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with State laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate. For if *the mere grant of power to the general government was in itself a prohibition to the States,* there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all State laws upon the subject would be ipso facto void, and there could therefore be no such thing as conflicting laws, nor any question about the supremacy of conflicting legislation. It is only where both may legislate on the subject, that the question can arise. [*580]

I have said that the legislation of Congress and the States has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws.

In relation to the first, they are admitted on all hands to belong to foreign commerce, and to be subject to the regulations of Congress, under the grant of power of which we are speaking. Yet they have been continually regulated by the maritime States, as fully and entirely since the adoption of the Constitution as they were before; and there is but one law of Congress making any specific regulation upon the subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched. It is true, that the Act of 1789 provides that pilots shall continue to be regulated by the laws of the respective States then in force, or which may thereafter be passed, until Congress shall make provision on the subject. And undoubtedly Congress had the power, by assenting to the State laws then in force, to make them its own, and thus make the previous regulations of the States the regulations of the general government. But it is equally clear, that, as to all future laws by the States, if the Constitution deprived them of the power of making any regulations on the subject, an act of Congress could not restore it. For it will hardly be contended that an act of Congress can alter the Constitution, and confer upon a State a power which the Constitution declares it shall not possess. And if the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress could no more restore to the States the power of which it was thus deprived, than it could authorize them to coin money, or make paper money a tender in the payment of debts, or to do any other act forbidden to them by the Constitution. Every pilot law in the commercial States has, it is believed, been either modified or passed since the Act of 1789 adopted those then in force; and the provisions since made are all void, if the restriction on the power of the States now contended for should be maintained; and the regulations made, the duties imposed, the securities required, and penalties inflicted by these various State laws are mere nullities, and could not be enforced in a court of justice. It is hardly necessary to speak of the mischiefs which such a construction would produce to those who are engaged in shipping, navigation, and commerce. Up to this time their validity has never been questioned. On the contrary, they have been repeatedly recognized and upheld by the decisions of this court; and it will be difficult to show how this can be done, except upon the construction of the Constitution

581*] which I am now maintaining. *So, also, in regard to health and quarantine laws. They have been continually passed by the States ever since the adoption of the Constitution, and the power to pass them recognized by acts of Congress, and the revenue officers of the general government directed to assist in their execution. Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the State. They subject the ship, and cargo, and crew to the inspection of a health officer appointed by the State; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the State authority. The expenses of these precautionary measures are also usually, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the State law, and not by Congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by Congress ever since the adoption of the Constitution, and constantly affirmed and supported by this court whenever the subject came before it.

The decision of this court will also, in my opinion, when carefully examined, be found to sanction the construction I am maintaining. It is not my purpose to refer to all of the cases in which this question has been spoken of, but only to the principal and leading ones; and,

First, to Gibbons v. Ogden, because this is the case usually referred to and relied on to prove the exclusive power of Congress and the prohibition to the States. It is true that one or two passages in that opinion, taken by themselves, and detached from the context, would seem to countenance this doctrine. And, indeed, it has always appeared to me that this controversy has mainly arisen out of that case, and that this doctrine of the exclusive power of Congress, in the sense in which it is now contended for, is comparatively a modern one, and was never seriously put forward in any case until after the decision of Gibbons v. Ogden, although it has been abundantly discussed since. Still, it seems to me to be clear, upon a careful examination of that case, that the expressions referred to do not warrant the inference drawn from them, and were not used in the sense imputed to them; and that the opinion in that case, when taken altogether and with reference to the subject matter before the court, establishes the doctrine that a State may, in the execution of its powers of internal police, make regulations of foreign commerce; and that such regulations are valid, unless they come into collision with a law of Congress. Upon examining that opinion, it will be seen that the court, when it uses the expres-

582*] sions *which are supposed to countenance the doctrine of exclusive power in Congress, is commenting upon the argument of counsel in favor of equal power on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for State purposes, although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the State power is concurrent with that of the general government—is equal to it, and is not bound to yield. In the second, it is subordinate and subject to the superior and controlling power conferred upon Congress. And it is solely with reference to this distinction, and in the midst of this argument upon it, that the court uses the expressions which are supposed to maintain an absolute prohibition to the States. But it certainly did not mean to press the doctrine to that extent. For it does not decide the case on that ground (although it would have been abundantly sufficient, if the court had entertained the opinion imputed to it), but, after disposing of the argument which had been offered in favor of concurrent powers, it proceeds immediately, in a very full and elaborate argument, to show that there was a conflict between the law of New York and the act of Congress, and explicitly puts its decision upon that ground. Now, the whole of this part of the opinion would have been unnecessary and out of place, if the State law was of itself a violation of the Constitution of the United States, and therefore utterly null and void, whether it did or did not come in conflict with the law of Congress.

Moreover, the court distinctly admits, on pages 205, 206, that a State may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear, that, so far as these regulations are merely internal, and do not operate on foreign commerce, or commerce among the States, they are altogether independent of the power of the general government and cannot be controlled by it. The power of control, therefore, which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the States. And if a State, with a view to its police or health, may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the State is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress.

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard *the lives and health of their citi- [*583

zens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its

own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. Are the States absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the State, or whatever the real object of the law; and it requires no law of Congress to control or to annul them. Yet the case of Gibbons v. Ogden unquestionably affirms that such regulations may be made by a State, subject to the controlling power of Congress. And if this may be done, it necessarily follows that the grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon Congress the superior and controlling power. And to expound the particular passages herein before mentioned in the manner insisted upon by those who contend for the prohibition would be to make different parts of that opinion inconsistent with each other—an error which I am quite sure no one will ever impute to the very eminent jurist by whom the opinion was delivered.

And that the meaning of the court in the case of Gibbons v. Ogden was such as I have insisted on is, I think, conclusively proved by the case of Wilson et al. v. The Black Bird Creek Marsh Company, 2 Peters, 251, 252. In that case a dam authorized by a State law had been erected across a navigable creek, so as to obstruct the commerce above it. And the validity of the State law was objected to, on the ground that it was repugnant to the Constitution of the United States, being a regulation of commerce. But the court says: "The repugnancy of the 584*] law of Delaware to the *Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect the question," and then proceeds to decide that the law of Delaware could not "be considered as repugnant to the power to regulate commerce in its dormant State, or as being in conflict with any law passed on the subject."

The passages I have quoted show that the validity of the State law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted. And it is worthy of remark, that the counsel for the plaintiff in error in that case relied upon Gibbons v. Ogden as conclusive authority to show the unconstitutionality of the State law, no doubt placing upon the passages I have mentioned the construction given to them by those who insist upon the exclusiveness of the power. This case, therefore, was brought fully to the attention of the court. And the decision in the last case, and the grounds on which it was placed, in my judgment show most clearly what was intended in Gibbons v. Ogden; and that in that case, as well as in the case of Wilson v. The Black Bird Creek Marsh Company, the court held that a State law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress passed in pursuance of the power granted. And it is worthy, also, of remark, that the opinion in both of these cases was delivered by Chief Justice Marshall; and I consider his opinion in the latter one as an exposition of what he meant to decide in the former.

In the case of The City of New York v. Miln, 11 Peters, 130, the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court.

For my own part, I have always regarded the cases of Gibbons v. Ogden, and Wilson v. The Black Bird Creek Marsh Company, as abundantly sufficient to sanction the construction of the Constitution which in my judgment is the true one. Their correctness has never been questioned; and I forbear, therefore, to remark on the other cases in which this subject has been mentioned and discussed.

It may be well, however, to remark, that in analogous cases, where, by the Constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus, in the case of Houston v. Moore, 5 Wheat. 1, it was held that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from *legislating on the same [*585 subject, provided the law of the State was not repugnant to the law of Congress. And every State in the Union has continually legislated on the subject, and I am not aware that the validity of these laws has ever been disputed, unless they came in conflict with the law of Congress.

The same doctrine was held in the case of Sturges v. Crowninshield, 4 Wheat. 196, under the clause in the Constitution which gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States.

And in the case of Chirac v. Chirac, 2 Wheat. 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive, they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power

in the Constitution, but insisted that the Maryland law was "virtually repealed by the Constitution of the United States, and the act of naturalization enacted by Congress." Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility be a State law which did not come in conflict with it. And, indeed, in this case it might well have been doubted whether the grant in the Constitution itself did not abrogate the power of the States, inasmuch as the Constitution also provided, that the citizens of each State should be entitled to all the privileges and immunities of citizens in the several States; and it would seem to be hardly consistent with this provision to allow any one State, after the adoption of the Constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the State, and compel other States to acknowledge as citizens those whom it might not be willing to receive.

In referring to the opinions of those who sat here before us, it is but justice to them, in expounding their language, to keep in mind the character of the case they were deciding. And this is more especially necessary in cases depending upon the construction of the Constitution of the United States; where, from the great public interests which must always be involved in such questions, this court have usually deemed it advisable to state very much at large the principles and reasoning upon which their judgment was founded, and to refer to and comment on the leading points made by the counsel on either side in the argument. And I am not aware of any instance in which the court have spoken of the grant of power to the general government as excluding all State power over the subject, unless they were deciding a case where the power had been exercised by Congress, and a State law came in conflict with it. In cases of this kind, the power of Congress undoubtedly ex-
586*] cludes *and displaces that of the State; because, wherever there is a collision between them, the law of Congress is supreme. And it is in this sense only, in my judgment, that it has been spoken of as exclusive in the opinions of the court to which I have referred. The case last mentioned in a striking example; for, there the language of the court, affirming in the broadest terms the exclusiveness of the power, evidently refers to the argument of counsel stated in the preceding sentence.

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.

The judgment of the State courts ought, therefore, in my opinion, to be affirmed in each of the three cases before us.

12 L. ed.

Mr. Justice McLean:

Thurlow v. The Commonwealth of Massachusetts. Erorr from the State Court.

The plaintiff was indicted and convicted under the Revised Statutes of Massachusetts, chapter 47, and the Act of 1837, chapter 242, for selling foreign spirits, in 1841 and 1842, without a license.

The third section of the revised act provides that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, "under the penalty of twenty dollars." The seventeenth section authorizes the county commissioners to grant licenses; and the second section of the Act of 1837 provides, that nothing contained in that act, or in the forty-seventh chapter of the Revised Statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted."

On the trial in the Court of Common Pleas it was objected that a part of the spirits sold were foreign; but the court instructed the jury that such sale was in violation of the statute, which was not inconsistent with the Constitution or revenue laws of the United States. On this ruling of the court an exception was taken, and the cause was removed to the Supreme Court of the State of Massachusetts, which overruled the exception, and entered a judgment on the verdict against the defendant.

*The acts of Congress authorize the [*587
importation of spirits in casks of fifteen gallons, and wine in bottles.

The great question in this case is, whether the license laws of Massachusetts are repugnant to the Constitution of the United States, or the revenue laws which have been enacted under it.

And, first, it is insisted that they are unconstitutional, as they prohibit the importer from selling an article that he is authorized to import, without the payment of an additional duty, or impost, which the State cannot impose.

The case of Brown v. The State of Maryland, 12 Wheat. 419, is supposed to be conclusive upon this point. This may be admitted, and yet it does not rule the case before us.

Brown was charged with having imported and sold a package of dry goods without a license. An act of Maryland required all importers, before the sale of their imported articles, to take out a license. And the court held, "that a tax on the sale of an article, imported only for sale, is a tax on the article itself"; "that the importation gave a right to the importer to sell the package in question free from any charge by the State, and consequently that the act of Maryland was unconstitutional and void, as being repugnant to that article of the Constitution which declares that no State shall lay any impost or duties on imports or exports."

The act was also held to be repugnant to that clause in the Constitution which "empowers Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In Brown's case the reasoning of the court and their decision turned upon the fact, that he, being the importer of the package, had a right to sell it; that this right continued so long as the package was unbroken, and remained the property of the importer.

The plaintiff, Thurlow, asserts no right as an importer of the article sold. He purchased it in the home market; consequently neither the general reasoning nor the ruling of the court in Brown's case can control this one.

The tenth amendment of the Constitution declares, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Before the adoption of the Constitution, the States possessed, respectively, all the attributes of sovereignty. In their organic laws they had distributed their powers of government according to their own views, subject to such modifications as the people of each State might sanction. The agencies established by the articles of confederation were not entitled to the dignified appellation of government.

Among the delegated functions it is declared, that "Congress shall have power to regulate commerce with foreign nations, and among 588*] *the several States, and with the Indian tribes." This investiture of power is declared by this court, in the case of Gibbons v. Ogden, 9 Wheat. 1, and also in Brown v. The State of Maryland, "to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution."

There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the federal and State governments. The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government.

The power to tax is common to the federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict of jurisdiction. The conflicts which have arisen are mainly attributable to the want of an accurate definition and a clear comprehension of the respective powers of the two governments. In a system of government so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and State powers.

The powers expressly prohibited to the States *are few in number, and* are specified in the *Constitution. Those which* are exclusively delegated to the federal government, and consequently, by implication, are prohibited to the States, are more numerous.

The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its constitution they have existed in Massachusetts. A great moral reform, *which enlisted the judgments [*589 and excited the sympathies of the public, has given notoriety to this course of legislation, and extended it, lately, beyond its former limit. And the question is now raised, whether the laws under consideration trench upon the power of Congress to regulate foreign commerce.

These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of Brown v. Maryland, it is admitted that the license acts cannot operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remain in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws. This is the predicament of the spirits in question.

A license to sell an article, foreign or domestic, as a merchant, or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business, or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise, or spirits, at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But, if this were the effect of the license, would that make the acts unconstitutional?

The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which

does him harm, whether he be assailed by an assassin, or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others.

From the explosive nature of gunpowder, a city may exclude it. Now, this is an article of commerce, and is not known to carry infectious 590*] *disease; yet to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And although they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State.

The objection is strongly and confidently urged, that a license may be refused under these laws, which would, in effect, prevent importation, as importation is only made to sell.

It is admitted that a State law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the act of Congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a State. But a State has a right to regulate the sale of this, as of every other imported article, out of the hands of the importer.

The license system, as adopted in all the States, restrains persons from selling by retail, who have not taken a license; and a license to retail spirits is granted by the court, or some other body, at its discretion, and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town, as a person of good moral character. Should this recommendation be refused improperly or unjustly, an appeal is given to the commissioners of the county. But the commissioners are not required to grant any licenses, "when, in their opinion, the public good does not require them to be granted."

There is no evidence in the record of a refusal to grant a license in this case. The plaintiff is charged with selling without a license; but it nowhere appears that he ever applied for one. This would seem to be conclusive. For if a State have a right to regulate the retail of foreign spirits, no one can retail them where a license is required without it. Now, that a State may do this no one doubts. And it is equally clear, if the plaintiff rests upon a prohibition to sell, it must be shown. This does not appear on the face of the law, and if, in the exercise of their discretion, the commissioners have refused all licenses, that is a matter of fact which must be established. On this ground alone, admitting the force of the arguments for the plaintiff, his case must fail.

But, *not to rest the decision of so important a question on a defect of proof, we will consider* the case as if the fact of refusal to grant the license were in the record.

The necessity of a license presupposes a prohibition of the right to sell as to those who have no license. For if a State may require a license to sell, it may, in the exercise of a proper discretion, limit the number of such licenses as the public good may seem to require. This *is believed to have been done under [*591 every system of licenses to retail spirits which has been adopted in the different States. And this limitation may, possibly, lessen the sale of the article. This may be the result of any regulation on the subject. But it constitutes no objection to the law. An innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold. Is this unconstitutional, because it may reduce the importation of the article? Such an argument would be so absurd as to be at once rejected by every sound mind. No one could fail to see that the injunction was laid for the maintenance of good order and good morals. To reject this view would make the excess of the drunkard a constitutional duty, to encourage the importation of ardent spirits.

Such an argument would be advanced by no one, and no one would question either the constitutionality or expediency of the law which prohibits an innkeeper from encouraging drunkenness. And yet in this simple proposition is the argument answered against the constitutionality of the laws in question.

A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the State.

It is said that the object of these laws is to prohibit the importation of foreign spirits. This is an inference which their language does not authorize. A license is only required to sell in less quantity than twenty-eight gallons. A greater quantity than this may be sold without restriction. But it is said, if the Legislature may require a license for twenty-eight gallons, it may extend the limitation to three hundred gallons.

In answer to this it is enough to say, that the Legislature has not done what is supposed by the plaintiff's counsel it might do. But if the Legislature cannot extend the license to twenty-eight gallons, what shall be the constitutional limit? By what rule shall it be ascertained? Shall a gallon, a quart, or a pint be the limit? This is altogether arbitrary, and must depend upon the discretion of the law making power —the same discretion that imposes a tax, defines offenses and prescribes their punishment, and which controls the internal policy of the State? Will it be contended that the Legislature cannot exercise the power, as it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is, power may be abused, therefore it cannot be

exercised. What power dependent on human agency may not be abused?

592*] *In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretense of a police regulation, a State cannot counteract the commercial power of Congress. And yet, as has been shown, to guard the health, morals, and safety of the community, the laws of a State may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still, it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation. And especially is this not the case, when the State regulation has a salutary tendency on society, and is founded on the highest moral considerations.

The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a State. The former ceases when the foreign product becomes commingled with he other property in the State. At this point the local law attaches, and regulates it as it does other property. The State cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the State, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited.

When in the appropriate exercise of these federal and State powers, contingently and incidently their lines of action run into each other; if the State power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained.

593*] *But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety and the moral energies of society, its prosperity is advanced.

In McCulloch v. The State of Maryland, 4 Wheat. 428, this court say: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against abuse."

Believing the laws of Massachusetts to regulate licenses for the sale of spirituous liquors to be constitutional, I affirm the judgment in this case.

Andrew Peirce, Jr., and Thomas W. Peirce, v. The State of New Hampshire.

This is a writ of error to the Supreme Court of New Hampshire, on a judgment given by that court, sustaining the validity of the Act of that State, "regulating the sale of wines and spirituous liquors," "approved 4th July, 1838;" which is alleged to be in violation of the Constitution of the United States, and the revenue acts of Congress made in pursuance thereof.

The first section provides, "that if any person shall, without license from the selectmen of the town, etc., sell any wine, rum, gin, brandy, or other spirits, in any quantity, etc., such person, so offending, for each and every such offense, etc., shall pay a sum not exceeding fifty dollars," etc. The indictment charged the defendants in the State court with having sold one barrel of gin without a license.

On the trial, it was proved that the barrel of gin was purchased by the defendants in Boston, brought coastwise to the landing at Piscataqua Bridge, and thence to the defendants' store in Dover, and afterwards sold in the same barrel.

The views expressed by me in the case of Thurlow v. The State of Massachusetts, [*594 at the present term, as regards the power of a State to require a license for the sale of spirituous liquors, apply equally to the present case. a State may require a license to sell ardent spirits of domestic manufacture, as well as foreign. And the only difference between this case and the one above cited is, that the defendants imported this barrel of gin from the State of Massachusetts to that of New Hampshire, where

they sold it; and they claim the right of importers to sell without a license.

In the case of Brown v. The State of Maryland, 12 Wheat. 449, after sustaining the right of the importer to sell a package of foreign goods without a license, which an act of Maryland required, the court say: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State."

This remark of the court was incidental to the question before it, and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming as it did from a most learned and eminent Chief Justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case.

The power to regulate commerce among the several State is given to Congress in the same words as the power over foreign commerce. But in the same article it is declared, that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And it is supposed that the declaration, "that no State, without the consent of Congress, shall lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," refers to foreign commerce.

A revenue to the general government could never have been contemplated from any regulation of commerce among the several States. Countervailing duties, under the Confederation, were imposed by the different States to such an extent as to endanger the confederacy. But this cannot be done under the Constitution by Congress, in whom the power to regulate commerce among the States is vested.

The word "import," in a commercial sense, means the goods or other articles brought into this country from abroad—from another country. In this sense an importer is a person engaged in foreign commerce. And it appears that in the acts of Congress which regulate foreign commerce he is spoken of in that light. In Brown v. The State of Maryland, 12 Wheat. 443, the court say, the act of Maryland "denies to the importer the right of using the privilege which he has purchased from the United States, until he has purchased it from the State." And it was upon the ground that the tax was an additional charge or impost upon 595*] the thing imported, *which a State could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases, the transportation is only made a few feet or rods, and generally it is attended with little risk; and no duty is paid to the federal or State government. And why should property, when conveyed over a State line, be exempt from taxation which is common to all other property in the State?

There is no act of Congress to which the license law, as applied to this case, can be held repugnant. And the general "power in Congress to regulate *commerce among the several* States," under the restrictions in the Constitution, cannot affect the validity of the law. The Constitution prohibits impost duties on a commercial interchange of commodities among the States. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society.

The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of Brown v. The State of Maryland. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law.

If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. One of the objects in adopting the Constitution was, to regulate this commerce, and to prevent the States from imposing a tax on the commerce of each other. If this power has not been delegated to Congress, it is still retained by the States, and may be exercised at their discretion, as before the adoption of the Constitution. For if it be a reserved power, Congress can neither abridge nor abolish it.

But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account *of their having transported [*596 this property from Massachusetts to New Hampshire. I affirm the judgment of the State court.

Joel Fletcher v. The State of Rhode Island.

This is a writ of error to the Supreme Court of Rhode Island, under the 25th section of the Judiciary Act of 1789. Fletcher was indicted for selling strong liquor, to wit, rum, gin, and brandy, in less quantity than ten gallons, in violation of the law of Rhode Island. From the evidence, it appeared that the brandy which he sold was purchased by him at Boston, in the State of Massachusetts, that it was imported into the United States from France for sale, and that the duties had been regularly paid at the port of Boston. The sale of the liquor was admitted by the defendant, as charged in the indictment.

In the defense it was insisted, that the License Act was void, it being repugnant to that clause of the 8th section of the Constitu-

tion of the United States which provides, "that the Congress shall have power to lay and collect taxes, duties, imports, and excises, to pay debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;" and is also repugnant to that clause of the 8th section which provides, "that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" and also repugnant to that clause which declares, that "no State shall, without the consent of Congress, lay any imposts or duties on imports, except what may be absolutely necessary for executing its inspection laws, and the acts of Congress in pursuance of the aforesaid several clauses of said Constitution," etc.

The Supreme Court of the State maintained the validity of the State statute, and to reverse that judgment this writ of error is prosecuted.

The opinions given by me in the cases of Thurlow v. The State of Massachusetts, and Peirce et al. v. The State of New Hampshire, decide, so far as I am concerned, this case. The first case related to the sale of spirits of foreign importation, not in the hands of the importer; the second, to domestic spirits transported from one State to another. And the indictment now under consideration relates to the sale of foreign spirits, purchased in Massachusetts and transported to Rhode Island. There is, however, one point made in this case, which was not embraced by the facts contained in either of the others. It was "agreed, that the town council of Cumberland, in Rhode Island, refused to grant any license for retailing strong liquors for a year from April, 1845, having been instructed to that effect by a town meeting." The effect of this proceeding was to prohibit the sale of spirituous liquors in the town of Cumberland in less quantities than ten gallons.

597*] *There is no constitutional objection to the exercise of this discretion under the authority of the State law. In the first place, no system of licenses to retail spirits has authorized the grant, except upon certain conditions. No one, it is presumed, can claim a license to retail spirits as a matter of right. Under the law of the State, a discretion is to be exercised, not only as regards the individuals who apply, but also as to the number that shall be licensed in each town. And, if it shall be determined that a certain town is not entitled to a license, it is not perceived how such a decision can be controlled. In the case of Fletcher, it seems that the town council, who have the power to make the grant, were influenced to refuse it by the popular vote of the town. A more satisfactory mode of instructing public officers, it would seem, could not be adopted.

This produces no restriction on the sale of spirits in any quantity exceeding ten gallons. And there is nothing in the record which shows that licenses are not granted in the adjacent towns within the State. But if this did appear, it would not avoid the force of the act. I think this regulation is clearly within the power of the State of Rhode Island, and, consequently, that the act is not repugnant to the Constitution of the United States, or to any act of Congress passed in pursuance of it. I therefore affirm the judgment of the Supreme Court.

Mr. Justice Catron:

Peirce et al. v. New Hampshire.

Andrew Peirce and two others were indicted for selling one barrel of gin, contrary to a statute of New Hampshire, passed in 1838, which provides, that if any person shall, without license from the selectmen of the town where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, part of which are spirituous, such person so offending, for each offense, on conviction upon an indictment, shall forfeit and pay a sum not exceeding fifty dollars, nor less than twenty-five dollars, for the use of the county.

The barrel of gin had been purchased by the defendants at Boston, in the Commonwealth of Massachusetts, and was brought coastwise by water near to Dover, in New Hampshire, where it was sold in the same barrel and condition that it had been purchased in Boston. Part of the regular business of the defendants was to sell ardent spirits in large quantities.

The defendants' counsel contended, on the trial, that the statute of 1838 was unconstitutional and void, because the same is in violation of certain public treaties of the United States with Holland, France, and other countries, containing stipulations for the admission of spirits into the United States. and because it is repugnant *to the two following [*598 clauses in the Constitution of the United States, viz.:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

"The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In answer to these objections, the court instructed the jury, that the statute of July 4, 1838, was not entirely void. if it might have an operation constitutionally in any case; and that. as far as this case was concerned, it could not be in violation of any treaty with any foreign power which had been referred to, permitting the introduction of foreign spirits into the United States, because the liquor in question here was proved to be American gin.

The court further instructed the jury, that this statute, as it regarded this case, was not repugnant to the clause in the Constitution of the United States providing that no State shall, without the consent of Congress, lay any duty on imports or exports, because the gin in this case was not a foreign article, and was not imported into, but had been manufactured in, the United States.

The court further instructed the jury, that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign

countries or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this statute was a regulation of that character, and constitutional.

The jury found the defendants guilty, and the Court of Common Pleas fined them thirty dollars; from which they prosecuted their writ of error to the superior Court of Judicature of New Hampshire, where the judgment was affirmed. The present writ of error is prosecuted, under the twenty-fifth section of the Judiciary Act of 1789, to reverse the judgment of the State court of New Hampshire, on the grounds above stated. And the question and the case presented for our consideration are, whether the State laws, and the judgment founded on them, are repugnant to the Constitution of the United States. The court below having decided in favor of their validity, this is the only question that comes within our jurisdiction, although divers others were presented to and adjudged by the State court.

The importance of this case, as regards its 599*] bearing on the commerce *among the States, and on the relations and rights of their citizens and inhabitants, is not to be disguised. To my mind it presents most delicate and difficult considerations.

The first objection, that the statute of New Hampshire violated certain treaties with Holland, France, etc., providing for the admission of ardent spirits, has no application to the case, as the spirits sold were not foreign, but American gin.

The second objection relies on the first article and tenth section of the Constitution, which provides, that "no State shall lay any imposts or duties on imports or exports, nor any duty on tonnage," unless with the assent of Congress, etc. These are negative restrictions, where the Constitution operates by its own force; but as no duty or tax was imposed on the gin introduced into New Hampshire from Massachusetts, either directly or indirectly, these prohibitions on the State power do not apply.

The third objection proceeds on the clause, that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," to which it is insisted the State statute is opposed. The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the States; and "among" means between two only, as well as among more than two; if it was otherwise, then an intermediate State might interdict and obstruct the transportation of imports, over it to a third State, and thereby impair the general power. The article in question was introduced from one State directly into another, and the first question is, Was it a subject of lawful commerce among the States, that Congress can regulate? That ardent spirits have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class, throughout a great portion of the civilized world, is not open to controversy; so our commercial treaties with foreign powers declare them to be, and so the dealing in them among the State of this Union recognizes them to be. But this condition of the subject matter was met by the State decision on the ground, and on this only, "that the State might pass health and police laws which would, to a certain extent, affect foreign commerce, and commerce between the States; and that the statute [of New Hampshire] was a regulation of that character, and constitutional."

This was the charge to the jury, and on it the verdict and judgment are founded, and which the State court of last resort affirmed. The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the Constitution, but left to the States as the Constitution found it. This is admitted; and whenever a thing, from character or condition, *is of a description to [*600 be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injury may have redress And the fact must find its support in this, whether the prohibited article belongs, to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of Gibbons v. Ogden, Brown v. The State of Maryland, and New York v. Miln.

What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist.

If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to

a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated.

Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial pow- 601*] er, *as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.

The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. And in this connection it may be proper to say, that the three States whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of State, under the belief that such a policy will best subserve the interests of society; and that to this end, more than to any other, has the sovereign power of these States been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result—at least, in some of the States—and that this was the policy of the law. For these reasons, I think the case cannot depend on the reserved power in the State to regulate its own police.

Had the gin imported been "an import" from a foreign country, then the license law prohibiting its sale by the importer would be void. The reasons for this conclusion are given in my opinion on the case of Thurlow v. The Commonwealth of Massachusetts, and need not to be repeated, and are founded on the case of Brown v. The State of Maryland. The next inquiry is, did it stand on the foot of "an import," coming, as it did, from another State? If it be true, as the State courts held it was, that Congress has the exclusive power to regulate commerce among the States (the States having none), and the gin introduced being an article of commerce, and the State license law being a regulation of commerce (as it was held by this court to be in the case of Brown v. The State of Maryland), then the State law is void, because the State had no power to act in the matter by way of regulation to any extent.

This narrows the controversy to the single point, whether the States have power to regulate *their own mode of* commerce among the States, *during the time the power of* Congress lies dormant, and has not been exercised in regard to such commerce.

Although some regulations have been made by Congress affecting the coasting trade, requiring manifests of cargoes where they exceed a certain value, to prevent smuggling, and for other purposes, still, no regulation exists affecting, in any degree, such an import as the one under consideration. It must find protection against the State law under the Constitution, or it can have none. This is also true as *respects similar articles of commerce [*602 passing from State to State by land. Congress has left the States to proceed in this regard as they were proceeding when the Constitution was adopted.

Is, then, the power of Congress exclusive? The advocates of this construction insist, that it has been settled by this court that the power to regulate commerce is exclusive, and can be exercised by Congress alone. And the inquiry in advance of further discussion is, Has the construction been thus settled? The principal case relied on is that of Gibbons v. Ogden, 9 Wheat. 1, in support of the assumption. In that case a monopoly had been granted to the inventors of machinery propelled by steam, which, when applied to vessels, forced them through the water. The law of monopoly of New York extended to the tide waters, and for navigating these with two steamboats belonging to Gibbons, a bill was filed against him, and he was enjoined by the State courts of New York; and in his answer he relied on licenses granted under the Act of 18th February, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, and for regulating the same. This was the sole defense. The court first held that the power to regulate commerce included the power to regulate navigation also, as an incident to, and part of, commerce.

After discussing many topics connected with, or supposed to be connected with, the subject, the power of taxation was considered by the court, and the powers to tax in the States and the United States compared with the power to regulate commerce, and in this connection the Chief Justice, delivering the opinion of the court, said: "But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations Congress deemed proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations, and among the States, while Congress is regulating it?"

And then the court proceeds to discuss the effect of the licenses set up in Gibbons's answer, and gives a decree of reversal, on that sole question, in his favor. The decree says: ' "This court is of opinion that the several licenses to

the steamboats the Stoudinger and the Bellona to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer, which were granted under an act of Congress passed in pursuance of the Constitution of the United States, gave full authority to 603*] those vessels to navigate *the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding." And then the State law is declared void, as repugnant to the Constitution and laws of the United States. 9 Wheat. 240.

This case, then, decides that navigation was within the commercial power of the United States, and that a coasting license granted pursuant to an act of Congress, in the exercise of the power, was an authority under the supreme law to navigate the public waters of New York, notwithstanding the State law granting the monopoly. This decision was made in 1824. Three years after (1827) the case of Brown v. The State of Maryland came before the court. 12 Wheat. 419.

Brown, an importing merchant, had been indicted for selling packages of dry goods in the form they were imported, without taking out a license to sell by wholesale. To this he demurred, and the demurrer was sustained, on the ground that "imports" could be sold by the importer regardless of the State law, on which the indictment was founded. Two propositions were stated by the court, and the decision of the cause proceeded on them both, and was favorable to Brown: First, The provision of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." And, second, That which declares Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The first proposition has no application to the controversy before us, as here no tax or duty was imposed.

2. The court proceeds (p. 446) to inquire of the extent of the power, and says: "It is complete in itself, and acknowledges no limitations, and is co-extensive with the subject on which it operates." And for this Gibbons v. Ogden is referred to, as having asserted the same postulates. The opinion then urges the necessity that Congress should have power over the whole subject, and the power to protect the imported article in the hands of the importer, and proceeds to say: "We think it cannot be denied what can be the meaning of an act of Congress which authorized importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser." "We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable."

Two points were decided on the second proposition: 1st. That a tax on the importer was a tax on the import.

2d. That "an import," which had paid a tax to the United States according to the regulations of commerce made by Congress, could not be taxed a second time in the hands of the importer.

Neither of these cases touch the question of exclusive power, nor *do I suppose it [*604 was intended by the writer of the opinions to approach that question, as he studiously guarded the opinion in the leading case of Gibbons v. Ogden against such an inference, and professedly followed the doctrines there laid down in Brown v. The State of Maryland.

The next case that came before the court was that of Wilson et al. v. The Black Bird Creek Marsh Company, in 1829, 2 Peters, 257. The Chief Justice again delivered the opinion of the court, as he had done in the two previous cases. The company was authorized to make a dam across the creek under a State charter. The creek was a navigable tide water; the dam was constructed, and the licensed sloop of Wilson not being enabled to pass, he broke the dam, and the company sued him for damages; to which he pleaded that the creek was a navigable highway, where the tide ebbed and flowed, and that he only did so much damage as to allow his vessel to pass. The plea was demurred to, and there was a judgment against Wilson in the State court. It was insisted on his behalf in this court that the power to regulate commerce included navigation; and that navigable streams are the waters of the United States, and subject to the power of Congress; and the case of Gibbons v. Ogden was relied on. The Chief Justice in the opinion said: "The counsel for the plaintiff in error insists that it comes in conflict with the powers of the United States to regulate commerce with foreign nations, and among the several States.

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying, that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Here the adjudications end. But judges who were of the court when the three cases cited were determined, differ as to the true meaning of the Chief Justice in the language employed in the case of Gibbons v. Ogden, in illustrating the Constitution in aspects supposed to bear more or less on the questions before the court; such, for instance, as that the commercial power was a unit, and covered the entire subject matter of commerce with foreign nations and *among the States; and [*605 that navigation was included in the power. In

the case of New York v. Miln, 11 Peters, 102, Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in Gibbons v. Ogden meant, in regard to the true exposition of the Constitution; one contending that the language used had reference to the power of Congress, and to a case where it had been fully exercised; the other insisting that the opinion maintained the exclusive power in Congress to regulate commerce, and that the States had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I thing it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of Wilson v. The Black Bird Creek Marsh Company. And as this case was an adjudication on the precise question whether the Constitution of the United States, in itself, extinguished the powers of the States to interfere with navigation on tide water, and as it was adjudged, in the case of Gibbons v. Ogden, that the power to regulate commerce included navigation as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the States, until Congress shall act on the same subject and suspend the State law in its operation. But, owing to the conflicting opinions of individual judges, it is deemed proper to treat the question as though it was an open one, in the aspect that this case presents it; and then the consideration arises; Can a State, by its general laws, operating on all persons and property within its jurisdiction, regulate articles coming into the State from other States, and prohibit their sale, unless a license is obtained by the person bringing them in; and where no tax or duty is demanded of the person, or imposed on the article?

In this proposition, it is not intended to involve the consideration, that where Congress regulates a particular commerce by general laws, as where a tax is levied on some articles on being introduced from abroad, and others permitted to come in free, that all are regulated; this I admit in the instance put, and in all others of a like character. But as no general law of Congress has regulated commerce among the States, such a rule cannot apply here.

To a true understanding of the power conferred on Congress to regulate commerce among the States, it may be proper briefly to refer to their condition and acts before the Constitution was adopted, in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly; and to secure themselves from undue and opposing taxes, the Constitution first provides, that Congress shall lay no tax on articles exported from any State; second, that no State shall lay any imposts or duties on imports or exports; nor, third, lay 606*] any duty on tonnage, without *the consent of Congress, except so much as may be necessary for executing its inspection laws. These are prohibitions, to which the States have conformed.

But, as many general and all necessary local *regulations existed* when the Constitution was *adopted, and this, in all* the States, affecting the end of commerce within their respective limits, the local regulations were continued, so far as the Constitution left them in force. And they have been added to and accumulated to a great extent up to this time in the maritime States, not only as regards commerce among the States, but affecting foreign commerce also; the States, within their harbors and inland waters, have done almost everything, and Congress next to nothing. So minute and complicated are the wants of commerce when it reaches its port of destination, that even the State Legislatures have been incapable of providing suitable means for its regulation between ship and shore, and therefore charters, granted by the State Legislatures, have conferred the power on city corporations. Owing to situation and climate, every port and place where commerce enters a State must have peculiarity in its regulations; and these it would be exceedingly difficult for Congress to make; nor could it depute the power to corporations, as the States do. The difficulties standing in the way of Congress are fast increasing with the increase of commerce and the places where it is carried on. And where it enters States through their inland borders, by land and water, the complication is not less, and especially on the large rivers. There, too, Congress has the undisputed power to regulate commerce coming from State to State; but as every village would require special legislation, and constant additions as it grew and its commerce increased, to deal with the subject on the part of Congress would be next to impossible in practice. I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision. And this state of things was too prominently manifest for the convention to overlook it. Nor do I suppose they did so, for the following reasons:

The general rules of construction applicable to the negative and affirmative powers of grant in the Constitution are commented on in the 32d number of the Federalist, in these terms: "That, notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced, and *refutes [*607 every hypothesis to the contrary." That is, in favor of the State power. These remarks were made to quiet the fears of the people, and to clear up doubts on the meaning of the Constitution, then before them for adoption by the State conventions. And it is an historical truth, never, so far as I know, denied, that these papers were received by the people of the States as the true exponents of the instrument submitted for their ratification. Proceeding on the principle of construction applicable to affirmative statutes—that they stood together as

a general rule, if there were no negative words —and taking the doctrine laid down in the Federalist to be the true rule of interpretation —that where the States were intended to be prohibited negative words had been used—the States continued to do what they had previously done, and were not by negation prohibited from doing; that is to say, to exercise the powers conferred on Congress in arming, and organizing, and disciplining the militia, to pass bankrupt laws, and to regulate the details of commerce within their limits, coming from other States and foreign countries.

The exercise of the powers to regulate the militia, and to pass bankrupt laws, has not the approval of this court in the cases of Houston v. Moore, and in Ogden v. Saunders.

As to the existence of the power in the States in these two instances, there is no further controversy here or elsewhere.

And in regard to the third, Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the same subject, and on no better assumption than that Congress and the State Legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts.

And as Congress and the courts have conceded that the States may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative grants of power to Congress in these instances did not deprive the States from exercising the power until Congress acted, it is now too late, under existing circumstances, for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress; as it could no more be done with consistency of interpretation, than with safety to the existing state of the country.

608*] *In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil; nor will the States have any right to complain. And so the courts can interfere if the States assume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, it is hardly possible for Congress to deal at all with the details of this complicated matter.

The case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire.

For the sake of convenience, the views on which this opinion proceeds will be briefly restated.

1. It is maintained, that spirits and wines are articles belonging to foreign commerce and commerce among the States; and that Congress can regulate their introduction and transmission into and through the States so long as they belong to either class of such commerce, but no further.

2. That any State law whose provisions are repugnant to the existing regulations of Congress (within the above limit) is void, so far as it is opposed to the legislation of Congress.

3. That the police power of the States was reserved to the States, and that it is beyond the reach of Congress; but that such police power extends to articles only which do not belong to foreign commerce, or to commerce among the States, at the time the police power is exercised in regard to them; and that the fact of their condition is a subject proper for judicial ascertainment.

4. That the power to regulate commerce among the States may be exercised by Congress at pleasure, and the States cut off from regulating the same commerce at the same time it stands regulated by Congress; but that, until such regulation is made by Congress, the States may exercise the power within their respective limits.

5. That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the State law was constitutionally passed, because of the power of the State thus *to [*609 regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

And, for these reasons, I think the judgment of the State court should be affirmed.

Thurlow v. Massachusetts.

The statute of Massachusetts provides, that no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offense.

The plaintiff, Thurlow, was found guilty by a jury for violating this law, on which verdict the Supreme Judicial Court of Massachusetts pronounced judgment; and from which a writ of error was prosecuted to this court under the twenty-fifth section of the Judiciary Act of

1789. The bill of exceptions shows that some of the sales charged in the indictment were of foreign liquors; in regard to which the court directed the jury that the license law applied as well to import spirits as to domestic. It was proved that the defendant below had sold in quantities of gallons, quarts, and pints. And the question submitted for our consideration is, whether the State law, and the judgment founded on it, are repugnant to the acts of Congress authorizing the importation of wines, brandies, and other foreign spirits; and it is proper to remark, that our jurisdiction and power to interfere involve the question merely of repugnance or no repugnance; if repugnance is found to exist, we must reverse, and if not, we must affirm. It follows that the judicial ascertainment of the fact will end the controversy.

For the plaintiff in error it is insisted, that the State law and the judgment founded on it are repugnant to the acts of Congress authorizing the importation of foreign wines and spirits, and to their introduction into the United States on paying a prescribed tax. That the laws of the States cannot control the retail trade in such liquors; that if they can to any extent, they may prohibit their sale altogether, and by this means do that indirectly which cannot be done directly, that is to say, prohibit their introduction; that the purposes of wholesale importation being retail distribution, the two must go together; if not, the first is of no value; that importations reach our country in large masses for the sole purposes of diffusion and consumption, and unless Congress has the control of distribution until the imported article reaches the consumer, the power to admit and to regulate commerce in regard to it will be worthless, and little better than a barren theory, leaving us where we began in 1789. That any law, therefore, that prohibits consumption necessarily destroys importation; and the retail process being the ordinary means 610*] *to consumption, and indispensable to it, to refuse this means would wholly defeat the end Congress has protected; that is to say, consumption. On the soundness of this reasoning, the result of the controversy depends.

To this argument we answer, that under the power to regulate foreign commerce, Congress can protect every article belonging to foreign commerce, so long as it does belong to it, from the operation of a tax or a license, imposed by a State law, that obstructs or hinders the commerce. But the true inquiry here is, how long does the imported article so continue? The acts of Congress protect "imports," and prescribe the quantity and measure in which they shall be made; the question of more or less is within the competency of Congress, but how long the imported article continues to be "an import" is a different question, for so soon as it ceases to be so, then it is beyond the power conferred on Congress "to regulate foreign commerce," and that power cannot afford it further protection. This is the line of jurisdiction where the powers of Congress end, and where the powers of the states begin, when dealing respectively with the imported article. And such is the limit established in the case of Brown v. The State of Maryland. I do not mean to say that Congress may not protect an import for the purposes of transmission over land, in the form it was imported, from one State to another, for the purposes of distribution and sale by the importer, as this can be done under the power to regulate commerce among the States. The question under examination is, not what Congress may do, but what it has done. It has not permitted spirituous liquors to be imported in the quantities that they were sold by the plaintiff in error. And when the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption, or is divided into smaller quantities, by breaking up the casks, packages, etc., by the importer, the article ceases to be a protected "import," according to the legislation of Congress as it now stands, and therefore the liquors sold in this instance did not belong to "foreign commerce," when sold at the retail house by single gallons, quarts, etc. When thus divided and sold in the body of the State, the foreign liquors became a part of its property, and were subject to be taxed, or to be regulated by licenses, like any other property owned within the State.

But while foreign liquors, imported according to the regulations of Congress, remain in the cask, bottle, etc., in the original form, then the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing so; nor does it make any difference whether the imported article paid a tax on its introduction, or was admitted as a free article; until it passes from the hands of the importer, it is "an import," and belongs to regulated "foreign commerce," and is protected.

*It follows from the principles stated, [*611 that the spirituous liquors sold by the defendant stood on no higher ground than domestic spirits did, and that domestic spirits are subject to the State authority as objects of taxation, or of license in restraint of their sale, is not a matter of controversy, and certainly cannot be here, under the twenty-fifth section of the Judiciary Act.

I admit as inevitable, that, if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined. The reasons are obvious. We have no power to inquire into abuses (if such there be) inflicted by State authority on the inhabitants of the State, unless such abuses are repugnant to the Constitution, laws, or treaties of the United States.

For the reasons above set forth, I think the judgment of the State court should be affirmed.

And as the case of Joel Fletcher v. The State of Rhode Island depends on the same principles, to every extent, I think it must be affirmed also.

Mr. Justice Daniel:

In the decision of the court, so far as it establishes the validity of the license laws of the States of Massachusetts, Rhode Island, and New Hampshire, I entirely concur; and had the

opinions of judges in forming that decision been limited strictly to an inquiry into the compatibility of those laws with the Constitution of the United States, or with a just exercise of State power (the only inquiry, in my apprehension, regularly before the court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfillment of their own convictions, have seemed to me to go beside the questions regularly before them, and in this departure have propounded principles and propositions, against which, whensoever they may be urged as motives for action on my part, I shall feel myself bound most earnestly to protest. It has been said, that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may in the first place be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent.[1]

612*] *But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this: that in matters involving the meaning and integrity of the Constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great lex legum. I, too, have been sworn to observe and maintain the Constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate. Could I, in cases of minor consequence, consent, in deference to others, to pursue a different course, I should, in instances like the present, be especially reluctant to place myself within the description of the poet—"Stat magni nominis umbra."

The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulged in the reasoning of this court in the case of Brown v. The State of Maryland, reported in 12 Wheaton, 419—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the Constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the Constitution which confers on Congress the power of regulating commerce with foreign nations, etc., etc., and by the further provision which prohibits to the States the power of levying imposts or duties on imports, merchandise, or property imported from abroad—however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively, and undeniably it shall have become the property, and passed into the possession, of the citizen resident within the State, and protected both in person and property by the laws of the State—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the court) it shall have been "broken up and mingled with the general mass of property."

With regard to this phrase, "broken up and mingled with the mass of property," so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted, that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the *general [*613 mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home.

By the 6th article and 2d clause of the Constitution it is thus declared: "That this Constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land."

This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the Constitution, or between the law of a State and the Constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision

1.—See 12 Wheaton, 449, the opinion of Thompson, *Justice.*

of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the Constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the States and of the United States. Let us test by these principles—believed to be irrefragable—the power over foreign commerce vested in Congress by the Constitution; and also the positions sought to be deduced from that grant of power by the argument in Brown v. The State of Maryland. By art. 1, sec. 8, clause 4, of the Constitution, it is declared "that Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes." 'Tis with the first of the grants in this article that we have now to deal. The commerce here 614*] *spoken of is that traffic between the people of the United States and foreign nations, by which articles are procured by purchase or barter from abroad, or by which the like subjects of traffic are transmitted from the United States to foreign countries; keeping in view always the essential characteristic of this commerce as stamped upon it by the Constitution, namely, that it is commerce with foreign nations, or, in other words, that it is external commerce. By this, however, is not meant that it should be external in reference to geographical or territorial lines, but in reference to the parties, and the nature of their transactions. The power to regulate this commerce may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may as foreign commerce be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. Independently of an express prohibition upon the States to lay duties on imports, this power of regulating foreign commerce may correctly imply a denial to the States of a right to interfere with existing regulations over subjects of foreign commerce; but they must be continuing, and still in reality, subjects of foreign commerce, and such they can no longer be after that commerce with regard to them has terminated, and they are completely vested as property in a citizen of a State, whether he be the first, second, or third proprietor; if this were otherwise, then, by the same reasoning, they would remain imports, or subjects of foreign commerce, through every possible transmission of title, because they had been once imported. Imports in a political or fiscal, as well as in common practical acceptation, are properly commodities brought in from abroad which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which still are subject to the power of the government for a fulfillment of the conditions upon which they have been admitted to entrance; as, for instance, goods on which duties are still unpaid, or which are bonded or in public warehouses. So soon as they are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee, or may have been purchased by cargo, package, bale, piece, or yard, or by hogsheads, casks, or bottles. I can perceive no rational distinction which can be taken upon the circumstance of mere quantity, shape, or bulk; or on that of the number of transmissions through which a commodity may have passed from the first proprietor, or of its remaining still with the latter. The *objection, that a tax [*615 upon an article in bulk (the property of a citizen) is forbidden because it is a burden on foreign commerce, whilst a similar burden is permissible on the very same bulk or on fragments of the same article in the hands of his vendee, it would appear difficult to reconcile with sound reasoning. Every tax is alike a burden, whether it be imposed on larger or smaller subjects, and in either mode must operate on price, and consequently on demand and consumption. If, then, there was any integrity in the objection urged, it should abolish all regulations of retail trade, all taxes on whatever may have been imported.

It cannot be correctly maintained that State laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress by the Constitution; and, I would add, with some regulation actually established by Congress in virtue of that power. In the case of Brown v. The State of Maryland, it is said by the court, that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies on the part of the States a duty to encourage, if not to enforce, the consumption of foreign merchandise; arising, it is affirmed, from a farther duty incumbent on the States to regard a priori the acts of the federal government as wisest and best, and therefore imposing an obligation on the States for co-operation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words, or any correct theory of the constitutional powers of Congress. It cannot be necessary here to institute a criticism upon the words "importation," "sale," "consumption," in order to show either their etymological or ordinary acceptation, or in order to expose the fallacy of the aforegoing new and startling theory. Goods, moreover, may be imported into a country as into a commercial entrepôt, for reshipment to other markets, and not for consumption at all. But where importation may have been made with the direct view to sell, it does not follow, by necessary induction, that permission for the former implies permission for the latter, nor the power of granting the former the power of conferring the latter; much less, that it implies the power of the obligation on the part of the government to command or insure a sale. Whatever might be the case under governments in which power is

either absolute or single, it is wholly otherwise under our system of confederated sovereignties. Here the power of the general government is emphatically delegated and limited, although it is paramount so far as it has been delegated; and when we look for this power of the government in relation to this matter in the Constitution, we find it the power to regulate [*616] commerce with foreign nations; it *being the foreign character of that commerce alone which confers on Congress any power whatsoever with respect to it. It has been urged, that the importer pays a duty to the government for permission to introduce and vend his merchandise; that it would be unjust, therefore, to deprive him of the power of vending, as he never would have imported except with the expectation of selling. To this it may, in the first place, be replied, as has been remarked in the argument at the bar, that the question here is one of constitutional power; and if the federal government shall have transcended its legitimate powers, I ask, can it be right, in any view, to compensate those who may have suffered by the transgression, by authorizing unlimited reprisals upon the States? But in truth no such right as the one supposed is purchased by the importer, and no injury in any accurate sense is inflicted on him by denying to him the power demanded. He has doubtless in view the profits resulting from the sale of his commodities; but he has not purchased and cannot purchase from the government that which it could not insure to him, a sale independently of the laws and polity of the States. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import, or introduce his merchandise—the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or f any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale.

The want of integrity in the argument under examination is farther exposed, by showing that it will not cover the conclusion sought to be drawn from it. If the right of the importer to vend, and his exemption from taxation, are made to rest on the payment of duties to the federal government, on what foundation must be rested his right and his exemption, in reference to articles on which duties are neither paid nor exacted? Are these to be left exclusively the subjects of State regulation and State taxation? That they must be so left is a logical and inevitable conclusion from the proposition that the right to vend flows from the payment of duties. And then this argument involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be admitted freely—nay, whose introduction is in effect invited and solicited by the federal government—may be burdened by the States at pleasure.

It has been insisted, that, as by treaty stipulations articles of foreign merchandise have been *admitted for consumption (and much stress is laid upon this expression) in certain specified *quantities, consequently by such [*617 stipulations, forming the supreme law of the land, the free sale of these articles must be an absolute right. In what instances a treaty is or is not the supreme law, or is no law at all, I have already endeavored to distinguish. Passing, therefore, that investigation, it seems very clear that the proposition just adverted to involves a great fallacy. The treaty stipulations here exemplified mean this, and nothing more, namely, that whereas certain enumerated commodities could heretofore be imported only in greater quantities, for the use of those who might choose to buy and consume them, they may hereafter be imported in lesser quantities. These stipulations no more signify that commodities shall be circulated and used free of all internal regulation, than they convey a positive mandate for their being purchased and consumed, eaten and drunk, nolens volens, or at all events. Every State that is in any sense sovereign and independent possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue, and under the protection of its own laws, whether that control be exerted in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived. Such a power differs entirely from an authority essentially extraneous in its character—an authority limited and specific, by the very terms which confer it; restricted to action upon the progress of property on its way to complete investment under the laws of the State.

The license laws of Massachusetts, Rhode Island, and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority.

These laws are therefore in violation neither of the Constitution of the United States, nor of any law nor treaty made in pursuance or under the authority of the Constitution. Viewing them in this character, my co-operation is given in maintaining them, whatever differences of opinion may exist in relation to their policy or necessity. But since, whilst extending to these laws their sanction and support, there have been advanced by others principles and opinions which to me appear to have their source not in the fountain of all legitimate power in this or any other department of the federal government, I cannot by silence seem to assent to those principles *and opinions, nor [*618 put from me the obligation of declaring my dissent from them.

Mr. Justice Nelson concurred in the opinions delivered by the Chief Justice and Mr. Justice Catron.

Mr. Justice Woodbury:

I concur in the conclusion of my brethren as to the judgment which ought to be pronounced in all of the three license cases.

But, differing in some of the reasons for that judgment, and in the limitations and extent of some of the principles involved, and knowing the cases to possess much interest in the circuit to which I belong, and from which they all come, I do not feel at liberty to refrain from briefly expressing my views upon them.

The paramount question involved in all the cases is, whether license laws by the States for selling spirituous liquors are constitutional. It is true that several other points are raised, as to evidence, the power of juries in criminal prosecutions to decide the law as well as the facts, and other questions not connected with the overruling of any clause in an act of Congress, or treaty, or the Constitution, which was interposed in the defense. But, confined as we are to these last considerations in writs of error to State courts, it would be traveling out of our prescribed path to discuss at all either the other questions just alluded to or some which have been long and ardently agitated in connection with this subject; such, for instance, as the expediency of the license laws, or the power of a State to regulate in any way the food and drink or clothing of its inhabitants. Fortunately, those questions belong to another and more appropriate forum—the State tribunals.

But, looking to the relations which exist between the general government and the different State sovereignties, the question, whether the laws in these cases are within the power of the States to pass, without an encroachment on the authority of the general government, is one of those conflicts of laws between the two governments, involving the true extent of the powers in each as regards the other, which is very properly placed under our revision. In helping to discharge that duty on this occasion, I carry with me, as a controlling principle, the proposition, that State powers, State rights, and State decisions are to be upheld when the objection to them is not clear, equally proper as it may be for them, when the objection is clear, to give way to the supremacy of the authorized measures of the general government. See Constitution, art. 3.

It is not enough to fancy some remote or indirect repugnance to acts of Congress—a "potential inconvenience"—in order to annul the laws of sovereign States, and overturn the deliberate decisions of State tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of "clashing sovereign-
619*] ties," *in order to demand the judicial interference of this court to reconcile them. McCulloch v. Maryland, 4 Wheat. 316, 487; 1 Story's Com. on Const. 432.

These cases present two leading facts in respect to the material points, which ought first to be noticed. Neither of them is a prosecution against the importer of spirit or wine from *a foreign country; and* in neither has a duty *been imposed, or a tax* collected by the State from the original defendant, in connection with these articles. From this state of things, it follows, that, however much has been said as to the collision between these license laws and some former decisions of this court, no such direct issue is made up in either of them.

The case usually cited in support of such a proposition is very different. It is that of Brown v. Maryland, 12 Wheat. 419, which was a tax or license required, before the sale of an article, from the importer of it from a foreign country; and it was an importer alone who called the constitutionality of the law in question. What do these statutes, then, really seek to do? They merely attempt to regulate the sale of spirit or wine within the limits of States, in regard to the quantity sold at any one time without a license from the State authorities—as in the cases from Massachusetts and Rhode Island; and in regard to any sale whatever without such license—as in the case from New Hampshire.

It is true, also, that the quantity allowed to be sold in Massachusetts at any one time, without a license, is not so small as that which is permitted by Congress to be imported in kegs, and in Rhode Island is greater than that which Congress permits to be imported in bottles, and in New Hampshire is no quantity whatever. Yet neither of the laws unconditionally prohibits importations. Indeed, neither of them says anything of the subject of importations. The first inquiry then recurs, whether they do not all stand on the same platform in respect to this, and without conflicting in this respect with any act of Congress. My opinion is that they do; as none of them, by prohibiting importations, oppose in terms any act of Congress which allows them, and none seem to me to conflict, in substance more than form, with entire freedom on that subject. Nor in either case do they, in point of fact, amount to a prohibition of importations in any quantity, however small. Under them, and so far as regards them, importations still go on abundantly into each of those States. It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore. In the next place, in point of fact, neither of the laws goes so far as to prohibit in terms the sales, any more than the imports, of spirits. On looking *at the laws, this will be conceded. [*620 But if such a prohibition existed as to sales, what act of Congress would it come in collision with? None has ever been passed which professes to regulate or permit sales within the States as a matter of commerce. A good reason exists for this, as the subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power.

And what power or measure of the general government would a prohibition of sales within a State conflict with, if it consisted merely in regulations of the police or internal com-

merce of the State itself? There is no contract, express or implied, in any act of Congress, that the owners of property, whether importers or purchasers from them, shall sell their articles in such quantities or at such times as they please within the respective States. Nor can they expect to sell on any other or better terms than are allowed by each State to all its citizens, or in a manner different from what has comported with the policy of most of the old States, as well before as since the Constitution was adopted. Any other view would not accord with the usages of the country, or the fitness of things, or the unquestioned powers of all sovereign States, and, as is admitted, even of those in this Union, to regulate both their internal commerce and general police. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and, also, if a merchant, extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad. This was the paramount object in the law of Congress, so often cited, as to the importation of kegs of fifteen gallons of brandy—to have them in proper shape to be re-exported and carried on mules into Mexico, rather than to be sold for use here.

I should question the correctness of this objection even were it the doctrine in Brown v. Maryland, though I do not regard it as the point there settled, or the substantial reason for it. See Chief Justice Parker's Opinion in The State of New Hampshire v. Peirce, in Law Rep. for September, 1845. That point related rather to the want of power in a State to lay a duty on imports.

But it is earnestly urged, that, as these acts indirectly prohibit sales, such a prohibition of sales is indirectly a prohibition of importations, and importations are certainly regulated by Congress. It is necessary to scrutinize the grounds on which such circuitous reasoning and analogy rest. The sale of spirit being still permitted in all these States, as before re-
621*] marked, it is first objected, that it is *permitted in certain quantities only, except under license, and that this restricts and lessens both the sales and imports. But the leading object of the license is to insure the sales of spirit in quantities not likely to encourage intemperance, and at places and times, and by persons, conclusive to the same end. This is the case in New Hampshire, where none can be sold without license, while in the two other States, if no license is granted, the owner may sell in ten or twenty-eight gallons at a time; and in all the three States, the owner may, without license, consume what he imports, or store and re-export it for market elsewhere. So the laws of most of the States forbid sales of property on the Sabbath. But who ever regarded that as prohibiting there entirely either their imports or sales?

It is further argued, however, that the license laws accomplish indirectly what is hostile to the policy of Congress, *and thus conflict with* the spirit of its acts, as much as if they prohibited absolutely both importations and sales. But if affecting this at all, it must be because they tend to lessen, and are designed to lessen, the consumption of foreign spirits, and thus help to reduce the imports and sales of them.

The case from New Hampshire is in this respect less open to objection than the others, the spirit there having been domestic. But as it came in coastwise from another State, it may involve a like principle in another view; and in its prohibitory character as to selling any liquor without license, the New Hampshire statute goes farther than either of the others.

Now, can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional, or violates acts of Congress? For that is the essence of this point. So far from this, whatever promotes economy in the use or consumption of any articles is certainly desirable, and to be encouraged by both the State and general governments. Improvements of that kind by new inventions and labor-saving machinery are encouraged by patents and rewards. More especially is it sound policy everywhere to lessen the consumption of luxuries, and in particular those dangerous to public morals. So in respect to foreign articles, the disuse of them is promoted by both the general and State governments in several other ways, rather than treating it as unconstitutional or against the acts of Congress; though the revenue as well as consumption be thereby diminished. Thus, the former orders the purchase of only domestic hemp for the navy, when it can be obtained of a suitable quality and price. Resolution, 18 February, 1843, 5 Statutes at Large, 648. And some of the States have often bestowed bounties on the growth of hemp, and of wheat, and other useful articles. An exception like this would cut so deep and wide into other usages and policy well established, as to need no further refutation. But this objection is mixed *up with another—that the operation of [*622 these license laws is unconstitutional, because they lessen the amount of revenue which the general government might otherwise derive from the importation of that which is made abroad. It may be a sufficient reply to this, that Congress itself, by its own revenue system, has at times, by very high duties on some articles, meant to diminish their consumption, and reduce the revenue which otherwise might be derived from them if allowed to be introduced more largely under a small duty. And in this very article of spirits it has confessedly, from the foundation of the government, made the duties high, so as to discourage their use; and this in the very last tariff of 1846, though considered to be more emphatically a mere revenue measure. So its actual policy for fifteen years has been to lessen the use of spirit in both the army and navy; and by the third section of the Act of Aug. 29th, 1842, ch. 267, 5 Statutes at Large, 546, this policy is recognized and encouraged by law.

So, when resorting to internal duties, for a like reason in part, stills and the manufacture of whiskey have been the first resorted to, and at last, in order to discourage the making of molasses into New England rum, the drawback on the former when manufactured into spirit

and exported is allowed to stand now on a footing much less favorable than that on sugar when refined and exported.

Again, where States look to the most proper objects of domestic taxation, it is perfectly competent for them to assess a higher tax or excise, by way of license or direct assessment, on articles of foreign rather than domestic growth belonging to her citizens; and it ever has been done, however it may discourage the use of the former, or lessen the revenue which might otherwise be derived from them by the general government, or tend to reduce imports, as well as restrict the sale of them when considered of a dangerous character.

The ground is therefore untenable entirely, that a course of legislation which serves to discourage what is foreign, whether it be by Congress or the States, is for that reason alone contrary to the Constitution, even if it tend at the same time to reduce the amount of revenue which would otherwise accrue from foreign imports, or from those of that particular article.

Importations, then, being left unforbidden in all of these cases, and the right to sell with a license not being prohibited in any of them—nor without one prohibited, except qualifiedly in two of them, and in the other absolutely, but not affecting foreign imports at all in that case, as the spirit sold there was of domestic manufacture—I pass to the next constitutional objection.

It has been contended, that the sum required to be paid for a license, and the penalty imposed for selling without one, are in the nature of a duty on imports, and thus come within the principle really settled in Brown v. Maryland, and thus conflict with the Constitution. It is conceded, that a State is forbidden "to lay [*623 any impost "or duties on imports" without the assent of Congress. Art. 1, sec. 10. But neither of these statutes purports to tax imports from abroad of foreign spirits, or imports from another State, either coastwise or by land, of either foreign or domestic spirits. The last mode is not believed to be that referred to in the Constitution, and no regulation has ever been made by Congress concerning it when consisting of domestic spirits, as in the case of New Hampshire, except with a view to prevent smuggling. Act of Congress, Sept. 1, 1789, ch. 11, sec. 25, and Feb. 18, 1793, ch. 8, sec. 14; 1 Statutes at Large, 61, 309.

Nor does either of these statutes purport to tax the introduction of an article by the merchant importing it, much less to impose any duty on the article itself for revenue, in addition to what Congress requires. Neither of them appears to be, in character or design, a fiscal measure. They do not touch the merchandise till it has become a part of the property and capital of the State, and then merely regulate the disposal of it under license, as an affair of police and internal commerce. They might then even tax it as a part of the commercial stock in trade, and thus subject it, like other property, to a property tax, without being exposed to be considered an impost on imports, so as to conflict with the Constitution. But the penalty and license in these cases are *imposed diverso* intuitu, and not as a tax of any kind. *Hence they operate* no more in substance than in form, as an impost of the prohibited character.

There is no pretense that the penalty is for revenue; and if the small sum taken for a license should ever exceed the expense and trouble of supervising the matter, and become a species of internal duty or excise, it would operate on spirit made in the State as well as that made elsewhere, and on others as well as importers, and, like any State tax on local property, or local trade, or local business, be free from any conflict with the Constitution for acts of Congress. And what seems decisive in these causes as to this aspect of the question is, that neither of the persons here prosecuted was in fact an importer of foreign spirit or wines, or set up a defense of that kind as to himself, on the trial, which was overruled in the State courts.

Nor can the proposition, sometimes advanced, be vindicated, that this license, if a tax, and falling at times on persons not citizens, whether they belong to other States or are aliens, is either unjust or unconstitutional. It falls on them only when within the limits of the State, under the protection of its laws and seeking the privileges of its trade, and only in common with their own citizens. Such taxes are justifiable on principles of international law (Vattel, B. 8, ch. 10, sec. 132), and I can find no clause in the Constitution with which they come in collision.

Again, it has been strenuously insisted on in these cases, and perhaps it is the leading position, that these license laws are virtually "regulations of foreign commerce; and [*624 hence, when passed by a State, are exercising a power exclusively vested in the general government, and therefore void. This is maintained, whether they actually conflict with any particular act of Congress or not. But, dissenting from any such definition of that power, as thus exclusive and thus abrogating every measure of a State which by construction may be deemed a regulation of foreign commerce, though not at all conflicting with any existing act of Congress, or with anything ever likely to be done by Congress, I shall not, on this occasion, go at length into the reasons for my dissent to the exclusive character of this power, because these license laws are not, in my opinion, regulations of foreign commerce, and in a recent inquiry on the circuit I have gone very fully into the question. The United States v. New Bedford Bridge, in Massachusetts District.

My reasons are in brief:

1. The grant is in the same article of the Constitution, and in like language, with others which this court has pronounced not to be exclusive, e. g., the regulation of weights and measures, of bankruptcy, and disciplining the militia.

2. There is nothing in its nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the States. But I admit, that, so far as regards the uniformity of a regulation reaching to all the States, it must in these cases, of course, be exclusive; no State being able to prescribe rules for others as to bankruptcy, or weights and measures, or the militia, or for foreign commerce. A want of

attention to this discrimination has caused most of the difficulty. But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbors, the extension of wharves into tide water, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, beside the exercise of numerous police and health powers, which are also by many claimed upon different grounds.

This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government; and hence, as the colonies under an empire usually attend to all local legislation within their limits, leaving only general outlines and rules to the parent country at home, as towns, cities, and corporations do it through by-laws for themselves, after the State Legislature lays down general principles, and as the war and navy departments and courts of justice make detailed rules under general laws, so here the States, not conflicting with any uniform and general regulations by Congress as to 625*] foreign commerce, *must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress. And to hold the power of Congress as to such topics exclusive, in every respect, and prohibitory to the States, though never exercised by Congress, as fully as when in active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial co-operation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial States in the Union.

If this view of the subject conflicts with opinions laid down obiter in some of the decisions made by this court (9 Wheat. 209; 12 Ibid. 438; 16 Peters, 543), it corresponds with the conclusions of several judges on this point, and does not, in my understanding of the subject, contradict any adjudged case in point. 5 Wheat. 49; Wilson v. Black Bird Creek Marsh Company, 2 Peters, 245; 11 Ibid. 132; 14 Ibid. 579; 16 Ibid. 627, 664; 4 Wheat. 196.

But, without going farther into this question, it is enough here to say, that these license laws do not profess to be, nor do they operate as, regulations of foreign commerce. They neither direct how it shall be carried on, nor where, nor under what duties or penalties. Nothing is touched by them which is on shipboard, or between ship and shore; nothing till within the limits of a State, and out of the possession and jurisdiction of the general government.

It is objected, in another view, that such licenses for selling domestic spirit may affect the commerce in it between the States, which by the Constitution is placed under the regulation of Congress as much as foreign commerce.

But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce. If the proposition was maintainable, that without any legislation by Congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighboring State. And the more especially can it be done from the latter, as *imports may be made in bottles of [*626 any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity.

The apprehension that the States, by these license systems, are likely to impair the freedom of trade between each other, is hardly verified by the experience of a half century. Their conduct has been so liberal and just thus far on this matter as never to have called for the legislation of Congress, which it clearly has the power to make in respect to the commerce between the States, whenever any occasion shall require its interposition to check imprudences or abuses on the part of any one of them towards the citizens of another. Some have objected, next, that these laws violate our foreign treaties, such as those, for example, with Great Britain and Prussia, which stipulate for free ingress and egress as to our ports, as well as for a participation in our interior trade. See 8 Statutes at Large, 116, 228, 378. But those arrangements do not profess to exempt their people from local taxation here, or local conformity to license systems, operating, as these State laws do, on their own citizens and their own domestic products in the same way, and to the same extent, as on foreign ones. And neither of those laws in this case forbid access to our ports, or importation into the several States, by the inhabitants of any foreign countries.

In settling the question whether these laws impugn treaties, or regulate either foreign commerce or that between the States, or impose a duty on imports, ordinary justice to the States demands that they be presumed to have meant what they profess till the contrary is shown. Hence, as these laws were passed by States possessing experience, intelligence, and a high tone of morals, it is neither legal or liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect revenue by a duty on foreign imports, thus imparting to them a character different from that professed by their authors, or from that which, by their

provisions and tendency, they appear designed for. These States are as incapable of duplicity or fraud in their laws, of meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other designs, and to construe their legislation as of a sinister character, which they never contemplated. Thus, on the face of them, these laws relate exclusively to the regulation of licensed houses and the sales of an article which, especially where retailed in small quantities, is likely to attract together within the State unusual numbers, and encourage idleness, wastefulness, and drunkenness. To mitigate, if not prevent, this last evil was undoubtedly their real design.

627*] *From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquor. And without entering here into the question whether legislation may not, on this as other matters, become at times intemperate, and re-act injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social, and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and co-operate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirit.

They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them.

But I go further on this point than some of the court, and wish to meet the case in front, and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibitions to sell certain articles within the limits of a State, as being dangerous to public health and morals, or were virtual taxes on them as State property in a fair ratio with other taxation, it does not seem to me that their conflict with the Constitution would, by any means, be clear. Taking for granted, till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things, except where within the limits of State territory, they would appear entirely defensible as a matter of right, though prohibiting sales.

Whether such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign *states. Call them* by whatever name, if they *are necessary to the well*-being and independ*ence of all communities*, they remain among the reserved rights of the States, no express grant of them to the general government, having been either proper, or apparently embraced in the Constitution. So, whether they conflict or not indirectly and slightly with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government.

*As a general rule, the power of a [*628 State over all matters not granted away must be as full in the bays, ports, and harbors within her territory, intra fauces terræ, as on her wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each State, if we consider the great conservative reserved powers of the States, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals.

It is conceded that the States may exclude pestilence, either to the body or mind, shut out the plague or cholera, and, no less, obscene paintings, lottery tickets, and convicts. Holmes v. Jennison et al. 14 Peters, 568; 9 Wheat. 203; 11 Peters, 133. How can they be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity? See Vattel, B. 1, ch. 19, secs. 219, 231.

The list of interdicted articles and persons is a long one in most European governments, and, though is some cases not very judicious or liberal, is in others most commendable; and the exclusion of opium from China is an instance well known in Asia, and kindred in its policy. The introduction and storage of gunpowder in large quantities is one of those articles long regulated and forbidden here. New York v. Miln, 11 Peters, 102. Lottery tickets and indecent prints are also a common subject of prohibition almost everywhere. 6 Greenleaf, 412; 4 Blackford, 107; see the tariff of 1842; 5 Stat. at Large, 566, sec. 28. And why not cards, dice, and other instruments for gaming, when thought necessary to suppress that vice? In short, on what principle but this rests the justification of the States to prohibit gaming itself, wagers, champerty, forestalling—not to speak of the debatable cases of usury, marriage brokage bonds, and many other matters deemed either impolitic or criminal.

It might not comport with the usages or laws of nations to impose mere transit duties on articles or men passing through a State, and however resorted to in some places and on some occasions, it is usually illiberal as well as injudicious. Vattel, B. 8, ch. 10. And if resorted to here, in respect to the business or imports of citizens of other States, might clearly conflict with some provisions of the Constitution conferring on them equal rights, and be a regulation of the commerce between the States, the power over which they have expressly granted to the general government. But the

present case is not of that character. Nor would it be, if prohibiting sales within the acknowledged limits of a State, in cases affecting public morals or public health. Nor is there 629*] in this case *any complaint, either by a foreign merchant or foreign nation, that treaties are broken; or by any of our own States or by Congress, that its acts or the Constitution have been violated.

There are additional illustrations of such powers, existing on general principles in all independent States, given in Puffendorf, B. 8, ch. 5, sec. 30, as well as in various other writers on national law. And those exercised under what he terms "sovereign or transcendental propriety" (sec. 7th), and those which we class under the right of "eminent domain," are recognized in the fifth amendment to the Constitution itself, and go far beyond this.

Much more is there an authority to forbid sales, where an authority exists both to seize and destroy the article itself, as is often the case at quarantine.

So the power to forbid the sale of things is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude persons. And yet who does not know that slaves have been prohibited admittance by many of our States, whether coming from their neighbors or abroad? And which of them cannot forbid their soil from being polluted by incendiaries and felons from any quarter.

Nor is there in my view any power conferred on the general government which has a right to control this matter of internal commerce or police, while it is fairly exercised so as to accomplish a legitimate object, and by means adapted legally and suitable to such end alone. New Hampshire has, for many years, made it penal to bring into her limits paupers even from other States; and this is believed to be a power exercised widely in Europe among independent nations, as well as in this country among the States. New Hampshire Revised Statutes, Paupers, 140.

It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary, or hospital, or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery. Indeed, this court has deliberately said: "We entertain no doubt whatsoever, that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers." Prigg v. Pennsylvania, 16 Peters, 625.

630*] *There may be some doubt whether the general government or each State possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the State. But it must exist somewhere; and it seems to me rather a police power, belonging to the States, and to be exercised in the manner best suited to the tastes and institutions of each, than one anywhere granted or proper to the peculiar duties of the general government. Or, if vested in the latter at all, it is but concurrent. Hence, when the latter prohibited the import of obscene prints in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the States, as it opened the door to a prohibition, or to prohibitory duties, to many articles by the general government which some States might desire, but others not wish to come in as competitors to their own manufactures. But, as previously shown, to prohibit sales is not the same power, nominally or in substance, as to prohibit imports.

It is possible, that, under our system of double governments over one and the same people, the States cannot prohibit the mere arrival of vessels and cargoes which they may deem dangerous in character to their public peace, or public morals, or general health. This might, perhaps, trench on foreign commerce. Nor can they tax them as imports. This might trench on that part of the Constitution which forbids States to lay duties on imports. But after articles have come within the territorial limits of States, whether on land or water, the destruction itself of what contains disease and death, and the longer continuance of such articles within their limits, or the terms and conditions of their continuance, when conflicting with their legitimate police, or with their power over internal commerce, or with their right of taxation over all persons and property under their protection and jurisdiction, seems one of the first principles of State sovereignty, and indispensable to public safety. Such extraordinary powers, I concede, are to be exercised with caution, and only when necessary or clearly justifiable in emergencies, on sound and constitutional principles; and, if used too often, or indiscreetly, would open a door to much abuse. But the powers seem clearly to exist in the States and ought to remain there; and though, in this instance, they are not used to this extent, but still, as respectable minorities within these three States believe not to be useful, and as some other States do not think deserving imitation, yet they are used as the competent and constitutional power within each has judged to be proper for its own welfare, and as does not appear to be repugnant to any part of the Constitution, or a treaty, or an act of Congress. They must, therefore, not be interfered with by this court, and the more especially as one reason why these powers have been left with the States is, that the subject matter of them is better understood by each State than by the Union; and the policy and opinions and usages of one *State [*631 in relation to some of them may be very unlike those of others, and therefore require a different system of legislation. Where can such a power also be safer lodged than with those public bodies, or States, who are themselves to be the greatest sufferers in interest and character by an improper use of it? If it should

happen at any time to be exercised injudiciously, that circumstance would furnish a ground for an appeal rather to the intelligence and prudence of the State, in respect to its modification or repeal, than an authority for this court, by a writ of error, to interfere with the well considered decision of a State court, and reverse it, and pronounce a State law null and void, merely on that account.

Many State laws are such, that their expediency and justice may be doubted widely, and by this tribunal; but this confers no authority on us to nullify them; nor is any such authority, for such a cause, conferred on Congress by any part of the Constitution.

The States stand properly on their reserved rights, within their own powers and sovereignty, to judge of the expediency and wisdom of their own laws; and while they take care not to violate clearly any portion of the Constitution or statutes of the general government, our duty to that Constitution and laws, and our respect for State rights, must require us not to interfere.

Mr. Justice Grier:

I concur with my brethern in affirming the judgment in this and the preceding cases on the same subject, but for reasons differing somewhat from those expressed by the other members of the court; and as I concurred mainly with the opinion delivered by Mr. Justice McLean in the case of Thurlow v. Massachusetts, I had concluded to be silent, and therefore am not prepared to express my views at length. I take this occasion, however, to remark, that the true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

It has been frequently decided by this court, "that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive." Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category.

632*] *As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, "salus populi suprema lex."

If the right to control these subjects be "*complete*, unqualified, and exclusive" in the *State Legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy.* The exigencies of the social compact require that such laws be executed before and above all others.

It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime, and protection of the public welfare, must of necessity have full and free operation, according to the exigency which requires their interference.

It is not necessary for the sake of justifying the State Legislation now under consideration to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousandfold in the health, wealth, and happiness of the people.

Order.

Samuel Thurlow v. The Commonwealth of Massachusetts.

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court, holden in and for the County of Essex, in the Commonwealth of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged *by this court, that the judgment of [*633 the said Supreme Judicial Court in this cause be, and the same is hereby affirmed, with costs.

Order.

Joel Fletcher v. The State of Rhode Island and Providence Plantations.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the County of Providence, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed with costs.

Order

Andrew Peirce, Junior, and Thomas W. Peirce
v.
The State of New Hampshire.

This cause came on to be heard on the transcript of the record from the Superior Court of Judicature in and for the First Judicial District of the State of New Hampshire, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be, and the same is hereby affirmed, with costs,

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1848.

BY BENJAMIN C. HOWARD,

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

VOL VI.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN MCKINLEY, *Associate Justice.**
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. LEVI WOODBURY, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*

NATHAN CLIFFORD, Esq., *Attorney-General.*
WILLIAM T. CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
ALEXANDER HUNTER, Esq., *Marshal.*

*Mr. Justice McKinley was prevented, by indisposition, from attending at this term.

ORDER OF COURT.

For the 1st Circuit, the HON. LEVI WOODBURY.
For the 2d Circuit, the HON. SAMUEL NELSON.
For the 3rd Circuit, the HON. ROBERT C. GRIER.
For the 4th Circuit, the HON. ROGER B. TANEY, *Ch. J.*
For the 5th Circuit, the HON. JOHN MCKINLEY.
For the 6th Circuit, the HON. JAMES M. WAYNE.
For the 7th Circuit, the HON. JOHN MCLEAN.
For the 8th Circuit, the HON. JOHN CATRON.
For the 9th Circuit, the HON. PETER V. DANIEL.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

January Term, 1848,

AND REPORTED HEREIN,

VOL. 47.

AS HAVE ALSO BEEN REPORTED IN

6 HOWARD AND IN 16 CURTIS'S DECISIONS.

6 How.	Title.	16 Curt.	Here in.
1–3	Sim v. Hundley		
	("Simms v. Hundley")	580	319
3–5	" "		320
5–6	" "		321
7–8	Gwin v. Barton	582	321
8–10	" "		322
10–11	" "		323
11–12	United States v. Daniel	583	323
12–14	" "		324
14	Collier v. Stanbrough	585	324
14–17	" "		325
17–19	" "		326
19–22	" "		327
22	" "		328
23–24	Bailey v. Dozier	587	328
24–27	" "		329
27–29	" "		330
29–31	" "		331
31	Bank of the United States v. Moss	590	331
31–34	" "		332
34–36	" "		333
36–39	" "		334
39–40	" "		335
41	Nesmith v. Sheldon	595	335
41–43	" "		336
43–44	" "		337
44–46	Stacy v. Thrasher, ex rel. Sellers	596	337
46–48	" "		338
48–51	" "		339
51–53	" "		340
53–55	" "		341
55–58	" "		342
58–60	" "		343
60–62	" "		344
62	Van Ness v. Van Ness	600	344
62–65	" "		345
65–67	" "		346
67–69	" "		347
70	Marshall v. Beall	604	347
70–72	" "		348
72–75	" "		349
75–77	" "		350
77–79	" "		351
79–81	Marshall v. Beall	604	352
81–82	Villabolos v. United States	607	352
82–84	" "		353
84–86	" "		354
86–89	" "		355
89–91	" "		356
91	" "		357
92–93	Brashear v. Mason	611	357
94–96	" "		358
96–98	" "		359
98–101	" "		360
101–103	" "		361
103	De Armas v. United States	615	361
103–105	" "		362
105–106	" "		363
106–108	United States v. Curry	617	363
108–110	" "		364
110–113	" "		365
113–114	" "		366
114–115	Davis v. Tileston	621	366
115–116	" "		367
116–118	" "		368
118–121	" "		369
121	" "		370
122–123	Mathewson v. Clarke	625	370
123–126	" "		371
126–128	" "		372
128–130	" "		373
130–133	" "		374
133–135	" "		375
135–137	" "		376
137–140	" "		377
140–142	" "		378
142–144	" "		379
144–146	" "		380
146–147	Curtis v. Innerarity	632	380
147–149	" "		381
149–151	" "		382
151–154	" "		383
154–156	" "		384
156–159	" "		385
159–161	" "		386
161–163	" "		387

6 How.	Title.	16 Curt.	Here in.
163	Shelton v. Tiffin	643	387
163–165	" "		388
165–167	" "		389
167–169	" "		390
169–172	" "		391
172–175	" "		392
175–177	" "		393
177–179	" "		394
179–182	" "		395
182–184	" "		396
184–186	" "		397
187–189	" "		398
189–190	" "		399
190–191	Pease v. Dwight	649	399
191–193	" "		400
193–195	" "		401
195–197	" "		402
197–199	" "		403
199–200	" "		404
201–202	Forgay v. Conrad	653	404
202–204	" "		405
204–206	" "		406
206	Perkins v. Fourniquet	657	406
206–209	" "		407
209	" "		408
209–211	Pulliam v. Christian	659	408
211–212	" "		409
212–213	Bank of the Metropolis v. New England Bank	660	409
213–216	" "		410
216–218	" "		411
218–221	" "		412
221–223	" "		413
223–225	" "		414
225–228	" "		415
228–229	Bein v. Heath	663	416
229–231	" "		417
231–234	" "		418
234–236	" "		419
236–238	" "		420
238–241	" "		421
241–243	" "		422
243–246	" "		423
246–248	" "		424
248–250	Bowling v. Harrison	672	425
250–253	" "		426
253–255	" "		427
255–257	" "		428
257–260	" "		429
260–262	Sheppard v. Wilson	676	430
262–265	" "		431
265–267	" "		432
267–269	" "		433
269–272	" "		434
272–274	" "		435
274–276	" "		436
276–278	" "		437
279	United States v. Hodge	681	437
279–281	" "		438
281–283	" "		439
283–284	" "		440
284–286	Bush v. Marshall	684	440
286–288	" "		441
288–290	" "		442
290–292	" "		443
292–293	McMicken v. Webb	689	443
293–294	" "		444
294–297	" "		445
297–299	" "		446
299–301	" "		447
301	Planters' Bank v. Sharp Baldwin v. Payne	697	447
301–304	" "		448
304–306	" "		449
306–308	" "		450
308–311	" "		451
311–313	" "		452
313–316	" "		453
316–318	" "		454
318–320	" "		455
320–323	" "		456
323–325	" "		457
325–328	" "		458
328–330	" "		459
330–333	" "		460
333–335	" "		461
335–337	" "		462
337–340	" "		463
340–342	" "		464
342–344	" "		465
344	New Jersey Steam Nav. Co. v. Merchants' Bank	722	465
344–346	" "		466
346–347	" "		467
347–350	" "		468
350–352	" "		469
352–355	" "		470
355–357	" "		471
357–359	" "		472
359–362	" "		473
362–364	" "		474
364–367	" "		475
367–369	" "		476
369–371	" "		477
371–374	" "		478
374–376	" "		479
376–379	" "		480
379–381	" "		481
381–384	" "		482
384–386	" "		483
386–388	" "		484
388–391	" "		485
391–393	" "		486
393–395	" "		487
395–398	" "		488
398–400	" "		489
400–403	" "		490
403–405	" "		491
405–407	" "		492
407–410	" "		493
410–412	" "		494
412–414	" "		495
414–417	" "		496
417–419	" "		497
419–421	" "		498
421–424	" "		499
424–426	" "		500
426–429	" "		501
429–431	" "		502
431–433	" "		503
433–436	" "		504
436–437	" "		505
437–438	Hogg v. Emerson	780	505
438–440	" "		506
440–443	" "		507
443–445	" "		508
445–448	" "		509
448–450	" "		510
450–452	"		511

6 How.	Title.	16 Curt.	Here in.
452–455	Hogg v. Emerson	780	512
455–457	" "		513
457–460	" "		514
460–462	" "		515
462–464	" "		516
464–467	" "		517
467–469	" "		518
469–471	" "		519
471–474	" "		520
474–476	" "		521
476–478	" "		522
478–481	" "		523
481–483	" "		524
483–486	" "		525
486	" "		526
486–488	Houston v. City Bank	790	526
488–490	" "		527
490–493	" "		528
493–495	" "		529
495–497	" "		530
497–500	" "		531
500–502	" "		532
502–504	" "		533
504–507	" "		534
507–509	West River Bridge v. Dix West River Bridge v. Brattleboro	793	535
509–511	" "		536
511–514	" "		537
514–516	" "		538
516–518	" "		539
518–521	" "		540
521–523	" "		541
523–526	" "		542
526–528	" "		543
528–531	" "		544
531–533	West River Bridge v. Dix West River Bridge v. Brattleboro	793	545
533–535	" "		546
535–538	" "		547
538–540	" "		548
540–543	" "		549
543–545	" "		550
545–547	" "		551
547–550	" "		552
550–552	Patterson v. Gaines	813	553
552–554	" "		554
554–557	" "		555
557–559	" "		556
559–562	" "		557
562–564	" "		558
564–567	" "		559
567–569	" "		560
569–572	" "		561
572–574	" "		562
574–577	" "		563
577–579	" "		564
579–582	" "		565
582–584	" "		566
584–586	" "		567
586–589	" "		568
589–591	" "		569
591–594	" "		570
594–596	" "		571
596–598	" "		572
598–601	" "		573
601–603	" "		574
603–605	" "		575
605	United States v. Yates	836	575
605–608	" "		576
608	" "		577

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1848.

1*] *BENJAMIN G. SIMMS, Plaintiff in Error,
v.
THOMAS HUNDLEY.

Sale of slaves brought into Mississippi from any other State, constitutional—refusal of Circuit Court to continue cause cannot be reviewed by writ of error—notarial certificate as evidence—rules of evidence prescribed by State statutes, followed by U. S. courts in such State.

The decisions of this court in Groves v. Slaughter, 15 Peters, 449, and Rowan v. Runnels, 5 How. ard. 134, again affirmed.

The continuance of a cause, or the refusal to continue it, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. This, also, has been long settled.

Under the statutes of Mississippi, a protest of promissory notes and statement of notices given to the parties, being certified under the notarial seal and verified by the affidavit of the notary, may be read in evidence. It is not necessary to introduce the notary, personally, to testify.

Under plea of non assumpsit, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court.

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

In 1835, the following notes were executed:

$4,000. Port Gibson, 2d May, 1835.

On the fifteenth day of February, eighteen hundred and thirty-seven, I promise to pay, to the order of Passmore Hoopes, four thousand dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. Spencer.

Indorsed: Passmore Hoopes, Benj. G. Sims.

$5,169. Port Gibson, May 2d, 1835.

Twelve months after the fifteenth February, 1836, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred sixty-nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. Spencer.

Indorsed: Passmore Hoopes, Benj. G. Sims.

2*] *$4,000. Port Gibson, 2d May, 1835.

On the fifteenth day of February, eighteen hundred and thirty-eight, I promise to pay, to the order of Passmore Hoopes, four thousand dollars, value received, negotiable and payable at the office of the Planters' Bank, at Port Gibson.

H. N. Spencer.

Indorsed: Passmore Hoopes, Benj. G. Sims.

Port Gibson, May 2d, 1835.

Twelve months after the 15th February, 1837, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred sixty-nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. Spencer.

Indorsed: Passmore Hoopes, Benj. G. Sims.

$3,907.17. Clinton, December 14th, 1835.

On the first day of January, eighteen hundred and thirty-eight, I promise to pay Thomas Hundley three thousand nine hundred and seven dollars and seventeen cents, for value received.

Benj. G. Sims.

All these notes came into the possession of Thomas Hundley.

In April, 1838, Hundley brought a suit in the Circuit Court, upon all the notes, against Sims, the plaintiff in error.

At May Term, 1838, Sims, the defendant, filed two pleas, 1. Non assumpsit, and 2. That the notes were passed to Hundley for the purchase of slaves illegally introduced into the State, in contravention of the second section of the seventh article of the Constitution.

The plaintiff joined issue upon the first plea and demurred to the second. The court sustained the demurrer, and the cause went to trial upon the general issue plea.

When the cause was called for trial, the defendant moved for a continuance, and filed an affidavit, which it is unnecessary to state; but the court refused the continuance, to which refusal the defendant excepted.

The bill of exceptions then proceeds as follows:

The plaintiff then produced the following record of a protest of the said note for $5,169, which said record is in the words and figures following, to wit:

State of Mississippi, Claiborne County, ss:

I, William M. Randolph, notary public, branch Planters' Bank, Port Gibson, duly commissioned and qualified according *to [*3 law, and residing in said town, do hereby certify, that on the eighteenth day of February, 1837, I went to the branch Planters' Bank at

Port Gibson, and then and there presented for payment the original note, of which the following is a true copy:

$5,169. Port Gibson, May 2d, 1842.

Twelve months after the 15th February, 1836, I promise to pay, without defalcation, to the order of Passmore Hoopes, five thousand one hundred and sixty-nine dollars, value received, negotiable and payable at the office of the Planters' Bank at Port Gibson.

H. N. Spencer.

Indorsed: Passmore Hoopes,
Benj. G. Sims,
Thos. Hundley.

And I then and there demanded payment of the said note, according to the tenor and effect, and was answered by the teller of the said bank, that the said note would not be paid, and that no funds were deposited in said bank for that purpose; and the said note was not paid by any person, when payment thereof was demanded as aforesaid. Whereupon, I protested said note for nonpayment, and notified the parties thereto of said demand, nonpayment, and protest, and that the holder of said note looked to them for payment thereof, which notices were given at the time and in the manner following, to wit:

(Copies annexed.)

For Passmore Hoopes, written notice of the above tenor was handed to him at his store in Port Gibson.

For Benjamin G. Sims, a written notice of the same tenor was put in the postoffice at Port Gibson, on the same day, directed to him at Clinton, Miss. Which facts, then and there noted to me on my official record, constitute, as herein set forth, a full and true record of all that was done by me in the premises.

In testimony whereof, I have here-
[L. s.] unto set my hand and affixed my official seal, this 1st day of June, 1838.

Wm. M. Randolph, Notary Public.

State of Mississippi, Claiborne County:

Personally appeared before me the undersigned, justice of the peace for said county, the above named Wm. M. Randolph, who made oath, that the foregoing record and certificate contain the truth, to the best of his knowledge and belief. Wm. M. Randolph.

Sworn to before me this 1st day of June, 1838. Lewis Cronly, J. P., [SEAL.]

4*] *NOTICES.

Port Gibson, 18th February, 1837.

Benj. G. Sims:

Please to take notice, that a note drawn by H. N. Spencer, in favor of Passmore Hoopes, for the sum of $5,169, and dated 2d day of May, 1835, was this day protested by me for nonpayment, and that the holder looks to you for payment as indorser thereof.

Respectfully, Wm. M. Randolph,
Notary Public.

Port Gibson, 18th February, 1837.

P. Hoopes:

Please to take notice, that a note drawn by H. N. Spencer, in your favor, for the sum of $5,169, and dated the 2d day of May, 1835, was this day protested by me for nonpayment, *and that the holder* looks to you for payment *as indorser thereof.* Respectfully,

Wm. M. Randolph, Notary Public.

To the introduction of which the defendant, by his attorney, objected, which objection the court overruled, and adjudged the said record sufficient; to which opinion the defendant, by his attorney, excepts; and thereupon the other records of protest on said notes of Spencer, indorsed by defendant, were produced and read, and the same being identical in substance with the proceding, it s agreed said exception shall apply to them also; the plaintiff then read said records, proved that said notes were protested on the proper day, and the notices directed to the proper place, and rested his case.

The defendant then offered to prove all the facts stated in his second plea, but the court refused to hear the proof; to which refusal the defendant excepts. The defendant then produced a witness, who proved that the plaintiff in this cause had been known to him about four years last past, during all which time he had resided in (this) Hinds County, Mississippi, and that he had considered, and did then consider, him a resident citizen of the State of Mississippi; and the defendant was proceeding to call another witness, Mr. Cook, deputy-marshal, further to prove the same facts, when the testimony was objected to by the attorney of the plaintiff, upon the ground that it could not be heard under the issue now on trial; which objection the court sustained, and excluded all testimony as to proof of plaintiff's citizenship; to which decision of the court, ruling out said proof that the plaintiff was a citizen of the State of Mississippi, under said plea of non assumpsit, the defendant, by attorney, excepts; and thereupon the jury *returned a ver- [*5
dict for the plaintiff; and said exceptions, being found conformable to the facts and the agreement of the parties, are signed, sealed, and ordered to be made of record in the cause.

George Adams, [L. s.]
Judge of the U. S. for D. Miss.

Upon this bill of exceptions the case came up to this court.

It was argued by Mr. Bibb for the plaintiff in error, no counsel appearing for the defendant in error.

Mr. Bibb said, that, after the decisions of this court upon the subject matter of the second plea, as to the meaning of the constitution of Mississippi, he would not argue its sufficiency. But he insisted that the objection made to the evidence offered by the plaintiff, Hundley, of the mere record made out by the said notary, was improperly overruled by the court. The notary himself, resident of the town and State wherein the protest was made, and wherein the trial was had, ought to have been introduced to testify; and his certificate of protest of an inland bill, of the same State, wherein the parties all lived, and wherein the trial was had, was not legal and sufficient evidence. On this point the cases of Townsley v. Sumrall, 2 Peters, 180, and Chesmer v. Noyes, 2 Campbell's Rep. 129, are relied on as conclusive.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought up by writ of error directed to the Circuit Court of the United States for the Southern District of Mississippi, upon a judgment obtained by the defendant in error against the plaintiff for the amount of four

notes, dated May 2, 1835, indorsed by the plaintiff in error to the defendant; and also for one other note drawn by the former in favor of the latter, dated December 14, 1835.

It appears by the record that three questions of law were raised at the trial, which are now before this court upon the writ of error, the testimony as to the residence of the plaintiff upon the plea of non assumpsit having been properly refused.

The first point relied on as a defense to the action was, that the notes above mentioned were all indorsed and delivered by Sims to Hundley in payment for slaves brought by Hundley into the State of Mississippi as merchandise, and there sold to Sims; and that the sale of slaves so brought into the State was prohibited by the constitution of Mississippi, and the contract therefore illegal and void.

This question was decided in the case of 6*] Groves v. Slaughter, *15 Pet. 449, and again in the two cases of Rowan v. Runnels, at the last term, 5 Howard, 134. And it is the settled law in this court, that contracts of this description, made at the time when these notes bear date, were valid, and not prohibited by the constitution of Mississippi.

The point next in order is presented by the exception taken to the refusal of the court to continue the case to another term, upon the affidavit filed by the plaintiff in error. But this point, also, has been long settled; and it has always been held in this court, that the continuance of a cause, or the refusal to continue, rests in the sound discretion of the court in which the motion is made, and cannot be reviewed by writ of error. Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206, 217, 218.

The remaining point, and the only one relied on in the argument here, is the exception taken to the admission in evidence of the protest and statement of notices given to the plaintiff in error—the said protest and statement being certified under the notarial seal, and verified by the affidavit of the notary. This, however, like the two preceding points, has been already decided by this court; and this case cannot be distinguished from the case of Brandon v. Loftus, 4 Howard, 127.

It is true, that, upon general principles of commercial law, the certificate would not be admissible. But it is made evidence by the statute of Mississippi, and the rules of evidence prescribed by the statute of a State are always followed by the courts of the United States, when sitting in the State, in commercial cases as well as in others.

The judgment of the Circuit Court is therefore affirmed.

Order.

This cause came to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*WILLIAM M. GWIN, Late Marshal, and [*7 Jacob S. Yerger and Robert Hughes, his sureties, Plaintiffs in Error,

v.

C. T. and A. BARTON, Defendants in Error.

Adoption of State law by U. S. Court—summary proceedings against marshal—does not apply to his sureties.

The decision of this court in the case of Gwin v. Breedlove, 2 How. 29, reviewed and confirmed, viz.:

That under a statute of Mississippi, relating to sheriffs, a summary process against a marshal might be resorted to, in order to enforce the payment of a debt, interest, and costs, for which he was liable by reason of his default; that the courts of the United States could not enforce the payment of a penalty imposed by the State laws in addition to the money due on the execution; that a marshal and his sureties could not be proceeded against, jointly, in this summary way, but they must be sued as directed by the act of Congress.

Any excess of interest awarded over and above the legal rate is a penalty, and comes within the above rule.

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

At May Term, 1843, viz., on the 5th of May, the following notice was filed:

To William M. Gwin, late Marshal of the Southern District of the State of Mississippi, and Jacob S. Yerger and Robert Hughes, his securities in his official bond.

Please take notice that on Wednesday, the 24th day of the present month (May), I will move the Circuit Court of the United States for the Southern District of the State of Mississippi for a judgment against you for the sum of twenty-nine hundred and twenty dollars thirty-nine cents, being the amount [of] the plaintiff's money mentioned in the writ of venditioni exponas, issued from said Circuit Court on the 14th day of November, 1840, in our favor, against Robert G. Crozier, Thomas J. Coffee, and R. S. Hardy, principals, and James J. King and William H. Shelton, securities, for the said sum of twenty-nine hundred and twenty dollars thirty-nine cents, and which said writ commanded the said W. M. Gwin, then marshal, to expose the property therein specified to sale, to satisfy the money aforesaid, and interest, and costs due on said execution; and which execution or writ of venditioni exponas came to the hands of said Gwin in due time, and upon the same said Gwin voluntarily and without authority omitted to levy the money aforesaid. I will also ask said court for a judgment for interest on the sum aforesaid, at the rate of thirty per centum per annum from the first Monday in May, 1840, till paid.

You may attend and oppose said motion, if you think proper.

Your obt. serv't,
C. T. & A. Barton,
By Rob't. Hughes, their attorney.
May 5th, 1843.

*On the 23d of May, the defendants filed [*8 a demurrer upon the following grounds, viz.:

1. There is no law which authorizes the making of such a motion.

2. The citizenship of either plaintiffs or defendants is not set out in the motion, or any part of the record in this cause.

3. If any motion will lie at all in this court against the marshal and his sureties, it must be in the name of the United States for the use of the creditor.

4. The motion does not set out the bond or obligation of the defendants, or in what capacity, or to what extent, or upon what kind of obligation, Hughes and Yerger are Gwin's sureties.

5. The motion does not specify any breach of official duty upon the part of Gwin.

6. The motion does not show when any breach of official duty was committed by Gwin, or that the plaintiffs have been damaged thereby, nor to what ex'ent.

7. The motion does not show or set forth a demand and refusal, upon the part of Gwin, to pay over any money collected by him for plaintiffs.

8. There are many other causes of demurrer, which will be assigned at the hearing.

The court below overruled the demurrer, and Gwin and his sureties were allowed to plead over.

Gwin and his sureties put in a plea, "for that heretofore, before the entry of this motion against them, or notice that any such motion, would be entered, suits had been instituted in this honorable court in favor of the United States of America against these defendants upon the official bond of said Gwin as marshal, for breaches of the condition thereof, for sums of money collected by Gwin, as marshal, and not paid over by him, in amount larger than the penalty of the bond; which suits are still pending undetermined in said court against these defendants, and judgments upon which cases will satisfy and discharge the penalty of said bond; and to the rendition of jugment in which cases these defendants are liable."

To this plea the plaintiffs demurred, to which there was a joinder.

The court below sustained the demurrer, with leave to plead over, which the defendants declined; and on proof of the plaintiffs, it appeared, to the satisfaction of the court, that on the 14th November, 1840, a writ of venditioni exponas was issued against Crozier and others, for the sum of $2,970.39, by which the marshal was commanded to sell the property in the writ mentioned, to satisfy the debt, inter-
9*] est and costs; that *said writ came to the hands of the marshal in due time, and upon the same he voluntarily and without authority omitted to levy the money aforesaid, and that payment of the said money, due to the plaintiffs on said execution, was by them, since the return of the said execution, demanded of Gwin; and it also appearing that Gwin gave an official bond, with Yerger and Hughes, his securities, the court therefore gave judgment against Gwin, Yerger, and Hughes, for the amount due on the execution, with interest at the rate of 30 per cent. per annum, from the 1st May, 1841, until paid, and costs of the motion.

The bill of exceptions set out the proceedings *on the motion,* the venditioni exponas bond by *Gwin and his sureties;* to the reading of which *bond the defendants* objected, which objection the court overruled, and the defendants excepted.

The plaintiffs then offered Hughes as a witness, which the defendants objected to, as he was one of the defendants in the motion; which objection the court overruled, and permitted Hughes to be introduced as a witness; to which the defendants, with the exception of Hughes, excepted.

Hughes then testified, that he was attorney of the plaintiffs; that at the return term of the venditioni exponas he went to the office of the marshal, and demanded the money on the same of Mr. Hunt, the office deputy of Gwin. Hunt said the money was not made; that the property mentioned in the venditioni exponas had been sold to William H. Shelton, who had promised to pay the money for it, but had failed to do so; and that he had not the money to pay on said venditioni exponas; that he did not want any motion against the marshal for said money, and wished a fieri facias on the judgment of the plaintiffs, for the benefit of the marshal. Hughes also proved that he had called on Gwin and told him he wanted the money; and this being all the evidence on the motion, the court gave judgment against Gwin and his sureties as above mentioned. To all which proceedings of the court, as well as the rendition of the judgment, the defendants excepted.

The causes of error assigned by the counsel for Gwin were that the court below erred in overruling the demurrer on the part of Gwin and his sureties, in sustaining the demurrer of the plaintiffs below, in admitting the bond, in admitting Hughes as a witness, and in rendering the judgment.

The case was argued by Mr. Bibb for the plaintiff in error, and Mr. Johnson for the defendant in error.

Mr. Chief Justice Taney delivered the opinion of the court:

It appears by the record, that this was a summary proceeding, by motion in the Circuit Court of the United States for the Southern *District of Mississippi, against Gwin, [*10 late marshal of the district, and Yerger and Hughes, the sureties in his official bond, for the default of the marshal in omitting to levy the money upon a writ of venditioni exponas. This summary process was according to the provisions of a statute of Mississippi regulating proceedings upon executions in the courts of that State, and which was supposed, it seems, to have been adopted by the courts of the United States, when sitting in the State. The defendants in error recovered a judgment against the marshal and his sureties jointly, in this summary way, for $2,920.30, with interest at the rate of thirty per cent, per annum from the day on which the venditioni exponas was returnable.

It is unnecessary at this time to state particularly the provisions of the statute of the State, or to examine how far these provisions can be enforced in a court of the United States. For the subject was fully considered in the case of Gwin v. Breedlove, 2 How. 29, and the decision in that case is conclusive upon the case before us.

In the case referred to, the court held, that,

so far as the statute of Mississippi authorized a summary process against the marshal himself to enforce the payment of the debt, interest, and costs, for which he was liable by reason of his default, it was adopted by the Act of Congress of 1828. But that the courts of the United States could not enforce the payment of a penalty imposed by the State law, in addition to the money due on the execution. And in the same case, the court further held, that such summary proceedings against the sureties of a marshal would be repugnant to the Act of Congress of April 10th, 1806; and that if the plaintiff in the execution sought to charge the sureties for the default of the marshal he must proceed regularly by action, and obtain his judgment in the manner and form pointed out by that law.

The judgment against the marshal and his sureties is, therefore, clearly erroneous. And if the proceeding had been against the marshal alone, it could not have been sustained for the excess of interest awarded over and above the legal rate. For this excess is evidently imposed as a penalty for the default.

The judgment must therefore be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and 11*] that *this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice, and in conformity to the opinion of this court.

THE UNITED STATES, Plaintiffs,

v.

JAMES and JOHN G. DANIEL, Executors of Beverly Daniel, late U. S. Marshal.

Cause of action does not survive in North Carolina as against marshal's executor for false and insufficient return of deputy.

An action on the case will not lie against the executors of a deceased marshal, where executions had been placed in the hands of the marshal, and false returns made on some of them, and imperfect and insufficient entries on others.

The rule respecting abatement is this: If the person charged has received no benefit to himself at the expense of the sufferer, the cause of action does not survive. But where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property survives against the executor.

As to the form of action, none will lie, at common law, against an executor, where the general issue is "not guilty."

THIS case came up from the Circuit Court of the United States for the District of North Carolina, on a certificate of division in opinion between the judges thereof.

In August, 1841, the United States brought an action of trespass on the case against the defendants, as executors of Beverly Daniel, late marshal, and at May Term, 1843, a verdict was found for the plaintiffs, subject to the opinion of the court upon the following cases stated:

Beverly Daniel being in his lifetime marshal of the District of North Carolina, certain executions, at the instance of the United States, from the District Court of Newbern, came to the hands of one of the deputies of the said marshal, who, in the name and on behalf of his principal, made false returns upon some of them, and imperfect and insufficient entries on others. After the death of Daniel, this action on the case was brought against the defendants, his executors, to recover damages for the said false and insufficient returns; and it is contended, on the part of the defendants, that the action will not lie, and is not sustainable against them as executors, and it is agreed by the parties that judgment shall be rendered for the plaintiffs upon the said verdict, if the court shall be of opinion that such action is sustainable; otherwise, the said verdict to be set aside, and the said action to be discontinued.

The judges being divided in opinion, the cause came up to this court upon a certificate of such division.

The cause was argued by Mr. Clifford (Attorney-General) on the part of the United States, and submitted on the record by Mr. Badger on the part of the defendants.

*Mr. Clifford made two points: [*12

1st. That the cause of action survives against the executors.

2d. That an action on the case is an appropriate remedy under the laws of North Carolina, which furnish the rule of decision on this point.

1st. The rule respecting abatement is now nearly confined to that laid down by Buller, viz., that where property is concerned, the action does not abate by the death of the party. Cowper, 371.

The distinction between the cause and the form of action must be borne in mind. The difficulty in this case must have arisen with regard to the form. The record is very imperfect, and does not show whether the rights of property were involved or not. But they were so in fact, and I will assume it to be so. The testator was certainly liable in his lifetime, and I only contend that the cause of action survives where the estate of the testator has been benefited and is therefore responsible. It must have been understood in this case that the deputy-marshal had made the money. The bond of the marshal covers the acts of his deputies under the Judiciary Act, and therefore the law presumes the money to be in the hands of the principal. It makes no difference whether the estate of the marshal has been benefited in point of fact or in presumption of law. It is equally responsible in both. He has his remedy against the deputy, and the law presumes that he will right himself. I assume, in this case, that the money had been made. An action for "money had and received" has been sustained. 3 Campbell, 347.

But an action for an escape does not survive, because the estate has not been benefited. To support these principles, 18 Mass. 454; 9

Wendell, 29; 1 Pick. 71; 4 Halsted, 173; Com. Dig. tit. Administrator, B. 15.

The laws of North Carolina furnish the rule of decision whether case will lie, 2 How. 29, and these laws sustain the action. 1 Rev. Stat. N. C. 57. This re-enacts the law of 1799. It may be said that the provision in this, which says suits shall not abate, was intended only to apply to suits then brought. But there is no good reason for the exclusion of future suits. 3 Hawks, 563; N. C. Repository, 529, 205, 226; 2 Haywood, 182; 1 Rev. Stat. N. C. page 443, secs. 1, 2, 3.

Mr. Justice McLean delivered the opinion of the court:

The case is brought here from the District of North Carolina, on a certificate of a division of opinion by the judges, under the act of Congress.

A jury, having been impaneled to try the is- [*13] sues joined, found for the plaintiffs, and assessed their damages at seven hundred seventy-five dollars and eighty cents. This verdict was taken by consent of parties, subject to the opinion of the court on the following case:

"Beverly Daniel, being in his lifetime marshal of the District of North Carolina certain executions, at the instance of the United States, from the District Court of Newbern, came to the hands of one of the deputies of the said marshal, who, in the name and on behalf of his principal, made false returns upon some of them, and imperfect and insufficient entries on others. After the death of Daniel, this action on the case was brought against the defendants, his executors, to recover damages for the said false and insufficient returns; and it is contended that the action will not lie, and it not sustainable against them as executors, and it is agreed by the parties that judgment shall be rendered for the plaintiffs upon the said verdict, if the court shall be of the opinion that such action is sustainable; otherwise, the said verdict to be set aside, and the action to be discontinued." And on a motion being made for judgment, the opinions of the judges were opposed on the point reserved.

No action will lie against an executor for a personal wrong by the testator. Com. Dig. Administrator, B. Nor does it lie against the executor of a jailer for an escape. Ibid. Waste does not lie against an executor or administrator; nor an action upon a penal statute. So trover is said not to lie against an executor upon a trover and conversion by his testator, though a different form of action will lie for the same cause. Cowper, 371.

If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. And it is laid down in Cowper, 376, with respect to the form, that no action survives where the plea of the defendant must be "not guilty," but where the case survives, some other form must be pursued.

If the deputy-marshal, in the misfeasance complained of, received money or property, the marshal being responsible for such acts, the cause of action survived against his executors. But this is not the case made in the present action. It is an action on the case requiring the general issue of "not guilty." If a liability were shown against the deceased marshal, it could not be enforced against his executors in this form. No action, where the plea must be that the testator was not guilty, can *lie [*14 at common law, against the executor. Upon the face of the record, the action arises ex delicto; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. 3 Bac. Abr. 539.

The provision in the 10th section of the North Carolina statute, "to prevent the abatement of suits in certain cases"—which declares that an action of trespass on the case, etc. shall not abate by the death of either party—does not affect the above question.

This court think that the action, in the form prosecuted, is not maintainable; and they direct the fact to be so certified to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of North Carolina, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such cases made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that the action in the form prosecuted will not lie. It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

LEWIS A. COLLIER, Plaintiff in Error,
v.
JOSIAH STANBROUGH.

Error to State court lies where decision was against title claimed under sale by U. S. marshal—sale of movable property by marshal in Louisiana without appraisement, at first bidding, void.

By the laws of Louisiana, debts which are due to a defendant, against whom an execution has issued, may be seized and sold. But they must first be appraised at their cash value, and if two thirds of such appraised value is not bid, the sheriff must adjourn the sale, and again advertise the property.

This mode of proceeding was adopted by a rule of the Circuit Court of the United States, and was therefore obligatory upon the marshal.

Where the marshal made a sale of some promissory notes secured by mortgage, without an appraisement, and sold them for less than one third of their amount, the sale was void.

THIS case was brought up by a writ of error, issued under the 25th section of the Judiciary Act, from the Supreme Court for the Western District of Louisiana.

In 1838 David Stanbrough was appointed, by the logical authority in Louisiana, curator of the estate of one Harper, deceased.

In 1840 he was sued as curator, in the Circuit Court of the United States for the Eastern District of Louisiana, by the Farmers' Bank of Virginia. Judgment was rendered against him, which became final on default.

15*] *On the 6th of February, 1841, Stanbrough, the curator, exposed to sale some property of Harper, the deceased, which was in the inventory taken by the Probate Court of Madison, which court granted the order for a sale. Dougal McCall became the purchaser, for the sum of $11,433.66, divided into three payments of $3,811.22 each, for which he gave three promissory notes, payable to the order of David Stanbrough, curator, at the Merchants' Bank of New Orleans, on the 1st of January, 1842, 1843, and 1844. And in order to secure the payment of the notes, he executed a mortgage upon the purchased property.

At some time subsequent to this, but when the record does not show, a fieri facias was issued upon the judgment which the Farmers' Bank of Virginia had obtained against Stanbrough, the curator, and a levy was made upon the three notes above mentioned.

On the 31st of December, 1841, David Stanbrough, the curator, filed a petition, in the nature of a bill in chancery, to the Court of Probates in the parish of Madison, praying, amongst other things, for an injunction to restrain the marshal from further proceedings upon the executior.

On the 10th of March, 1842, the court granted the injunction as prayed for.

On the 1st of April, 1842, Stanbrough filed a supplemental petition, stating that the parties enjoined continued to advertise the notes for sale, praying that proceedings might be had against the parties for a contempt of court, that the editor of the paper might be enjoined from further publication of the advertisement, and that Dougal McCall might be enjoined from paying the notes to any person except the petitioner. An injunction was issued accordingly, on the same day.

This injunction being afterwards dissolved, the marshal proceeded to sell, on the 9th of April, 1842, the property levied upon, being the three notes of McCall given to Stanbrough, the curator. The property was offered for sale and sold to Lewis A. Collier, the plaintiff in error in the present case. A transfer in writing was made of said property by the marshal to Collier. The seizure of the notes was made by notifying David Stanbrough, in whose hands they were, that they were thereby seized by virtue of the execution, but they never came to the corporal possession of the marshal. The transfer was returned to the office of the clerk of the Circuit Court of the United States, and there duly recorded.

On the 30th of July, 1842, Josiah Stanbrough, the defendant in error in the present suit, filed a petition in the Ninth District Court of the State of Louisiana, stating that

16*] the first note of *McCall, which became due on 4th of January, 1842, had been protested for nonpayment; that it had been transferred by the curator, the payee, to one Jesse Stanbrough, and by the said Jesse to him, the petitioner.

He therefore prayed for an order of seizure and sale of the property mentioned in the mortgage, for cash enough to pay the note then due, and upon a credit sufficient to meet the other payments as they should become due in succession.

On the same day, an order of seizure and sale was issued in conformity with the prayer of the petition.

On the 14th of December, 1842, Collier filed a petition in the same court, viz., the Ninth District Court of the State of Louisiana, in which he recited the facts in the case, and then alleged that Josiah Stanbrough had illegally and fraudulently obtained possession of the note then due; that David Stanbrough, the curator, had become leagued with Josiah Stanbrough to defraud the petitioner and all other creditors of Harper's estate; that if the petitioner was not the legal owner of the notes, then they were the property of Harper's estate; that Josiah Stanbrough never gave any value for them; and, finally, praying for any injunction against all parties concerned, which should afterwards be made perpetual.

An injunction to stay further proceedings was accordingly issued.

On the 4th of May, 1843, Josiah Stanbrough filed his answer, denying all the allegations of the petition, and averring that the property of the succession of Harper, whilst administered in the Probate Court of Louisiana, could not be legally subjected to any writ of execution from the federal courts, and claiming twenty per cent. damages.

Before the cause was tried, the following admission of facts was filed, viz.:

Lewis A. Collier v. Josiah Stanbrough.

Ninth District Court of the State of Louisiana, for the Parish of Madison.

The plaintiff in injunction relies upon the following facts, and he cannot go safely to trial without the documents necessary to prove them:

1. Some two or three years since, a judgment was obtained in the United States Circuit Court for the Eastern District of Louisiana, against David Stanbrough, as curator of the succession of Jesse Harper, deceased, upon a claim against the succession of said Harper, at the suit of the Farmers' Bank of Virginia (perhaps the suit is styled "The President, Directors and Company of the Farmers' Bank of Virginia v. David Stanbrough, *curator [*17 of the estate of Jesse Harper"); all which will appear by the judgment.

2. Some twelve or fifteen months since, an execution (a fieri facias) issued from said United States Circuit Court, at the instance of the plaintiff in said suit, and under said execution a levy was made on the three notes mentioned in the petition of the plaintiff in injunction; and, after due advertisement, the property was offered for sale, and was sold to Lewis A. Collier, the plaintiff in injunction, and a transfer, in writing, was made of said property, by the marshal, to said Collier. The seizure of the notes relied on was made by notifying David Stanbrough, in whose hands they were, that they were thereby seized by virtue of said execution, but they never came to the corporal possession of the marshal; all which will appear by the execution, the return of the marshal thereon, and the conveyance of the marshal to Collier as aforesaid.

3. Said transfer was returned to the office of the clerk of said United States court, and there duly recorded.

The statement of facts, on which the plaintiff in injunction relies, as mentioned above, and which facts are hereinbefore enumerated, is admitted by the defendant in injunction to be true.

Bemiss, J. Dunlap, B. M. Brawder,
Attorneys for Defendants.

The plaintiff in injunction admits that the notes in controversy were never appraised, and that the sale was made without appraisement, and that the notes in question belonged to the succession of said Harper, which said succession, at the time the said seizure was made, in manner stated above, was in due course of administration in the Probate Court of the Parish of Madison.

R. C. Stockton, Att'y for Collier.

The following facts were also admitted, viz.:

Admitted, that Lewis A. Collier is a creditor of Jesse Harper's estate, and that for two years, at least, the said succession has been insolvent.

Admitted, that the judgment in the case of The Farmers' Bank of Virginia v. David Stanbrough, curator of the succession of Jesse Harper, deceased, rendered in the United States Circuit Court of the Eastern District of the State of Louisiana, was made final on default.

Admitted, that David Stanbrough is now, and has been, curator of the succession of Jesse Harper, deceased, ever since the 1st day of January, 1840.

Admitted, that David and Jesse Stanbrough are brothers, and Josiah Stanbrough is the son of Jesse; that they all live within some three or four miles of each other; that Jesse Stan-
18*] brough *is security for David on his curator's bond, as curator of Harper's estate.

Admitted, that in the estate of Harper there was an inventory taken by the Probate Court of Madison of said succession of Harper, an order of sale, and sale of the property of Harper's estate, and the notes in dispute are of the proceeds of sale; that all those proceedings took place by order of the probate Court.

It is admitted, that there is no order on the records of the Court of Probates ordering the estate of Jesse Harper to be insolvent.

Admitted, that Mr. Stockton, a creditor for $1,000, has never received from the estate of Jesse Harper but $250.

On the 16th of May, 1843, the court made the following decree:

"By reason of the law and the evidence being in favor of the defendant, Josiah Stanbrough, it is ordered, adjudged and decreed, that the injunction sued out in this case be dissolved; and it is further decreed, that the defendant recover of the said plaintiff, Lewis A. Collier, and his surety, Archibald Matthews, in solido, the sum of four hundred and twenty-seven dollars damages, being ten per cent. upon the amount of said defendant's claim, when enjoined, and that said plaintiff pay the costs of this suit to be taxed."

From this decree an appeal was had to the Supreme Court of the State, which affirmed the judgment of the District Court, with costs.

A writ of error was sued out to bring the *case up to this court*, and the following assign*ment of errors filed*;

226

"Plaintiff assigns for cause, for which the judgment of the honorable the Supreme Court of Louisiana ought to be reversed by the honorable the Supreme Court of the United States, and a judgment rendered in his favor, as prayed for in his original petition, as follows, to wit:

"1. The decision of the Supreme Court of Louisiana denies to the Circuit Court of the United States for the State of Louisiana the power to execute judgments rightfully rendered by said Circuit Court against the representative of a succession, by proceeding to sell the property of the same, by a writ of fieri facias, or otherwise.

"2. The Supreme Court of Louisiana erred in assuming authority to inquire into the validity of a judgment or execution from the said Circuit Court, or the manner in which said execution was proceeded on, the Constitution and laws of the United States guarantying and conferring on said Circuit Court the power to take cognizance of such cases as that whereon *execution issued (to wit, the case of The [*19 Farmers' Bank of Virginia v. David Stanbrough, curator, etc.), which necessarily includes the power to execute judgments so rendered.

"3. The Supreme Court of Louisiana erred in sustaining the law of that State which requires money demands against a succession to be prosecuted exclusively in the Probate Court, which law, the plaintiff avers, contravenes the Constitution and laws of the United States; so far as it requires foreign creditors to prosecute their demands as aforesaid in said State court only is, therefore, so far null and void.

"4. The judgment aforesaid of the Supreme Court of Louisiana is, for other reasons, illegal and erroneous, and ought to be reversed."

The cause was argued by Mr. Bibb for the plaintiff in error, and by Stockton & Steele and Mr. Henderson (in a printed argument), upon the same side. No counsel appeared for the defendant in error. The following points were made and argued by the counsel for the plaintiff in error:

1. The decision of the Supreme Court of Louisiana denies to the Circuit Court of the United States for the State of Louisiana the power to execute judgments rightfully rendered by said Circuit Court against the representative of a succession, by proceeding to sell the property of the same by a writ of fieri facias, or otherwise.

2. The Supreme Court of Louisiana erred in deciding that a judgment of the Circuit Court of the United States must be presented to the Probate Court of Louisiana for classification, and that said judgment of the Circuit Court was a mere recognition that the deceased owed the plaintiff on said judgment the sum therein adjudged to him, and thus forcing a foreign creditor into a State tribunal to settle the question of the rank which his claim shall hold.

3. The Supreme Court of Louisiana erred in assuming authority to inquire into the validity of a judgment or execution from the said Circuit Court, or the manner in which said execution was proceeded on, the Constitution and laws of the United States guarantying and conferring on said Circuit Court the power to take

cognizance of such cases as that whereon execution issued, to wit, the case of The Farmers' Bank of Virginia v. David Stanbrough, curator, etc., which necessarily includes the power to execute judgments so rendered.

4. The Supreme Court of Louisiana erred in sustaining the law of that State which requires money demands against a succession to be prosecuted exclusively in the Probate Court; which law, the plaintiff avers, contravenes the 20*] Constitution *and laws of the United States; so far as it requires foreign creditors to prosecute their demands as aforesaid in said State court only is, therefore, so far null and void.

5. The judgment aforesaid of the Supreme Court of Louisiana is, for other reasons, illegal and erroneous, and ought to be reversed.

But as the court avoided a decision upon these important points, resting it upon one which was in some measure collateral, it is deemed proper to omit the arguments of counsel.

Mr. Justice Catron delivered the opinion of the court:

Lewis A. Collier field his petition in the District Court held for the Parish of Madison, in the State of Louisiana, against Josiah Stanbrough and others, alleging that the Farmers' Bank of Virginia had recovered a judgment in the Circuit Court of the United States for the Eastern District in that State, against David Stanbrough, as curator of the succession of Jesse Harper; that an execution issued on the judgment, by which the marshal seized a debt belonging to the succession, due from Dougal McCall, evidenced by three notes of hand, and by a mortgage on land, securing the payment to be made to David Stanbrough, the curator; that the debt, amounting to $11,433, was seized and sold by the marshal, and said Collier became the purchaser, for the sum of $3,500, etc.

It is also alleged, that a fictitious indorsement had been made on one of the notes by the curator to Josiah Stanbrough, which the petition prays may be annulled, and that the petitioner may have the benefit of his purchase by judgments and execution on the notes and mortgaged property.

The defendants answered, and insisted that the debt was not legally seized or levied upon; and, second, that it was not legally appraised or advertised, as required by law.

The facts were agreed, and it was admitted that the notes in controversy were never appraised, and that the marshal sold them to Collier at a cash sale on the first biddings.

In the District Court, the law was adjudged to be for the defendants, and Collier's petition was dismissed; and from this judgment he appealed to the Supreme Court of Louisiana, where the judgment was affirmed; and to reverse this latter judgment, the plaintiff prosecuted a writ of error from this court to bring up the record; and this he had a right to do, as his claim of title was founded on "an authority exercised under the United States," which the judgment below drew in question, and the decision was against its validity.

The only question submitted for our consideration is whether the marshal's sale was void, or valid.

21*] *The Supreme Court of Louisiana declared, in its opinion found in the record, and preceding the judgment, "that a creditor residing in another State cannot issue an execution upon the judgment which he has obtained in the federal court against the executor or administrator of an estate, which is admitted in the Court of Probates as insolvent, and take the property out of the hands of such executor or administrator, and leave nothing for the other creditors," adding, that, as it was one of the admitted facts that Harper's estate had been insolvent for several years before the seizure and sale were made, they were consequently void.

But as this case has been argued here by counsel for the plaintiff, Collier, only, no one appearing for the defendant in error, we deem it proper to forbear touching the delicate question on which the Supreme Court of Louisiana founded its judgment of affirmance. Its great importance in different States, and the difficulties attending it on either hand, because of the conflicts it is likely to produce between the tribunals of the State and the federal courts, strongly impress this court with the propriety of leaving the question open and uninfluenced by the present opinion, as no necessity exists for such a decision in this case. The judgment of the State court pronounced the seizure and sale on the federal execution void; this judgment we are called on to revise, and if we find that it was proper, for the reasons given by the court below, or on other grounds manifestly appearing of record and equally calling into exercise the jurisdiction of this court, it is our duty to affirm it; and we are of opinion that the judgment of the State court was proper, on another ground.

In Louisiana, the debts due to an execution debtor may be seized and sold on execution, like other movable property, and equally with the immovable property; in respect to lands seized on execution, it is necessary, before they are offered for sale, that they should be appraised by persons appointed for the purpose, and if, when offered at public sale, two thirds of the appraised value is not bid, the officer who is attempting to sell shall not adjudicate the sale, but cease, and re-advertise the property, and again offer it at public outcry on a credit of twelve months; and this mode of proceeding, having been adopted by rule in the Circuit Court of the United States held in Louisiana, governs the marshal of that court. Whether movable property was entitled to the benefit of the provision seems not to have been definitively settled until 1845, in the case of Phelps v. Rightor et al., 9 Robinson's Rep. 541, when it was adjudged by the Supreme Court of Louisiana, that movable property (of the same description that is here in controversy) *could not be legally sold by a sheriff in [*22 virtue of an execution, without having been first appraised at its cash value, and that then the cash bid on the first offer must be equal, at least, to two thirds of the appraised value; and for want of such an appraisement and bid, the adjudication of a cash sale on the first offer to sell was void, for want of power in the officer. And it is proper to remark, that, in the case of Gantly v. Ewing, 3 Howard, 707, this court declared a similar principle to apply in a case arising under a law of Indiana,

which provided that the fee-simple of real estate should not be sold, until the sheriff had, at the time and place of sale, first offered the rents and profits of the land for a term of seven years at public outcry, and if no bid was had for the rents and profits sufficient to satisfy the execution, then the sheriff should proceed to sell the fee. In that case the sheriff had proceeded to sell the fee-simple estate without first offering the rents and profits for the seven years' term, and this court held that the sale was void, for want of power in the sheriff to make it before he complied with the previous step, forasmuch as the power to sell the fee-simple arose for want of a bid for the term. In principle, that case and the one under consideration cannot be distinguished. In each it was immaterial whether the purchaser had or had not knowledge of the fact, that the officer had not taken the first step, as on that step the power to sell first arose. In this case, no appraisement was had, and the debt on the first bidding was struck off to Collier, for less than one third of the amount called for by the three notes and the mortgage to secure them; and these facts being admitted on the record, it follows that the sale was void, and that the judgment of the Supreme Court of Louisiana must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

22*]*WILLIAM BAILEY, Plaintiff in Error,

v.

WILLIAM B. DOZIER.

Formal protest need not be drawn up at time of presentment and dishonor—Mississippi statute as to protests—plea of non assumpsit waives plea to jurisdiction.

Where a bill of exchange is presented for acceptance or payment, which is refused, it is sufficient if the officer who presents it makes a note at the time of the facts which occurred on presenting the bill. The formal protest may be drawn up afterwards, at the convenience of the notary.

Under the laws of Mississippi, a protest is not essential to enable the indorsee of an inland bill of exchange to recover the amount of it. The statute of Mississippi is similar to the English statutes of 9th and 10th of William III., and 3d and 4th of Anne, and must receive the same construction with them.

Before those statutes, the indorsee of an inland bill had a right to recover the amount of it from the drawer. This right was not taken away by them; but they gave an additional right to interest and damages. The common law right remains.

If a plea to the jurisdiction and a plea of non assumpsit be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived.

Although the declaration began with an averment that the drawer and indorser were citizens of the same State (which, of course, would oust *the jurisdiction of the* Circuit Court), yet as it *afterwards averred that the* indorser, who was also the payee, was an alien and citizen of Texas, this was sufficient to maintain the jurisdiction.

*22

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

The facts were these:

On the 18th of January, 1838, the following inland bill was drawn:

$2,670. Paulding, 18th January, 1838.

Twelve months after date of this my first and only bill of exchange, pay to the order of John D. Fatheree two thousand six hundred and seventy dollars, for value received, and place the same to account of your ob't servant,

Will. B. Dozier.

Mr. Pierson Lewis,
Jackson, Mississippi.

Indorsed, J. D. Fatheree.

Accepted, Pierson Lewis.

Being indorsed by Fatheree and accepted by Lewis, it passed into the hands of Bailey, the plaintiff in error.

On the 21st of January, 1839, when the bill became due, it was presented and protested for nonpayment, under the circumstances which will presently be stated.

In April, 1841, Bailey brought suit in the Circuit Court of the United States against Dozier and Fatheree, who were both alleged in the writ to be citizens of Mississippi, Bailey being stated to be a citizen of Virginia. The declaration commenced with stating that Dozier and Fatheree were both citizens *of Mis- [*24
sissippi, but afterwards, in reciting the bill, said, "and then and there requested the said Lewis to pay, twelve months after the date of said bill of exchange, to John D. Fatheree, who is an alien and resident of the republic of Texas," etc. The declaration contained also counts for money "lent and advanced," "paid, laid out, and expended," and "had and received."

To this, the defendant pleaded two pleas. The first was as follows:

"And the said defendant, William B. Dozier, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, as to him, said Dozier, because he says that the said bill of exchange, in the plaintiff's declaration mentioned, was drawn in the State of Mississippi, to wit, at Paulding, in Mississippi, payable at Jackson, in the said State of Mississippi, and that the drawer and indorser and acceptor thereof were, and yet are, citizens and resident in the State of Mississippi; and said bill is not a foreign bill of exchange; and this the said William B. Dozier is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid.

"And for further plea in this behalf, the said William B. Dozier says, that this court ought not to have or take further cognizance of this action, because he says that the said William Bailey, the plaintiff, is a citizen of the State of Mississippi, to wit, of the County of Rankin, in said State, and this he is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid."

The second plea was non assumpsit.

The record showed that the plaintiff joined issue upon the last plea, without taking any notice of the first.

In May, 1843, the cause went to trial, upon this state of the pleadings, after a discontinuance had been entered as to Fatheree, when the jury, under instructions given by the court, found a verdict for the defendant.

The bill of exceptions taken by the plaintiff, after reciting the bill and protest by David H. Dickson, calling himself a justice of the peace and ex officio notary public, proceeded thus:

"The plaintiff then introduced David H. Dickson, the notary, as a witness, who, being first duly sworn, stated on oath, that, on the day the bill fell due, he went to the Union Bank in Jackson, and demanded payment of said bill of the teller of said bank, and was answered by him that there were no funds in the bank to pay said bill. Witness did not know where said Pierson Lewis, the acceptor, 25*] lived; but on coming out of *the bank a person was pointed out to him as said Lewis, the acceptor of the bill. Whereupon witness demanded payment of said Lewis, who answered that he could not pay the same. Whereupon witness protested said bill for nonpayment, as well against the acceptor as all other parties to the same, and on that day deposited in the postoffice at Jackson notice of the dishonor of said bill, in season to go out by the next mail, directed to Paulding, Mississippi, for said Will. B. Dozier, the defendant, which is the residence and postoffice of said Dozier, who is the drawer of said bill, advising him of the nonpayment thereof by the acceptor, and that the holder looked to him for payment.

"On his cross-examination, witness stated, that after he left the bank a person was pointed out to him by the plaintiff as Pierson Lewis, of whom he made demand of payment, which was refused; that the protest now attached to said bill of exchange is not the original protest made out by him on the day of said above named demand.

"That on making demand of said bill, as above stated, he made out a protest and attached the same to the bill by wafer, and delivered the bill and protest to the plaintiff; that afterwards the plaintiff sent a messenger to him, stating that said protest would not do, and requesting another; and thereupon witness tore the bill away from it, and made out another, differing from the first, and delivered it, also annexed to said bill, to said messenger. That near a year afterward the plaintiff applied, in person, to said witness, and stated that said second protest was also materially defective, and requested witness to make out another; and witness then again separated said bill from said second protest, and made out a third protest, and after wafering the bill thereto, delivered the said bill and protest to the said plaintiff, which last is the protest now read to the jury, and the two rents or multilations on said bill designate the parts at which it was wafered to each of said protests.

"That the original protest differed from the second, and the third from both the preceding.

"Whereupon the defendant, by attorney, moved the court to exclude said bill of exchange from the jury for the want of valid protest; which motion, after argument, the court sustained, and instructed the jury that the plaintiff could not sustain his action on the bill of exchange, unaccompanied by a protest.

"To which plaintiff's counsel excepted, and tendered this bill of exceptions before the jury retired from the box, and prayed that the same may be signed, sealed, and made a part of the record in this cause; which is done accordingly.

"S. J. Gholson. [Seal.]"

*Upon this bill of exceptions the case [*26 came up to this court.

It was argued by Mr. Bibb for the plaintiff in error, and Mr. Crittenden for the defendant in error.

Mr. Bibb for the plaintiff in error, made four points:

1st. That the judge erred in excluding the notarial protest from the jury.

2d. The court erred in the instruction given to the jury.

3d. The judge erred in taking upon himself to decide the facts testified by the witness, instead of leaving it to the jurors to respond to the facts properly within their province.

4th. That upon the evidence, the plaintiff was entitled to verdict and judgment; and that the decision of the court, as certified in the bill of exceptions, was erroneous.

No protest of the bill, which was an inland bill, was necessary to enable the plaintiff to sustain his action for the sum named in the bill. Brough v. Parkins, 2 Ld. Raym. 992; Chitty on Bills, 9th Lond. ed. 334, 335, 464, 465; 3 Kent's Com. 93, 94.

The proof of the demand of payment, of the refusal, and of notice to the defendant of the dishonor of the bill, was sufficient. Chitty on Bills, 9th Lond. ed. 335, 658, 659; Townsley v. Sumrall, 2 Peters, 170.

The judge gave to the certificate of protest of an inland bill, made by the notary residing in the State and district wherein the suit was brought and trial had, a magnified dignity, a power of diction, self-sufficient and indispensable, which the law did not allow to a notarial certificate in such a case.

In Townsley v. Sumrall, the Supreme Court of the United States said: "It is admitted, that, in respect to foreign bills of exchange, the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence." "But where the parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And, accordingly, even in cases of foreign bills, drawn upon, and protested in, another country, where the suit is brought, courts of justice sitting under the common law require that the notary himself should be produced, if within the reach of process, and his certificate is not, per se, evidence. This was so held by Lord Ellenborough in Chesmer v. Noyes, 2 Campbell's R. 129." Townsley v. Sumrall, 2 Peters, 179, 180.

The plaintiff, Bailey, produced the notary, David H. Dickson, as a witness. His statements, upon oath, in chief and *upon [*27 cross-examination, proved every fact—of presentation of the bill at the proper time for payment, the demand of payment thereof made of

the acceptor, his refusal to pay, the protest for nonpayment, and the notice of the dishonor of the bill sent to the drawer by the first mail after the dishonor of the bill.

When the notary so testified in open court, at the trial, of what importance was the notarial certificate made by him ex parte? That the notary made three or three dozen notarial certificates of protest is immaterial. In what respect did the first, second, and third certificates of the notary differ one from another? It is not pretended that they were contradictory the one to another, nor that either was contradictory to the evidence given by the notary to the court and jury when on his oath. In such case, the credibility and weight of the evidence would have been a question of fact proper for the jury to try, and not a question of law to the court.

Supposed omissions were the subjects of the several notarial certificates, not falsehoods.

The evidence, as given at the trial, was sufficient to maintain the action so brought against the drawer of the bill of exchange; and the instruction of the court to the jury was erroneous

Mr. Crittenden, for the defendant in error, said that the only question in the case related to the sufficiency of the evidence of protest offered by the plaintiff.

By the laws of the State of Mississippi, a protest was necessary and indispensable to the plaintiff's right of recovery. Statute Laws of Mississippi, page 372, 8th section, and page 375, section 17, etc.; Offet v. Vick, Walker's Reports, Mississippi, 100.

The instrument offered in evidence as such was no legal or valid protest, because the justice of the peace (David H. Dickson) who made it had no authority so to do, it not appearing that there was no notary public in Jackson at the time ready to act, and his authority, by law, being only to make protest for want or in default of a notary public. Statute Laws of Mississippi, section 8, page 373.

If Dickson, as a justice of the peace, was under the circumstances, authorized to protest, the instrument offered in evidence as a protest, made out near a year after the transaction, cannot be taken or regarded as an authentic or legal instrument, admissible as evidence, especially as it appears that it was neither the first nor second protest made in reference to the same occasion.

288*] *It would be subversive of the security and certainty of commercial interests and dealings in such transactions, if such an instrument as that offered in evidence in this case should be received and allowed the effect of a legal protest. The first protest, made at the time of the alleged demand and refusal of payment, is suppressed. A second edition of it, made out some time after, is also suppressed. And the one now offered in evidence is the third edition, fabricated about one year after the transaction. The proof is, also, that each of these differed from the other. It is impossible as it seems to me, that such an instrument can be regarded as a protest, or admitted in evidence as such.

On both grounds—1st. That Dickson had no authority to protest; and 2d. That if he had, the instrument offered in evidence was no protest—*it seems clear* that the instruction of the court was correct, and that therefore the judgment ought to be affirmed.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States held by the district judge in and for the Southern District of Mississippi.

The suit was brought on an inland bill of exchange by the indorsee against the drawers, and resulted, in the court below, in a verdict for the defendant on an objection taken to the validity of the protest.

The statute of Mississippi provides for protesting inland bills in case of non-acceptance, or of nonpayment by the drawee, after due presentment, in like manner as in case of foreign bills of exchange; and allows five per cent. damages on the amount for which the bill is drawn. Howard & Hutchinson, Statutes of Miss. pp. 372, sec. 8; 375, sec. 17; and 376, sec. 20.

On the trial, the notary was called as a witness by the plaintiff, and proved the presentment of the bill at maturity, demand of payment, and refusal, and notice to the drawers. And further, that he drew up the protest in form at the time and delivered it to the holders, but that, on account of some alleged defect, which is not stated in the bill of exceptions, it was returned to him, and a second one made out, and delivered, which was also subsequently returned, and a third drawn up, which was the protest offered in evidence. It was made out nearly a year after the presentment.

The court below decided, that the protest was invalid, and instructed the jury that the plaintiff could not recover, unless the bill had been duly protested according to the requirement of the statute. Whereupon a verdict was rendered for the defendant.

*The bill was presented and the pro- [*289
test made out by a justice of the peace, as a notary ex officio; and on the argument the ruling of the court was sought to be sustained, on the ground that the power of this officer to protest bills extended only to cases where the notary was absent or could not be procured. But, on looking into the laws of Mississippi, it was found that a subsequent statute had given the power to this officer in all cases, without any qualification, and the point was given up How. & Hutch. p. 430, sec. 24.

The ground of objection, therefore, is narrowed down to the time when, and the circumstances under which, the notarial protest was drawn up, in form. And on looking into the cases and books of authority on the subject, it will be found, that, if the bill has been duly presented for acceptance, or payment, and dishonored, and a minute made, at the time, of the steps taken which is called noting the bill, the protest may be drawn up in form afterwards, at the convenience of the notary. And it has been held, if drawn up at any time before the trial, it will be sufficient. Chitty on Bills, 334, 436, and cases, ed. 1842.

The minute contains a brief record of the facts which transpired on presenting the bill, and the protest, as subsequently made out, is but an extension of them in the customary form. The time of the extension, therefore, would seem to be of no great importance.

For the same reason, if a mistake should occur, no great danger need be apprehended if the notary is permitted to correct it, provided the regular steps have been taken, and noted, to charge the parties. The amendment would not be made from memory, or recollection, but from a written memorandum of the facts.

But, without pursuing this view of the case further, a decisive ground against the ruling of the court below is, that a protest of the bill was not essential to enable the plaintiff to recover.

The statute of Mississippi is taken, substantially, from the 9 and 10 Wm. III., ch. 17, amended by the 3 and 4 Anne, ch. 9, under which it has always been held by the courts in England that the action at common law was not thereby taken away; but that an additional remedy was given, by which the holder could recover interest and damages on an inland bill in cases where he was not entitled to them at common law. And that if he chose to waive the benefit of the statute, he might still recover the amount due on the bill, by giving the customary proof of default and notice. 2 Ld. Raym. 992; S. C. 1 Salk. 131; S. C. 6 Mod. 80; 2 Barn. & Ald. 696; Chitty on Bills, 466.

30*] *The act of Mississippi is not more explicit and positive in its terms, in respect to the duty of protesting, than that of the 9 and 10 Wm. III. as will be seen on a comparison of the two acts, and should receive a similar interpretation. It follows, therefore, from this view, as the plaintiff did not claim the five per cent. damages given by the act, he should have been allowed to recover the amount of the bill, principal and interest, on the testimony of the notary alone, independently of the written protest.

It appears from the record that the defendant put in two pleas to the jurisdiction in the court below, for the want of proper parties; and also the plea of non assumpsit. To the latter, the similiter was added, upon which issue the cause went down to trial. No notice was taken of the pleas to the jurisdiction.

It is suggested that this affords ground of error on the record.

The plea of non assumpsit in bar of the action operated as a waiver of the pleas to the jurisdiction, which doubtless furnishes the reason why no notice was afterwards taken of these pleas by either party. 3 Johns. 105; 6 Bac. Abr. tit. Pl. & Pr. let. a, pp. 186, 187; Gould, Pl. ch. 5, sec. 13.

They were virtually abandoned by the defendant.

It was also suggested, that it appeared from the declaration that Fatheree, the payee of the bill, was a citizen of Mississippi, and that the plaintiff deriving title from him, though a citizen of Virginia, could not maintain the action, for want of jurisdiction within the eleventh section of the Judiciary Act.

The answer to the suggestion is, that the fact upon which it is founded is not sustained by the record. The suit was brought, originally, against Dozier and Fatheree, the drawer and payee, indorsers jointly, who are described in the commencement of the declaration as citizens of the State of Mississippi. But in a subsequent part of the declaration it is averred, that Fatheree, at the time the bill was drawn, and also at the time of its transfer to the plaintiff, was an alien, and resident of Texas.

The suit was discontinued as to Fatheree before the trial, which left it between the plaintiff and the defendant alone.

The plaintiff being a citizen of Virginia, and deriving title through a person competent to maintain a suit in the Circuit Court against the defendant, that court properly took jurisdiction of the case.

In every view taken of the case, we think the court below erred, and that the judgment should be reversed.

Judgment reversed, with venire de novo by the court below.

*Order. [*31

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, Plaintiffs in Error.

v.

HENRY K. MOSS, William H. Shelton, Robert A. Patrick, and Chas. Lynch, Defendants.

Jurisdiction—action on notes by indorsee in U. S. court—citizenship of payee not alleged—money counts—presumptions—circuit court, after adjournment sine die, cannot set aside its own judgment on motion.

Where a declaration contained special counts upon promissory notes, and also the common money counts, although the jurisdiction of the court was not apparent upon the special counts, yet the money counts, sustained by evidence, might have been sufficient to sustain it; and this court will presume such evidence to have been given if the record is silent upon the subject, and if no objection was made to the jurisdiction in the progress of the trial.

Judgment having been rendered for the plaintiffs, it was not competent for the court below to strike out the judgment at the next term, on the ground of supposed want of jurisdiction.

The power of a court over its records and judgments examined and stated.

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

In 1838 the two following notes were executed, viz.:

$10,715 $\frac{53}{100}$ Brandon, March 17th, 1838.

Nine months after 1st April, 1838, we, or either of us, promise to pay to Briggs, Lacoste & Co., or order, for value received, ten thousand seven hundred and fifteen $\frac{53}{100}$ dollars.

payable and negotiable at the Commercial Bank in Natchez.

H. K. Moss,
W. H. Shelton, Sec'ty.
R. A. Patrick,
Charles Lynch.

Indorsed, "Briggs, Lacoste & Co."

$10,876 $\frac{87}{100}$ Brandon, March 17th, 1838.

Eleven months after 1st April, 1838, we, or either of us, promise to pay to Briggs, Lacoste 32*] & Co., or order, for value received, *ten thousand eight hundred and seventy-six $\frac{87}{100}$ dollars, payable and negotiable at the Commercial Bank in Natchez.

(Signed) H. K. Moss,
W. H. Shelton, Sec'ty.
R. A. Patrick,
Charles Lynch.

Indorsed, "Briggs, Lacoste & Co."

In March, 1840, the Bank of the United States brought suit, in the Circuit Court of the United States for the Southern District of Mississippi, against Henry K. Moss, William H. Shelton, Robert A. Patrick, Charles Lynch, and Charles A. Lacoste. On the same day, a declaration was filed, consisting of five counts, in which all the defendants were averred to be citizens of Mississippi. The first two counts were upon the notes, each count being upon one note. In the first count, the indorsement is thus averred: "And the said Charles A. Lacoste, together with Charles Briggs and Louis Hermann, who are not sued in this action, not being citizens of this State, by the name and style of Briggs, Lacoste & Co., being partners in trade, using the name and style of Briggs, Lacoste & Co., to whom or to whose order the payment of the sum of money in the said note," etc., and in the second count, upon the other note, it is thus stated: "And then and there delivered the same to said Briggs, Lacoste & Co., and the said Briggs, Lacoste & Co., of which firm the said defendant, Charles A. Lacoste, is a partner, the rest not being citizens of this State, to whom or to whose order the payment of the sum of money in the said note specified was by the same to be made, after the making of the said note, and before the payment of the said sum of money therein specified, to wit, on the day and year last aforesaid, and at the district aforesaid, indorsed the same note in writing, by the name of Briggs, Lacoste & Co.," etc.

The other three counts in the declaration were the common money counts.

The defendants all appeared, and pleaded the general issue.

At November Term, 1841, on motion of the plaintiffs' attorney, the suit was discontinued as to Lacoste, and a jury, being impaneled, found a verdict for the plaintiffs, assessing the damages at $26,485.66, for which sum judgment was entered up.

At May Term, 1841, the defendants, by their counsel, moved the court to set aside the verdict and judgment rendered in the cause, because the court had not jurisdiction; which motion was sustained. The verdict and judgment were set aside, and the case dismissed for want of jurisdiction; to which decision the plaintiffs filed the following bill of exceptions:

33*] "Be it remembered, that at the present term of this court the defendants in the above case came into court and moved the c to set aside the verdict and judgment in case rendered at the last term of this c and to dismiss the suit for want of jurisdi of the court; which motion is in the words figures following: "The defendants by attorney move the court to set aside the ve and judgment rendered in this cause, an dismiss the suit, because the court had no risdiction of the cause." And thereupon the plaintiffs and objected to said motion, the court, without any evidence other than record in said cause, sustained the said de ants' motion, and ordered said verdict and j ment rendered in this case at the last ter this court to be set aside, and the suit missed; to which opinion of the court in taining said motion, and setting aside said dict and judgment, and dismissing said the plaintiffs by their counsel except, and that this their bill of exceptions be sig sealed, enrolled, and made a part of the re in this cause, which is done accordingly.

"J. McKinley. [SEA

Upon which exception, the cause came u this court.

The cause was argued by Mr. G. M. Wha and Mr. Sergeant for the plaintiffs in erro counsel appearing for the defendants in e

The error assigned is, that the court b erred in setting aside, at May Term, 1842, judgment rendered at November Term, 1 in favor of the plaintiff.

The judgment was set aside at a term su quent to that, at which it was rendered; this was done for alleged want of jurisdic in the court below over the cause of act The defect of jurisdiction was alleged to a form the first count of the narration not a ring that one of the payees and indorsers of note, Lacoste, was a citizen of some other St than Mississippi.

That the discontinuance of the suit as to coste was not erroneous, and was a local pr tice sanctioned by this court, they cited McA v. Doremus, 5 How. 53. See How. & Hut Miss. Dig. 596, for the law of that State. T remaining three counts in the narration w the common money counts, and in them th was no pretense of error.

The first question arising upon the rec was as to the power of the Circuit Court to aside its former judgment. They conten that it was a general rule, that the same co which enters up a judgment cannot set it asi at a subsequent *term, for errors of law. [* This would be tantamount to the power of versing its own judgment.

The power of setting aside or opening ju ments for fraud, irregularity, or misprision the clerk, they asserted to be a different pow

As authority for their view of the first qu tion, they cited and relied upon the followi cases:

In the courts of the United States, Assess of Medford v. Dorsey, 2 Wash. C. C. R. 43 The Avery, 2 Gall. 386; Cameron v. McRober 3 Wheat. 591; Jackson v. Ashton 10 Pete 480. Ex-parte Crenshaw, 15 Peters, 119, th said, was not a decision the other way, becau there the Supreme Court merely revoked mandate, and declared its former judgment nullity, as the cause had never been before

Washington Bridge Co. v. Stewart, 3 How. 413; Jenkins v. Eldridge, 1 Wood. & M. 61. were also cited.

In the Supreme Court of Pennsylvania, Catlin v. Robinson, 2 Watts, 373; Stephens v. Cowan, 6 Ib. 511; Gallup v. Reynolds, 8 Ib. 424.

In New York, Barheydt v. Adams, 1 Wend. 101; Soulden v. Cook, 4 Ib. 217.

In North Carolina, Anon. 2 Haywood, 73; S. C. Taylor, 146; Ib. 239; Bender v. Asken, 2 Dever. 149; Skinner v. Moore, 2 Dev. & Bat. 138.

The like general rule is settled in England. During the same term, judgments are amendable at common law—being then in paper, in fieri, in the breast of the court. Afterwards, they are only amendable under the Statutes of Amendments or Jeofails. 2 Tidd's Pr. 975; 2 Archb. Pr. 243; Ib. 202, 203, as to setting aside judgments for irregularity.

If courts were not held strictly to the rule contended for, what would become of acts imposing limitations on writs of error, or of those protecting purchasers at sheriffs' sales?

The second question was this: Was the judgment entered at November Term, 1841, void or irregular, because the foreign citizenship of Lacoste was not alleged in the first count? They contended that this was not the case; it was merely matter assignable as error, upon a writ of error.

They cited, on this point, McCormick v. Sullivant, 10 Wheat. 192; Voorhees v. Bank of United States, 10 Peters, 449; Kemp v. Kennedy, 5 Cranch, 185; Skillen v. May, 6 Ib. 267.

The courts of the United States are courts of limited, but not of inferior jurisdiction. Their judgments, until reversed on error, are conclusive between parties and privies.

Under this head, they further contended that there was not necessarily a defect of jurisdic- [*35
35*] tion in the Circuit Court over the *first two counts, because it did not appear but that Lacoste was a citizen of another State when the note was indorsed. If he were so then, the jurisdiction of the Circuit Court would not be taken away, although, at the time of the bringing of the present suit, he had become a citizen of Mississippi. The 11th section of the Judiciary Act of 1789 would be fully satisfied by this construction. The right of the assignee of a chose in action to sue in the federal court could not be taken away by his assignor subsequently becoming a citizen of the same State with the defendant.

In the third place, they argued, that, under the statute law of Mississippi governing the case, the judgment of November Term, 1841, was not erroneous, and that consequently, on a writ of error, this court would not have reversed the judgment. Although by the common law, where, in a civil suit, one count is good and the others bad, and there is a general finding, judgment will be arrested, yet, by the statute law of Mississippi, a different rule prevails. They referred to the 12th section of the Act of 1820. How. & Hutch. Dig. 591. The defendant must apply to the court to instruct the jury to disregard the faulty count.

They contended that this statute was binding upon the Circuit Court of the United States for Mississippi. The Act of Congress of May 19, 1828, 4 Statutes at Large, 278, provides that the forms and modes of proceeding then used in the highest courts of original and general jurisdiction in the States admitted into the Union since 1789 shall be the rules of the United States courts held in those States, subject to alterations and additions by said United States courts, or by the Supreme Court of the United States. The statute of Mississippi was passed eight years before this act of Congress. That State was admitted into the Union in 1817.

But, further than this, the Circuit Court of the United States for the Southern District of Mississippi adopted the practice and proceeding of the State courts by their printed Rules of 1839. See section 30 of those Rules.

This provision of the Act of 1820 binds the United States courts in Mississippi, as one of the "forms and modes of proceeding" in that State. In support of this, they cited United States v. Boyd, 15 Peters, 187; McNutt v. Bland, 2 How. 9; Gwin v. Breedlove, Ib. 29.

For the distinction between final and mesne process, as bearing upon this head, they cited Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 Ib. 608.

They admitted that the statute law of Mississippi (sec. 33, Act of 13 May, 1837; How. & Hutch. Dig. 595), which compelled plaintiffs *to sue in one action, the drawers and in- [*36
dorsers of promissory notes who live in Mississippi, does not confer upon the courts of the United States jurisdiction of a case where otherwise they would not have it; nor is such a joint suit maintainable in the federal courts, as has been decided in Dromgoole v. F. & M. Bank, 2 How. 241; Keary v. Same, 16 Peters, 89, and Gibson v. Chew, Ib. 315. But inasmuch as the suit had been, before verdict, properly discontinued as to Lacoste, this difficulty was removed, and the action stood as if originally brought against the present defendants alone.

In further proof of the error of setting aside the judgment in the Circuit Court, the three last counts showing jurisdiction, they cited and relied upon Mollan v. Torrance, 9 Wheat. 537.

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

In this case, at the November Term of the Circuit Court for the Southern District of Mississippi, A. D. 1841, a verdict was found for the plaintiffs against the defendants for $26,485.66. Final judgment was then rendered for that sum.

At the ensuing May term, on motion of the defendants, the court set aside both the judgment and verdict, and dismissed the case for what it considered to be a want of jurisdiction.

To this the plaintiff excepted, and a writ of error is now before us to reverse that decision.

The first question is, whether any want of jurisdiction appears on the record.

No evidence is reported, nor any defect apparent, which seems to raise any doubt concerning the jurisdiction, unless it be in the pleadings.

The declaration contained the usual money counts, beside special ones on two notes, made to Briggs, Lacoste & Co., or their order, and by them indorsed to the plaintiffs.

The defendants pleaded that they did not promise as alleged, and a verdict was found against them, without any statement being given of the evidence laid before the jury or the court, though copies of the two notes named in the declaration are printed in the case.

The various questions which this state of the record presents, and which bear upon the jurisdiction, can, when analyzed and separately considered, be disposed of chiefly by adjudged cases, without any labored examination of the principles involved. The special counts on the notes standing alone might not be sufficient. under the 11th section of the Judiciary Act, to give jurisdiction to a circuit court of the United States, without an allegation that the promisees resided in a different State from the promisors. Turner v. Bank of North America, 37*] *4 Dall. 8, and 9 Wheat. 539; Dromgoole et al. v. Farmers' and Merchants' Bank, 2 How. 243; and Keary et al. v. Farmers' and Merchants' Bank of Memphis, 16 Peters, 95.

But it is very clear, that the money counts aver enough to give jurisdiction to the court below over them, as they state an indebtedness and a promise to pay, made directly by the defendants to the plaintiffs. Mollan v. Torrance, 9 Wheat. 539; Bingham v. Cabbot, 3 Dall. 41.

It is well settled, likewise, that the notes would at the trial be evidence of money had even of an indorsee. 4 Esp. Ca. 201; 7 Halsted, 141; 6 Greenl. 220; 12 Johns, 90; 8 Cowen, 83; Wild v. Fisher, 4 Pick. 421; Webster v. Randall, 19 Pick. 13; Ramsdell v. Soule, 12 Pick. 126; Ellsworth v. Brewer, 11 Pick. 316; 16 Pick. 395; State Bank v. Hurd, 12 Mass. 172; 15 Mass. 69, 433; Page's Administrators v. Bank of Alexandria, 7 Wheat. 35; 2 Wm. Bl. 1269.

But they probably would not alone be sufficient, by the 11th section of the Judiciary Act, to give jurisdiction over them to a circuit court of the United States, under these money counts any more than the others, without additional evidence that the original promisees resided in a different State from the promisors. 7 Wheat. 35, semb.

No decision, however, is made on this point, as from this record we cannot learn but that such additional evidence was given, or that other evidence than the notes was not introduced in support of the money counts.

It is not competent for this court now to presume that neither of these kinds of evidence was offered beside the notes. The inference, on the contrary, is the other way, or the defendants would probably have objected to the jurisdiction at the trial, and the jury not found a verdict for the plaintiffs, or the court not have rendered judgment upon it.

In the next place, if such a state of things did happen as there having been no additional or other evidence, it is clear from the record. that no advantage was taken of it till after final judgment, and at the following term of the court, and then by motion only.

But it was then too late, after final judgment, and at the next term, and by motion only, to set aside the judgment and verdict on account of a supposed want of jurisdiction. At the next term, if no final judgment had yet been rendered, the court might, from its minutes, have *had the verdict* applied to the counts on which it was in truth found. 2 Howard, 263; 1 Saund. 171, b; Tidd's Pr. 901.

And if, in this case, it was found on the two special counts alone, the judgment on the verdict might then have been arrested *for [*38 want of proper averments in them conferring jurisdiction.

So it might have been arrested for a misjoinder of bad counts with good, if the verdict has not been applied to the latter, but remains general. Hopkins v. Beedle, 1 Caines' Rep. 347; 5 Johns. 476; 1 Chit. Pl. 236, 448; 1 Taunt. 212; 2 Bos. & Pull. 424; Cowp. 276; 3 Wils. 185; 2 Saund. 171, b; 3 Maule & Selw. 110; Doug. 722.

But here jurisdiction did appear on three of the counts, and also final judgment had been rendered in November previous.

The action was not regularly on the docket at the new term in May following, when the court undertook to set the judgment aside. The power of the court over the original action itself, or its merits, under the proceedings then existing, had been exhausted—ended. Jackson v. Ashton, 10 Peters, 480; Catlin v. Robinson, 2 Watts, 379; 12 Peters, 492; 3 Bac. Abr. Error, T. 6; Co. Lit. 260 a; 7 Ves. 293; 12 Ves. 456; 1 Stor. P. 310; 1 Hoff. Pr. 559; 2 Smith Ch. 14; 9 Peters, 771; 3 Johns. 140; 9 Johns. 78: Kelly v. Kezir, 3 Marsh. R. 268.

This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court of a previous term, is never a sufficient justification for revising and annulling it, at a subsequent term, in this summary way, on motion. See cases ante; 2 Gall. 386; Cameron v. M'Roberts, 3 Wheat. 591; 2 Haywood, 237; Skinner v. Moor, 2 Dev. & Bat. 138; Wash. Bridge Comp v. Stewart, 3 How. 413; and Jackson ex al. v. Ashton, 10 Peters, 480; Lessee of Hickey et al. v. Stewart, 3 How. 762; Henderson v. Poindexter, 12 Wheat. 543; Elliott et al. v. Peirsol et al. 1 Peters, 340; Wilcox v. Jackson, 13 Peters, 511; Rose v. Himely, 4 Cranch, 241.

We would not be understood by this to deprive a court, at a subsequent term, of power to set right mere forms in its judgments. Wheat. 591; 3 Peters, 431; 12 Wheat. 10; Lawrence v. Cornell, 4 Johns. Ch. 542. Or power to correct misprisions of its clerks. The Palmyra, 12 Wheat. 10; Hawes v. McConnel, 2 Ohio, 32; 1 Greenl. 375; Com. Dig. Amendment, T. The right to correct any mere clerical error so as to conform the record to the truth, always remains. Sibbald v. United States, 12 Peters, 492; Newford v. Dorsey, 2 Wash. C. C. 433; 6 Watts. 513; 8 Watts. 424; 1 Wendell, 101; 4 Wendell, 217; 1 Bibb, 324; 2 Bibb, 8; Weston's case, 11 Mass. 417; The Bank v. Wistar, 3 Peters, 431. Irregularities, also, in notices, mandates, and similar proceedings can still, in some cases, be amended. Ex-parte Crenshaw, 15 Peters, 123.

*Indeed, any amendments permissible [*39 under the Statutes of Jeofails may be proper at subsequent terms. 2 Tidd's Pr. 917; 2 Arch. Pr. 202, 243; and at times even after a writ of error is brought. 2 How. 243; 3 Johns.

95; Poph. 102; Pease v. Morgan, 7 Johns. 468; Cheetham v. Tillotson, 4 Johns, 499; 1 Johns. Cas. 29; 2 Johns. 184; 1 Bing. 486; Douglass v. Bean's Executors, 5 Bing. 60. So it is well settled, that at a subsequent term, when the judgment had before been arrested, an amendment may be made to apply the verdict to a good count if another be bad, and the judge's minutes show that the evidence applied to the good count. Matheson's Adm. v. Grant's Adm. 2 How. 282, and cases cited there.

So a mistaken entry of mandate, in a case where the parties were not at all before the court may be revoked at a subsequent term, the hearing having been irregular and a nullity. Ex parte Crenshaw, 15 Peters, 119; 14 Peters, 147. but no cause of this kind appears here in the proceedings, and nothing else appears to justify the court in going back to a final judgment of a previous term and summarily setting it aside for an error in the law or the facts, and dismissing the whole case from the docket.

The only relief for errors in law in such cases is usually by new trial, review, writ of error, or appeal, as either may be appropriate and allowable by law, or by some other mode specially provided by statute; where, for instance, a judgment has occurred at some previous term by default, through accident or some circumstance, which clearly entitles the party to redress. 12 Peters, 492; Jenkins v. Eldridge et al. 1 Wood. & M. 65, and cases cited; Anthony et al. v. Love, 3 Ohio, 306; Bennett v. Winter et al. 2 Johns. Ch. 205; 3 Marsh. R. 268; Southgate v. Burnham, 1 Greenl. 375.

Beside these remedies, judgments entered up by fraud may, perhaps, on due notice, by scire facias, or otherwise, be vacated at a subsequent term by the same court, or if offered in evidence be deemed a nullity, should fraud be clearly proved to have taken place. 2 Roll. Abr. 724; 2 Bac. Apr. Error, T. 6.

But the present judgment was neither fraudulent nor void on its face, nor even voidable. Had it been rendered on the special counts alone, it might have been voidable by a writ of error, for not alleging jurisdiction in the pleadings. See ante; 2 How. 243; Capron v. Van Norden, 2 Cranch, 126. But it has been repeatedly settled, that even then, without any plea to the jurisdiction, and after a verdict for the plaintiff on the general issue and final judgment, it is not a nullity, but must be enforced till duly reversed. Kempe's Lessee v. Kennedy, 5 Cranch, 185; and Skillern's Executors v. 40*] May's Executors, 6 *Cranch, 267; McCormick v. Sullivant, 10 Wheat. 192; Voorhees v. Bank of United States, 10 Peters, 449; 3 Ohio, 306; Wilde v. Commonwealth, 2 Metc. 408; Hopkins v. Commonwealth, 3 Metc. 460. Because it would be a judgment rendered by a court, not of inferior, but only limited, jurisdiction, and the merits would have been investigated and decided by consent. This view is supported by the English doctrine. There, though judgments of inferior courts or commissioners are often void, when on their face clearly without their jurisdiction, and may be proved to be so and avoided without a writ of error, 3 Bac. Abr. Error, A; 10 Cok. 77 a; Hawk P. C. ch. 50, sec. 3; yet the judgment of a superior court is not void, but only voidable by plea on error. Bac. Abr. Void and Voidable, C; 2 Salk. 674; Carth. 276. Even where the record of a circuit court did not contain any averments giving jurisdiction, this court has held that, at a subsequent term, after final judgment, the same tribunal which rendered it could not set it aside on motion. Cameron v. McRoberts, 3 Wheat. 591. And we have repeatedly decided as to judgments of this court, that they could not be changed at a subsequent term, in matters of law, whether attempted on motion, or a new writ of error, or appeal, on the mandate to the court below. Hunter's Lessee v. Warton, 5 Cranch, 316; 6 Cranch, 267; 1 Wheat. 354; Santa Maria, 10 Wheat. 442; Davis v. Packard, 8 Peters, 323; 9 Peters, 290; 12 Peters, 491, 343; 15 Peters, 84.

Without going further, then, into the reasons or precedents against the course pursued in the court below, the last judgment there, on the motion, must be reversed, and the case be reinstated as it stood before.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court on the motion dismissing this case be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to re-instate this case as it stood in that court before the said judgment dismissing the case.

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*JONATHAN W. NESMITH and Thom- [*41
as Nesmith, Complainants,

v.

THOMAS C. SHELDON, Horace H. Comstock, David French, William E. Peters, James Forton, Alta E. Mather, Henry B. Holbrook, Samuel P. Mead, Francis E. Eldred, Phœbe Ann Dean, Cullen Brown, and Charles H. Stewart, Defendants.

Certificate of division, form of.

Where it is evident, from the record, that the whole case has been sent up to this court upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction.

THIS case came up from the Circuit Court of the United States for the District of Michigan, on a certificate of division in opinion between the judges thereof.

The facts were briefly these:

The second section of the 12th article of the constitution of Michigan is in these words, viz.: "The Legislature shall pass no act of incor-

poration, unless with the assent of at least two thirds of each House."

On the 15th of March, 1837, the Legislature passed an act entitled, "An Act to organize and regulate banking associations."

Under this act a company was formed and commenced doing business as a banking association, under the name of the Detroit City Bank.

On the 15th September, 1838, Harris, the cashier of the Detroit City Bank, drew a bill of exchange upon the Albany City Bank, in the State of New York, in favor of J. W. and T. Nesmith, for six hundred dollars, payable nine months after date, which bill protested for nonpayment when due.

In February, 1833, whilst the bill was running, the Detroit City Bank became insolvent.

The plaintiffs, Nesmiths, sued the bank upon the bill, and obtained a judgment in May, 1841, in a State court.

The plaintiffs then proceeded, under a statute of the State, against the directors of the bank, and obtained a judgment in July, 1841, in the Circuit Court of the United States. An execution was issued upon this judgment, which was returned wholly unsatisfied.

The plaintiffs then, under the same statute, filed a bill on the equity side of the Circuit Court against the stockholders, being the defendants mentioned in the title of this case, seeking to hold them individually liable, in proportion to the amount which each one held in the stock of the bank.

To this bill the defendants put in general demurrers.

The cause was heard on the bill and demurrers. The following points and questions were made and presented by the complainants:

42*] *1. Whether the banking association organized under the Act of the Legislature of the State of Michigan, entitled, "An Act to organize and regulate banking associations," approved March 15th, 1837, and the amended Act, entitled, "An Act to amend an act entitled 'An Act to organize and regulate banking associations and for other purposes,'" approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the constitution of the State of Michigan.

2. Whether said acts of the Legislature, or either of them, are in accordance with the provision of the constitution of the State, and valid, or contrary thereto, and void, in whole or in part.

3. And if so much and such parts of said acts as purport to create corporations, or bodies corporate, are repugnant to the constitution and void, whether the remaining parts of said acts are not valid, and the directors and stockholders of the association, set out in the bill, liable for the debts thereof, according to the provisions of said amended act.

4. Whether the stockholders of the Detroit City Bank, are, or are not, liable in their individual capacity, as corporators, or as members of a joint stock association, company, or copartnership, to pay the debts due to the complainants, as set forth in the bill.

5. Whether the defendants are, or are not. *liable to pay the* debt due to the complainants, *set out in the bill of* complaint.

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On the part of the defendants, the following points were made:

1. The Supreme Court of the State of Michigan has decided that the acts under which the Detroit City Bank was organized were intended to authorize the creation of an indefinite number of corporations, by the prospective action of individuals; that they were so far unconstitutional and void, and under them no corporate body could legally come into existence. This decision of the Supreme Court of the State will not be questioned by the courts of the United States, but will be followed and applied to the latter.

2. If the Detroit City Bank was not validly in existence as a corporation, or artificial person, then it was not exempted from the penalties and restrictions of the laws of Michigan on the subject of unauthorized banking, commonly called the restraining laws.

3. Under the acts last referred to, the claim of the complainants was illegal and forbidden, and could not be the basis of a recovery.

4. The Detroit City Bank having contracted as a corporation, when it was not such, its contracts on that account are invalid.

*5. If the Detroit City Bank was not a [*43 corporation, then the defendants can be liable only as general partners.

6. If liable only as general partners, the judgment against the directors is a merger of the whole claim.

7. If the defendants are general partners, the remedy against them is complete at law.

8. If the court shall hold that the Detroit City Bank was validly a corporation, and authorized to engage in banking, then it is further contended by the defendants, that the bill which forms the foundation of the claim of the complainants was illegal, because not payable on demand.

9. The defendants are not concluded by the judgment against the bank, but may dispute the validity and obligation of the original claim.

Upon all the above points and questions, as made and presented by the complainants and defendants, the opinions of the judges of the Circuit Court were opposed; wherefore, it was ordered that the same be stated, under the direction of the judges, and certified, under the seal of this court, to the Supreme Court, at their next session to be held thereafter.

The case was very elaborately argued in print by Mr. E. C. Seaman and Mr. J. M. Root for the plaintiffs, and Mr. George E. Hand and Mr. Theodore Romeyn for the defendants. But as the case went off upon a point of jurisdiction, the arguments are omitted.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before the court upon a certificate of division from the Circuit Court for the District of Michigan. Upon opening the record, it is evident that the whole case has been sent up in this form. It is, indeed, divided into points, but most of them are merely hypothetical, and might never have arisen or required a decision upon them in the Circuit Court. For whether they would or would not arise depended altogether upon the decision of points which precede them in the statement.

Howard 6.

This subject has been frequently before the court, and we have repeatedly said, that, under such certificates of division, we have no jurisdiction. Without attempting to enumerate the cases, it is sufficient on the present occasion to refer to White v. Turk et al. 12 Peters, 238, and The United States v. Stone, 14 Peters, 524, which are decisive of this case. It is unnecessary, therefore, to examine the printed arguments that have been filed, as the case must be dismissed for want of jurisdiction.

44*] *Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no point in the case within the meaning of the act of Congress has been certified to this court, it is thereupon now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

DAVID S. STACY, Administrator of Charles S. Lee, Plaintiff in Error,

v.

J. B. THRASHER, for the use of William Sellers, Defendant in Error.

Action of debt will not lie against administrator in one State on judgment recovered against another administrator of same intestate, appointed in another State.

An action of debt will not lie against an administrator, in one of these United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another State.

The doctrine of privity examined.

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

The history of the case is this:

In April, 1836, Charles S. Lee, a resident of the County of Claiborne and State of Mississippi, was sued in the County Court of Claiborne, by Christopher Dart and William Gardner, who called themselves late merchants and copartners trading under the style and firm of Dart & Co., and stated the suit to be for the use of Christopher Dart.

It is not necessary to state the cause of action, or trace the progress of the suit minutely.

Lee appeared to the suit.

In December, 1836, his death was suggested.

In July, 1837, Ann Lee took out letters of administration upon the estate of Charles S. Lee, under the authority of the Probate Court of Claiborne County.

In September, 1837, the suit was revived against the administratrix, by a scire facias.

*In November, 1837, she appeared to [*45 the suit and pleaded the general issue.

On the 1st of December, 1838, the cause came on for trial, when the plaintiffs obtained a judgment for $6,080.99.

On the same day, viz., the 1st December, 1838, Christopher Dart, for whose use the judgment was entered, made an assignment of it to John B. Thrasher, of Port Gibson, the nominal defendant in error in the present case.

After this, however, a new trial was granted by the court of Claiborne County in the suit against Ann Lee, administratrix, which resulted in another judgment, for a different sum of money, in June, 1840.

Another new trial was granted, and in December, 1840, another judgment was rendered against the administratrix for $6,088.05.

Nothing further appears to have been done for some time. The next fact in the history of the case is, that David S. Stacy, the plaintiff in error in the present case, and a citizen of Louisiana, took out letters of administration upon the estate of Charles S. Lee, in the State of Louisiana. At what particular time these letters were taken out the record does not show.

In January, 1844, John B. Thrasher, to whom the judgment in Mississippi had been assigned by Christopher Dart, as above stated, filed a petition in the Circuit Court of the United States for the Eastern District of Louisiana, against Stacy, the administrator of Charles S. Lee. Thrasher now stated himself to be suing for the use of William Sellers, and averred that Sellers and himself were both citizens of the State Mississippi. The petitioner stated himself to be the legal owner, by transfer and assignment, of a judgment for $6,988.05, which judgment was final and definitive.

In February, 1844, Stacy appeared to the suit and filed the following exceptions and answer, which are according to the practice in Louisiana, and equivalent to a demurrer.

"David S. Stacy, a citizen of the State of Louisiana, residing in the parish of Concordia, administrator of the succession of Charles S. Lee, in the State of Louisiana, under the appointment and authority of the Court of Probates of the parish of Concordia aforesaid, being made defendant in the above entitled suit, appears and pleads as follows, by way of exception:

"1. That plaintiff in his petition does not allege or show that this honorable court has jurisdiction of this suit, as it is not therein alleged that Christopher Dart, who is declared to be the assignor of the judgment upon which this suit is brought, was either an alien or a citizen of another State than Louisiana, or *could [*46 have maintained the suit in this honorable court either against the appearer or the said Charles S. Lee.

"2. Appearer alleges that Christopher Dart and William Gardner, the alleged owners of the claim upon which the judgment was obtained in Mississippi, were citizens of Louisiana, and members of a commercial firm located in New Orleans, and could not have maintained this suit in this honorable court either against the

said Lee or against this appearer, and that this court has no jurisdiction of this suit.

"3. That the said William Gardner, one of the joint owners of said claim, was a citizen of Louisiana, and that the said Dart & Gardner could not have maintained a suit upon said claim in this honorable court either against the said C. S. Lee or against this appearer.

"4. That the said C. Dart, under an assignment and transfer of said claim from the said Gardner, could not have maintained a suit thereon in this honorable court.

"5. Appearer further excepts and says, that this honorable court has no jurisdiction over successions in the State of Louisiana, nor over the settlement of said successions and the distributions of the proceed among the creditors, nor over administrators and others appointed to administer them, nor of the establishment of claims for money against such successions; that the Court of Probate of this State have the sole and exclusive jurisdiction of all these matters; that no property belonging to a succession in the course of administration in the Probate Court, whose jurisdiction has attached over the subject matter, can be taken, levied upon, or sold by process from the courts of the United States; nor can said probate courts be ousted or disseized of their said exclusive jurisdiction once obtained, nor the property withdrawn from their control by any other tribunal. That this has been the well known and settled law of the State for the last twenty years, and that the said Dart & Gardner contracted in New Orleans, in Louisiana, under and in reference to this law, and are bound by it; appearer alleges that this honorable court, for the above reasons, has no jurisdiction in this suit, ratione personæ, nor ratione materiæ, but avers that the Court of Probates of the parish of Concordia has sole and exclusive jurisdiction thereof. Wherefore appearer prays that this suit may be dismissed at plaintiff's costs, &c.

"If all the above exceptions should be overruled, then appearer pleads that the plaintiff has neither alleged nor shown any cause of action against him whatever, nor any indebtedness to the plaintiff by the succession of C. S. Lee in the State of Louisiana.

47*] *"If the above exception should be also overruled, then defendant denies generally and specially each and every allegation in plaintiff's petition contained. Wherefore he prays that plaintiff's demand may be rejected with costs, and for general relief in the premises, &c.

(Signed) D. S. Stacy,
"Adm'or estate C. S. Lee."

On the 26th of February, 1844, Thrasher filed an amended petition, averring that Christopher Dart, the assignor of the judgment, was, at the time of the assignment, an alien, being a citizen of the republic of Texas, and resident therein, and that Charles S. Lee, at the time of said assignment and of his death, was a citizen of Louisiana.

On the 13th of March, 1844, the court overruled the exceptions, and on the 11th of April following gave the following final judgment:

"This cause came on for trial, and the law and the evidence being in favor of the plaintiff, it is ordered, adjudged and decreed, that the defendant, David S. Stacy, as administrator of *the estate of Charles* S. Lee, be condemned to pay to the plaintiff, for the use of William Sellers, the sum of six thousand nine hundred and eighty-eight dollars and five cents, with eight per cent. interest thereon per annum from the first day of December, eighteen hundred and forty, until paid, and costs of suit. Judgment rendered April 11th, 1844. Judgment signed April 18th, 1844.

(Signed) "J. McKinley."

From this decree, a writ of error brought the case up to this court.

The case was argued by Mr. T. B. Barton for the plaintiff in error, and Mr. Crittenden, Mr. Thrasher, and Mr. Henderson, for the defendant in error.

Mr. Barton, for the plaintiff in error:

The great and important question which the record presents, and to which this argument will be confined, is that to which the last exception is directed.

The petition, with the other proceedings in Louisiana upon the judgment in Mississippi, are not distinguishable from an action of debt, brought under the same circumstances, upon a like judgment, in the courts of those States where the practice is according to the course of the common law. The petition is founded, as the action of debt would be, upon the judgment. The validity and effect of the judgment must be the same in *both kinds of pro- [*48 ceedings. The case involves the question whether a judgment, rendered in one State against an administrator who has taken administration of the assets in that State, and within that jurisdiction, can be made the foundation of an action in another State against a different administrator, whose administration has been taken within the jurisdiction of the latter, of the assets within the latter jurisdiction.

There are some special circumstances in this record which arrest our attention in advancing to the discussion of the main point. Cases of this kind must always be open to remark, and entitled to grave consideration. The judgment rendered against the first administrator, which is made the foundation of a recovery against the administrator out of the assets in another jurisdiction, must be taken to have adjudged that the administrator against whom the judgment was rendered had assets to satisfy the debt. That administrator, in the proceedings against him, must have admitted, by his pleadings, that he had assets; and that will always be the case when he neglects (as was the case in Dart & Co. v. Lee's Administratrix in Mississippi) to plead plene administravit; or, assets have been denied by such plea, that issue must have been found against him. A general judgment, therefore, against an administrator, necessarily includes in it the adjudication of assets in the hands of that administrator to the amount of the judgment. According to the rigor of the common law, the judgment in that form would be absolutely conclusive against the defendant's administrator, and against the plaintiff and all others; and the only ulterior proceedings upon such judgment, if not satisfied upon an execution to be levied de bonis testatoris, would be against that administrator for a devastavit. 2 Lomax on Executors, 391, sec. 8, and 451, sec. 21.

Virginia, and perhaps others of the States, has mollified, in some respects, the rigorous

conclusion of this common law rule, but without destroying it. In its most mitigated application to such a recovery, the judgment will be at least taken, until the contrary is shown by that defendant, as a judgment that the administrator had assets for the satisfaction of the recovery. For this reason, as well as for other reasons, it is certain that we shall find no case in the English authorities where a judgment has been recovered against one administrator, in which any recovery has been sought against another administrator, unless in cases of an administrator be donis non, or unless in cases of special administrations, such as administrator durante minore ætate, etc. And, for the same reason, it is probable that no such cases can be found in any of the American authorities, even 49*] where the rules alluded to have been *mitigated. It will be found extremely difficult within the jurisdiction where administration was granted, to conceive any case of that kind. The judgment, then, upon which the petitioner founds his recovery against the administrator in Louisiana, shows upon its face that assets for its satisfaction, in the State of Mississippi, were also adjudged. The very judgment, by showing that matter, an adjudged liability of a sufficiency of estate in Mississippi, shows an eroneration of assets elsewhere than in Mississippi, and that the Louisiana administrator ought not to be charged, by a double recovery, for that which has been already or can be recovered against another representative in Mississippi.

There is also another remark that may be made upon the proceedings in this case—that the decision, if sustained, must lead to alarming mischiefs in the administration of assets which an intestate has left in two or more States. It seems, from the amended petition, that C. S. Lee, at the time of his death, was a citizen of Louisiana; that was his domicil, and consequently Ann Lee, in Mississippi, was a foreign administratrix. The bulk of an intestate's assets will almost always be found in the jurisdiction of his domicil. The proposition which is contended for to sustain this recovery goes to this extent—that if an intestate in one State had died, leaving property of the most inconsiderable value in another State, making it necessary that there should be an administration in the latter, a plaintiff, by recovering a judgment against the latter, establishing a debt of the intestate, that judgment, as contended for by the defendant in error, would be conclusive upon the administrator and the assets, in the State of the domicil, at least so far as it established the indebtedness of the intestate. In vain might the domiciliary administrator attempt, in an action brought against him upon that judgment, to prove that the plaintiff had no shadow of claim against the intestate; he would be repelled, by force of the judgment, from any such defense.

It is reasonable, that, in the international law of these States under the Constitution and acts of Congress, such ruinous stringency should be given to the judgment of one State in the courts of another?—that a judgment against the foreign administrator, who is regarded only as auxiliary or ancillary to the domiciliary *administration, and who is in practice oftentimes, in some of the States, little more than a nominal administrator, shall conclude the primary domiciliary administrator, holding the main bulk of the assets, by establishing against him and against those assets the principal fact in the case, the indebtedness of the intestate, so that they can never be extricated from this rigid conclusiveness of the foreign judgment?

*There is a further remark, that the [*50 petitioner seeks a recovery upon the Mississippi judgment against "a considerable estate, real and personal," left by the intestate in the State of Louisiana; estates of both descriptions, it would seem, are liable as assets in the hands, or under the control, of the administrator in that State. There is no principle in general jurisprudence, and particularly in the United States, better established, than that land can never be subjected to a foreign jurisdiction. Story's Confl. of Laws, pages 436, 437, secs. 522, 523.

To give to the judgments of one State validity and effect in the courts of another, is a wise provision under our system of government. It cannot, however be overlooked, that to whatever extent force is allowed to them out of the State which pronounced them, in the jurisdiction of another State, it operates as a restriction or compulsion upon this jurisdiction, making it subordinate to the jurisdiction of a foreign forum. The provision, therefore, which has been alluded to should be jealously guarded by the courts; and unless its application should be shown to be clearly reasonable, the application should be denied. It has before been intimated, that no authority can be found, certainly not in the English law, probably not in the American law, which can govern the precise case now under consideration.

Without attempting to disturb any doctrine heretofore established in regard to the conclusiveness of judgments, and the effect of the judgment of a court of one State, when sued upon or offered in evidence in the courts of another State, it is contended that that doctrine has never been extended to a case like the present, and that it would not be reasonable to give it such application. It is a principle incontrovertibly established in the English jurisprudence, in that of Louisiana (Benjamin and Slidell's Digest of Louisiana Laws, page 559, et seq.), and in all the other States, that "no one, in general, can be bound by a verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. For (as has been well said) otherwise he has no power of cross-examining the witnesses, or of adducing evidence in support of his rights. He can have no attaint, nor can he challenge the inquest, or appeal (or have a writ of error on the judgment). In short, he is deprived of the means provided by the law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice that he should be bound by the results of an inquiry to which he was altogether a stranger." 1 Stark. Law Ev. 217, 6th Am. ed.

It is not pretended that the administrator in Louisiana was *a party to the proceed- [*51 ings in Mississippi, or could by any possible means have made himself a party to them. It is incumbent upon the defendant in error clearly to show, before the jurisdiction in Mis-

sissippi shall control that of Louisiana, that the administrator of the latter State was, in the proceedings in which judgment was recovered in the former, in privity with the defendant in that suit. The contrary has been distinctly laid down by Justice Story, in his learned treatise on the Conflict of Laws, sec. 522. That is a direct authority upon the present case. It makes no difference that the judgment in the cases in Rawle, 431, to which he refers, was a judgment rendered in Barbadoes. The matter under consideration involves no discussion, as to the difference between the effect of a judgment when rendered in a State jurisdiction, and when rendered in a jurisdiction out of the United States. The point decided there was, that there was no privity between one administrator and another administrator of the same intestate, when both administrations have been granted by different jurisdictions entirely separate and independent of each other.

The jurisdiction of each State of this Union is sovereign and independent in granting letters of administration, as much so as that of any two foreign States. The grant, when made, invests the administrator under the authority of that State with the proprietorship of the effects of the intestate within that State, but, having no jurisdiction beyond its own limits, it can confer no property upon him out of those limits.

Each administrator, when several administrations are granted in several States, is made the owner of a distinct property, wholly unconnected with any other out of the State. The authority under which each derives his title is a separate sovereign power; and it is exclusively by that authority, not by virtue of testamentary appointment of the dead, that they are invested with any interest or control in the respective estates; and it is entirely to the authority from which their rights are alone derived that they are in any manner accountable. In some sense they may severally be said to be a representative of the deceased.

There would be no ground for asserting that these representatives in different States constitute one representative, as several executors under the same will, or administrators under the same jurisdiction, may constitute one executor or administrator, though the assets confided to each may be separated.

It is believed that this doctrine, here attempted to be presented, of the relation in which the separate administrators under different jurisdictions stand in these United States, has been universally recognized by the States, 52*] except so far as by *statutory law (showing that the original principal was as here stated) the doctrine has been changed or modified. It would seem necessarily so, not only as regards the relation of the administrator, but as regards the rights of the executor as affecting the assets and the representative of the deceased, for he has no lien upon the fund in the hands of the representative as the debtor, but the person of the administrator, who is, in a measure, the officer or bailiff of the court appointing him, in respect of the assets which he has in his hands, is the debtor. 1 Lomax on *Executors*, 345; Ram. on Ass. 484. What constitutes privity between one representative of a dead man and another representative depends upon no peculiar rules springing out of a practice of the Probate Court, in regard to the representatives of deceased persons, but it is to be ascertained upon principles of the common law, as applicable to cases generally, of which a variety of illustrations will be found in the books, especially 1 Stark. Law Ev. 217, et seq. Privity between one administrator and another does not depend upon, and cannot be created by, their being each of them the representative of the same intestate, though it be a duty in which they all unite. It has not been so regarded in the English law, which until the 17th Car. II. did not regard the administrator de bonis non in privity with an executor or administrator, to bring scire facias on the judgment which the executor or administrator had obtained. See authorities, 1 Lom. Ex. 325. So, if one brings several ejectments against several upon the same title, a verdict against one is not evidence against the rest, because the party against whom the verdict was had might be relieved against it, if it was not good, but the rest could not. 1 Stark. Law. Ev. 217; as the title under which all these defendants in ejectment claimed is the same, each of them, of course, must have held in privity to some one person, from whom all their titles were severally derived; nevertheless, that privity in one common title did not unite them in privity to each other.

The judgment, therefore in Mississippi, against Ann Lee, administratrix of the assets of Charles S. Lee in Mississippi, could not bind the appellant, D. S. Stacy, administrator of the assets of C. S. Lee in Louisiana.

The rule excluding res inter alios acta as a ground of action, or as a bar in the pleadings, it is hardly necessary to remark, extends with equal stringency to exclude such matter as evidence at the trial. 1 Stark. Law. Ev. 217; and 1 Greenl. Ev. sec. 522, et seq.

The principle here contended for cannot be evaded by force of the statute of Mississippi, which seems, as is contended for, *to [*53 make the judgment recovered in Mississippi against Ann Lee, administratrix, have the effect of being a judgment recovered against Charles S. Lee, the intestate himself, because that suit was instituted against him in his lifetime. That statute enables the plaintiff to revive the suit pending against the intestate, and empowers the court to render judgment for against such administrator, in the same manner as if the original party were in existence. How. & Hutch. Dig. 584. This Statute cannot mean nothing more than in the strongest expressions to remove merely the impediments thrown in the way of the proceedings of the plaintiff by abatement. It did not mean, by strict adherence to the same manner as if the original party were in existence, to preclude the administratrix from pleading pleas peculiarly allowed to executors and administrators —such as plene administravit, generally or specially, no assets, and the like; or to preclude the plaintiff from taking a judgment against the administratrix; and if so, the judgment could not be in the same manner as if the original party was in existence. If the Legislature had intended that, it would have adopted a provision like that in the 17th Car. II., c. 8. s. 1, where a party dies between ver-

dict and judgment, directing that the judgment shall be entered as if both parties were living. See 1 Lom. Ex. 324, 325.

The judgment rendered in this very case shows that such has not been the interpretation given to that statute, for it is a judgment not against the intestate. but against the administratrix. Whatever may be the interpretation to be put upon the statute, it is sufficient here to say, that the judgment taken was not in accordance with any directions that it should be rendered as if the party were living, but that was waived if the statute gave such power, and the plaintiff has taken a judgment against the administratrix; and taking it in that manner, the plaintiff subjects himself to all the consequences of that form of judgment.

In conclusion, the plaintiff in error is not precluded from the grounds of error here attempted to be maintained by force of the 32d section of the Judiciary Act of 1789. That section was only intended to apply to proceedings in actions at common law; not to proceedings by petition, according to the practice of Louisiana. Even if it did, the exception taken in the court below cannot but be regarded as tantamount to a demurrer according to the requisitions of that statute. That clause is a transcript of the provisions of 27th Eliz. c. 5, and 4th Anne, c. 16, for the purpose of curing mere defects of form, and requiring special demurrers, leaving matters of substance unaffected by its provisions, to be taken advantage of by general 54*] demurrer, *without setting down any special cause, or to be taken advantage of by errors in arrest of judgment, or by writ of error. See Bac. Abr. Pleas and Pleading; Stephens on Pleading, 140.

Mr. Crittenden, Mr. Thrasher, and Mr. Henderson, for the defendant in error, sustained the judgment of the court below upon the same grounds, which are thus explained in the argument of Mr. Henderson:

This Mississippi judgment, we say, conclusively established the plaintiffs' demand against the estate of the intestate Lee, not only in Mississippi, but in every State of the Union. We do not say but its ratable priorities and claims, as to order of satisfaction, are to be governed by the local law of the administration. The claim, however, is legally authenticated as against the decedent estate, so as to entitle it to payment and satisfaction, though put to judgment in a different State than that of the administration. 13 Pet. 312.

Notwithstanding all that is said in the books upon original and ancillary administrations in different States, we insist the administrative tribunals of a decedent's effects in no one State can reject the allowance of a creditor's claim from another State, if legally established.

The Constitution of the United States gives to the citizens of each State the privileges and immunities of the citizens of the several States. State tribunals, therefore, cannot regard a co-State creditor as a foreign creditor, and so administer the effects of the decedent within a State, to the exclusive use of creditors within that State. And so is it implied in 3 Pick. 128; and so, undoubtedly, is the requirement of the Constitution of the United States, above quoted.

The record of this judgment in Mississippi shows that the action was instituted against Lee in his lifetime, who appeared and pleaded; that before verdict he died, and his widow and administratrix, by the positive requirements of the laws of Mississippi, came in on scire facias, pleaded to, and defended the action. This, in Mississippi, merged the original cause of action, established the debt against the decedent estate, and was and is res adjudicata.

The Act of Congress of 26th May, 1790, expressly requires that this judgment shall have full faith and credit given to it in every court within the United States, as it has by law or usage in the courts of the State of Mississippi. 1 Statutes at Large, p. 122.

It undoubtedly has, in that State, the "faith and credit" of establishing or authenticating the debt against the estate of Lee, regardless of whosesoever hands the estate may come to or *be found in. It is not that it merely es- [*55 tablishes the debt against the administratrix, Ann Lee; but against the estate of C. S. Lee.

The judgment, thus presented, either by suit, in the courts of Louisiana, or to the administrator, in Louisiana, for allowance or payment, must have the same "faith and credit" accorded to it as in Mississippi. 6 Wheat. 129; 7 Cr. 481; 13 Pet. 312.

Now, this "faith and credit" is not so conceded to a foreign judgment. Hence the case in 2 Rawle, 431, which was a judgment from Barbadoes, sued on in Pennsylvania. All the pleas in that case imply the opinion of the pleader, that, had it been a judgment from another State of the Union, the defense could not have been relied on; nor does the court say otherwise.

Another well established rule of decision sustains the point we contend for—namely, that the judgment of a competent State court merges and extinguishes the original cause of action as to all parties and privies whether privies by blood or estate in all other States of the Union. 3 Wash. C. C. R. 17; 1 Pet. 692, 693; 16 Mass. 71.

But a foreign judgment does not so extinguish the cause of action, if again sued on here, as to bar recovery for this cause.

Again. Our petition makes no personal demand against the defendant; but, setting forth a claim against the estate of Lee, by authentication of a judgment, duly obtained, in contest with the administratrix in Mississippi, seeks its satisfaction out of Lee's estate in Louisiana, represented by the defendant as administrator. But the spirit of his objection is personal to himself. It is not that he questions but the cause of action has been established in judgment, by a court of competent jurisdiction, as against Lee's estate, so far as represented by his administratrix in Mississippi; but defendant objects, the estate is not thereby liable in Louisiana, till he, defendant, has litigated the same question over again. And for what good? Is there in the Constitution of the United States, and the laws of Congress, any sensible purpose or policy that this question should be twice litigated, in order to conclude the estate of Lee, as represented by this administrator, any more than if this judgment had been rendered against Lee, in his lifetime?

Suppose this judgment in Mississippi had been rendered in the United States Circuit

Court, and then sued on as now in the United States Circuit Court of Louisiana; could this defense be heard? Now, the 31st section of the Judiciary Act of 1789 provides that where the 56*] defendant dies pending the *suit, his representatives may be brought in by scire facias, as in this case, and "the court may render judgment against the estate of the deceased party." But what a silly provision of law, if, when they have so rendered judgment, the same controversy shall be tried over again in every other State where the judgment may be carried for enforcement and satisfaction, against the same decedent's "estate."

As this pretended right of defense does not go to bar the original cause of action, it is a mere technical objection, without semblance of merit. For, on any supposition that the first judgment was fraudulently obtained, the defendant here could undoubtedly make that defense by plea. But, with no objection against the justice or integrity of the judgment, that the defendant may relitigate it from mere caprice is certainly a most idle rule of construction, for no possible good.

The only pretense of legal rule which can be offered in vindication of this claim of the defendant to litigate the original cause of action in this case over again is, that as between the defendant with whom it was contested in the State of Mississippi, and this defendant in Louisiana, there is no privity; and hence the judgment is not evidence against him.

But we deny the fact that there is no privity. There is, in all truth, and in the rationale of the thing, a clear privity of estate. On Lee's death, his estate, everywhere throughout the United States, was liable to payment of his debts. No one anywhere could take possession of this estate, either by lawful administration or by tort, that did not hold in privity to the creditor's claim, as verily as to the claims of heirs and distributees. The decedent's estate, to this end and responsibility, is but a unit, though possessed by a dozen administrators in different States of the Union. And in what sense can an administrator claim to be a privy at all? No connection of blood, nor the agent's claim which he has to the estate, could give him, as administrator, the relation of privity in any legal sense. Had this judgment been granted against Lee in his lifetime, this objection would have the same force. His privity, as administrator on the estate of Lee, would have been precisely what it now is—namely, he would have been no party to the judgment, nor would he be holding any part of the estate, by virtue of his administration in Louisiana, which the judgment directly bound, or could be levied on. Yet, surely, this plea could not avail in such case; and equally clear, on the same principles, it cannot avail here. But if there were any room to distinguish the legal effect of a judgment obtained against the decedent, and one obtained by suit against his administrator, then we reply, that this suit, having 57*] *been instituted against the decedent in person, and who became party to the record, the same privity in succession connects this defendant with this record and judgment, as if *the* decedent had survived till the verdict was *rendered against him.*

But the truth is, the doctrine of personal privity has no application here, and can never be interposed, but as to parties who may be affected in their personal rights. A trustee of a legal title for the heirs cannot object to the judgment against the ancestor as incompetent evidence in suit against him to recover the trust property, on the ground that he is not a privy to the judgment. And so of the administrator, who is but a trustee for the creditors and distributees.

If the case in 16 Mass. 71, would seem to conflict with this last position, that of 3 Rand. 287, sustains a contrary rule.

The authority of the late Justice Story, in his Conflict of Laws, sec. 522, has been referred to in support of the defendant's objection. In a clear case of conflict of laws, where the foreign claim was "to affect assets" of the local administrator, to the prejudice of local creditors, the rule insisted on might, to some form and extent, be applicable. But the conflict of laws, as between nations foreign to each other, not bound to recognize each other's judgments, nor to recognize the claim of the foreign creditor on the same ground as the domestic creditor—such conflict of laws is not predicable of the subsisting relations of these United States. The judgments of the several States under the Constitution and laws of Congress, before referred to, are not foreign to each other in the sense of the common law. And the Constitution of the United States secures each creditor of the different States the same rights in prosecuting his claims in any other State, whether against the living man or the estate of the dead, as are secured to the citizens of the State where the same is prosecuted. If, therefore, the rule as now contended for was intended to be asserted by Justice Story as applicable to these States, we are bound to say his assertion is without authority, and against the paramount laws of the Union.

Mr. Justice Grier delivered the opinion of the court:

John B. Thrasher, the plaintiff below, commenced this action by a petition (according to the practice of the courts of Louisiana) in the nature of an action of debt upon a judgment. He claimed as assignee of a judgment obtained in the Circuit Court of Claiborne County, in the State of Mississippi, by Dart & Gardner against Ann Lee, administratrix of C. S. Lee, deceased. David S. Stacy, the defendant below, is the administrator of Lee in the State of Louisiana, where he had his domicil *at [*58 the time of his death. In his pleas he has set forth six several grounds of exception against the plaintiff's right to recover, the last of which is in the nature of a demurrer to the declaration, or a denial of the plaintiff's right to recover on the case set forth in his petition. As the decision of this point will be conclusive of the whole case, it will be unnecessary to notice the others.

The question presented by the demurrer is, whether the judgment against Ann Lee, the administratrix of Charles S. Lee in Mississippi, is evidence by itself sufficient to entitle the plaintiff to recover against Stacy, the administrator of the same intestate in Louisiana. Or, to state the point disconnected with the accidents of the case, Will an action of debt lie

against an administrator in one of these United States, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?

This is a question of great practical importance, and one which, we believe, has not yet been decided.

The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He cannot, therefore, do any act to affect assets in another jurisdiction, as his authority cannot be more extensive than that of the government from whom he received it. The courts of another State will not acknowledge him as a representative of the deceasd, or notice his letters of administration. See Tourton v. Flower, 3 P. Wms. 369; Borden v. Borden, 5 Mass. 67; Pond v. Makepeace, 2 Metcalf, 114; Chapman v. Fish, 6 Hill, 554, etc.

It follows as a necessary inference from these well established principles, "that, where administrations are granted to different persons in different States, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in comtemplation of law there is no privity between him and the other administrator." See Story, Confl. of Laws, sec. 522; Brodie v. Bickley, 2 Rawle, 431. The same doctrine is recognized in the case of Aspden v. Nixon, 4 How. 467, by this court.

But it is contended, that, however applicable [59*] these principles *may be to judgments against administrators acting under powers received from States wholly foreign to each other, they cannot apply to judgments against administrators in different States of this Union, because of the provision of the Constitution, which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

The Act of Congress of 26th May, 1790, which prescribes the mode of authenticating records, and defines their "effect," enacts, that they "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The question, then, arises, what is the "effect," or the "faith and credit," given to the judgment on which this suit is brought, in the courts of Mississippi? The answer to this must be, that it is evidence, and conclusive by way of estoppel, 1st, between the same parties; 2d, privies; and 3d, on the same subject matter, where the proceeding is in rem.

But the parties to these judgments are not the same.

Neither are they privies. "The term privity *denotes mutual succession or relationship to* 12 L. ed.

the same rights of property." Greenleaf on Ev. sec. 523. Privies are divided by Lord Coke into three classes—1st, privies in blood; 2d, privies in law; and 3d, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the same principle, namely, that a party claiming through another is estopped by that which estopped that other respecting the same subject matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims. An executor or administrator, suing or sued as such, would be bound by a verdict against his testator or intestate, to whom he is privy in law. With regard to privies in estate, a verdict against feoffer would estop feoffee, and lessor, the lessee, etc.

An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate They receive their authority from different sovereignties, and over different property The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts, as in the case of an administrator de bonis non, who may be truly said to have an *official privity with his prede- [*60 cessor in the same trust, and therefore liable to the same duties. In the case of Yare v. Gough, Cro. Jac. 3, it was decided that an administrator de bonis non could not have scire facias upon a judgment obtained by his predecessor on a debt due to the intestate "for default of privity." But in Snape v. Norgate, Cro. Car. 167, it was decided that a scire facias would lie against an administrator de bonis non, on a judgment against the executor; and the court attempt to make a distinction between that and the preceding case, on the ground that "he cometh in place of the executor;" or in other words, by reason of an official succession or privity. These cases cannot be well reconciled on principle; but the difficulty was remedied in England by the statute of 17 Charles II. c. 8. The Court of Appeals of Virginia have considered the latter case as founded on more correct principles than the first, and have overruled the doctrine of Yare v. Gough. Dykes v. Woodhouse, 3 Randolph, 287.

We may assume, therefore, that in the State of Mississippi, as in most other States in the Union, the administrator de bonis non is treated as privy with his predecessor in the trust, and estopped by a judgment against him; but the question still recurs as to the effect of a judgment in that State as against one who has neither personal nor official privity with the defendant. Each administrator is severally liable to pay the debts of the deceased out of the assets committed to him, and therein they resemble joint and several co-obligors in a bond. A judgment against one is no merger of the bond, nor is it evidence in a suit against the other. Their common liability to pay the

same debt creates no privity between them, either in law or in estate.

It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: that the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is in rem, and not in personam, or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is 61*] personally a *stranger. A judgment may have the "effect" of a lien upon all the defendant's lands in the State where it is rendered, yet it cannot have that effect on lands in another State by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is res inter alios acta. It cannot be even prima facie evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel.

It is alleged by those who desire to elude this conclusion, while they cannot deny the correctness of the principles on which it is founded, that it is technical and theoretical, and leads to an inconvenient result. But every logical conclusion upon admitted legal principles may be liable to the same imputation. Decisions resting only on a supposed convenience, or principles accommodated to the circumstances of a particular case, generally form bad precedents. It may be conceded that in this case there is an apparent hardship; that the plaintiff who has established his claim after a tedious litigation in Mississippi should be compelled to go through the same troublesome process in Louisiana. But the hardship is no greater than if the administrators had been joint and several co-obligors in a note or bond. A plaintiff may be fairly presumed always to have the evidence of his demand in his possession, and the ability to establish it in any court. But if a judgment against an administrator in one State, raised up, perhaps, for the very purpose of giving the plaintiff a judgment, should be conclusive on the administrator in another State, the estates of decedents would be subjected to innumerable frauds. And to what purpose is the argument that the defendant may be permitted to prove collusion and fraud, when, in order to substantiate it, he must commence by proving a negative? This would be casting the burden of proof where it ought not to rest, and would cause much greater inconvenience and injury than any that can possibly result from the present decision.

844

The judgment of the Circuit Court must, therefore, be reversed.

Mr. Justice McLean and Mr. Justice Wayne dissented.

Order.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration *whereof, it is now here ordered [*62 and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law and justice, and in conformity to the opinion of this court.

MARY ANN VAN NESS, Plaintiff in Error,
v.
CORNELIUS P. VAN NESS, Administrator of John P. Van Ness.

Writ of error does not lie from order of Circuit Court to certify to court below findings of jury on an issue on trial out of court, not being final.

The Act of Congress, passed on the 27th of February, 1801, 2 Stat. at Large, 103, authorizes a writ of error from this court to the Circuit Court for the District of Columbia in those cases only where there has been a final judgment, order, or decree in that court.

Where the Orphans' Court directed an issue to be sent for trial in the Circuit Court, which issue was, "whether the petitioner was the widow of the deceased or not," and the Circuit Court proceeded to try the issue, and the jury, under the instructions of the court, found that the petitioner was not the widow, exceptions to these instructions cannot be reviewed by this court on a writ of error.

The certificate of the finding of the jury, transmitted by the Circuit Court to the Orphans' Court, was not such a final judgment, order, or decree as is included within the statute. After the reception of the certificate, the Orphans' Court had still to pass a decree in order to settle the rights of the parties.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington.

All the circumstances of the case are fully set forth in the opinion of the court, as delivered by Mr. Chief Justice Taney, from the commencement of which the Reporter extracts the following statement:

A motion has been made to dismiss this case which is brought here by writ of error directed to the Circuit Court for Washington County in the District of Columbia.

The case is this: John P. Van Ness, of the same county and district, died intestate, and letters of administration were granted by the Orphans' Court to Cornelius P. Van Ness, his brother, who is the defendant in error.

Shortly after the letters were granted, Mary Ann Van Ness, the plaintiff in error, filed her petition in the Orphans' Court, alleging that

NOTE.—As to what is a "final decree" or judgment of a State or other court from which appeals lies, see notes to 5 L. ed. U. S. 302; 4 L. ed. U. S. 97; 49 L. ed. U. S. 1001; 51 L. ed. U. S. 271; 6 L.R.A. 515.

she was the widow of the deceased, and praying that the letters granted to the defendant should be revoked, and administration granted to her. The defendant answered, denying that she was the widow of the deceased. The right to the letters depended upon this fact; as by an act of Assembly of Maryland, passed in 1798, and adopted by Congress when it assumed jurisdiction over this District, the widow 63*] is *entitled to letters of administration, in preference to any other person, where the husband dies intestate.

This act of Assembly, 1798, ch. 101, subchap. 8, sec. 20, and subchap. 15, sec. 16, 17, makes it the duty of the Orphans' Court, in a case like this, if required by either party, to direct an issue to be sent for trial to any court of law most convenient for trying it; and the court to which it is sent is authorized to direct the jury, and to grant a new trial if it thinks proper, as if the issue were in a suit therein instituted; and upon a certificate from such court, or a judge thereof, of the verdict or finding of the jury, under the seal of the court, the Orphans' Court is directed to give judgment upon such finding. It is unnecessary to give the words of the act. We state its provisions only so far as they relate to the case before us.

When the answer of the defendant came in, the Orphans' Court, upon the motion of the plaintiff, ordered the following issue to be made up and sent to the Circuit Court for Washington County, to be there tried; that is to say, "whether the said Mary Ann Van Ness be the widow of the said John P. Van Ness or not." No depositions or other testimony were taken on either side in the Orphans' Court.

The Circuit Court proceeded to the trial of the issue, and in the course of the trial sundry directions were given to the jury, to which the plaintiff excepted; and finally, as appears by the eleventh exception, the court instructed the jury that there was no evidence from which they could find that the plaintiff was lawfully married to John P. Van Ness, the intestate. Under this direction, the jury found by their verdict that Mary A. Van Ness was not the widow of the late John P. Van Ness; and this finding was, by order of the court, certified under seal to the Orphans' Court.

This is the case before us, upon the record brought here by the writ of error; and the question to be decided is, whether this court can take cognizance of the case, and inquire whether error has or has not been committed by the Circuit Court in giving the instructions under which the verdict was found.

The cause was argued upon a motion to dismiss the writ of error for want of jurisdiction. Mr. Coxe and Mr. Bradley for the motion, and Mr. May and Mr. Brent against it.

Mr. Coxe, in support of the motion, explained the laws of Maryland upon the subject, and referred to the Act of 1798, in 1 Dorsey's Laws of Maryland, p. 414, subchap. 15, sec. 17, and also to p. 394, subchap. 8, sec. 20.

The certificate directed to be transmitted to 64*] the Orphans' *Court is altogether different from chancery practice, where the verdict is merely to inform the Chancellor, who may set it aside and direct a new trial. Mr. Coxe referred also to the cases in 1 Peters, 502, 565; 2 Peters, 243; 5 Howard, 118; and 3 Howard, 681.

Mr. May, against the motion to dismiss:

The widow in this case filed a petition praying for letters of administration to herself, and for a revocation of those previously granted to the brother. If she was the widow, she was entitled to letters in preference to anyone else. Act of 1798, chap. 101, subchap. 15, sec. 17; 2 Harris & Gill, 51.

After receiving the certificate from the Circuit Court, the Orphans' Court dismissed her petition. We took an appeal from this dismissal, but the Circuit Court affirmed it.

It is evident that the appeal carried up nothing but the mere certificate, and under it, it was impossible again to bring before the Circuit Court the instructions which had been given at the previous trial. The Orphans' Court never saw these exceptions. If we could have got them into the record which was transmitted from the Circuit Court to the Orphans' Court, then an appeal from the order of dismissal would have carried them again to the Circuit Court and from that court to this. But we could not do it; and if this writ of error should be dismissed, it will follow that instructions were given by the court below which were decisive of the result, and yet there is no mode of having such instructions reviewed by this court. The certificate either established or destroyed the claim, because it was conclusive upon the Orphans' Court. It was, therefore, a final order. The Act of 1801 includes final orders. See 2 Statutes at Large, 106, sec. 8.

This court, in 6 Cranch, 235, decided that any final judgment, order, or decree might be brought up for review.

The Act of 1801 has been pronounced comprehensive. 4 Cranch, 396; 8 Cranch, 252.

What are final orders? See 3 Dall. 404; 2 Peters, 464.

The tendency of decisions is to enlarge the power of appeal. 3 Miss. Rep. 328; 1 Stewart & Porter, 171; 1 Martin, N. S. 75; 4 N. H. Rep. 220; 2 Mass. Rep. 142; 4 Mass. Rep. 107, 108; 5 Mass. Rep. 194; 11 Mass. Rep. 275.

For the definition of a judgment see 3 Bl. Com. 296.

Mr. Brent, on the same side:

It is admitted by the other side, that she had a right to administer if she was the widow, and that this right was not lost by the fact that letters had been issued to the brother previous *to her application. The power of the [*65 Orphans' Court to revoke letters cannot be questioned. The only point in issue was, whether she was or was not the widow. If the certificate of the Circuit Court had been that she was the widow, it might not have been a final order or judgment, because the Orphans' Court would still have to inquire whether she was competent in other respects to take out letters. For example, whether she was a resident, etc. But as the certificate was against her, it was conclusive of her rights. Mutuality is not necessary. Can there be any doubt of the certificate deciding the question as to her? The Orphans' Court are compelled to obey it. No case ever occurred in Maryland by which the opinion of her courts upon this point can be ascertained. A case did happen involving it; but before a certificate was sent to the Orphans' Court, a special act of the Legislature was applied for and obtained in 1834–1835.

Under this act, the case was carried to the Court of Appeals, and is reported in 5 Gill & Johnson.

Mr. Brent then made the two following points:

1. The power of the Circuit Court over this case, sent to it from the Orphans' Court, was as absolute, respecting a control over the jury and granting a new trial, as over a case which originated within itself.

2. The Orphans' Court had no control whatever over the verdict and judgment of the Circuit Court.

What appeal had we? The Orphans' Court could not review the proceedings of the Circuit Court, and yet it was a case where the verdict either established or destroyed the claim. If the present remedy is not applicable, then there is a strange anomaly here in Washington—that there is no mode of correcting errors where very important rights are involved. The Act of 1785, chap. 87, sec. 6, gave to a party aggrieved by any "judgment or determination" a right to appeal to the Court of Appeals. See Dorsey's Laws of Maryland. Can there now be, under our system, such a thing as a legalized error? See 5 Harris & Johns. 176. As to what is a final judgment in Maryland, see 2 Harris & Gill, 378; 12 Gill & Johns. 332.

The certificate was in effect a final order, and an appeal from a judgment opens all interlocutory orders. An instruction to a jury is a substitute for the whole demurrer to evidence. 3 Peters, 37.

A writ of error must be upon a judgment which settles the whole matter. 11 Coke, 38; 21 Wendell, 658, 668; 1 Roll. Abr. 751. Pennsylvania decisions are, 3 Laws of Pennsylvania, 34; 1 Yates, 113; 2 Yates, 46, 51; 1 Binney, 444. Other cases respecting appeals, 7 Clark & Fin. 52.

66*] *The judgment in this case is final. 3 Binney, 276; Addison, 21, 121; 5 Howard, 214; 12 Wendell, 327; 2 Paige, 487; 19 Ves. 499; 2 Dan. Ch. Pr. 747, 1306, 1360; 1 Binney, 444; 5 Serg. & Rawle, 146; 6 Watts & Serg. 188.

The statute of Pennsylvania is the only one in all the States like that of Maryland; and the courts of Pennsylvania have practically entertained appeals from such issues. If the substance appears in the record, this court will not regard forms, because, if it did, its jurisdiction would fluctuate, and it would be in the power of the court below to oust it of its proper jurisdiction. The right of appeal must exist or not exist when the bill of exceptions is taken, and cannot depend upon the mode in which the judgment is rendered.

The act of Congress mentions a final order. But here an order was necessary to direct the certificate to be transmitted to the Orphans' Court, and that order was final. If there are two judgments, one for dower and the other for damages an appeal may lie from one, and not the other. Viner's Abr. tit. Judgments, letter P. T.

The Orphans' Court must dismiss our petition on the reception of the certificate. 2 Harris & Gill, 51.

But it is said on the other side, suppose we now succeed, and another trial takes place in the Circuit Court, with a different result, what is the Orphans' Court to do with these two different verdicts? The difficulty is solved by referring to 10 Leigh, 572.

The act of Congress gives the same jurisdiction to this court in common law cases as in chancery. But in chancery an appeal will lie, although further proceedings may be necessary. 3 Barbour's Eq. Dig. 118, and cases there cited; 3 Cranch, 179.

[That part of Mr. Brent's argument relating to the amount in controversy is omitted, the decision of the court not involving that point.]

Mr. Bradley, in reply, and in support of the motion to dismiss, maintained the following propositions.

1. That a writ of error can be issued from this court only in cases provided by statute.

2. That it can be issued only upon a final judgment, according to the common law.

3. There has been no judgment, final or otherwise, in the Circuit Court.

4. That the words "order and decree," in the Act of 1801, refer to proceedings in equity; not to orders in a court of common law.

*5. the statute of Maryland of 1798, [*67 chap. 101, gives to the courts of law a peculiar, special, and limited jurisdiction, and has not provided any mode for reviewing proceedings under that jurisdiction.

6. That no writ of error could lie to such a court, because there is no judgment of that court, final or otherwise.

In support of these propositions he cited Wilson v. Daniel, 3 Dall. 401; Rutherford v. Fisher, 4 Dall. 22; Boyle v. Zacharie & Turner, 6 Pet. 656, 657; Toland v. Sprague, 12 Pet. 331; Evans v. Gee, 14 Pet. 1; Amis v. Smith, 16 Pet. 303; Smith v. Trabue's Heirs, 9 Pet. 4; United States v. Goodwin, 7 Cranch, 108; United States v. Gordon, 7 Cranch, 287; United States v. Tenbroek, 2 Wheat. 248; United States v. Barker, 2 Wheat. 395; Sarchet v. United States, 12 Pet. 143; Mayberry v. Thompson, 5 How. 121; Ches. & Ohio Canal Co. v. U. Bank of Georgetown, 8 Pet. 259; Brown v. U. Bank of Florida, 4 How. 465; Winston v. Bank of United States, 3 How. 771; Judiciary Act of 1789, ch. 20, sec. 22.

Mr. Chief Justice Taney delivered the opinion of the court. After stating the case as above recited, the opinion proceeded as follows:

The appellate power of this court in relation to the Circuit Court for the District of Columbia is regulated by the Act of Congress of February 27, 1801. And it authorizes the writ of error to the Circuit Court in those cases only in which there has been a final judgment, order, or decree in that court. Whatever errors, therefore, may have been committed, however apparent they may be in the record, yet we have not the power to correct them unless the Circuit Court has passed a final judgment, order, or decree in the case before it.

The argument on the part of the plaintiff in error is, that inasmuch as the verdict was found in obedience to the positive instructions of the court, and as the certificate of the finding of the jury was conclusive upon the Orphans' Court, the order of the Circuit Court to certify the verdict to the Orphans' Court ought to be

regarded as a final judgment or order within the meaning of the act of Congress.

It is true the Orphans' Court has no power to grant a new trial, and is bound to consider the fact to be as found by the jury; and consequently the judgment of that court must be against the plaintiff. But the matter in contest in the Orphans' Court is the right to the letters of administration. And it is the province of that court to apply the law upon that subject to the fact, as established by the verdict of the jury, and to make their decree accordingly; refusing to revoke the letters [*68 *]granted to the defendant, and dismissing the petition of the plaintiff. The suit between the parties must remain still pending until that decree is pronounced. The certificate of the Circuit Court is nothing more than evidence of the finding of the jury upon the trial of the issue. It merely certifies a fact, that is to say, that the jury had so found. And the order of the Circuit Court directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment, order, or decree, in the legal sense of these terms as used in the act of Congress. Certainly it is not a final judgment or order. For it does not put an end to the suit in the Orphans' Court, as that court alone can dismiss the petition of the plaintiff which is there pending; and no other court has the power to pass a judgment upon it. A verdict in any court of common law, if not set aside, is in all cases conclusive as to the fact found by the jury, and the judgment of the court must follow it; as the Orphans' Court must follow the verdict in this case. Yet a writ of error will not lie upon the verdict.

And if this court should take jurisdiction, and should determine that the Circuit Court had erred in its directions to the jury, what judgment could be given here? Could we give a judgment reversing an order which does nothing more than direct a fact to be certified to another court? If we could do this, it would not reach the judgment in the Orphans' Court, nor exercise any control over it. And a writ of error can hardly be maintained where the judgment of the appellate court would be ineffectual and nugatory.

Neither could it make any difference as to the jurisdiction of this court, if there had been a feigned issue with formal pleadings, and the Circuit Court had entered a judgment upon the verdict. For the judgment would have had no effect upon the rights of either party to the administration in dispute, nor could it exercise any influence upon the decision of the Orphans' Court. And if this court could have regarded the feigned issue as an action regularly brought in the Circuit Court, and upon that ground have taken jurisdiction, the affirmance or reversal of the judgment would have had as little effect upon the proceedings in the Orphans' Court as the original judgment in the Circuit Court. It would indeed decide the right to the fictitious wager stated in the pleadings. But if the judgment of the Circuit Court was reversed, and a venire de novo awarded, it would not alter the decree in the Orphans' Court. That court is required by law to act upon the finding of the jury, and not upon the judgment of the Circuit Court. And the reversal of that judgment and a new *find- [*69 ing would not authorize the Orphans' Court to recall the judgment it had given, and was bound to give upon the original verdict certified by the Circuit Court.

The act of Assembly of Maryland appears to have received in practice in that State the same construction that we have given to it. There is, indeed, no judicial opinion on the subject; but there is no ground for supposing that a writ of error was ever sued out under that law.

In 1832, an act was passed authorizing a writ of error in such cases, and staying proceedings in the inferior courts until a decision was had in the appellate court: and this law embraces cases which had been tried before its passage, as well as those which should afterwards take place. But from 1798 down to the passage of this act of Assembly, we can find no trace of a writ of error sued out in a case like this. The absence of any such proceeding for so many years is the strongest evidence of the construction put upon the law, and of the opinion entertained by the bar of the State, that the writ would not lie. For many issues from the orphans' courts must have been tried during that period of time which would have given rise to the writ of error if it had been supposed to be warranted by the law. The Act of 1832, also, embracing as it does prior as well as future cases, would have been altogether unnecessary, if a different construction had been given to the Act of 1798.

Upon the whole, therefore, this court is of opinion that there has been no final judgment, order, or decree in the Circuit Court, and the writ of error must be dismissed for want of jurisdiction.

Order.

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

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*ROBERT MARSHALL, Appellant, [*70

v.

SUSAN G. BEALL, Defendant.

Conveyance of property to trustee for separate use of feme covert, husband's rights therein after her death—bequest of money to trustee for use of married woman, husband's right thereto after her death.

Were a husband and wife, in order to carry out an ante-nuptial agreement, conveyed personal property to a trustee, with directions to hold a part of it for the sole and separate use of the wife, with a power to the wife to alien or devise it, such part goes, if she dies intestate, to her next of kin, free of all claim on the part of the husband.

But where a legacy was left to a trustee for the benefit of the wife, and the trustee was directed "to let the wife have some part or parcel of the money, occasionally, as she may stand in need, to be paid out to her, at the discretion of the trustee," this fund goes to the husband at the wife's death, by the laws of Maryland.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

In February, 1820, Robert Marshall and Ann Berry, being about to be married, executed the following contract, which was duly recorded:

"Whereas Robert Marshall and Ann Berry, both of Prince George's County, State of Maryland, are about to intermarry, its thereof agreed by the parties, before the marriage, that the said Ann Berry shall hold in herself, all her right, title and interest to the following funds of her own, viz.: one hundred and fifty shares of stock in the Patriotic Bank, of which ten dollars have been paid, which stock stands to the credit of Ann Berry; also, one hundred and thirty-seven shares of the stock in the Central Bank of Georgetown and Washington, upon which eleven dollars per share have been paid; and three thousand five hundred dollars in the bonds of Charles Glover.

"Given under our hands and seals, this 17th day of February, 1820.

"Robert Marshall, [seal.]
"Ann Berry. [seal.]
"Witness: Jane H. T. Dorsett."

Soon after this, the marriage was solemnized.

On the 27th of August, 1823, Marshall and wife executed a deed to Susan G. Beall, which appeared to be unsatisfactory, and to have no influence upon the decision of the case.

On the 1st of May, 1824, Marshall and wife made another deed to Susan G. Beall, who was a sister of Mrs. Marshall, as follows:

"This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and twenty-four, between Robert Marshall and Ann Marshall, his wife, late Ann Berry, of Prince George's County, in the State of Maryland, of the first part, and Susan G. Beall, of Washington County, in the District of Columbia, of the other part. Whereas, by 71*] *an agreement entered into between Robert Marshall and Ann Marshall, late Ann Berry, dated the 17th day of February, in the year of our Lord one thousand eight hundred and twenty, and previous to the marriage of the said Robert Marshall and Ann Marshall, it was agreed by and between the said parties, that the said Ann Marshall should have and possess, in her own rignt, the following funds for her own property, to wit.: one hundred and fifty shares of stock in the Patriotic Bank, upon which ten dollars per share had been paid; also, one hundred and thirty-seven shares of stock in the Central Bank of Georgetown and Washington, upon which eleven dollars per share had been paid, and three thousand five hundred dollars due to the said Ann Marshall, then Ann Berry, by Charles Glover, and which was secured by a mortgage of a tract of land, formerly sold by the said Ann Berry to the said Charles Glover, all which stocks and debts belonged to the said Ann Berry previous to the said marriage, besides considerable other real and personal property; and whereas the said Robert Marshall did, at the same time, agree to make any other or further instrument of conveyance which might be considered necessary fully to assure and convey the said stock and debts above mentioned to the sole and separate use of the said Ann Berry, her heirs and assigns, free and clear from any debts, control, demands, or incumbrances of the said Robert Marshall; and whereas the said bank stock has been sold by the mutual consent and agreement of the said Robert Marshall and Ann Marshall; and whereas judgment has been obtained against the said Charles Glover for two thousand dollars, part of the said three thousand five hundred dollars, with interest and costs, in the name of the said Robert Marshall, and on which execution hath been issued against the property of said Charles Glover, and one other judgment for fifteen hundred dollars, with interest and costs, being the remaining part of the said three thousand five hundred dollars, due by said Charles Glover; and whereas the said Robert Marshall and Ann Marshall have agreed further to dispose of and settle the judgments above mentioned, and the tract of land hereinafter mentioned, by a more full, complete, and formal instrument of writing than the marriage agreement above mentioned, according to the terms, stipulations, and conditions of the present instrument of writing. Now, this indenture witnesseth, that for and in consideration of the premises, and for the more fully, completely, and perfectly carrying into effect the marriage contract between said parties, and for the further consideration of five dollars, to them in hand paid by the said Susan G. Beall, the receipt whereof is hereby acknowledged, and for divers other good, *causes [*72 and considerations, them thereunto moving, the said Robert and Ann Marshall have given, granted, bargained, sold, released, and assigned, and by these presents do give, grant, bargain, sell, release, and assign, to the said Susan G. Beall, her heirs, executors, administrators, and assigns, the following tract, piece, or parcel of land, situate, lying, and being in Prince George's County aforesaid, on which the said Robert and Ann Marshall at present reside, being lot number four in the division of the estate of William D. Berry, and containing about fifty acres of land, more or less, for and during the joint lives of the said Robert and Ann Marshall, and the survivor of them; likewise the two judgments above particularly recited, against Charles Glover; to have and to hold the said tract of land above mentioned and described for and during the lives of the said Robert and Ann Marshall, and the survivor of them, and the said two judgments against the said Charles Glover, to the said Susan G. Beall, her heirs, executors, administrators, and assigns; in trust, nevertheless, and to and for the following uses, intents, and purposes, to wit: in trust to hold the above mentioned and described tract of land for the use of the said Robert and Ann Marshall, during their joint lives; and if the said Robert Marshall shall survive the said Ann Marshall, for the use of the said Robert Marshall during his life and no longer, upon the express agreement and understanding that the said tract of land is not to be subject or liable for debts, contracts or engagements, of the said Robert Marshall, and in further trust that the said Robert Marshall shall have and receive the said judgment of two thousand dollars, with interest and costs, against the said Charles Glover,

to his sole and separate use, free and clear of the marriage contract above mentioned, and of all separate claim of the said Ann Marshall, and his receipt shall be good and sufficient acquittance and discharge of said judgments; and in further trust, that the said Susan G. Beall shall hold the said judgment of fifteen hundred dollars, with interest and costs, for the sole and separate use of the said Ann Marshall, her executors, administrators, and assigns, free and clear from any control or demand of the said Robert Marshall, or of his creditors, debts, or engagements; and upon the payment of the said judgment, or any part thereof, to invest the said money in stock, or to loan the same on interest, with the approbation of the said Ann Marshall, for the like sole and separate use of the said Ann Marshall; and in further trust, that the said Ann Marshall, during the life of her husband, may dispose of said judgment, or the proceeds thereof, and of her right, interest, and estate in the said tract of land, after the death of the said Robert 73*] Marshall, *either by her last [will] and testament, or by any instrument of writing, under her hand and seal, in the presence of two witnesses, during her coverture, in the same manner as if she were single. It is further understood and agreed, that said Robert Marshall is to pay and satisfy the judgment of Hodges and Lee against them; and the claim of Mr. McDaniel's estate, if judgment should be recovered; and all fees, costs, and expenses in prosecuting and recovering the two judgments against Charles Glover, and all legal expenses of the judgment assigned to him.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"Robert Marshall, [seal.]
"Ann Marshall, [seal.]
"Susan G. Beall. [seal.]"

In November, 1825, there was paid to the trustee, on account of the judgment for $1,500 reserved as above for the separate use of Ann Marshall, the sum of $1,960.66.

In May, 1832, Ann T. Beall, the mother of Ann Marshall, died. By her will, she gave the following legacy to her daugher:

"I give and bequeath to my daughter, Ann Marshall, the sum of four hundred dollars, and hereby appoint my daughter, Susan G. Beall, her trustee, to hold and retain the whole amount in her hands, and let the said Ann Marshall, wife of Robert Marshall, have some part or parcel of the money occasionally, as she may stand in need, but to be paid out to her at the discretion of my trustee, Susan G. Beall."

During the lifetime o&f Ann Marshall, Susan G. Beall, the trustee, loaned the sum of $400 to Amelia T. Dorsett, a third sister, out of the trust fund.

In July, 1833, Ann Marshall, the wife, died, never having disposed of the trust property belonging to her and in the hands of the trustee, in the manner provided for in the deed carrying out the marriage articles.

After her death, her surviving husband, Robert Marshall, sued Amelia T. Dorsett, to recorver the four hundred dollars loaned to her by the trustee, as above recited, and obtained a judgment.

In April, 1835, Robert Marshall, also filed a bill on the equity side of the court against Susan G. Beall, the trustee, in which he recited the facts as above set forth, averred that the trust fund, with the profits and interest, became vested in him by the death of his wife, and prayed an account by the trustee, with an injunction, etc.

*In April, 1836, Susan G. Beall, the [*74 trustee, filed her answer, admitting the facts stated in the bill, but denying that the complainant had any right to the trust fund.

To this answer the complainant filed a general replication.

In November, 1836, Amelia T. Dorsett filed a bill of interpleader, averring substantially the same facts and exhibiting the same documents as had been stated and produced by complainant; alleging that the provision in the deed referred to—that the real estate was to be conveyed to complainant if he survived his wife—was null and void, and inoperative against the legal representatives or heirs of said Ann; averring that the said Ann died intestate in July, 1855, without children, and leaving the complainant and another sister, Susan G. Beall, living, and three children of a deceased sister; that they were the only heirs of said Ann, and entitled to the trust property.

That during the lifetime of said Ann, the complainant, with her consent, borrowed of the trustee $400, part of said trust fund, and gave her note therefor; that, since her death, Marshall had brought suit for the recovery of this money, as surviving husband of said Ann, and by the judgment of the court had obtained judgment for the same; but denied his right to the money, asserting that she, as next of kin of her deceased sister, was entitled to letters of administration on the estate, and if said Marshall had obtained any, they should be revoked.

The bill prayed that the children of her deceased sister may be made parties to the original suit, in which Marshall was complainant; that this bill of interpleader may be filed in said suit; that the said parties may be required to interplead; that the judgment against her may be enjoined, the trust property adjudged to the heirs of said Ann, and the said Marshall be perpetually enjoined, etc., etc.

To this bill the defendants filed the following demurrer:

Demurrer to Bill of Interpleader.

Whereupon the defendants, by their solicitors, Coxe & Carlisle, filed the following demurrer to the foregoing bill of interpleader:

The demurrer of Robert Marshall and Richard H. Marshall, jointly and severally, to the bill of interpleader of Amelia T. Dorsett.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of interpleader contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill; and for cause of demurrer show, *that the said [*75 complainant hath not in her said bill of interpleader made such a case as entitles her, in a court of equity, to any relief against these defendants, or either of them, as to the matters contained in said bill of interpleader.

for further cause of demurrer these de-
ts show, that although the said com-
nt's bill is avowedly, and on the face
of, a bill of interpleader, yet the said com-
ant doth herself claim an interest in the
ect matter in dispute between the various
ies named in the said bill of interpleader.
nd for further cause of demurrer the de-
dants show, that the said complainant, al-
ough she admits in and by her said bill of
terpleader that the subject matter in dispute,
a portion thereof, is money loaned to, and
ustly due by, the said complainant to the per-
on who shall be adjudged entitled to the
specific fund out of which the said loan was
made, yet nowhere in the said bill of inter-
pleader does the said complainant offer to bring
the said money so loaned into court. Nor hath
the same, or any part thereof, been brought in-
to court, to be subject to the decree or order of
the court.

Wherefore, and for divers other good causes
of demurrer, these defendants do demur to the
said bill of interpleader, and they pray the
court to adjudge whether they shall make any
other or further answer to the same; and they
humbly pray to be hence dismissed, with costs,
etc., etc.

Coxe & Carlisle,
Solicitors for defendants.

The cause was then set for hearing by com-
plainant on bill, answer, exhibits, and replica-
tion, and upon the demurrer and bill of inter-
pleader, and at March Term, 1843, the court
passed the following decree:

"The said bill of injunction, and for general
relief, wherein the said Robert Marshall is
complainant, and the said Susan G. Beall is de-
fendant, together with the said other bill, by
way of cross bill and bill of interpleader,
wherein the said Amelia T. Dorsett is com-
plainant, and the said Robert Marshall is de-
fendant, having been regularly set for hearing
by consent of the parties, as well upon the
first mentioned bill, the answer thereto, the
replication to said answer, and the several ex-
hibits and papers therewith filed, and in the
proceedings mentioned, as upon the last men-
tioned bill and the demurrer of the said Robert
Marshall thereto, and as if taken for confessed
against the other defendants therein named or
referred to, this court, upon consideration of
the premises, and the arguments of counsel, as
well in behalf of the said complainants respect-
76*] ively as of the said *defendants respect-
ively, has ordered and decreed, and now here,
on this 23d day of May, 1843, doth order and
decree, that the said first mentioned bill be, and
the same is hereby dismissed, with costs; that
the demurrer of the said Robert Marshall to the
last mentioned bill be, and the same is hereby
overruled, with costs; and that the said Amelia T.
Dorsett pay to the said Susan G. Beall all the
principal sum of money with the interest there-
on recovered against her in the name of said
Robert Marshall by the said judgment at law
in the proceedings mentioned, to be, together
with all such personal property, moneys, se-
curities, stocks, and effects as have come or
may come to the hands of the said Susan G.
Beall as trustee for the deceased Ann Marshall
in the proceedings mentioned in virtue of the
marriage contract, and marriage settlement in
the proceedings mentioned, and of the last will
and testament of Ann T. Beall, also in the pro-
ceedings mentioned, accounted, distributed,
and paid over to and among the next of kin by
blood of the said deceased Ann Marshall, in
the order and proportions prescribed by law for
the distribution of the personal estate of per-
sons dying intestate among such next of kin;
that upon the payment by the said Amelia T.
Dorsett, in the manner aforesaid, of the prin-
cipal and interest of the debt so recovered at
law against her in the name of the said Robert
Marshall as aforesaid, she be, and is hereby ex-
onerated, released, and discharged from the
said judgment at law so recovered against her;
which the clerk of this court, upon such pay-
ment being certified to him by said Susan G.
Beall, is hereby authorized and required to en-
ter of record as paid and satisfied pursuant to
this decree; and that the said Robert Marshall
pay to the said Susan G. Beall her costs in this
behalf expended, etc., etc.

An appeal from this decree brought the case
up to this court.

It was argued by Mr. Coxe for the appellant,
and Mr. Jones for the appellee.

Mr. Coxe contended that the decree was ir-
regular, informal, and erroneous. Upon over-
ruling the demurrer of Marshall to the bill of
interpleader, he should have been held to an-
swer, and the case was not ready for a final de-
cree against him. The demurrer itself was
good, and ought to have been sustained. This
was no regular bill of interpleader. Such a
bill only lies where a person has to pay money
and is at a loss to whom it ought to be paid.
But here the party who files the bill avers an
interest in the subject. 1 Madd. Ch. Pr. 239;
Story's Eq. Pl. secs. 201-203.

Marshall was not bound by the laws of Mary-
land to take out *letters of administra- [*77
tion upon the estate of his wife. He was ad-
ministrator by force of law. When he sued
Amelia T. Dorsett for the four hundred dollars
loaned to her by the trustee, all the matters
stated in the bill of interpleader were open as
grounds of defense, and having omitted to avail
herself of them at law, she cannot now bring
them into court of equity.

A bill of interpleader is regarded as an orig
nal suit, and therefore demurrable to by one
all the persons against whom it is broug
But in this case it was demurred to by Marsh
alone, and the court ordered it to be taken
confesso as to the other parties. It had
right to do this.

Mr. Jones, contra, said that there mig
some technical informality in the procee
but the right of the wife to her separate
was fairly presented. The substantial
was against Marshall, and in favor of t
of kin to the wife. There was two
funds which Marshall claimed, arising
ferent modes, to be governed by differe
The bill called an interpleader was
It was in fact a cross bill, because
fund was placed in danger, and the
terested in it had a right to be he
would have a right of appeal in E
the decision of the court below is
saying that the property of the w
belong to Marshall, it is of no co
him who gets it. A misnomer o
therefore, of no value.

It is said that it was irregular for the court to pass a final decree without first calling upon Marshall to answer, after overruling his demurrer. But upon referring to the order of the court, it appears that Marshall had set the cause down for hearing upon the demurrer, etc., and therefore waived all such irregularity. If he chooses to rest his case upon his demurrer, he may do so.

All the questions now involved could not have been raised in a court of law when Marshall sued for the four hundred dollars.

When a married woman has separate property, the question whether the rights of the husband are destroyed, or only suspended, must depend upon the instrument which they execute, as the interpreter of their intentions. Clancy on Married Women, 34.

That the instrument now under consideration is sufficient to vest the property absolutely in the wife, see Clancy, 43, 51; 2 Roper, Hus. and Wife, 157; 2 Story's Esq. secs. 1378-1383.

Mr. Coxe, in reply, insisted, that if these defenses had been made at law, the judgment must have been decisive of the husband's 78*] *rights. The objection to the bill of interpleader is not technical. The rule is positive, that no such bill shall be filed in such a case. Clancy says there must be a manifest intention to give the wife an exclusive right. This is not apparent either in the deed or the will. The will only gives the property to Ann Marshall, but does not exclude the husband.

Mr. Jones referred to 7 Johns. Ch. 229, and 6 Gill & Johns. 349, to show under what circumstances the court would consider the husband as being shut out.

Mr. Justice Catron delivered the opinion of the court::

Robert Marshall filed his bill against Susan G. Beall, to recover two funds held by her as trustee for Ann Marshall, the late wife of the complainant. The larger fund sued for was fifteen hundred dollars, with the addition of some interest that had accrued on it, at the time it was received by the trustee. In 1830, Robert Marshall and Ann Berry, both of Maryland, were about to intermarry, and before the marriage took place agreed in writing that the said Ann should hold in herself all right, title, and interest to the following funds of her own, to wit: one hundred and fifty shares of stock of the Patriotic Bank, on which ten dollars for each share had been paid; also, one hundred and thirty-seven shares of stock in the Central Bank of Georgetown, on which eleven dollars to each share had been paid; and three thousand five hundred dollars in bonds on Charles Glover. The marriage took place, and a portion of the property sought to be secured to the wife by the foregoing agreement having fallen into the hands of the husband, further to secure the wife in some portion of her property, another agreement was made in May, 1834, to which Marshall and wife, and Susan G. Beall, as trustee, are parties. First, the husband and wife conveyed to Miss Beall a tract of land, the property of Mrs. Marshall, to hold in trust for the use of the husband and wife during their joint lives, and for the separate use of the husband for life, if he was the survivor. Then follows the three thousand five hundred dollar debt from Glover, secured by the first articles, and reduced to two judgments. This debt and the land seem to have been the only property left in 1834 to either party. The use of the land was fairly divided; and of the debt from Glover the wife very generously gave the husband the larger portion, "to his sole and separate use, free and clear of the marriage contract of 1830. And then she reserved to herself the smaller judgment of fifteen hundred dollars, in very nearly the same language; the trustee was to hold the fund "for the sole and separate use of the said Ann, her *executors, adminis- [*79 trators, and assigns, free and clear from any control or demand of the said Robert Marshall." The wife retained the power of appointment in regard to the land and the fund, but failed to exercise the power. She died intestate, and as by the laws of Maryland the husband was her administrator by mere force of law, he now claims to recover the fund from the trustee, and to retain the money by force of his marital rights. And the question presented for our decision is, whether the husband only made a temporary surrender of his marital rights during the coverture, or whether he abandoned them altogether. This depends on the intention of the parties, as expressed in the marriage articles. By the first agreement we do not doubt the wife desired, and really intended, to retain her property after the marriage as if she was a feme sole; but the agreement was vague, and it is doubtful whether the husband's marital rights did not attach; then he stood as trustee himself, and might, and obviously did, use the property. Under these circumstances, the articles of 1834 was entered into, and the wife secured in her separate use as if she was a feme sole; and, in consideration of a division of the wife's property with the husband, he abandoned all claim, founded on his marital rights, to that part secured to the wife. We think that the terms of the agreement of 1834 sufficiently show that the intention of the parties was to carry the title of the fund beyond the period of the wife's death, and to exclude the husband. And in this conclusion we are supported by the opinion of the Court of Appeals of Maryland, in the case of Ward v. Thompson 6 Gill & Johns. 349, and in the soundness of which opinion we fully concur.

But there was another fund vested in Miss Beall by the will of Ann T. Beall, the mother of Susan G., the trustee, and of Mrs. Ann Marshall; and as respects this latter fund, also, the court below dismissed the complainant's bill, on the ground, as we suppose, that his marital rights never attached to it. The correctness of this decree depends on the will of Mrs. Beall, the clause of which vesting in trust this legacy is as follows:

"To my daughter, Amelia Dorsett, the sum of four hundred dollars, loaned to her some years ago. I give and bequeath to my daughter, Ann Marshall, the sum of four hundred dollars, and hereby appoint my daughter, Susan G. Beall her trustee, to hold and retain the whole amount in her hands, and let the said Ann Marshall, wife of Robert Marshall, have some

part or parcel of the money occasionally, as she may stand in need, but to be paid out to her at the discretion of my trustee, Susan G. Beall."

The will was made in 1832, and is altogether 80*] independent *of the marriage articles. Its granting part limits the use of the fund exclusively to Mrs. Marshall's own use and benefit; there is no disposition of the property in the event of her death; as, for instance, to the next of kin of the devisee. In Watt v. Watt, 3 Ves. 244. Garrick v. Camden 14 Ves. 372, and in Bailey v. Wright, 18 Ves. 49, the cases turned on a provision, that for want of appointment the property should go over to the next of kin of the deceased; and this was held to be a limitation that excluded the husband, he not being of the next of kin. But we think there is no doubt, that, if such a limitation over had not existed, the English courts would without hesitation have adjudged the fund to the husband. Such is the plain inference from these and other cases of the same class. On the wife's death, he is entitled to all the undisposed of choses in action of the deceased wife. This fund was not disposed of at her death; it does not belong to the trustee, and is subject to be distributed according to the laws of Maryland, and by these laws the husband is entitled, in exclusion of the next of kin of the deceased wife. As to this fund, the bill will be sustained, and for so much the decree will be reversed. And the bill of Amelia T. Dorsett will also be retained as part of the proceeding in the court below on the cause being remanded there for further proceedings; when the Circuit Court will take an account between the complainant, Robert Marshall, and Susan G. Beall, in which they will charge the complainant with any moneys he may owe said Susan G., and for the balance of the sum of four hundred dollars, with such interest as the court may find to be reasonable and proper; a decree will be rendered for said Marshall, either out of the moneys due from Amelia T. Dorsett, or out of the fund in the hands of Susan G. Beall, the trustee. And it is ordered, that one half the costs of this appeal be paid by the appellant, Robert Marshall, and that the other half of said costs be paid by Susan G. Beall out of the trust fund of fifteen hundred dollars in her hands; and that as to all other costs, the court below shall adjudge their payment on the final decree as in the discretion of that court may be deemed proper.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this case be, and the same is hereby reversed; and that this cause be, and the same 81*] is hereby *remanded to the said Circuit Court, to be proceeded with in conformity to *the opinion of this court*, and that each party *pay his own costs in this court.*

*82

JOSE ARGOTE VILLABOLOS, Marie Rose, and François Felix, Marquis de Fougeres, Appellants,

v.

THE UNITED STATES.

Practice—appeal—private land claims in Florida.

By the Act of May 23d, 1828, 4 Statutes at Large, 284, relating to private land claims in Florida, appeals from the Superior Court of the Territory of Florida are governed by the laws of 1789 and 1803.

Therefore, where an appeal was not made in open court, and at the term at which the final decree was passed, a citation was necessary, which must be signed by a judge, and not by the clerk. See United States v. Hodge, 3 How. 534.

The Act of 1828, above mentioned, allowed appeals to be prosecuted within four months, and placed them, in other respects, upon the same footing with writs of error under the Act of 1803. Writs of error and citations are returnable to the terms of the appellate court next following; and unless the writ and citation are both served before the term, the case is not removed to the appellate court.

Consequently where there was only an entry of an appeal in the clerk's office, and no citation served within four months, the appeal was not regularly brought up, and must be dismissed on motion.

THIS was an appeal from the Superior Court of East Florida.

The case being dismissed for want of jurisdiction, it is unnecessary to do more than refer to the circumstances, which are fully stated in the opinion of the court.

Mr. Mason, then Attorney-General, had moved at a preceding term to dismiss this case, upon the ground of its being irregularly brought up.

It was now argued by Mr. Clifford, Attorney-General for the motion and Mr. Yulee against it.

Mr. Clifford, for the motion:

The points relied on by the United States for dismissal of the appeal in this case are—

1st. That there is no citation issued according to law; the citation in the record being signed by the clerk of the Superior Court of East Florida instead of the judge, in pursuance of the twenty-second section of the Judiciary Act.

2d. That there is no allowance of the appeal.

1st. The counsel of the appellants contend that the citation is signed according to the practice of the territorial courts of Florida which must govern this question. It is, however, submitted, that the practice of the courts does not afford the rule to govern appeals in land cases under the special jurisdiction with respect to them, conferred on the judge of the Superior Court of East Florida.

*A slight examination of the acts of [*82 Congress on the subject will satisfactorily demonstrate this proposition.

By the sixth section of the Act of the 23d May, 1828, 4 Statutes at Large, 284, it is provided, that certain claims to land within the Territory of Florida shall be received and adjudicated by the judge of the Superior Court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district

judge and claimants in the State of Missouri, by Act of Congress approved 26th May, 1824, entitled "An Act enabling the claimants to lands within the limits of the State of Missouri, and Territory of Arkansas, to institute proceedings to try the validity of their claims."

And by the seventh section it is enacted, that it shall be lawful for the claimants to land as aforesaid to take an appeal, as directed in the act aforesaid, from the decision of the judge of the district to the Supreme Court of the United States, within four months after the decision shall be pronounced.

And by the twelfth section it is enacted, that the petitions were to be filed within one year from the passage of the act; and if, on account of the neglect or delay of the claimant, they should not be prosecuted to a final decision within two years, they were forever barred both at law and in equity.

A subsequent act was passed on the 26th May, 1830, 4 Statutes at Large, 406, which, by its fourth section, in effect revived the Act of 1828.

It was, however, under the Act of 1828 that the petition in this case was filed; and it is clear, beyond all controversy, that the forms of proceeding were to be the same as those prescribed to the district judge and claimants in the State of Missouri, by the Act of 1824, hereinafter mentioned.

The Act of 1824, 4 Statutes at Large, 52, the rules of proceeding under which were made the rules of proceeding in the Florida cases, by its first section enacts, that it should be lawful for any person claiming lands in the State of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, "to present a petition to the District Court of Missouri," setting forth their claims. The second section provides, that the proceedings are to be conducted according to the rules of a court of equity, and that "in all cases the party against whom the judgment or decree of the said District Court may be finally given shall be entitled to an appeal within one year from the time of its rendition to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

83*] *At the time this Act passed, the State of Missouri was not embraced within any circuit; but the federal jurisdiction was exercised by the district judge under the Act of the 16th March, 1822, 3 Statutes at Large, 653, entitled "An Act to provide for the due execution of the laws of the United States within the State of Missouri, and for the establishment of a district court therein." By the second section, the State of Missouri was created a district, with one judge, to be called the district judge, who should "in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district" under the Judiciary Act and the Act of the 2d March, 1793, being the act in addition to the Judiciary Act.

The tenth section of the Judiciary Act, 1 Statutes at Large, 77, prescribes the mode in which appeals were to be taken from the District Court of Kentucky to the Supreme Court, as follows: "And writs of error and appeals shall lie from decisions therein to the Supreme Court, in the same causes as from a circuit court to the Supreme Court, and under the same regulations."

It is clear, therefore, that citations, in the case of appeals from the District Court of Kentucky, were subject to the rules prescribed by the twenty-seventh section of the Judiciary Act; that the rules applicable to Kentucky were adopted for Missouri; and that the judge of the Superior Court of Florida was to adjudge these land cases according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants in Missouri. The legislation of Congress on the subject is plain and distinct, as it seems to me, and the local practice of Florida has nothing to do with the question, and furnishes no guide whatever to regulate the proceedings.

It therefore appears to me that the case of The United States v. Hodge, 3 Howard, 534, is directly in point.

2d. No appeal was taken in open court at the term when the decree was made rejecting the claim, or at any other time. The claim was rejected 10th September, 1838. On the 25th November following, the solicitor of the appellants filed in the clerk's office a notice of appeal, but no allowance thereof was ever made.

It is insisted that a notice thus filed in the clerk's office, unaccompanied by any other act of the party, and without the knowledge either of the opposing party or of the court, and without any approval by the judge before whom the cause was tried, cannot be regarded as an appeal effectually taken. It was not an appeal in fact, but a mere notice of an intention to *carry up the case for revision. It is not [*84 denied that the right of appeal, when claimed in open court during the term when the cause was tried, is an absolute right, and one which the court has no power to deny; but when subsequently claimed in vacation, it must be approved or allowed by the court, otherwise it might be resorted to for purposes merely wanton, or for delay, and would operate as a surprise upon the opposite party. Yeaton v. Lenox, 7 Peters, 220.

The appeal, under the circumstances of this case, was not prosecuted in due time, but must be considered as having been abandoned before the citation was issued.

It is reasonable to conclude, after a delay of more than five years, that the party had waived any right which he acquired by filing the notice of appeal in the office of the clerk of the court. Whatever may be the effect of a notice thus filed, it cannot remain available indefinitely. The appeal must be claimed and allowed within the time prescribed by law. The mere filing of the notice within the time allowed to take the appeal is insufficient to secure the right, unless the appeal be perfected within a reasonable time. The delay of more than five years raises the presumption that the right to appeal had been abandoned, or waived, before the citation was issued, or that the notice was not filed in good faith.

If the party may assert the right in this case,

after more than five years have elapsed since the notice was filed, when would the right to prosecute the appeal cease? The practice, if sustained, would introduce great looseness into legal proceedings, and create confusion and uncertainty in the rights of property over which such a notice of appeal was permitted to hang. It is often the main purpose of an appeal to secure a new trial, which it is always desirable to have during the lifetime of the witnesses who testified in the court below. If this practice be sustained, a party might purposely defer his appeal, and wait the events which would deprive his adversary of the testimony upon which he had relied in the former trial.

There must be some limit to the period within which the appeal may be prosecuted. It will be found, upon examination, that, in the Florida cases heretofore brought up for revision, the appeal in every instance was in fact prayed for in open court, and in presence of the opposing party. In such cases no citation is necessary, and it was wholly immaterial whether the citation was signed according to law, or issued by the clerk. Moreover, in those cases, the opposing counsel having entered their appearance, the defect was cured. It is clear, to my mind, that no aid can be drawn from those precedents to sustain the present proceedings. It appears to be well 85*] settled, *that no citation is necessary when the appeal is prayed for and allowed in open court. The San Pedro, 2 Wheat. 142; Reily v. Lamar, 2 Cranch, 349; United States v. Hooe, 3 Cranch, 79.

It was not my intention to waive any of the rights of the United States in this case, and I have so apprised the counsel, since the printed argument of the appellants was filed. What I intended to say in the argument, I have now to repeat, and it is, that when the appeal is regularly allowed by the presiding judge within the period prescribed by law, a legal citation may issue and be served after that time, provided it be at least thirty days before the return day of the writ of error.

I have also to refer to Parish v. Ellis, 16 Peters, 451.

Mr. Yulee, against the motion to dismiss:

The objections in this case are very technical.

1. That the citation does not conform to the 22d section of the Judiciary Act of 1789, upon the force of which the case of United States v. Hodge, 3 Howard, 534, was decided.

The act cited has no application to the present case, because it possessed no obligation upon the court from which the record comes.

The appeal comes neither from a district nor from a circuit court of the United States, to which, alone, the 22d section applies.

The Superior Court of Florida was a legislative, not a constitutional, court. It composed no part of the federal judicature, but was simply a territorial court, for territorial purposes. Its powers were defined by special enactment of Congress, and within the scope of those powers the Territorial Legislature regulated its practice.

No appeal was authorized from the Superior *Court of Florida to* the Supreme Court of the *United States. From* the Court of Appeals of *the territory only* could appeals be made to the Supreme Court. See the organization of the judicial system of Florida, Act of 26th May, 1824, 4 Statutes at Large, 45.

No general laws of the United States had force within the territorial limits, unless expressly extended to that territory by Congress.

The laws of the United States in force in Florida will be found specified in 3 Statutes at Large, 657.

The 22d section of the act cited was never considered as of force in Florida, because not applicable to our judicial system, especially so far as the Superior Court was concerned.

The process acts of the United States were, by some, thought to extend there; but this was not a settled opinion. *The citation, [*86 however, in this case, conforms to the Process Act.

The process of the superior courts of Florida was regulated by the Legislature of that territory. See Act of 1832, Duval's Compilation of the Laws of Florida, 91.

The citation in this case conforms to that prescription, and was the same which was used in appeals from the Superior Court to the Court of Appeals (the highest tribunal) in Florida.

The Act of 1828, conferring upon the superior courts special jurisdiction of land claims, and authorizing appeals, directs no form or style of process. The court very naturally and correctly adopted the form prescribed by the Legislature of Florida, and by the Process Act of the United States, and which was used in cases of appeals to the highest territorial tribunal.

The propriety of this course stands conceded by the United States, from which party an objection comes now, at this late stage, with very ill grace.

It happens that the first appeal taken in these Florida land causes was by the United States, and was brought up upon a citation issued at the instance of the United States, in the precise form used in this case. And that the same form has been invariably used in all the Florida land causes, from the commencement to the present time. A large majority of these appeals were at the instance of the United States. See the Records.

The court would now be required to reject that which had been sanctioned by its own practice, and by the assent and direct adoption of the United States, throughout the course of these cases, commencing, I believe, in 183[illegible]. This certainly would be pressing a merely formal objection very far.

But, if I am not mistaken, the first motion filed in this cause did not object to the form of the citation. Not having access to the motion, I cannot be certain; but, if I am correct in my impression, the objection to the citation, as well as the objection presented in the second point, may be regarded as having been waived. See McDonogh v. Millaudon, 3 Howard, 693.

Although unnecessary to this case, it may be questioned whether the Process Act did not virtually repeal the form and style prescribed in the 22d section of the Act of 1789 for citations; that is to say, if a citation may be regarded as being a "writ" or "process" within the meaning of the Act of 1792, as I think it may be.

2. The next objection is, that the appeal was never granted by the court.

Whether it was or not, I am not prepared to say; and if the court consider the allowance of 87*] the appeal material, I will ask *a certiorari, presuming that all was done in the court below which was necessary to justify citations, though omitted from the transcript of the record forwarded here.

But an allowance of the appeal by the court was totally unnecessary.

The appeal was a right of the party. The court had no power to refuse, and being without any judicial discretion in the matter, there was neither occasion nor propriety in any application to it to grant.

The statute confers upon the party the peremptory right of appeal.

See Act of 1828, sec. 7, Statutes at Large, Vol. IV., page 285; and Act of 1824, sec. 3, same volume of laws, page 53.

If a party chose to appeal, and the court refused to send up the record, the Supreme Court would undoubtedly have allowed a mandamus to coerce it.

All that is requisite in the case of an appeal is that enough be done to remove the record. Enough was done for this purpose when the party signified his adoption of the right of appeal allowed by the statute. The statute had made the allowance; an allowance by the court was supererogation.

That such was the impression upon all sides heretofore will be seen by reference to the record in the very last Florida case acted upon in this court, to wit, the case of Darley's Heirs, decided at the last term. It will be seen in that case, that, although the appeal was taken in term time and in open court by the United States district attorney, no application was made to the court for an allowance of the appeal, and no allowance was granted.

In this case, the appeal was taken in vacation, and the mode pursued was the only one practicable.

In fact, the requirement of an allowance by the court would defeat the purpose of the law. The party was allowed four months to decide his mind as to an appeal. The judge was almost continually in motion over a very extensive circuit, and in attendance upon the Court of Appeals at Tallahassee. A term for trial of land causes occurred only once in the year, and the effect of a requirement such as proposed would have been to send a party in chase of the judge all over the territory, and to abridge very materially the time intended to be allowed for considering his interest and deciding upon appeal.

3. That the appeal was not prosecuted in due time.

This objection, I understand from the Attorney-General, has been abandoned by him. It requires, therefore, no reply.

But to prevent any impression that the parties interested were indifferent as to their ap-88*] peal, I will state, as the reason of *the delay in bringing the case up, that the proprietors of the grant reside in a foreign country (France); that about the date of the appeal, the counsel and agent of the claimants, stricken by the hand of God, had become imbecile in mind and incapable of business; and that it was not until long afterwards the parties in France became sufficiently apprised of his condition to make other provision for their interests.

In reply to the Attorney-General, I have further to say:

1. It is conceded that the judge of the Superior Court was required, as stated by the Attorney-General, to receive and adjudicate claims to land according to the rules, etc., prescribed to the district judge of Missouri; but it does not by any means result from this, that in citing an appellee the clerk was to use any other form of process than one appropriate to the court.

2. No such delay or injury, as suggested by the Attorney-General, could result to the appellee from the mode of taking an appeal adopted in this case. The party interested can always, at the end of four months (the time allowed for appeal), ascertain if an appeal has been made; and if it has, the 30th rule of the Supreme Court will insure an early docketing and disposal. In this case, the laches of the United States is without excuse; while the delay on the part of the appellant was the result of misfortune.

The case in 16 Peters was from the Court of Appeals, and has no application.

Mr. Chief Justice Taney delivered the opinion of the court:

This is an appeal from the Superior Court of East Florida.

It appears that on the 18th of April, 1829, a petition was filed by the appellants in the Superior Court, claiming title to certain lands under a Spanish grant. The district attorney answered, denying the validity of the claim, and testimony was taken on both sides, and the case proceeded to final hearing. And on the 10th of September, 1838, the court decreed that the claim was not valid, and that it be rejected.

No appeal was taken at the time, but afterwards, on the 25th of November, in the same year, an appeal was filed in the clerk's office by the solicitor for the appellants. No citation, however, issued, nor was any further step taken in this appeal until August 9, 1844, when a citation issued, signed by the clerk of the Superior Court, which, on the 13th of the same month, was served on the district attorney. And under this appeal and citation the record was filed by the appellants in this court, on the 12th of December, 1844.

A motion has been made on the part of the United States to dismiss this case—1st, upon the ground that the citation is not signed *by the judge; and 2d, that the appeal [*89 was not taken within the time limited by law.

The proceedings in the Superior Court of Florida were had under the Act of Congress of May 23, 1828. It has been urged in the argument for the appellant, that appeals to this court in such cases are not governed by the acts of 1789 and 1803, and may be brought up by a citation signed by the clerk. And it was suggested that such has been the usual mode of prosecuting appeals from the Superior Court of Florida, and sanctioned by the practice of this court.

With a view of ascertaining the practice up-

on this subject, we have caused the records in former cases to be examined; but no case has been discovered in which the appeal was taken in the clerk's office, and the citation signed by the clerk. So far as the examination extended, all of the cases were brought here by appeals taken in open court. And if there are any cases like the present in which this court has treated the appeal as valid, they must have passed sub silentio and without having attracted, in this respect, the attention of the court. It is true, that, in all of the former cases from the Superior Court of Florida, the citation appears to have been signed by the clerk. But as they were taken in open court, no citation is necessary under the acts of 1789 and 1803. It was so held in the case of Yeaton v. Lenox, 7 Peters, 220. And these appeals were therefore regularly before the court, according to the last mentioned acts of Congress—the citations signed by the clerk being altogether unnecessary and unimportant. The question is, therefore, now for the first time presented, whether such a citation is sufficient where the appeal is entered in the clerk's office, and not taken in open court.

The laws of Congress upon this subject are, unfortunately, a good deal complicated. But the view taken in the argument of the Attorney-General is undoubtedly the correct one. The sixth section of the Act of 1828 provides that the proceedings of the Superior Court of Florida, shall be according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants in the State of Missouri by the Act of May 26, 1824; and the seventh section provides that the claimant may take an appeal as directed in the act aforesaid to the Supreme Court within four months after the decision shall be pronounced. The District Court of Missouri, to which the above mentioned Act of 1824 refers, was established by the Act of March 16, 1822, and the second section of this act provides that it should in all things have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky Dis-
90*] trict under the *Act of March 2, 1793. And the tenth section of the last mentioned act directs that writs of error and appeals shall lie from the decisions of the District Court of Kentucky to the Supreme Court in the same causes as from a circuit court, and under the same regulations. Thus, in order to determine how appeals must be prosecuted from the Superior Court of Florida, under the Act of 1828, we are in the first place referred to the law in relation to the District Court in the State of Missouri, and that law refers us again to the act in relation to the District Court of Kentucky, and that law in express terms refers us to the laws regulating appeals from a circuit court of the United Sttaes—that is to say, to the acts of 1789 and 1803. Appeals from the Superior Court of the Territory of Florida, therefore, are governed by these acts; and consequently the case of The United States v. Hodge, 3 Howard, 534, is decisive against the present appeal. When the appeal is not made in open court, and at the term at which the final decree is passed, a citation is necessary. The San Pedro, 2 Wheat. 142; and where necessary, the law requires it to be signed by the judge; and we have no power to receive an appeal in any other mode than that provided by law.

But if the citation had been properly signed, it is too late. By the Act of 1828, the claimant must appeal within four months; and the Act of 1803 subjects appeals to the rules and regulations prescribed by law in cases of writs of error. Now, the writ of error is always returnable to the term of the appellate court next following the date of the writ; and the citation required by the Act of 1789 (which is a summons to the opposite party to appear) must be returnable to the same term, and unless the writ and citation are both served before the term, the case is not removed to the appellate court, and the writ, if returned afterwards, will be quashed. Lloyd v. Alexander, 1 Cranch, 365; Bailiff v. Tipping, 2 Cranch, 406; Wood v. Lide, 4 Cranch, 180; Pickett's Heirs v. Legerwood, 7 Peters, 144; and Yeaton v. Lenox et al. 8 Peters, 123. It follows that, where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered. Yeaton v. Lenox, 7 Peters, 220. The entry of the appeal in the clerk's office is analogous to the issuing a writ of error; it is returnable to the next term of the appellate court; and a citation to the opposite party to appear is necessary. Here the entry of appeal was made in the clerk's office within four months from the date of the decree, and therefore within the time limited by law. The citation might, upon such an entry, have been issued after the expiration of the four months. *But it must be issued [*91 and served before the term of this court next succeeding the entry of the appeal. And unless this is done, the case is not brought before this court. There was no such citation in the present case, and the entry in the clerk's office, standing by itself, was not a removal of the case by appeal, according to the act of Congress. There was, therefore, no appeal within the time limited by law.

The construction of the Act of 1828 contended for by the appellant would defeat its evident policy and intention. It was the object of the law to obtain a speedy settlement in the judicial tribunals of claims made under Spanish titles, many of which were disputed by the United States, as unfounded or fraudulent. This is manifest from the whole scope of the law; and provisions are introduced for the purpose of compelling the claimants to prosecute their claims to final judgment without any unnecessary delay. And it was to accomplish this object, that, instead of limiting the time for appealing to the Supreme Court to five years, as in the Act of 1803, it is reduced to four months. But if this appeal can be maintained, there is no limitation in cases of this kind. For here, after filing his apeal in the clerk's office, it has been suffered to remain there for nearly six years, without any citation to notify the district attorney that an appeal had been prayed, or taking any step to prosecute it. This entry without a citation was a mere nullity.

Upon both of the grounds, therefore, above stated, the appeal must be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Superior Court of the District of East Florida, and it appearing to the court here that this appeal is barred by the lapse of time, and that the citation is not signed as directed by the act of Congress, it is therefore now here considered and decreed by this court, that this cause be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Superior Court, to be proceeded in according to law and justice.

92*] *WILLIAM C. BRASHEAR, Plaintiff in Error,
v.
JOHN Y. MASON, Secretary of the Navy, Defendant.

Admission of Texas into the Union—word "navy" as used in stipulation construed—mandamus does not lie to Secretary of the Navy to compel payment of navy officer's pay.

Under the joint resolutions of Congress, providing for the annexation of Texas to the United States, the officers of the navy of Texas did not pass into the naval service of the United States. The transfer of the navy of Texas related exclusively to the ships of war and their armaments.

A mandamus against the Secretary of the Navy will not lie at the instance of an officer to enforce the payment of his pay.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It was an application to the Circuit Court for a mandamus, under circumstances which are thus stated by that court in its opinion.

William C. Brashear petitioned the court for a rule on John Y. Mason, Secretary of the Navy of the United States, to show cause why a mandamus should not issue, commanding him, as Secretary of the Department of the Navy, to cause payment to the petitioner of his just dues as an officer in the navy for the time past since the annexation of Texas to the United States.

The petitioner states, that, in pursuance of the constitution and laws of the republic of Texas, he was, on the 23d of June, 1845, by the then president of the said republic, commissioned as a commander in the navy of the republic, and forthwith entered into service under orders from the department of war in Texas, and continued in that service from the 23d of September, 1844, thenceforth, and was so in service when the joint resolution of the Congress of the United States passed for annexing Texas to the United States was approved, and when the said State of Texas was admitted into the Union and Confederacy of the United States of America, and was actually in service and a commander in the navy of Texas when the ship Austin, brigs Wharton and Archer, and schooner San Bernard, armed vessels of war of and belonging to the Texan navy, were delivered over to the United States, under the terms and articles of compact and agreement between the United States of America and the republic of Texas; and as such he is advised that he is in good faith, and in accordance with the said articles of agreement, compact, and treaty of annexation, an officer in the navy, and entitled to his pay and emoluments from the United States.

The petitioner further states, that he never has resigned his commission, nor been cashiered, nor dismissed; that he has regularly reported himself for duty under the said commission to *the Secretary of the Navy of [*93 the United States, and has demanded his pay as an officer, but the Secretary of the Navy of the United States has hitherto refused, and yet refuses, to pay him, or to recognize him as an officer of the navy. He states further, that he is informed and advised by counsel learned in the law, that for his pay and emoluments as an officer of the navy of Texas, transferrred to the United States by the terms of the annexation aforesaid, he is entitled to have and receive, up to the 1st of October, 1847, the sum of $2,100; whereof he has received from the treasury of the United States no more than the sum of $689.20, which was paid him by order of the Secretary of the Navy of the 19th of March, 1847. And he is also advised, that he is entited to his continuing pay and rank as an officer in the navy of the United States, by virtue of the said agreement, compact, treaty, and transfer before mentioned.

Notwithstanding all which, the Secretary of the Navy of the United States refuses to order payment to him for the time past since the said annexation and transfer, or to recognize him as an officer in the navy of the United States.

That part of the second section of the joint resolution of the 1st March, 1845, for annexing Texas to the United States, which is applicable to this case, is in the following words:

"Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports, and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means, pertaining to the public defense, belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to, or may be due and owing, said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of the said republic of Texas; and the residue of said lands, after discharging the said debts and liabilities, to be disposed of as the said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States."

The Circuit Court overruled the motion for a mandamus, and rejected the prayer of the petition, to which judgment Brashear excepted, and upon this exception the case came up to this court.

It was argued by Mr. Bibb and Mr. Jones for the plaintiff in error, and by Mr. Clifford (Attorney-General) for the Secretary of the Navy.

A portion of the argument on behalf of the plaintiff in error was as follows:

NOTE.—As to Mandamus, see notes to 4 L. ed. U. S. 263; 39 L. ed. U. S. 160.
12 L. ed.

94*] *Whether the applicant has a right to the money which he demands by his petition and motion depends upon the proper meaning and effect of that part of the convention for annexation and union which relates to the cession by Texas of her "navy," and the acceptance thereof by the United States.

The proposition flowed from the United States to Texas. Texas accepted, and made the cession and delivery, in compliance with her sense of the proposition; and the United States accepted.

The first question is, What is the sense in which this condition was presented by the United States, and the sense in which Texas accepted?

This may be solved by considering, first, the meaning of the word "navy," as established by general use; second, by the circumstances of the parties proposing and accepting; third, by the conduct of the parties in acting under the convention immediately after it was ratified.

1. As to the meaning established by use, "navy" is a mixed mode of speech, a complex idea, including the insensible, inert matter whereof the vessels of war are composed; also the armaments and equipments; and also the active, living bodies and minds necessary to give mobility, direction, utility, and efficiency to the vis inertiæ of the vessels and armaments.

Inanimate matter cannot think, plan, protect, drive off, pursue, blockade, and give safe convoy. Officers and sailors are indispensably necessary to make a navy.

The idea of the navy composed solely of vessels and guns, without officers and seamen, is as absurd as the idea of an army composed solely of muskets, swords, pistols, and big guns, without officers and soldiers to wield them.

The law of the United States entitled "An Act for the better government of the navy of the United States" (2 Statutes at Large, 45), contains forty-two articles to rule and govern the officers and privates in the navy of the United States, which is an authoritative definition, not to be gainsaid, that officers and privates are component parts of a navy. The law of the navy is to govern the officers and the privates who compose the navy, not to govern ships, and guns, that cannot offend nor commit crimes, nor be the subjects of accusation before naval courts-martial.

2. As to the circumstances of the parties proposing the cession and making the cession of the navy and navy yards, docks, ports, and harbors, the United States, by their Constitution, had power to "provide and maintain a navy"; their situation, interests, and duties, imperiously demanded the execution of that power. The State of Texas, if admitted into 95*] *the Union, could no longer keep ships of war in time of peace without the consent of Congress; and yet a navy would be essential to guard and protect the coasts and harbors of Texas after the union, as it had been before the proposed conditions and guarantees for the union. The people and government of Texas could not, did not, understand the proposal to cede the navy to the United States as intended *to destroy it, any more* than that the proposal to cede the ports and harbors was intended t the United States for the purpose of obstruc ing or rendering them useless. The natur sense in which they were presented, unde stood, and accepted, was, that the navy, port and harbors were to be maintained, preserve and used for their several and appropriate pu poses.

But the circumstances under which the peop and government of Texas were, in relation their navy, so well known to public history a to fame, forbid the idea that the United Stat intended the proposal, or that Texas wou have acceded to it, as containing a violation the obligations due to the officers of the nav who had so repeatedly, so gallantly, so glo ously, and so usefully fought the enemies Texas, beat off the foes who came to invad pursued them into their own ports and ha bors, there blockaded them, and levied co tributions to assist the means of Texas in the war of independence. The many naval battl between the vessels of war of Texas and tho of Mexico, in the year 1836, and after, which the navy of Texas fought against t very superior force of the Mexicans, alwa sustaining the honor of the flag, and addi new brilliancy to the lone star, were just fou dations of national pride, as well as of nation gratitude towards the navy. The belief, tha by the proposal for ceding the navy of Tex to the United States, the officers would ha been deprived of their commissions and pay the navy so transferred, turned adrift to seek precarious subsistence in some other callin for which their long and gallant services in t navy of Texas had unfitted them, would of i self have been cause for rejecting the propos on the part of Texas. Such fell ingratitu would have tarnished the escutcheon of Texa The words of the proposal, the circumstanc of the parties to the convention, the end pr posed, left no ground for suspicion, that su an act of injustice and ingratitude to the of cers of the navy was concealed in the propos made by the United States.

3. The conduct of the parties in acting und the convention immediately after it was rat fied. The government of Texas issued order to the commander of the navy for deli ering to the United States; the United Stat received the navy *officers, privates, and [*9 vessels, and kept them in service and pay f the time shown in the petition and the doc ments. Texas had no standing army, nor c ficers of a regular army upon permanent esta lishment. She had some companies of rang enlisted as volunteers for the limited period three months, not expired when Texas w admitted into the Union. These rang with the noted gallant Major Jack Hay their head, were turned over to the comm of General Taylor, served out the time which they had been enrolled, and perfor under his command eminent services known to fame.

Such were the actings and doings by t parties to this convention, when the mutu sense of its meaning was fresh in memory, an the faith of the treaty prevailed.

The word "navy" as used in the Constit tion of the United States, has never been su posed by anyone to mean ships only. E

established usage, and by various acts of Congress "navy" comprehends both ships and men.

There is nothing in the convention itself, nor in the circumstances attending the parties, nor in the end proposed, which requires that the terms of the convention should be understood in a confined, restrictive sense. On the contrary, all the circumstances unite in requiring the expressions to be taken in the most extensive sense. For surely the authors of the proposal, and the party accepting it, did use the word "navy" in its extensive sense, because it was applied to the existing navy of Texas, known to be armed, officered and manned; known to have gloriously fought the battles of Texas, and kept in check the naval power of Mexico, which nation had not then acknowledged the independence of Texas, but kept up the threat to subdue the spirit of the revolted province and subject it to the Mexican power.

The counsel for the plaintiff in error then proceeded to show, from several other considerations, that the word "navy" must be construed to include officers and men.

Mr. Clifford (Attorney-General), contra:

There are several views of this question, either of which, as it seems to me, is conclusive against him. He claims pay as an officer of the United States navy.

It is contended that the joint resolution of March, 1845, makes him such officer. The construction contended for by the petitioner is founded entirely on the meaning which he puts upon the word "navy," which in my judgment is entirely erroneous, and cannot be sustained. The resolution contained the terms of a compact between two sovereign and independent States, and by its second condition [97] clearly contemplated *nothing more than an agreement as to the public property, means, resources and liabilities of Texas. It was the public property, and that alone, which was embraced in that provision. Texas was to retain certain public property, and meet her own liabilities; all the residue of her means of public and national defense was to be "ceded" to the United States—a term of grant evidently applicable to property and not to persons. No ingenuity can change the obvious meaning and sense of a law so plainly written.

The condition, it will be observed, is confined to acts to be done by Texas, and not to duties to be assumed by the United States. Texas binds herself, by acceding to the terms of the resolution, to cede her navy and other public property. The petitioner held a commission under Texas, and had taken the oath of allegiance to her. This did not establish any such relation between the officer and the government as authorized the government to transfer him to the United States, into official responsibilities to which he had not assented, and to which his commission did not bind him. Still less can the United States be held to have taken him into their service by that condition, which imposed on them no duties. The construction contended for would be placing the United States in the attitude of proposing impossible conditions to the government of Texas, for how could Texas cede the services of her citizens?

By a proviso in the naval appropriation Act of 4th August, 1842 (5 Statutes at Large, 500), it is declared, "That, until otherwise ordered by Congress, the officers of the navy shall not be increased beyond the number in the respective grades that were in the service on the 1st day of January, 1842." The construction contended for is inconsistent with this provision of law, and no implication arising under the resolution of March, 1845, can be held as repealing it. This test as to the intention of Congress is conclusive.

But, further, the construction contended for is wholly inconsistent with the power of appointment, which, by the Constitution, is vested in the President, by and with the advice and consent of the Senate. It is unnecessary to consider any of the qualifications annexed to that provision of the Constitution, as it is very certain they can have no application to the present case. It will not be disputed, that officers in the navy of the United States, under existing laws, must be appointed and commissioned by the President.

Congress has no power, either by treaty or by act of ordinary legislation, to abrogate this constitutional provision. It is presumed no authority can be found for the pretension that *Congress can supersede the necessity of [*98 an appointment by the President, by and with the advice and consent of the Senate, in order to constitute, an officer in the navy of the United States; and certainly no person can be entitled to pay as such, without a commission from the President, under the existing laws. Such a proposition, so subversive of the Constitution, cannot be seriously entertained.

What was the remedy sought by the petitioner? It was, that the Circuit Court should issue a writ of mandamus, directing the Secretary of the Navy to pay a sum of money to the petitioner, which he alleges is due to him as an officer of the United States navy. At all times this remedy is used by the court with extreme caution, and never in a doubtful case; and only to compel the performance of a mere ministerial act, or to do some specific thing enjoined by law, in which the party has no discretion. Surely this is not a case in which this power of the court should be exercised.

The petitioner has mistaken his remedy. Congress appropriates money for the pay of officers and men of the United States navy; and the right of an officer to pay attaches as a necessary consequence to the rank conferred by his commission. Has he established his rank? Certainly not.

But even if he has established his rank, the Secretary of the Navy can neither pay him nor withhold his pay; that is a question for the accounting officers of the treasury, over whom, in this respect, the Navy Department can assume no control. The sum stated by the petitioner as received by order of the Secretary of the Navy was paid out of the contingent fund of the department for services rendered by the petitioner, which might have been performed by any citizen holding no commission in the navy. That fund is not chargeable with the pay of officers and men, as is too well known to require any reference to the law. The appropriation for pay is under the general superintendence of the Secretary of the Treasury, and no account for such pay can be allowed until it shall have been passed by the account-

ing officers in the last named department. The sum paid to the petitioner was for services rendered in taking charge of the property of the United States, and not as being due him as an officer. The petitioner's account as presented shows this. The Secretary of the Navy expressly refused to recognize the petitioner as an officer of the navy of the United States. (See Secretary's letter.)

The reasons assigned by the Circuit Court for refusing the rule are so entirely satisfactory and conclusive, in the view which I take of the question, that I deem it wholly unnecessary to pursue the argument, and have only to ap-
99*] pend a copy *of that opinion for the consideration of the court, and to ask their attention to the fact, which appears by the record, that Brashear's commission in the Texas navy bears date subsequent to the passage of the joint resolution of Congress.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court held in and for the District of Columbia.

The plaintiff made application to the court below for a mandamus against a defendant, to compel the payment of $2,100 arrearages of pay due him from the government as a commander in the navy of the United States, which application was founded on the following state of facts:

The plaintiff was appointed a commander in the navy of the republic of Texas on the 23d of September, 1844, and continued in its service down to the annexation of the republic to the United States, in pursuance of the joint resolutions of Congress, March 1, 1845, and until Texas was admitted into the Union as one of the States of the confederacy, and was in the actual service of that republic at the time when its navy, consisting of four vessels of war, was delivered over to the authorities of the United States, according to the terms of annexation.

The plaintiff insists, that, according to the terms and conditions of the compact between the two countries, on the transfer of the navy of Texas to the United States, and their acceptance of the same, he became an officer of the United States navy, and entitled to his pay and emoluments as such.

He further states, that he had reported himself to the Secretary of the Navy for duty, and had demanded his pay of the same; but that the Secretary had refused to recognize him as an officer of the navy, or to make any payment to him as such.

The court below refused the mandamus, and dismissed the application.

The case is now before us for review.

It is not pretended that there has been any stipulation, either by act of Congress or by treaty between this government and Texas, by which the officers of her navy were to become incorporated into the navy of the United States, as a consequence of the annexation; but it is supposed to result from a proper construction and understanding of one of the stipulations contained in the second joint resolution of March 1, 1845. The part material is as follows:

*"Said State (Texas), when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, *arms, armaments, and all [*100 other property and means pertaining to the public defense belonging to Texas, shall retain all the public funds," etc. 5 Statutes at Large, p. 797.

The argument is, that the term "navy" properly includes, not only the vessels of war, their armaments and equipments, but also the usual complement of officers and crew on board the respective vessels; and that it is in this sense the term is used, and should be understood, in the joint resolutions.

We think not, but, on the contrary, are of opinion that it relates exclusively to the ships of war and their armaments belonging to the naval establishment of Texas, which, according to the compact, were to become the property of the United States.

The two governments were not negotiating about persons holding public employments in Texas, or in respect to any place or provision for that class, on the breaking up of the old government and its reconstruction for admission into the Union, but in respect to her public property, which she was, generally, disabled from holding, under the Constitution of the United States, after her admission, as it fell under the jurisdiction and direction of the federal government.

The resolution provides for ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, etc., and all other property and means pertaining to the public defense.

The phraseology is appropriate for the purpose of conveying the property of the one government to the other, but exceedingly inapt and unfortunate if intended to embrace persons or other public officers, as contended for by the plaintiff.

The argument in favor of including the officers of the navy of Texas in the transfer of the ships might be urged with equal force by the officers and hands in charge of the navy yard or of those at the time in charge of the fortifications; for the term "navy," in the connection in which it is used, no more includes, *vi termini*, the officers and crew on board, than the term "navy yard" includes the officers and hands in charge of that part of the public property, or the term "fortifications" includes the officers and soldiers of the republic engaged in manning them.

The construction contended for we think altogether inadmissible, and properly rejected by the court below.

We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States navy, a mandamus would not lie in the court below to enforce the payment.

The Constitution provides, that no money shall be drawn from the treasury but in consequence of appropriations made *by law. [*101 Art. I., sec. 9. And it is declared by act of Congress (3 Statutes at Large, p. 689, sec. 3) that all moneys appropriated for the use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of

the Treasury, upon the requisitions of the Secretaries of these departments, countersigned by the second comptroller.

And, by the Act of 1817 (3 Statutes at Large, p. 367, secs. 8, 9), it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the object for which they are respectively appropriated, and no others. 2 Statutes at Large, p. 535, sec. 1.

Formerly, the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury, countersigned by the comptroller.

In the case of Mrs. Decatur v. Paulding (14 Peters, 497), it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear, in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also, was under the control of the Secretary, and the money payable on his own warrant.

Still the court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, on the ground that the court below had no jurisdiction over the case, and, therefore, the question not properly before this court on the writ of error.

The court say, that the duty required of the Secretary by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties; that, in 102*] general, such *duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.

The court distinguish the case from Kendall v. The United States, 12 Peters, 524, where there was a mandamus to enforce the performance of a mere ministerial act, not involving, on the part of the officer, the exercise of any judgment or discretion.

The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy.

Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.

The Secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be apportioned among the parties entitled to it.

These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the government, to the payment of whose demands the particular fund is applicable, are interested, as well as the government itself. At most, the Secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.

It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals.

For these reasons we think the writ of mandamus would *not lie in the case, and [*103 therefore, also, properly refused by the court below, and that the judgment should be affirmed.

Order.

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

THE HEIRS OF C. and M. DE ARMAS, Appellants,

v.

THE UNITED STATES.

Practice—judgment, when final.

An order of the District Court, sustaining a demurrer to a petition because it was multifarious, and because the names of the persons claiming or

NOTE.—As to what is a "final decree" of judgment from which appeal lies, see notes to 5 L. ed. U. S. 302; 4 L. ed. U. S. 97; 49 L. ed. U. S. 1001; 62 L. R. A. 515.

in possession of the land which the petitioners alleged to belong to them were not set forth, was not a final judgment or decree from which an appeal lies to this court.

THIS case came up by appeal from the District Court of the United States for the District of Louisiana.

It was a petition in the District Court relating to land, the circumstances of which it is unnecessary to state any further than they are referred to in the opinion of the court, as the case went off upon a point of jurisdiction. It was argued by Mr. S. S. Prentiss and Mr. Perin for the appellants, and Mr. Clifford (Attorney-General) for the United States.

That part of the argument of the Attorney-General which related to the point of jurisdiction was as follows:

On the part of the United States it is contended, that the Supreme Court has no jurisdiction under the second section of the Act of 1824, or under any other act, unless in cases where the judgment or decree in the court below made final disposition of the suit.

This point has been repeatedly ruled, on the twenty-fifth section of the Judiciary Act, by the unanimous judgment of the court, and is believed no longer to be an open question. Houston v. Moore, 2 Wheat. 433; Gibbons v. Ogden, 6 Wheat. 448; Weston et al. v. City Council of Charleston, 2 Peters, 449; Winn's Heirs v. Jackson et al. 12 Wheat. 135.

"The word 'final' must be understood as applying to all judgments and decrees which determine the particular cause." Weston et al. v. City Council of Charleston, 2 Peters, p. 464, 465.

104*] *The Act of 1824 follows very closely the requirements of the Judiciary Act in this respect. The second section provides, "And in all cases the party against whom the judgment or decree of the said District Court may be finally given shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

The appeal is allowed only to the party against whom the judgment or decree may be finally given; and, further, to place the point beyond doubt, in case no appeal be taken, it is specially provided that the judgment or decree of the District Court shall be final and conclusive.

In this case no final decree was made. Some points in the demurrer being sustained, the petitioners appeal. The petition is not dismissed, but, from aught that appears in the record, is still open to a rehearing. It is clearly within the discretionary power of the district judge to allow the appellants to amend and avoid the objections raised. At all events, the final decree has not been passed, and no appeal will lie.

The record does not show that the proceedings in the court below are closed; consequently no case is made within the provisions of law authorizing an appeal. The petition and *pleadings are still within the control of the court below.*

862

Mr. Justice Justice Taney delivered the opinion of the court:

This case is brought here by appeal from the District Court of the United States for the District of Louisiana.

It appears that a petition was filed by the appellants, claiming an inchoate title to certain lands, under Spanish grants, which they alleged the United States were bound to perfect; but that these lands had been sold by the United States to divers persons unknown to the petitioners. They therefore prayed that the validity of their claim might be inquired into, and that they be allowed to locate the same number of arpents upon the public domain, according to the provisions of the Act of Congress of May 26, 1824, sec. 11, which was extended to Louisiana by the Act of June 17, 1844.

The proceedings upon this petition, as stated in the record, appear to have been irregular and confused, and it is unnecessary to state them at large. It is sufficient to say, that the district attorney demurred to the petition, setting forth various causes of demurrer, that the petitioners afterwards amended their petition, and that the district attorney again demurred; *and after various other pro- [*105 ceedings, the record states that the following judgment was entered on the minutes:

"The demurrers to the original and to the amended petition of petitioners, submitted to the court yesterday, having been considered by the court, it is now ordered, adjudged and decreed, that the 4th ground of demurrer set forth in the demurrer to the original petition be sustained, and that the 1st, 2d, 3d, 5th, 6th, 7th, and 8th grounds set forth in said demurrer be overruled, it appearing that said last mentioned grounds of demurrer have been removed by petitioner's amended petition.

"It is further ordered, that the 1st and 2d grounds of demurrer, set forth in the demurrer of respondents to the amended petition of petitioners, be sustained, and that the 3d ground of demurrer, set forth in said demurrer to said amended petition, be overruled."

The grounds of demurrer sustained by the District Court were, that the petition was multifarious, and that the names of the persons claiming or in possession of the land which the petitioners alleged belonged to them were not set forth.

The appeal was taken from the judgment above recited. But evidently that judgment is not a final judgment or decree. For the petition is not dismissed, nor is the title of the petitioners to the land claimed by them finally adjudicated, nor their right to locate the same number of arpents upon the public domain. Nothing is decided but a question of pleading and a question as to proper parties. The petition appears to be still pending in the District Court; and the objections upon which the court decided against the petitioners might be removed, if the appellants desired it, by an application to the court for leave to amend. But if the petitioners did not move for leave to amend, and preferred taking the opinion of this court upon the questions decided against them in the District Court, then, under the opinion given by that court upon the demurrer,

Howard C.

it should have proceeded to pass a final decree dismissing the bill. An appeal from that decree would have brought the case legally before this court, and authorized it to examine the grounds upon which the decree had been made.

But as there is no final judgment or decree, we have no jurisdiction, and consequently the appeal must be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel; and it appearing to the court here that there has been no final 106*] judgment or decree *of the said District Court in this cause, it is thereupon now here ordered and decreed by this court, that this appeal be, and the same is hereby dismissed for the want of jurisdiction.

THE UNITED STATES, Appellants,
v.
THOMAS CURRY and Rice Garland.

Appeal taken by district attorney and sanctioned by Attorney-General is sufficient under Act of 1824—attorney or solicitor cannot withdraw from cause without permission of court—citation, time of.

The 9th section of the Act of 26th of May, 1824, relative to the action of the Attorney-General in cases of appeal, is only directory, and its non-observance does not vitiate an appeal, provided it be taken by the district attorney and sanctioned in this court by the Attorney-General.

An attorney or solicitor cannot withdraw his name, after it has been entered upon the record, without the leave of the court, and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself.

The opinion of the court in the case of Villabolos v. The United States, ante, p. 81, again asserted, viz., that the appellant must prosecute his appeal to the next succeeding term of this court, and whenever the appeal is taken by entering it in the clerk's office, the adverse party must be cited to appear at that time.

Therefore, where an appeal was filed in the clerk's office in November, 1846, and there was no citation to the adverse party to appear on the 7th of December, 1846 (the commencement of the succeeding term of this court), the case was not removed upon that appeal.

A party may take a second appeal where the first has not been legally prosecuted. But in the present case, the order of the court, cannot be construed as a grant of a second appeal.

The appeal must therefore be dismissed, on motion.

THIS was an appeal from the District Court of the United States for Louisiana, involving the title to a large body of land in that State. The proceedings of the District Court are sufficiently set forth in the opinion of the court and in the argument of Mr. Curry, to which the reader is referred.

Mr. Curry moved to dismiss the appeal, as having been irregularly brought up.

The motion was argued by Mr. Curry and Mr. Jones, in favor of it, and Mr. Clifford, Attorney-General, against it.

Mr. Curry said that the proceedings in this case were had under the law of Congress, passed the 26th of May, 1824, "enabling claimants to land (within the State of Missouri, etc.) to institute proceedings to try the validity of their claims," etc.; which is revived by the Act of the 17th June, 1844, by "An Act to *provide for the adjustment of land claims with-*

in the States of Louisiana, etc." The first of these acts is in the 4th volume of the Statutes at Large, p. 52; the last one is to be found in the 5th volume of the same work, p. 676.

The appeal is from the United States District Court for Louisiana, sitting as a court of equity, under the provisions of the first recited act.

*The second section of this act pro- [*107
vides, "that every petition or suit shall be conducted as in a court of equity, etc.; and in all cases the party against whom the judgment or decree of said District Court may be finally given shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties," etc.

The ninth section of said act has this provision: "That it shall be the duty of the district attorney of the United States for the district in which the suits authorized by this act shall be instituted, in every case where the decision is against the United States, and the claim exceeds one thousand acres to make out and transmit to the Attorney-General of the United States a statement containing the facts of the case, and the points of law on which the same was decided; and if the Attorney-General shall be of opinion that the decision of the District Court was erroneous, it shall be his duty to direct an appeal to be made to the Supreme Court of the United States, and to appear and prosecute the said appeal in that court; and it shall be the further duty of the district attorney to observe the instructions given to him by the Attorney-General in that respect."

The decree of the District Court of Louisiana sought to be appealed from was rendered and signed on the 26th day of June, 1846.

On the 5th of November, 1846, the following petition was filed, upon which the following proceedings of the court took place, viz:

To the Hon. T. H. McCaleb, Judge of the District Court of the United States for the District of Louisiana.

The petition of the United States respectfully shows, that it is believed there is error in the judgment rendered against them in this honorable court on the twenty-sixth day of June last, 1846, in the matter of Curry and Garland v. The United States.

Wherefore they pray that your honor may be pleased to allow an appeal to be taken from said judgment to the Supreme Court of the United States.

(Signed) Thomas J. Durant, Att'y U. S.

Judge's orders thereon.

Let this petition be filed and an appeal granted as prayed for.

(Signed) Theo. H. McCaleb,
U. S. Judge.

*Let the said appeal be returnable on [*108
the second Monday of January, 1847.

(Signed) Theo. H. McCaleb,
U. S. Judge.

Let the return day of the appeal in this case be extended to the third Monday of February next, 1847.

(Signed) Theo. H. McCaleb,
U. S. Judge.

And on the 13th day of February, 1847, the following entry was made on the minutes, to wit:

Saturday, February 13th, 1847.

Present, the Hon. T. H. McCaleb.

Curry and Garland
v.
The United States.

Upon motion of Thomas J. Durant, United States district attorney, that the land cause No. 1, and entitled as above, appeal has been granted from the judgment rendered therein to the Supreme Court of the United States, at Washington, and that the said appeal has been made returnable on a subsequent day during the present session of the Supreme Court, and not on the first day of the said term, as the practice generally is; to the end that said case of appeal might have its chance of being tried during the present session; and as no object will be gained by issuing citation to the appellees, directing them to appear at any other time than on the first day of the said term of said court, it is therefore ordered, that the order upon the said petition of appeal in said cause be so amended as to make it returnable on or before the commencement of the next annual session of the Supreme Court.

Mr. Curry further said, that no citation upon this order was issued until the 14th of August, 1847. But at that time the year within which an appeal could be taken had expired for more than a month. The citation was also irregularly served. The following extract from the record shows the date of the citation, and its irregular service:

United States District Court for the District of Louisiana.

To Thomas Curry and Rice Garland, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States of America, to be holden at Washington city, on the first Monday of December next, pursuant to an order of appeal granted on the thirteenth day of February, 1847, by the district judge of the United States for the District of Louisiana, in a certain suit 109*] *wherein you are plaintiff and the United States are defendants, to show cause, if any there be, why the decree rendered on the second day of May, 1846, against the said appellants and in your favor, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal, at New Orleans, this fourteenth day of August, A. D. 1847.

Theo. H. McCaleb, U. S. Judge.

Marshal's return.

Rec'd, August 27th, 1847, and on the 8th September, 1847, served copies of the above citation on Wm. C. Hammer, in person, at New Orleans, said Wm. C. Hammer's names appearing on the docket as attorney for the above named plaintiffs.

Wm. Shearer, D'y U. S. Marshal.

Filed 15th November, 1847.

Mr. Curry therefore moved to dismiss the appeal, on the three following grounds, viz.:

1. Because it was taken and entered in the *clerk's office* on the 5th November, 1846, and *no citation issued* or was served before the *next term of this* court after the appeal was entered; nor did any issue until the year allowed to appeal in had elapsed. Consequently there was no appeal within the year. See the case of Villabolos v. The United States, decided at the present term of this court. Ante. 81.

2. There was no service of the citation of appeal, even if it had issued in time, on the appellees, as is required by law.

3. That no appeal has been directed to be made to the Supreme Court of the United States in this case by the Attorney-General, so far as the record shows, in the manner prescribed by the 9th section of the Act of 26th May, 1824.

Mr. Clifford (Attorney-General) contended, on the part of the United States, that the appeal was not taken in fact until the 13th February, 1847; that an appellant may withdraw an appeal and renew it; that the appeal was prayed in open court, when no citation was necessary; that the citation was not necessarily a part of the record, and therefore was no part of a writ of error; that if served at any time before the return day, the service is good.

For these and other views he referred to 4 La. Rep. 318; Code of Practice, art. 494; 2 Smith, Ch. Pr. 14, 37; 2 Cranch, 33; 6 Binney, 16; 6 Mass. 435; 5 Howard, 295; 4 Cranch, 180; 3 Peters, 459; 7 Peters, 147.

Mr. Jones, in support of the motion, contended, that the 9th section of the Act of 1824 had not been complied with; *that the [*110 right of appeal was limited and not absolute, under the 2d and 9th sections of that act; that the public interest required that frivolous cases should not be brought up; that the service upon an attorney was not sufficient; that it depended on the rules of the court to make it so, and here there were no rules; that a reference to the record would disprove that the 13th of February, 1847, was the time of appeal, and show that this order was merely a modification of an existing appeal.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to dismiss this case for want of jurisdiction.

The appeal was taken from a decree of the District Court of the United States for the Louisiana District, confirming to the appellees certain lands which they claimed under a Spanish grant. The decree was made on the 2d of May, 1846. But a new trial was afterwards granted, in order that third persons, who also claimed title to the land, might have an opportunity of intervening in the suit, according to the practice of the Louisiana State courts. Subsequently, however, the petition of the intervenors was withdrawn, and another decree was passed and signed on the 26th of June, 1846, again confirming the title of the present appellees. It is not material to this inquiry whether the first or second decree is to be regarded as the final one in the District Court.

This proceeding by new trial (instead of rehearing, as in chancery) and intervention was irregular. And the court seems to have followed the Louisiana State practice, when the acts of Congress direct that the proceedings in such cases shall be conducted according to the

rules of a court of equity. 5 Statutes at Large, 676; 2 Statutes at Large, 53.

On the 5th of November, 1846, the district attorney presented a petition to the district judge, praying an appeal, who thereupon passed an order, indorsed on the petition, directing it to be filed and the appeal granted. Further orders of the district judge are also indorsed on the petition—one directing the appeal to be returnable to the second Monday of January, 1847; another extending the time to the third Monday in February, and another dated the 13th of February, 1847, in the following words:

"Upon motion of Thomas J. Durant, United States district attorney, that the land cause No. 1, and entitled as above, appeal has been granted from the judgment rendered therein to the Supreme Court of the United States, at Washington, and that the said appeal has been made returnable on a subsequent day during the present session of the Supreme Court, 111*] and not *on the first day of said term, as the practice generally is; to the end that said case of appeal might have its chance of being tried during the present session; and as no object will be gained by issuing citation to the appellees, directing them to appear at any other time than on the first day of the said term of said court, it is therefore ordered, that the order upon the said petition of appeal in said cause be so amended as to make it returnable on or before the commencement of the next annual session of the Supreme Court.

Afterwards, on the 14th of August, 1847, a citation was issued, requiring the appellees to appear in this court on the first Monday in December then next following. The citation states the decree from which the appeal was made to have passed on May 2, 1846, and refers to the order above recited as an appeal granted on the day the order bears date. It was served, as appears by the return of the marshal, on the 8th of September following, on the attorney whose name appeared on the docket as the attorney for the petitioners, who are the present appellees. But the affidavit of the attorney has been filed here, stating that he was not at that time their attorney—that his fee had been paid, and he had been discharged from all duty as attorney or counsel for the parties, and had so informed the marshal at the time of the service.

In this state of the facts, several objections have been made to the validity of this appeal. Two of them may be disposed of in a very few words.

It is said that the record does not show that this appeal was taken by the direction of the Attorney-General, according to the provisions of the 9th setion of the Act of May 26, 1824. We think there is no force in this objection. That section is merely directory to the officers of the United States, and intended to guard more effectually the public interests. And if the appeal is taken by the district attorney, and sanctioned in this court by the Attorney-General, it is sufficient, even though it should appear (which it does not in this instance) that the appeal was taken without his previous direction.

So, too, as to the service of the citation on the attorney. It is undoubtedly good and *according to the established practice in courts of* chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to withdraw his *name after the case was finally de- [*112 cided. For if that could be done, it would be impossible to serve the citation where the party resided in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting an attorney to embarrass and impede the administration of justice, by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke.

The remaining objection is a more serious one. Has this appeal been taken and prosecuted within the time limited by the acts of Congress? The District Court appears to have acted, in relation to the appeal, as it did in its previous proceedings, under the erroneous impression that it must follow the practice of the Louisiana State courts; without adverting to the acts of Congress which conferred on the court the special jurisdiction it was exercising, and which prescribe the manner in which it shall be exercised. There was no necessity for the petition to the district judge to grant the appeal. It was a matter of right given by law after final decree, which the court could not refuse. Nor had it any power to prescribe the time or manner in which the record was to be transmitted, and the case brought before this court. That, too, is regulated by acts of Congress, which the court can neither change nor modify. All the orders, therefore, upon this subject were unauthorized and void. And the validity of the appeal depends altogether upon the laws of the United States, without reference to the laws of Louisiana or orders of the District Court.

The acts of Congress concerning appeals in cases of this description were fully considered by the court in the case of Villabolos v. United States, decided in the early part of the present term, and the previous decisions of this court referred to and examined. And the court in that case held that the appellant must prosecute his appeal to the next succeed ng term of this court, and the adverse party be cited to appear at that time, whenever the appeal is taken by entering it in the clerk's office. In the case before us, the appeal was filed in the clerk's office November 5, 1846. The next succeeding term of this court commenced on the 7th of December in the same year. But there was no citation to the adverse party to appear at that time, and consequently the case was not removed to this court upon that appeal. The citation which issued on the 27th of August, 1847, would not bring up an appeal returnable to December Term, 1846.

It is true, that, although this appeal was not prosecuted, yet the district attorney might have taken another appeal at any *time with- [*113

in a year from the date of the decree, and brought it up by a citation returnable to the December Term, 1847. The right of a party to take a second appeal where the first had not been legally prosecuted was decided in the case of Yeaton v. Lenox, 8 Peters, 123. In that case, the first appeal was dismissed by the court, for the want of a proper citation. And the appellant, before the expiration of the time limited by law for appealing, entered a second appeal in the Circuit Court, and cited the adverse party to appear at the term of this court next following the second appeal; and the second appeal was held good. If, therefore, the order of February 13, 1847, could, as contended for in the argument, be regarded as a second appeal, the case would be regularly before the court, upon the citation issued in the August following. But, after very carefully considering that order, the court think that no just construction of its language will authorize us to regard it as a second appeal. It was evidently nothing more than a motion to extend the time for returning the appeal previously taken; and the court directs that its former order be so amended as to make the citation returnable to the next term of this court. The citation which afterwards issued, in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order. It appears, like the preceding ones, to have been made under the impression that the District Court had the power to regulate the time and manner of bringing up the appeal.

It has been said that this objection is a mere technicality, and may be regarded rather as a matter of form than of substance. But this court does not feel itself authorized to treat the directions of an act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court. And as this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.

Mr. Justice Woodbury dissented.

114*] *Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel; on consideration whereof, and it appearing to the court that this appeal has not been prosecuted in the manner directed and within the time limited by the acts of Congress, it is therefore now here ordered and decreed by this court, that this appeal be, and the same is hereby dismissed.

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THOMAS DAVIS, Plaintiff in Error,
v.
WILLIAM M. TILESTON & COMPANY.

Bill to enjoin judgment, showing complainant's ignorance of defense at law, and combination to defeat his right of offset, not demurrable.

Where a bill of equity sought to enjoin a judgment, and charged that the complainant had a good defense which he did not know of at the time when judgment at law was rendered against him, and charged also, that he was entitled to pay the debt in the depreciated notes of a particular bank, of which advantage it was attempted to deprive him by fraud and collusion, and this bill was demurred to, it was error in the court below to sustain the demurrer.

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

In the year 1838, Thomas Davis, the plaintiff in error, received three thousand dollars from the Aberdeen and Pontotoc Railroad and Banking Company in the notes of that institution, and gave his bond for the delivery of seventy-five bales of cotton at the town of Burlingham, on the Tallahatchie River, on or before the 1st day of the ensuing March. According to his own statement in the bill which he afterwards filed, he paid \$1,685.50, and delivered eighteen bales of cotton, subject to the order of the company. The precise time of this payment and delivery was not stated.

On the 12th of December, 1839, William M. Tileston and Charles N. Spofford, residing in New York, and carrying on business under the name of William M. Tileston & Co., obtained a judgment in the District Court of the United States for the Northern District of Mississippi against the Aberdeen and Pontotoc Railroad and Banking Company, for a sum of money, the amount whereof is nowhere stated in the record.

Upon this judgment, a writ, called a writ of garnishment, was issued by way of execution and served upon Davis. This writ was returned, duly executed, to June Term, 1840.

At December Term, 1840, judgment was rendered against Davis and his securities, as debtors to the Aberdeen and Pontotoc Railroad Banking Company for \$1,861 and costs.

*A fieri facias was issued upon this [*115 judgment in favor of Tileston & Co., returnable to June Term, 1841.

On the 10th of June, 1841, Davis paid, on account of the judgment, \$242.77, which was duly credited.

At December Term, 1841, a return was made of property levied upon, with its valuation, but no further proceedings appear then to have taken place.

In July, 1843, Davis filed a bill on the equity side of the court against Tileston & Co., to enjoin the judgment obtained against him at December Term, 1840. The bill recited the above facts, and then proceeded thus:

"Your orator further states unto your Hono[r],

NOTE.—When a judgment at law will be enjoined in equity.

Though the jurisdiction of courts of equity to enjoin judgments at law is of ancient origin and well established, a bill for this purpose is watched with extreme jealousy and the grounds upon which it will be sustained are narrow and restricted. Howard [v.]

that, before the rendition of the said judgment upon the said garnishment in favor of William M. Tileston & Co. against your orator, he paid upon the said cotton bond $1,685.50, or about that sum, and delivered at the town of Burlingham, according to his contract, eighteen bales of good cotton, averaging in weight about five hundred pounds, and subject to the order of the said Aberdeen and Pontotoc Railroad and Banking Company, and which cotton was shipped on board of steamer Big Black, Steilling, master, without the orders of or being subject to the control of your orator; and said cotton was left by said steamer at the house of and in the care of Young & Richards, Vicksburg, Miss., and by them twelve of said bales were shipped to George Buckanan, of New Orleans, for the benefit of and on account of the said Aberdeen and Pontotoc Railroad and Banking Company. The remaining six biles were shipped and sold in New Orleans, from the said house of Young & Richards in Vicksburg, for the benefit of and in the name of one Dickens, for between fourteen and fifteen cents per pound; and the said Dickens was found by your orator on the western bank of the Mississippi River, in the State of Arkansas, about forty miles above Memphis, Tennessee; and the proceeds of the sale of the said six bales of cotton were collected from him by your orator, amounting to about four hundred dollars, but not one cent has ever been collected for the twelve bales shipped to Buckanan, for and on account of the said bank, or applied by said bank to the credit of your orator's bond.

"Your orator further states, that, relying upon the statements of the agents of the said bank, solemnly made and often reiterated, that they knew nothing about the twelve bales of cotton or any other part of the eighteen bales shipped as before stated, he did not know of the shipment of said twelve bales of cotton from Young & Richards, Vicksburg, to Buckanan, of New Orleans, for and on account of the said Aberdeen and Pontotoc Railroad and Banking Company, until long after the 116*] *rendition of said judgment in December, 1840, against your orator, a debtor to said bank, in favor of the said William M. Tileston & Co., and was kept from his legal and lawful defense and credits, on the trial of said garnishment, by the false assurances of the bank and its agents, so made to your orator as aforesaid, and, as your orator fully believes, intended for and made to lull him to sleep, and impose upon his general credulity and confidence in his fellow-men where the least show of honesty is to be discovered. Your orator further states unto your Honor, that he was not apprised of, but wholly ignorant of the fact that the said twelve bales of cotton were shipped by the agents of the said bank from Vicksburg to New Orleans, as above stated, until by a critical examination, about a year or thereabouts since, through his agent, the facts were ascertained to be as before stated."

The bill then proceeded to charge a fraudulent combination between the bank and Tileston & Co., by setting up a fictitious claim against the bank for the purpose of depriving Davis of the benefit of paying the bank in its own depreciated notes, and finally averred that the only part of the debt still due was $809.47, which he tendered in the notes of the bank.

An injunction was issued according to the prayer of the bill.

In June, 1844, the defendants filed a demurrer, and assigned the following causes:

1st. The bill shows that the complainant had a full and complete remedy at law, which he has neglected.

2d. That the bill shows that complainant knew, at the time he answered the garnishment against him, that no credit had been given for said cotton, and having at that time acquiesced in the conduct of the bank, and acknowledged himself indebted to the amount of defendant's judgment, he cannot now re-open the judgment in this court to be heard, to deny what he might and ought to have denied in his said answer to said garnishment.

3d. That it appears, by complainant's own showing, that judgment was rendered against him on his answer at December Term, 1840; that he made a payment and satisfaction of said judgment by the execution and forfeiture of a forthcoming bond in May, 1841; that as late as between June and December, 1841, he took the benefit of the valuation law on said execution, and postponed further action by the

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Slack v. Wood, 9 Grat. 40; Bateman v. Willoe, 1 Sch. & Lef. 204; Roebuck v. Haskins, 38 Ga. 174.

In case of a judgment it must be shown to be against equity and good conscience to allow it to be extended. In addition to this, the aggrieved party must show either that he could not have availed himself of the facts which make it unjust in a court of law, or that he was prevented from so doing by fraud, accident, surprise, or mistake, without negligence on the part of himself or his agents. 2 Story Eq. Jur. s. 887; Willard Eq. Jur. 347; Wingate v. Haywood, 40 N. H. 437; Wiench v. DeZoya, 2 Gilm. 385; Wright v. Eaton, 7 Wis. 595; Ableman v. Roth, 12 Wis. 81; Little v. Price, 1 Md. Ch. 182; Slack v. Wood, 9 Grat. 40; Marine, etc. v. Hodgson, 7 Cranch, 332; Dugan v. Cureton, 1 Ark. 31; Andrew v. Fenter, 1 Ark. 186; Watson v. Palmer, 5 Ark. 501; Conway v. Ellison, 14 Ark. 360; Bently v. Dillard, 6 Ark. 79; Hempstead v. Watkins, 6 Ark. 317; Menifee's Adm'rs v. Ball, 7 Ark. 520.

The jurisdiction of a court of equity to interfere to prevent a multiplicity of suits or to draw to one action cognate interests sought to be litigated in many actions is well established, and for that purpose to enjoin the parties to suits in coordinate courts from proceeding therein. N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592.

One court of equity may overhaul the decree of

13 L. ed.

another court of equity for fraud, contrivance or covin in obtaining it. Bandon v. Beecher, 3 Clark, & Fin. 479; Manaton v. Molesworth, 1 Eden, 25.

It may entertain an action in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought in question, and it may pending the suit restrain by injunction the execution and enforcement of that decree. It may thus restrain the proceedings in another court of equity to enforce the decree of that court, and may restrain the proceedings in that court to obtain the decree. Jackson v. Leaf, 1 Jac. & W. 229; Clarke v. Oramonde, Jacobs, 546; Earl of Newberry v. Wren, 1 Vern. 220; Vendall v. Harvey, Nelson, 19; James v. Whitney, Carey, 181; Booth v. Leyaster, 3 Myl. & Cr. 459; Beckford v. Kemble, 1 Sim. & Stu. 7; Crawford v. Fisher, 10 Sim. 479; Schuyler v. Pellissier, 3 Edw. Ch. 191. 192; Beauchamp v. Huntley, Jacob, 546.

This ground of equitable jurisdiction, viz., that to restrain proceedings in a court of law is not removed when the same court is clothed with powers both at law and in equity. A court upon its equity side may enjoin its own suitors proceeding on the law side. This is the case where relief is needed as well against a co-defendant in the original action as the plaintiff therein, 1 Beav. 171, and relief cannot be had against the co-defendant

said defendants for twelve months thereafter, without ever settling up the matter contained in his bill, or claiming any deduction or offset from the said judgment in favor of defendants.

4th. That the pretended charge of fraud is not specifically stated, but is vague, uncertain, and indefinite in general.

117*] *5th. That the said bill seeks to offset the judgment of defendants against said complainant on his answer, and to pay and discharge the same with the bills and liabilities of the Aberdeen and Pontotoc Railroad and Banking Company, obtained by him after he has acknowledged himself indebted in his answer, and after judgment has been rendered against him in favor of defendants, and after he has executed a forthcoming bond, and the same has been forfeited and become a new judgment against him in favor of defendants, and after he has availed himself of the valuation law on said judgment.

6th. That the said bill shows no equity on its face.

There being a joinder in demurrer, the case was, on the 11th of June, 1844, set down for hearing on the bill and demurrer at the next term of the court.

On the 2d of December, 1844, a rule for decree pro confesso was entered, and on the 3d of December, the defendants, Tileston & Co. filed their answer, which it is not necessary to recite.

On the 6th of December, 1844, the final decision of the District Court was signed and ordered to be enrolled as follows:

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: that the demurrer of the defendants to the said bill of complaint of the complainants be sustained, and the said bill dismissed.

"It is further ordered, adjudged and decreed, that the defendants go hence and recover of the complainants the costs in and about this cause expended, for which execution may issue."

The complainant appealed from this decree to this court.

The cause was argued by Mr. R. Davis for the appellant, and Mr. S. Adams for the appellees.

Mr. Justice Woodbury delivered the opinion of the court:

The judgment in this case below was founded entirely on the bill in chancery and the general demurrer to it.

There is in the record an answer filed a few days previous to the judgment. But the cause having before been set down for a hearing on the bill and demurrer, the answer does not appear to have been at all considered—for that or some other reason—and is not referred to in the decision.

The only question for consideration by us, then, is, whether the judgment dismissing the bill on the demurrer was correct.

Upon a careful examination of the facts and principles involved, *we feel constrained [*118 to come to the conclusion that it was not correct. We are reluctant to form this conclusion, because, on examining the contents of the bill, it does not in some aspects of it appear free from what is exceptionable, and the answer, if open to consideration now, would show a denial of most of its material allegations.

But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill. The grounds of our judgment are as follows:

The demurrer, by admitting the truth of the allegations in the bill, admits these facts:

1st. That the complainant had a good defense to a large part of the original judgment recovered against him, as garnishee of the bank, and which he did not know at that time.

2d. That he was entitled to pay to the original creditor, the bank, its own notes in discharge of any balance due to it, and which were under par, and that, through fraud between the bank and the respondents, the demand against him was assigned to them, and he sued as garnishee of the bank, in order to exclude the payment in its notes.

The former judgment having been in the District Court of the United States, these

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on the new matter in the answer, inasmuch as he cannot take issue upon them and contest them. Willard's Eq. Jur. 351; Dicker v. Judson, 16 N. Y. 439; Jones v. Grant, 10 Paige, 348.

United States courts have accordingly entertained a bill on the equity side and awarded an injunction to restrain proceedings on the law side thereof, and it is held that this may be done before the commencement of the suit at law, pending such suit or after its decision by the highest law tribunal. Parker v. Judges, etc., 12 Wheat. 561; Dunlap v. Sisson, 4 Mason, 349; Humphrey v. Leggett, 9 How. U. S. 297; Nixdorf v. Smith, 16 Pet. 182.

Jurisdiction exists, and in a case demanding it, an injunction may issue in one action to affect the proceedings in an action already pending in the same court. Crawford v. Fisher, 10 Sim. 479; Schuyler v. Pellissier, 3 Edw. Ch. 191; Sieveking v. Behrens, 2 Myine & C. 581; Prudential, etc., v. Thomas, Law. Rep. 3; Ch. App. 74; Richards v. Satter, 6 Johns. Ch. 445; Morgan v. Marsack, 2 Mer. 107; Cheeseborough v. Millard, 1 Johns. Ch. 409.

In the absence of any suggestion of fraud, accident or surprise, and when no good reason is shown why the defense was not made at law, the injunction will not be allowed where it is not obviously against conscience to enforce the judgment. 7 Cranch, 332; Emerson v. Udall, 13 Vt. 477; Pettes v. B'k of Whitehall, 17 Vt. 435; Clute v. Pottee, 37 Barb. 199; Windwart v. Allen, 13 Md. 1956; Sm. & M. Ch. 110; Lafon v. Desessart, 1 Mart. N. S. 71; Meredith v. Benning, 1 Hen. & Mun. 585; Turpin v. Thomas, 2 Hen. & Mun. 139; Stannard v. Rogers, 4 Hen. & Mun. 438; Benton v. Roberts, 3 Rob. La. 224; Ponder v. Cox, 26 Ga. 485; Abrams v. Camp. 3 Scam. 290; Lucas v. Spencer, 27 Ill. 15; Albro v. Dayton, 28 Ill. 325; Shricker v. Field, 9 Iowa, 366; Wilsey v. Maynard, 21 Iowa, 107.

Equity will relieve against the judgment where through fraud upon the part of the plaintiff or his representatives the defendant was prevented from making his defense at law. Carrington v. Holabrid, 17 Conn. 530; Pearce v. Olney, 20 Conn. 544; Kent v. Ricards, 3 Md. Ch. 392; Greene v. Haskell, 5 R. I. 447; Wiertch v. DeZoya, 2 Gilm. 385; Webster v. Skipwith, 26 Miss. 341.

The mistake must be one of fact—equity will not interfere to restrain against a judgment where the mistake is merely one of law. Hubbard v. Markin, 8 Serg. 498; Richmond v. Shippen, 2 P. & H. Va. 327; Risher v. Roush, 2 Mo. 77; Meem v. Rucker, 10 Grat. 506; Shricker v. Field, 9 Iowa 366.

grounds for an injunction against the further enforcement of it till the mistake as to the defense is corrected, and the balance allowed to be satisfied in notes of the bank then held, or an equivalent to their value at the time of the judgment, seem equitable on these allegations, thus admitted.

The respondents can, ex æquo et bono, claim to stand in no better condition than the bank. If there was a further good defense against the bank, there was against them. And if in any material respect they and the bank fraudulently combined, by or in that suit, to deprive the debtor of any legal advantage, the least which can be done in equity is to restore him to it.

What is the answer to this view? Not that the demurrer does not in law admit the goodness of a further defense, and one not known at the judgment, and likewise the existence of fraud by those parties, but that the statement of the defense is not entitled to full credit, is contradictory, and develops culpable neglect to enforce the defense, and that the fraud is not set out with sufficient detail.

But so far as regards the credibility to be 119*] given to the statement *of the further defense in the bill, that statement cannot be impugned on a demurrer. The truth of it can be doubted only where a denial of it is made in an answer, or proof is offered against it, neither of which is now before us. The next objection, founded on some supposed contradictions in the bill, as if not knowing the existence of the defense when he delivered the cotton on which it is founded, can be reconciled on various hypotheses, which need not here be detailed. For, however this may be, we think the allegations sufficiently distinct on a general demurrer.

The validity of the defense as alleged is resisted as the last objection, and rests on the ground, that he had an opportunity to make it at law and omitted to improve it. This principle is conceded to be correct, if the defense was then known. But the bill avers he was ignorant of the existence of the defense when the judgment was recovered. This excuse in some instances might not avail him at law. It has been settled, that in an action at law, if the party omits to make a defense which existed to a part or all of the cause of action, he can afterwards have no redress in a separate legal proceeding. Tilton v. Gordon, 1 N. Hamp. 33; 7 D. & E. 269; 1 Ld. Raym. 742; 9 Johns. 222; 2 N. Hamp. 101; 12 Mass. 263. In such case, he can sometimes obtain relief by a petition for a new trial, but seldom in any other manner.

In certain instances, if the defense arose out of something subsequent to the original cause of action, such as a part payment of money, or a delivery of property to be applied in part payment, and the creditor neglected to make the application, it has been held that this may be treated even at law as a distinct transaction, the creditor having thus rescinded or failed to fulfill his promise to apply the money, and a separate action be then maintained to recover it back. Snow v. Prescott, 12 N. Hamp. 535; 7 N. Hamp. 535.

However this should be at law, there is strong equity and substantial justice in it, and much more in cases where, as is usual, the debtor is defaulted, having no defense to the original cause of action, and supposes that the creditor, in making up judgment, will deduct all payments and all promised allowance, and does not discover the neglect to do it till after execution has issued.

The present application being in equity and not at law, a party in the former is clearly entitled to an injunction, if there was accident, or mistake, or fraud, in obtaining the judgment.

So ignorance of a defense goes far, sometimes, to repel negligence, though standing alone it may not be a sufficient ground for such *relief. See 1 Bibb, 173; Cook, 175; 4 [*120 Hayw. 7; 4 Mumford, 130; 6 Hammond, 82; Brown v. Swann, 10 Peters, 498, 502; 2 Swanston, 227; Thompson v. Berry, 3 Johns. Ch. 395.

On this point, however, we give no decisive opinion, because all of us are not satisfied that a clear remedy can be given at law on these facts by a separate action, and as we have jurisdiction of this cause on the other ground of fraud, we advert to this merely as being one of the plausible reasons in favor of an injunction, till the whole matters between the parties can be further investigated. See reasons for this course in United States v. Myers, 2 Brock. 516; 1 Wheat. 179; 2 Caines' Cas. in Err. 1; 10 Johns. 587; 1 Paige, Ch. 90.

The existence of fraud in obtaining the original judgment, which is the other ground assigned for relief, is next to be considered. It is not only alleged generally, but in the details, so far as already specified, in this opinion. A general allegation of it in the bill would have been sufficient, if so certain as to render the subject matter of it clear. Nesmith et al. v. Calvert, 1 Wood. & M. 44; Smith v. Burnham, 2 Sumner, 612; and Jenkins v. Eldridge, 3 Story's R. 181. The demurrer admits the fraud thus set out, and the law is undoubted, that our jurisdiction in equity extends over frauds generally, and in a special manner one like this, to which it is doubtful whether any remedy existed by law when defending the original action. 2 Caines' Cas. in Err. 1; 10 Johns. 587; 1 Paige's Ch. 90; 2 Stuart, 420.

The character of this fraud, as admitted by the demurrer to exist, is one of great injustice to the community, it being equitable, no less than legal, in Mississippi, by an express statute, for debtors of a bank to make payment to it in its own bills. Laws at Miss. A. D. 1842, p. 140.

It seems generally allowable, even on common law principles, as a set-off. See the express declaration to that effect by this court in The United States v. Robertson, 5 Peters, 659; see, also, Planters' Bank v. Sharp et al. at this term.

Looking probably to a transaction much like the present, the court, in 5 Peters, say: "So far as these notes were in possession of the debtor at the time he was summoned as a garnishee, they form a counter-claim, which diminishes the debt to the bank to the extent of that counter-claim." But how the balance is to be paid in respect to notes, the court forbore to give any opinion. P. 684.

Any assignment or other proceeding got up with the fraudulent intent of preventing the exercise of that right, as is here alleged and admitted, cannot receive the countenance of this court. *But we do not decide on the [*121

extent at law to which such a defense can be made in Mississippi, or in respect to the manner of paying the balance; as all our conclusions here rest entirely on the averments and the admission of their correctness by the demurrer.

In coming to our conclusions, we by no means would be understood, as before intimated, to approve all the language or forms of allegation adopted in this bill. But we are forced to think that enough is stated in it, in substance, to give us jurisdiction, and to entitle the complainant to relief, when the statement is not denied by the respondents.

The judgment below in favor of the demurrer is, therefore, reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause be heard on the bill and answer, if no evidence is desired to be put in; or on these and such evidence as the parties may wish to offer.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court sustaining the demurrer to the bill of complaint be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, in order that leave may be given to the respondents to withdraw their demurrer, and that the cause may be heard on the bill and answer, if the parties do not desire to put in any evidence, or on the bill and answer and such evidence as the parties may wish to offer.

122*]*HENRY MATHEWSON, Respondent and Appellant,
v.
JOHN H. CLARKE, Administrator of Willard W. Wetmore, Appellee.

Assignee of partner's interest may, after termination of voyage, maintain bill for account—questions of fact decided.

Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits.

The language of the complainant in his bill, "that he became interested in a ship and cargo at and from Gibraltar," is decisive of the question of time when his interest commenced, and shows that he had no interest until she arrived at Gibraltar.

Where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent., and also one tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo had no right to traffic upon his own account, for his own benefit.

If the master and supercargo, after the loss of his first vessel, charters another and uses the capital of his partners in prosecuting his trade, informing his owners theerof and expressing his willingness to continue the business upon the same terms as before, to which they did not object, such continuance of the business must be governed by the same rules which regulated the transactions in the first ship.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island.

The record was very voluminous, being a printed volume of more than five hundred pages, which contained numerous letters and accounts relating to trading voyages to different and distant parts of the world, from October, 1820, to November, 1826. There were three reports from masters in chancery in the court below, and a supplemental report made to this court by agreement of counsel and sanction of the court. The arguments of counsel referred to a great number of these transactions, of which it is impossible to give any other than a general outline.

In the year 1820, there were in Providence, Rhode Island, two mercantile houses, one known by the name and firm of Edward Carrington & Co., and the other by that of Cyrus Butler. The house of Edward Carrington & Co. was composed of Edward Carrington and Samuel Wetmore.

In October, 1820, these two houses made the following agreement with Henry Mathewson, the present appellant:

"This agreement witnesseth: That whereas Messrs. Lynch, Hill & Co., of the republic of Chili, have contracted and agreed with his Excellency, General San Martin, commander-in-chief of said republic, to furnish to him, or said government, a quantity of military stores, which contract has been assigned to Cyrus Butler and Edward Carrington & Co., who have undertaken to furnish the same. Wherefore the said Cyrus Butler and Edward Carrington & Co. on the one part, and Captain Henry Mathewson on the other part, all of Providence, in the State *of Rhode Island, on the [*123 12th day of October, A. D. 1820, make and enter into the following agreement and stipulations, viz.:

"1st. The said Henry Mathewson agrees to take the command of the ship or vessel the said Butler and Carrington & Co. shall provide for said expedition, and at all times to act as captain and supercargo thereof.

"2d. The said Mathewson is to proceed to Europe, attend to the purchase of said military stores, proceed therewith in said ship to Chili and Peru, deliver the same, receive the payment therefor, and do all and everything that may be necessary and advisable for the faithful accomplishment of said contract, both as regards the delivery of the military stores and the receiving the payment therefor, whether the said payments shall be in cash or in produce of the republics; and with the said payments, proceed to such ports in China, Europe, or the United States as may be considered most advantageous, and according to the instructions and recommendations of said Butler and Carrington & Co. Providing further, that should any circumstance have occurred, or should occur, to prevent the contract being complied with on the part of the Chilian or Peruvian government, or by General San Martin or his successor, then the said Mathewson is to use his best abilities and exertions to dispose of said military stores in the most advantageous manner, and to [the] best profit; and the proceeds of

such sale embark on board said ship, and proceed therewith to such ports in China, Europe, or the United States as may be considered most advantageous, and according to the recommendations and instructions of said Carrington & Co. and C. Butler.

"3d. The said Butler and Carrington & Co., on their part, promise to allow and pay the said Mathewson fifty dollars per month, as wages as navigator and master of the ship, and also the sum of seven hundred dollars as commission for attending and procuring the purchase of said military stores in Europe, for delivering and making the sale of the same in Chili or Peru, receiving the payment either in cash or produce of the republics, and delivering the same in China, Europe, or the United States—he conforming always to the instructions and recommendations of said Butler and Carrington & Co. The said Mathewson is to have allowed him all traveling expenses and charges that attach to business.

"It is further mutually agreed between the aforesaid parties, that after delivering or depositing the proceeds of the aforesaid military stores, and completing and finishing the aforesaid agreement, according to the tenor thereof, a new voyage and adventure is to be begun in the following manner:

124*] **"1st. The said Henry Mathewson is then to be admitted an owner in said ship of one tenth part, at the rate of her first cost in the United States, including repairs on hull, sails, and rigging, that may be put on her after her purchase, either in [the] United States, Europe, or elsewhere; and also owner of one tenth part of her cargo, on such new voyage and adventure.

"2d. Said Butler and Carrington & Co. agree to sell said Mathewson, and he agrees to purchase, one tenth of the ship on the terms heretofore described in article first.

"3d. Said Cyrus Butler and E. Carrington & Co. agree to furnish the sum of fifty thousand dollars (as a cargo for said ship) at the port where the said ship shall deliver and deposit the proceeds of said military stores.

"4th. The said Mathewson is to allow said Butler and E. Carrington & Co. interest, at the rate of six per cent. per annum, for his one tenth of ship and cargo, from the time the proceeds of the military stores (heretofore mentioned) are delivered or deposited in manner as heretofore stipulated.

"5th. The said Mathewson is, in this new voyage, to have liberty to proceed to such ports, countries, and places, backward and forward, for trade, freight, or other employment of the ship and cargo, as he may think most for the interest and advantage of the concern in said ship and cargo.

"6th. In this new voyage, as before described, it is mutually agreed, the said Mathewson shall have fifty dollars per month, as wages as commander and navigator of said ship, to commence with the new voyage, and as supercargo a commission of five per cent. on the net amount [of] all property safely returned to the United States, Canton, or Europe, proceeding from the original stock of fifty thousand dollars, together with one tenth of all the profits and earnings made in the voyage or voyages, *freights or otherwise.*

"7th. It is agreed that the wages and commissions specified and agreed for in the sixth article are to be in full of all services and privileges to Captain Mathewson, as master and supercargo during the voyage or voyages heretofore specified or otherwise.

19 L. ed.

"It is understood, the said Mathewson is to have no privilege in the first voyage heretofore specified, and that the wages and commissions of seven hundred dollars allowed on that voyage are to be paid in the United States at the end of voyage.

(Signed) "Cyrus Butler,
"Edward Carrington & Co.,
"Henry Mathewson."

In pursuance of this agreement, Mathewson repaired to *Europe, and in December, [*125 1820, at the Texel, received the ship Mercury and her cargo from the other parties. He also received two sets of instructions, one genuine, and the other fictitious, to be used in case of capture. The true instructions commenced in this way:

'Providence, November 13, 1820.

"Capt. Henry Mathewson:

"Sir,—We herewith hand you the letter of Messrs. Lynch, Hill & Co., of Valparaiso, to Edward Carrington & Co., under date of June 15, 1820, accompanied with a contract made by their Mr. Lynch with General San Martin, commander-in-chief of the Chilian and Peruvian Armies, and in behalf of said government. You will observe, on perusal of the letter and contract, that the muskets, carbines, and sabres expressed in the first article in the contract, are to be furnished by Lynch, Hill & Co. themselves, and that the same articles mentioned in the second article are the ones intended to be supplied by ourselves, and are the same as we directed to be purchased by yourself in Europe, viz.: "20,000 muskets, of good proof.
"7,000 carbines.
"7,000 cavalry sabres.

"The prices, you will observe, are stipulated at eight and a half dollars for the muskets, six dollars for the carbines and cavalry sabres, to be imported into Peru free of duties, and the proceeds, or payment for the same, is also allowed to be exported free of duties. The delivery of the said arms to be at any one port in Peru in possession of the patriots under General San Martin, or where, on your arrival at any one of said ports, General San Martin may determine, on the coast of Peru. You will observe the contract provides that any articles, the produce of Peru, may be received in payment (at the current market price) for the arms; always by the agreement and consent of both contracting parties, and that the same may be exported free of duties. You will also observe, that the duties on the import of any other articles of merchandise by said Lynch, into the port of Peru, are to be admitted towards the payment of the said arms. You will also observe it is understood, that, if the payment is made in specie for said arms, it is permitted to be exported free of duties."

The instructions then proceeded to tell him how to arrange his cargo, what to do when he got to Valparaiso, and continued thus:

"In the execution of this business it will require your best *attention and circum- [*126 spection to weigh well all points and circumstances, and, in conjunction with Lynch, Hill & Co., pursue that course best calculated to

have the contract complied with, taking care at the same time, as much as possible, to have the payment therefor placed under favorable circumstances; or if circumstances should have occurred to defeat the expedition, and with it destroy the hope of having the contract complied with, you are then to adopt the next best plan to make the sales of our property to the best advantage. If the contract is complied with by General San Martin, we should recommend your fully loading the ship with copper, (taking the same as payment towards the arms, particularly as it is to be allowed export free of duties); and taking copper may facilitate and help the government, and be the means of getting payment before the expiration of the eighty days limited in the contract, and taking the balance in specie, and proceed immediately to Canton; or if the contract is not complied with, and you should make the sale in Chili, or other place where copper can be procured at not exceeding fifteen or sixteen dollars the quintal on board, we should then also recommend your loading with copper, particularly if it should aid you in making sales of the arms; and then taking the balance in specie, and proceed direct for China. After having disposed of the arms, and obtained the payment for the same, it will be of much importance that you reach China as direct, and with as little delay, as possible. In order that a second deposit may be had for the property, and that a new voyage may be begun anew, without any regard to the present one, after reaching Canton you will deliver all our property to Messrs. S. Russell & Co., except the fifty thousand dollars, which you are to retain as a capital for the ship in any future operations you may think it advisable to undertake, either by trading or freighting, according as you think most profitable for all concerned; perhaps a cargo from China for Chili or Peru may be a good investment. However, after you get to Canton, and take the fifty thousand dollars as a capital, you must be your own master, and do that which is best."

The instructions then proceeded to provide for many contingencies, and concluded with a general reference to conversations between the parties before Mathewson left the United States.

The fictitious instructions provided entirely for a trading voyage to Columbia River, thence to Canton, etc.

In April, 1821, having purchased a cargo of arms, Mathewson sailed from Bremen, in the ship Mercury, for Valparaiso, and arrived there in August of the same year.

127*] *From Valparaiso he went to Lima, where he arrived in September.

On the 1st of June, 1821, a transaction occurred at Providence which was the basis of this litigation. Willard W. Wetmore (and his administrator, the present defendant in error) claimed to have been admitted on that day as a partner in the firm of Edward Carrington & Co., and the following entry upon their books was produced upon the call of the defendant Mathewson:

"Providence, June 1st, 1821.
"Day-book.
"Edward Carrington & Co.—New concern.
"*Edward* Carrington 3/8,
"*Samuel Wetmore* 3/8,
"*W. W. Wetmore* 2/8."

And commencing on the first page, under date of 1st June, 1821, and continuing through several pages, Edward Carrington & Co., old concern, are credited with the sum of $118,987.32, for their interest in various adventures and shipments then outstanding.

The corresponding ledger is headed, "New concern, ledger A," and commences with the same date.

Let us return to the voyages of Mathewson.

At Lima he sold his cargo of arms, and was detained there nearly ten months waiting for payment from the Peruvian government.

In June, 1822, having chartered the Mercury, at Lima, to a person by the name of Rodolpho, he sailed with the proceeds of the arms for Gibraltar, by way of Rio de Janeiro, and arrived at Gibraltar in November, 1822.

In December, 1822, he sailed from Gibraltar, on a trading and freighting voyage, with freight and merchandise for the joint account of the owners.

Arrived at Rio, February, 1823.
Sailed from Rio, February, 1823.
Arrived at Valparaiso, April, 1823.
Arrived at Callao, July 1, 1823.
Left Callao, September, 1823.
Arrived at Arica, October, 1823.
Left Arica for Callao, October 25, 1823.
Arrived at Callao, December, 1823.
Sailed from Callao for Canton, January 1, 1824.
Arrived at Canton, April 10, 1824.
Left Canton for South America, July 11, 1824.
*Arrived at Monterey, October 25, [*128 1824.
Left Monterey for Mazatlan, January 1, 1825.
Arrived at Mazatlan, January 21, 1825.
Left Mazatlan for Lima, March 20, 1825. Arrived at Guayaquil, June 3, 1825, where the ship, being injured in a gale and decayed by age, was condemned and sold.

On the 12th of September, 1825, Mathewson embarked at Guayaquil with goods and money for Lima, in the steamboat Tilica, which was blown up and destroyed on the passage.

In November, 1825, being at Lima, Mathewson chartered three fourths of the ship Superior. He claimed to do this upon his sole responsibility and risk, and therefore to be entitled to all the profits, allowing to Butler, Carrington & Co. only the interest upon such portion of the partnership funds as were invested in the adventure.

In November, 1825, he sailed from Lima to Canton, where he arrived in March, 1826. Leaving there in June, he returned to Valparaiso, where he arrived in October, and consigned all his property, individual as well as joint, to Alsop, Wetmore & Co., who sold it at a large profit.

In June, 1827, he arrived in Providence, having been absent nearly seven years.

During all these voyages, Mathewson claimed to have received sums of money for himself upon various accounts; such as presents and gratuities from the persons with whom he dealt; from Spaniards for assisting in concealing their money; a deposit from a man named Martinez, to be invested in military clothing for him at Gibraltar, but who could never after-

Howard

872

wards be found or heard of; from passengers for taking care of their money; presents from several persons for transporting specie from the shore without full duties; and profits upon all these sums, invested upon his own account in articles of trade sold and reinvested from time to time, paying freight for the same.

In 1830, Willard W. Wetmore, of New Haven, in Connecticut, filed a bill on the equity side of the Circuit Court of the United States for the District of Rhode Island against Mathewson, claiming to have been admitted by Edward Carrington & Co. as a member of their firm in June, 1821, and calling upon Mathewson to render an account of his agency as master and supercargo of the ship Mercury, on a voyage by him prosecuted before he became part owner of said ship; and of his agency as master, supercargo, and part owner of said ship and her cargo; and of his agency as master, supercargo, and part owner of said ship and her cargo after he became a part owner; and also of his employment of the funds of the owners of the Mercury, after her condemnation and sale, in the ship Superior, three 129*] fourths of which he *chartered at Lima in November, 1825. The bill also called for a discovery of all his transactions during the adventures.

This bill was afterwards amended by the insertion of the following clause after the claim to have been admitted as a partner in June, 1821, viz.: "(amendment—and then and there became the assignee and purchaser of one fourth of nine twentieth parts of said ship Mercury and her cargo and of one fourth of nine twentieth parts of all the rights of said Edward Carrington & Co. in and to said contract with the said Mathewson, and, as such, entitled to a discovery and relief against the said Mathewson)."

In September, 1830, Mathewson filed his answer, to which exceptions were taken, and in February, 1831, filed a further answer. In these answers he denied that the complainant ever was a partner in the house of Edward Carrington & Co., or that he ever had any interest in the ship Mercury and cargo, or in the concerns of said adventure. The answers then went into a minute detail of all the transactions which had occurred during all these voyages, and had annexed to them a hundred and seven accounts with different persons, explaining the shipments, sales, freights, purchases, remittances, etc., etc.

At November Term, 1831, the cause was referred to Samuel Eddy, as master in chancery, "to take and state an account between the complainant and the defendant, Henry Mathewson, touching and concerning the concerns and business of the partnership subsisting between the parties in said cause, and all the other matters and things charged in said bill of complaint."

At June Term, 1832, Samuel Eddy, Richard K. Randolph, and John H. Ormsbee were appointed masters under the above interlocutory decree.

In 1834, whilst the cause was pending before the masters, Wetmore, the complainant, died, and letters of administration upon his estate were granted to John H. Clarke, a citizen of Rhode Island, the *laws of that State not per-*

12 L. ed.

mitting a person residing out of the State to become the administrator of a citizen thereof. Clarke, the appellee in the case now before the court, filed a bill of revivor. Mathewson appeared, and moved to dismiss the suit on the ground of want of jurisdiction, inasmuch as the administrator and respondent were citizens of the same State. The Circuit Court dismissed the bill; but the cause being brought up to the Supreme Court, this judgment was reversed, and the cause remanded for further proceedings. The report of this case will be found in 12 Peters, 164.

In January, 1839, Charles F. Tillinghast was appointed a third master, in the place of Samuel Eddy, to act in conjunction with the other two.

*In November, 1840, the masters made [*130 a very elaborate report to the court, accompanied by numerous depositions, in which report they found a balance due from Mathewson to the administrator of $8,098.52. To this report Mathewson filed twenty-six exceptions.

At June Term, 1841, the master's report was referred back to the same masters, to re-examine and review and reconsider the same, with liberty to either party to introduce further evidence; the plaintiff to have leave to amend his bill, and the defendant to file his answer to the amendment within twenty days. Whether or not it was at this stage of the proceedings that the plaintiff amended his bill by inserting the part included within brackets, as set forth in the preceding part of this statement, the record does not show. But on the 9th of September, 1841, Mathewson filed a further answer, denying that Wetmore was or ever had been a copartner in the firm of Edward Carrington & Co.; denying that he, Wetmore, had ever asked an account from the defendant previously to filing the bill, and denying that Wetmore had ever been admitted by the defendant as a copartner in said ships and adventures in any manner whatever.

At November Term, 1841, the masters made their second report, finding a balance due by Mathewson to Clarke, as administrator, of $8,568.52. This report was accompanied by a great mass of additional evidence. To this report Mathewson filed twenty-four exceptions.

At the same term, viz., November, 1841, the court ordered this report of the masters, so far as respected the matters in the sixteenth exception, to be referred back to them for further inquiry.

In conformity with this order, the masters filed a third report correcting the preceding one by making an additional allowance, and reporting the entire balance due by Mathewson to be $8,685.66 2/16.

At June Term, 1842, Mathewson filed six exceptions to this third report.

At November Term, 1842, the following decree was made by the Circuit Court, viz.:

"This cause came on to be heard upon the report of the masters made in this cause at the November Term, A. D. 1840, of this court, and upon the exceptions filed thereto; and upon the report of the masters made in this cause at the November Term, A. D. 1841, of this court, and the exceptions filed thereto; and upon the masters' report in this cause, filed in the clerk's office of this court on the 11th day of April,

A. D. 1842, and the exceptions filed thereto, and council being heard thereon:

131*] *"In consideration whereof, it is ordered, adjudged and decreed, that the exceptions to the first mentioned report be disallowed, and that the said report do stand and be confirmed, except so far as the same is altered by the report aforesaid made to the November Term, A. D. 1841, of this court, and the report aforesaid filed in the clerk's office of this court on the 11th day of April, A. D. 1842.

"It is further ordered, adjudged and decreed, that the exceptions to said report, made at the November Term, A. D. 1841, of this court, be disallowed, and that said report do stand and be confirmed, except so far as the same is altered by the said report, filed in the clerk's office of this court on the 11th day of April, A. D. 1842.

"It is further ordered, adjudged and decreed, that the exceptions to the said report, filed in the clerk's office of this court on the 11th day of April, A. D. 1842, be disallowed, and that said last mentioned report do stand and be confirmed.

"It is further ordered, adjudged and decreed, that the said John H. Clarke, administrator on the estate of the said Willard W. Wetmore, in his said capacity of administrator, have and recover of the said Henry Mathewson the sum of eight thousand six hundred and eighty-five dollars and sixty-six cents, said sum being the amount found due by said last mentioned report, together with costs, and that execution issue therefor.

"Let this decree be filed in the clerk's office in this court. Joseph Story,

"Ass. Jus. of the Sup. Ct. of U. S.

"John Pitman,

"District Judge U. S., R. I. District."

From this decree an appeal brought the case up to the Supreme Court.

Whilst the cause was pending in the Supreme Court, an order was passed, at December Term, 1845, directing the masters to review their report. They accordingly made a supplemental and fourth report, addressed directly to the Supreme Court, in which they admit an error in their preceding accounts, from not giving Mathewson a sufficient credit for his commissions and his interest in the copartnership. Correcting this error, they find the amount due by Mathewson to Clarke, including interest up to January 1, 1846, to be $6,241.44. This report was made a part of the record, by agreement of counsel.

In the argument of the case in this court, the exceptions taken to the first report of the masters were not insisted upon any further than they were included in the exceptions to the second; and the exceptions to the third were

132*] entirely waived. *None being taken to the fourth, which was made to this court, the argument was confined exclusively to the exceptions to the second report, which have been already stated to have been twenty-four in number.

The cause was argued by Mr. Albert C. Greene and Mr. Webster on the part of *Mathewson, the appellant*, and Mr. R. W. *Greene and Mr. Whipple for the appellee.*

Mr. Albert C. Greene gave a history of th case, and of all the voyages which had take place. He then classified the exceptions so a to include all which related to or depende upon the same general principle of law. And first, with respect to the right of the complain ant to sue. This being a limited copartnershi consisting of the sum of $50,000 and the shi he maintained the three following propositions

1. That being a limited copartnership, n third person can be admitted without the con sent of all the copartners.

2. That no assignment of an interest in copartnership fund to a third person can give t such third person any right against the rest o the partners, where the right to assign is no provided for in the agreement.

3. That Wetmore, not being an original pa ty, cannot be a party to any suit at law o equity founded on the original agreement.

1st. The relations which exist between part ners are either provided for specially by agree ment, or result, by operation of law, from union of funds. They may contract for wha they choose—for example, that one of them shall not enter into a particular branch of busi ness; or they may stipulate for the right to as sign, in which case an assignee is in the enjoy ment of full rights, flowing from the origina agreement. But if the contract is silent upo this point, the law does not permit a thir person to be introduced without the assent o the other parties. If we were at law, it i clear that no action would be maintainabl and the same rule must prevail in equity. Th relations between partners are of a confide tial character, and therefore it is reasonabl that no stranger should be brought in. Thes relations are also mutual. In case of loss, eac partner has a right to look to his associate and ought not to be compelled to rely upon person whom he may be unwilling to trus The only evidence of the copartnership of th complainant, Wetmore, is the entry upon th books of Carrington & Co. There was no a signment, no letter informing Mathewson, wh was then absent on one of the voyages, nor di he know anything of it until the service of th subpœna in this case. See Collyer on Partne ship, 4, 101; 14 Johns. 318; 6 Madd. 5.

*2d. No assignment can be made [*13 where it is not provided for in the articles.

There is no evidence here of any assignmen to Wetmore which does not show him to hav been also admitted as a partner, if it is vali for any purpose. Suppose there was such ev dence, what could partners assign except chos in action, which the assignee would be unab to enforce? But the claim here is, that th new partner has the same rights as the old, an has the same right to forbid certain things t be done. If the relation of partner cannot b assigned together with choses in action, the the suit must fail, because the ground of th complainant's claim is that Mathewson had a right, under his agreement, to do certain thing which he has done. But this relation cann be assigned. Mathewson never agreed tha any one else should be his master. He had a claim for anything against Wetmore, an therefore Wetmore can have none against hi

If these two propositions can stand, the thi follows of course.

The next general proposition arises from the second and third exceptions, and is this: that Mathewson has a right to the profits upon purchases which he made whilst detained at Lima. If his partners had ratified his acts, the profits would have inured to the common benefit, and Mathewson was willing that this should be done. But we say that his partners should have decided when he asked them; whereas they always avoided saying whether they would sanction his acts or not. The reasoning of the masters is not good. They say, that, as Mathewson's inducements to the purchase were to hasten the settlement of his own cargo, the profits ought to belong to his owners. But they should have adopted or rejected his acts when he informed them what he had done, and solicited their sanction.

A general proposition arises under the sixth exception. Martinez had placed money in the hands of Mathewson to be employed for him at Gibraltar. The purchases were made, but Martinez could never more be heard of. To this money we say the other partners have no right whatever. [Mr. Greene here examined all the evidence on this subject.]

The next general proposition is, whether and how far Mathewson had a right to trade upon his own private account at the same time that he was trading upon the partnership funds. The masters say that he must not carry his own property in the same ship, although they admit that he has a right to traffic for himself, and send his commodities in another ship to the same market We apprehend that the true 134*] rule is this: that *a partner must not place himself in such a situation that his own private interests will necessarily conflict with those of his partners. Collyer on Part. 100; 6 Madd. 369; 4 Beavan, 534; 1 Sim. & Stu. 124; found also in 1 Cond. Eng. Ch. Cases, 124.

The ninth and eleventh exceptions raise a general question, what were the rights and duties of Mathewson after the loss of the Mercury? We contend that his contract was to take command of that ship, in which he became a part owner. After its loss, he had a right to engage in anything new, and chartering the Superior was a fresh adventure altogether. If his partners chose to ratify his acts, he was willing to include them; but the evidence in the case shows that they disowned them. The profits must therefore belong to Mathewson alone.

Mr. R. W. Greene, for defendant in error, took up the exceptions in numerical order, and examined each one in comparison with the evidence. The general scope of his argument was to show that the voyage was a very hazardous one on the part of the shippers, who had planned the whole series until the termination that Mathewson had no right to receive presents from his consignees; that it is always suspicious when vendors make presents; that Mathewson was especially debarred from all privileges by the agreement; that he had full power to obtain payment for the arms in any mode, and if the purchase of the Nancy was necessary to accomplish this, it was within his instructions; that he himself thought so, because, when about to do it, he wrote to his partners hoping not to be censured; that his receipts for his own cargo were in fact in this new purchase; that was a direct breach of duty to receive the money of Spaniards, in the disturbed condition of the country, and might have led to the forfeiture of the property under his control; that he risked the whole cargo for his own private advantage; that he concealed all these matters until the exceptions to his first answer compelled him to disclose them in his second; that he had no right to carry goods on his private account to the same market with those of his partners; that their interests must necessarily clash; that he could not fairly have realized the sum of $57,000, which the evidence shows that he did; that he only charged himself with half freight; that the accounts show that he settled with his consignees as if the whole goods belonged to him, and therefore could easily claim, as his own, whatever part he chose; that his average when the steamboat was destroyed was wrong; that the evidence showed that no such man as Martinez had ever existed; that with respect to the profits by the voyage in the Superior, the original voyage, as planned, was not ended; that Mathewson had [*135 no right to trade and speculate upon the money of his partners, but if the voyage was over, he ought to have sent it home; that in fact the partnership was not concluded, but the ship Mercury was only one instrument to carry it on; that Mathewson's letters show this; that in the voyage of the Superior he made 100 per cent. for himself, and only 40 per cent. for his partners.

With respect to the right to sue, Mr. Greene drew a distinction between the two voyages. As to the first voyage, the assignee had a right to sue in his own name. 2 Story, Eq Jur. p. 391, sec. 1055.

The owner had a right to assign, and the present assignment is sufficient. 2 Story, Eq. Jur. p. 381, 382, sec. 1047.

As to the right to sue on the new voyage.

It has been said, on the other side, that no new member can be introduced into a firm without the consent of all. But in this case one of the members of the partnership was itself a firm, viz., Carrington & Co., with which the contract was made. The admission of Wetmore did not change the name of the firm. Besides, the contract gave to Mathewson the exclusive control over the business. There was therefore no necessity for consultation. The partners at home had nothing to do but to receive the proceeds. The reason of the rule does not apply. But if we claim as assignee, we have a right to an account. All property is transferable in equity, and the bill was amended so as to include the rights of an assignee.

Mr. Whipple, on the same side:

With respect to the right to sue, we do not say that the complainant was a partner in the voyage of the Mercury in any other mode than as he was a member of the firm of Carrington & Co. It has been said, that a partner cannot introduce a stranger into the firm without the consent of the rest. We admit it. But the contract here was between Butler, Carrington & Co., and Mathewson. There was no contract between Mathewson and Carrington himself, or Samuel Wetmore individually. It

was with the firm. Carrington's order alone would not have been binding, and in case of his death, the business would be wound up by his surviving partner. The property involved was not liable for Carrington's debts until all the partnership claims upon it were satisfied. If Carrington had drawn an order for money upon Mathewson, he ought not to have paid it, because he knew that all their share of the property belonged to Carrington & Co., and not to Carrington personally. A change in the component members of the firm could make no difference in the rights of Mathewson. 130*] The *power to control him was just the same after as before it. In case of loss, the firm of Carrington & Co. would have to contribute, and a portion of this must fall upon the new member. He ought, therefore, to share in the profits. The only question is, whether an assignee can sue a partner. But in equity, a bill for a specific performance would lie. All that would be necessary in such a case would be to bring in all the parties who had an interest in the subject.

Mr. Whipple then took up and enlarged upon the following propositions:

1. The answer of Mathewson was overthrown and discredited by counterbalancing testimony.

2. There was no difference in principle between Mathewson's right to trade in the Mercury and in the Superior

3. He had no right to trade upon his own account in either, because it was expressly prohibited by the contract, and because it was at war with the duties which he had undertaken to perform.

These propositions Mr. Whipple illustrated at great length.

Mr. Webster, in reply and conclusion, gave a particular narrative of the course of the suit, and the transactions between the parties. The first proposition raised by the exceptions is, that the complainant has no right to maintain this suit. We say that he had no interest whatever except as a partner, and that he cannot become so without our consent. It is necessary here to make a distinction between the first and second voyage. Mathewson was not a partner during the first voyage of the Mercury, and after that was over, became a partner to the amount of one tenth. It may be said, that, if Mathewson was not then a partner, our objection to the complainant's right to sue for the first voyage does not apply. But the answer to this is twofold:

1. Because this bill counts on a special agreement, to which Wetmore, the complainant, was no party. His claim as assignee does not aid him in this.

2. Wetmore never had a particle of interest in the first voyage of the Mercury. This terminated at Gibraltar, in November, 1822, and in December following a new voyage was commenced. But it does not appear from the record that the Mercury and her cargo constituted any part of the $118,987 which was credited to the old concern when a change of the books took place, in 1821. On the contrary, the following extract from the record shows that the Mercury was not brought into *the new partnership until* the 7th of February, *1824.*

E. Carrington & Co.—old concern, Cr. [*137

1824, 7th Feb.	By ship Wm. Baker, as cash,	July, 1821	$7,000
	" Nancy,	June, 1821	8,000
	" Trumbull,	" 1823	9,000
	" John Brown,	Jan'y, 1823	6,612 50
	" Fame,	July, 1823	1,500
	" Integrity,	May, 1823	2,000
	" Mercury, at Gibr.,	June, 1822	5,000
	" Lion,	Dec'r, 1822	14,000
	" General Hamilton,	1821	2,000
	" George,	1822	10,000
	" Panther,	1822	10,000
			$81,112 50
	By adventure ship Mercury, voyage from Gibr. to Chili, $40,619 18—for one half -		35,200 00

Consequently Wetmore never had any interest in the first voyage. The transfer at the bottom of the account is for one half of the outfit, but does not include any profits at all. He has no right to call upon Mathewson for any explanation of his proceedings.

With respect to the subsequent voyages, the right of the complainant to sue is sustained upon two grounds:

1. That Carrington & Co. had admitted him as a new partner in their firm; and,

2. That the complainant was an assignee.

1st. The authorities already cited—Tidd, Collyer, Johnson, and Maddock—are clear, that no new partner can be admitted without the consent of all.

2d. It is said that he was an assignee. But he says himself in the bill that he was a partner. The amendment to the bill, putting his claim upon the ground of being an assignee, does not vary the facts in the case. He was just as much an assignee without putting that in. But his claim to be assignee is only an evasion of a well settled rule of law. Every new partner can claim to be assignee. In this case he would be a very strange one. He had as much right to control the others' shares as they had to control his. He could draw bills of exchange, settle accounts, etc. I had supposed that an assignment of a chose in action was recognized upon the principle that the assignor had nothing more to do with it. But not so here. Carrington & Co. had as much power over the property as they had before. There was no transfer of any distinct and specific interest. If Carrington & Co had failed, what would have become of the thing assigned? It is said that the change was of no consequence to Mathewson. But the answer is, that the rule is general. We are not bound to show any

reasons. If we were bound to do so, they might be given. Who knows whether or not Wetmore was an enemy of Mathewson? Some 138*] *unfriendly things were done afterwards; for example, they wrote to Alsop to take the business out of Mathewson's hands. How can we know that Willard Wetmore did not do this? It is said, also, that he was not a new partner, because he was only admitted to be a partner in the house of Carrington & Co., which house eo nomine was a member of the copartnership, and that therefore the copartnership remained unaltered. But this makes a commercial firm a corporation. If a contract be made with a firm composed of three persons, and then a fourth be admitted, can all four sue on the contract? Certainly not. The names of the partners must all be set forth in the declaration. They cannot sue in their commercial name. It is only a corporation that can do this. If the complainant had no interest in the first voyage, it disposes of the 2d, 3d, 6th and 12th exceptions.

The 7th, 9th, and 11th relate to the right of Mathewson to trade upon his own private account. The objection to his doing so is maintained under the 7th article of the agreement, which says that he is to have no privileges. One privilege of a captain is to carry his goods without being charged with freight. This article had nothing to do with the subject. Mathewson carried nothing out, and could only trade on his commissions. What he acquired in this way he could certainly bring home by paying freight. There are some facts in the case which are important.

1. He had only a limited capital to trade upon for his owners, not enough to fill the ship.

2. It was always contemplated that she should earn freight by carrying other goods.

3. The freight thus earned was for the benefit of her owners.

4. The ship was never full.

5. There is no allegation that Mathewson did not load the ship properly.

How Mathewson made his money is entirely immaterial. There is no pretense that he took it from his owners. He has accounted for the whole $50,000. There was no loss or damage of any kind by him. He squandered nothing. On the contrary, his owners made a very large sum of money through his care and skill. But the opposite counsel say that he could not carry his own goods in his own ship. Why not? If he paid freight to anyone else, the owners would lose that much. They might then justly have complained. The sound rule of law is, that the master of a vessel must not place himself in a situation where his interest necessarily clashes with that of his owners. Such was not the case here. It is also said, that he should have attended to nothing else 139*] than the concerns of his *owners. But he was detained at Lima for ten months without a possibility of expediting the business of his ship. Was he to sit down and think for his owners all this time?

We regard Mathewson's latter voyages as being out of the contract altogether. The parties probably never contemplated using any other ship than the Mercury. When he chartered three fourths of the Superior, he told his owners of it. They acknowledged the receipt of his letters in which he said that it was upon partnership account, and yet they held their peace upon the subject of sanctioning it. This they had no right to do. The rule is, that where an agent acts clearly beyond the scope of his authority, mere silence on the part of his principal does not ratify the act. He must prove a positive assent. Suppose all this property had been lost. The owners did not ratify the proceeding until all danger was over, and the adventure had been found profitable. But it was then too late. If this chartering was beyond the contract, and the owners claim the profits because Mathewson said he did it for the partnership, they must take the whole of his admissions together.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the Circuit Court of Rhode Island.

Wetmore, the complainant, states in his bill, that on the 12th of October, 1820, Cyrus Butler, Edward Carrington, and Samuel Wetmore, merchants, doing business under the name of Edward Carrington & Co., of one part, and Henry Mathewson, of the other, all of Rhode Island, entered into an agreement in relation to a certain commercial adventure; that, in pursuance of the agreement, the ship Mercury was procured, and in December, 1820, Mathewson, as master and supercargo, received her at the Texel, in Europe, with instructions under the contract; and having purchased the cargo, as directed, he sailed the 30th of March, 1821, to Valparaiso, in Chili, and to other ports and places in Chili and Peru, as required in the agreement; sold the cargo, and with the proceeds sailed to Gibraltar, at which place he arrived in November, 1822, and there sold the cargo, having completed his first voyage.

The complainant further states, that at Gibraltar, in November, 1822, Mathewson commenced a new voyage or adventure in said ship, and, according to the terms of said agreement, became and was an owner in the ship and cargo of one tenth part thereof. And Butler, Carrington & Co., in pursuance of the agreement, furnished the ship with a cargo of the value of fifty thousand dollars; and Mathewson sailed on the new voyage for Gibraltar, as master and supercargo, on the 28th of December, 1822. He proceeded to the ports of Rio Janiero, Valparaiso, *and [*140 other places, backwards and forwards, for trade, freight, and the employment of the ship, until the 10th of June, 1825, when, at the port of Guayaquil, in South America, the ship Mercury was condemned as unseaworthy, and ordered to be sold.

The complainant further states, that, about the 1st of June, 1821, he entered into copartnership with Carrington & Co., and thereupon became and was interested in the ship Mercury and cargo, and in all the concerns of said adventure, according to the terms of said agreement, at and from Gibraltar, as aforesaid, in the proportion of one fourth of nine twentieth parts thereof, and then and there became a partner therein with Mathewson and the other defendants, and so continued to be until the said adventure ended, and until the

dissolution of the partnership. In this part the bill was so amended as to enable the complainant to claim as an assignee, etc.

Mathewson, is further represented, in December, 1825, as having chartered at the port of Chorillas, or some other place in South America, three fourth parts of the ship Superior, Captain Andrews, on account and for the concern of the ship Mercury, and shipped on board of her a part or the whole of the proceeds of the sales of the ship Mercury and cargo, etc., on the terms and conditions of the agreement, and proceeded therewith to the port of Payta, and to other places backwards and forwards, until the 8th of November, 1826, at the port of Lima, where the charter-party expired, the voyages were ended, and the partnership dissolved.

And the complainant alleges that Mathewson had not rendered a full and fair account of his transactions and of the profits; and the bill prays that he and the other defendants may come to a full and fair account, etc.

None of the defendants, except Mathewson, answered the bill. The accounts were referred to masters at different times, and various reports were made. And the case comes before this court on exceptions to the masters' reports.

Instead of taking up the exceptions, the general principles on which they are founded will be considered.

It is first objected, that the complainant cannot sustain this suit, as he was not a member of the copartnership, and could not be without the consent of Mathewson. The general principle is admitted, that the individuals who compose the partnership cannot be changed without the consent of the whole. And it does appear that Mathewson had no knowledge that the complainant was a partner, or had any interest, in the concern, until some time after his return to the United States. The complainant, therefore, could not be considered or treated as 141*] a *partner, in prosecuting a partnership claim, or in any other procedure involving the rights of the original partnership.

But the complainant does not represent himself to be a partner in any other light than to the extent of his interest. He seeks to enforce no right of the firm; but, alleging that the partnership was long since dissolved, he asks that the share of the profits to which he may be entitled shall be decreed to him. And in the amended bill he represents himself to be the assignee of a certain interest in the capital, and consequently entitled to a proportionate share of the profits.

If the firm were still in operation, the complainant, not being a member of it, could have no right or power to dissolve the partnership or to maintain this suit. His remedy would be against Carrington & Co., with whom he made the contract. But the partnership, or whatever it may be styled, having been dissolved, the complainant must be considered as having a certain interest in the fund to be distributed. On this ground he may maintain the suit, although Mathewson may never have had notice of his interest until the bill was filed. The allegation in the bill is, that the defendant has in his hands funds which belong to the complainant. And as it is stated and proved that the business was transacted by Mathewson, without the particular knowledge of the other parties in interest, he may be called on in the form of this bill to account for and pay over to the complainant any moneys in his hands which belong to him. The object seems to be merely to ascertain the distributive share to which the complainant may be entitled, as the answers of the defendants, except Mathewson, have not been required.

The next inquiry is, At what time did the interest of the complainant in the ship Mercury and her cargo accrue?

It is claimed for the complainant, that from the 1st of June, 1821, when his alleged contract of partnership was entered into, his interest in the ship and cargo attached. If this be so, he will be entitled to participate in the profits of the first voyage of the Mercury.

There is no written evidence of the contract between the complainant and Carrington & Co., and we must ascertain the commencement of the contract from the statements in the bill, the books of the company, and other evidence in the case.

The complainant states that Butler & Carrington & Co. furnished the "ship with specie and a cargo for the new adventure, according to the terms of said agreements, of the value of fifty thousand dollars; and the said Mathewson sailed from said port of Gibraltar on said new voyage or adventure in said ship, as master and supercargo, with said specie and *cargo on board, on or about the 28th [*142 of December, 1822."

And in the succeeding paragraph the complainant alleges, that about the first of June, 1821, he entered into copartnership with the said Edward Carrington & Co., and thereupon became and was interested in the said ship Mercury and cargo, and in all the concerns of said adventure, according to the terms of said agreement, at and from Gibraltar as aforesaid.

This language would seem to be too explicit to be misunderstood. The new voyage or adventure is spoken of from Gibraltar; and the complainant alleges, that, by virtue of his contract, he became interested in the said ship Mercury and cargo in all the concerns of said "adventure," "at and from Gibraltar." And this view is confirmed by a reference to the books of the company, in which the old concern is credited, "By adventure ship Mercury, voyage from Gibraltar to Chili," $50,619.18; for one half, $25,309.59.

The partnership of the complainant with Carrington & Co. seems to have embraced some ten or eleven vessels; in some, if not in all of which, except the Mercury, the interest of the complainant may have attached at the time of the contract. But, however this may be, we are satisfied that he had no interest in the Mercury, by his own showing, until the new voyage commenced from Gibraltar, in December, 1822.

It seems that Mathewson, as master and supercargo, having funds, traded on his own account, in all the voyages he made; by which means he accumulated as profits a large sum. That trade, it is insisted, was incompatible with his duties as a partner, and was prohibited by his contract.

In the first voyage, which was ended at Gib-

raltar in November, 1822, Mathewson was to receive "fifty dollars per month as wages as navigator and master of the ship, and also the sum of seven hundred dollars as commission," etc. And he was "to have no privilege in the first voyage."

In the new or second voyage, Mathewson was to have "fifty dollars per month as wages as commander and navigator of said ship, to commence with the new voyage, and as supercargo a commission of five per cent. on the net amount of all property safely returned to the United States, Canton, or Europe, proceeding from the original stock of fifty thousand dollars, together with one tenth of all the profits and earnings made in the voyage or voyages, freights or otherwise." And it was "agreed that the wages and commissions specified and agreed for," as above, "are to be in full of all services and privileges to Captain Mathewson, as master and supercargo, during the voyage or voyages specified."

143*] *Usage has given to the masters of vessels and others certain privileges of transportation and traffic, which are denied to Mathewson by the terms of the contract. He agreed that the wages and commission should be in "full of all services and privileges." The privileges here referred to cannot be limited to the mere right of the master to transport on board of his vessel articles of a certain weight or bulk without charge, but to all privileges whatsoever which by usage he might claim. The compensation to be paid was in full for the relinquishment of any usage or privilege of traffic, as well as for services to be rendered. This seems to be the import of the agreement. And when we consider the nature of the trust vested in Mathewson, the propriety of such an arrangement is clear.

He was to be the acting partner in the voyages contemplated, having under his control the large capital invested, with power to trade from port to port, and to buy and sell as he should deem best for the interest of the company. He was entitled, for his part of the capital, to a ratable proportion of the profits. Now, is it reasonable to be supposed that the merchants with whom he was associated would allow him to be engaged on his own account in a commercial enterprise in which he might secure to himself the profits of the trade, and throw upon his partners the loss? This is not like the case where the master, having merely the command of the ship, exercises his privilege. The supercargo is the agent of the owners, and disposes of the cargo and makes purchases under their general instructions on his own responsibility.

But Mathewson was master and supercargo, exercising full powers over the vessel and cargo. He purchased and sold where he could do so to the best advantage; and for his entire services in this agency, and for the management of the ship, he was paid. Now, can an agent, thus acting for his principles, engage in a traffic on his own account? He buys for himself and his principals at the same market, and sells at the same time. On the one side, he is interested in a small portion of the profits, and in a commission of five per cent. On the other, he realizes the entire profits, deducting therefrom the common charge of freight. In the purchases and in the sales, under such circumstances, the agent would be influenced, as may be reasonably supposed, by his own interests. From the accounts rendered, it appears that a much larger profit was realized by Mathewson on his private sales than on the sales for the company. Whether this resulted from the more judicious purchases or sales in the private enterprise, it shows that the traffic was inconsistent with the general agency. It was a rival interest, hostile to the interest of the company, exercised by their agent, and *without their approbation or knowl-[*144 edge. This the law will not sanction. It requires not only a bona fide action by an agent, but that he shall be free from those selfish motives which conflict with the interests of his principals.

After the condemnation and sale of the ship Mercury, three fourths of the Superior were chartered by Mathewson, and it is insisted, that any restrictions on his private trading, in the contract, on board of the Mercury, cannot be applied to similar transactions on the Superior, that the contract of partnership terminated on the sale of the Mercury, and that if the new adventure on board of the Superior be sanctioned, it must be taken subject to the conditions imposed by Mathewson, one of which was his private trading.

It does not appear from the contract or the correspondence of the parties, that any other ship than the Mercury was named or referred to, in which the commercial enterprise contemplated was to be carried on. And it may be said that the condemnation of that vessel ended the adventure. But Mathewson, without the authority or knowledge of his company, chartered another vessel, and used their capital in the enterprise in which he was subsequently engaged. Of necessity they sanctioned this procedure, as a disavowal of it would have limited their claim, at least in effect, to the personal responsibility of their agent.

In his letter dated at Guayaquil, 16th August, 1825, to Carrington & Co., Mathewson says: "If I can get the ship" Superior "at a fair charter, I shall return back to Canton by the way of Manilla, with the intention of returning to this coast again," etc. And again: "Should I take the ship Superior, I expect to have the same interest in the voyage as I had in the Mercury, and wish you to keep my property constantly insured." A similar expectation is expressed in a letter dated at Lima, 10th November, 1825.

And again, in a letter dated at Lima, 16th November, 1825, after giving an account of the loss occasioned by the explosion on board the steamboat Tilica, he says: "I have chartered three fourths of the ship Superior, Captain Andrews, for a voyage to Canton, via Manilla, and back to this coast. Copy of the charter-party inclosed, which I hope will be satisfactory to you. I expect to have the same interest in the charter of this ship as I had on the former voyage in ship Mercury, and wish you to keep my interest insured."

Butler and Carrington & Co. wrote a letter to Mathewson, dated Providence, July 10th, 1826, in answer to various letters received from him, in which they speak discouragingly of the

adventure in the Superior, decline sending 145*] another ship, as *requested by him, and advise him to return home in the Superior, making the best disposition he can of their property, etc. At the date of this letter the Superior was probably on her return voyage, as she arrived at Valparaiso on the 5th of October following. There was no dissent from the terms proposed by Mathewson in his three letters, above referred to, and of course the law implies an acquiescence. Indeed, from the directions given by the company in regard to their property, a sanction, though a reluctant one, and somewhat indirect, was given to the proceedings of their agent, as connected with the Superior. The refusal to advance money to Mr. Mathewson, under the circumstances, does not seem to have any direct bearing on this point.

It is claimed for Mathewson, that the company purposely avoided sanctioning his acts in regard to the Superior, until the result of the adventure should be known, when they could act as their interests might dictate.

The use of the capital of the company, which subjected it to the hazards of trade, under the circumstances, would, on equitable principles, entitle the company to the profits of the enterprise. But looking at the declarations of Mathewson about the time the ship Superior was chartered, and the nature of the enterprise undertaken, we feel authorized to say, that the relation of the parties to each other was not changed by this adventure. The rule applied to the Mercury, in regard to the rights of the complainant and the responsibilities of the defendant, must be applied to the Superior.

After the appeal was taken to this court, errors being discovered in the report of the masters, by consent their report was returned to them for correction. And in their report to this court, dated the 1st of January, 1846, they say that they erred in their former report, in not making to Mathewson allowance for his commissions, and for his one tenth of the profits and earnings.

This last report finds a balance due to the complainant of two thousand nine hundred fifty-eight dollars and three cents; to which they add interest from the 1st of July, 1827, to January 2d, 1846, making three thousand two hundred eighty-three dollars and forty-one cents; which sum being added to the above balance makes the sum of six thousand two hundred forty-one dollars and forty-one cents.

From this sum must be deducted any amount charged for or against the defendant, by the masters in their reports, as the profits of trade or otherwise on his private account during the first voyage of the Mercury. And under the views expressed in this opinion, the complain-146*] ant being interested in the *Mercury and her cargo in her voyage from Gibraltar, in December, 1822, the exceptions to any items charged against the defendant and allowed to the complainant, arising out of any private trading by the defendant on board the Mercury, and afterwards on board of the Superior, are overruled. The exceptions which apply to allowances made to the complainant against the defendant, growing out of the first voyage of *the Mercury, ending* at Gibraltar, are sustained.

880

The decree of the Circuit Court is reversed, and the cause is remanded to that court, with instructions to enter a decree in pursuance of this opinion.

LEWIS CURTIS and George Griswold, Trustees of the Appalachicola Land Company, Appellants,

v.

JOHN and JAMES INNERARITY.

Florida wild lands—excuses for not paying interest on purchase price—civil law rule, vendee not liable for interest where he receives no profit from purchase, when applicable—after refusal to ratify agent's compromise and notice, money paid to agent at debtor's risk.

Where there was a sale of wild lands in Florida, occupied by Indians, and the purchasers gave a mortgage to secure the payment of some outstanding installments of the purchase money, the fact that the purchasers had not complete possession of the lands is not a sufficient objection to their being charged with interest from the time the money was due.

They had paid a large part of the purchase money before the execution on the mortgage, without raising this objection, and the parties to the contract of sale knew that the Indians had possession of the lands as hunting-grounds.

The purchasers in a former suit averred that they had peaceable possession, and the vendors cannot be held responsible for a subsequent disturbance.

The doctrine of the civil law, viz., that the vendee is not liable for interest where he received no profits from the thing purchased," applies only to executory contracts where the price is contracted to be paid at some future day, and the contract is silent as to interest.

Nor is it an objection to the allowance of interest, that the purchaser was put to much trouble and expense to obtain a recognition of his title.

The claim to be released from interest, upon the ground that there was no person legally authorized to receive it, is not supported by the facts in this case.

Where the vendor gave a power of attorney to an agent to receive a payment from the purchasers on account, and the agent gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved of the acts of the agent, the payment is not good, even on account against the vendor.

The purchasers by making a payment in this way, upon certain terms which were not within the power of attorney, constituted the agent their agent. For two years afterwards they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was then too late.

THIS was an appeal from the Court of Appeals for the Territory of Florida.

All the material facts in the case are set forth in the opinion of the court.

The case was argued at the preceding term by Mr. Webster and Mr. Berrien for the appellants, and by Mr. Westcott and Mr. Jones for the appellees.

*Mr. Webster opened the case, on the [*147 part of the appellants, by stating all the circumstances of it. He then contended that the appellants were not properly chargeable with interest during the interval between the death of John Forbes in 1822, in Cuba, and their be—

NOTE.—As to how far failure of title is a defense to purchase price of lands, see note to 4 L. ed. U. S. 172.

ing a personal representative of his estate in the United States. There was nobody to whom a payment could rightfully have been made. Moreover, the purchasers did not come into possession until 1835, when a decree of this court confirmed their title. Previously to that both the commissioners and courts in Florida had rejected it. By the rules of the civil and Spanish law, the land when sold was warranted, and when this is the case, and the purchaser cannot get possession, no interest is payable. 1 Domat, 399, secs. 3, 4, 5, 75, 76, 79; 2 Wash. C. C. 204.

Under such circumstances, if notes are given for the purchase, chancery will restrain the vendor from collecting the notes until the incumbrances are cleared away. Of course interest would not run during this time. 2 Johns. Ch. R. 546; Colin Mitchell's case, 9 Peters, 711.

We are entitled to a credit for the money paid to Blount under his power of attorney. The power was ample to receive money. If he went beyond it, it is an affair between his principal and himself. But the power extended to the receipt of the money which we paid. If what he did beyond his power can be separated from what he did within it, then the latter is good pro tanto. If it cannot be separated, perhaps the whole act is void. It is for the court to say whether the payment on our part of a specific sum of money cannot be distinguished from the releases which he gave. Story on agency, 204, sec. 170.

If he had power to receive money on behalf of the morgagee, he had power also to state an account and to give a receipt. So far his acts must be good, because a line can be drawn between them and his other acts.

Mr. Westcott, for the appellees, said that some of the facts stated by the opposite counsel did not appear upon the record. He therefore recapitulated the circumstances of the case as they were exhibited by the record. The installments were all payable in London according to the contract, and in deciding that they were not, the court below erred, for the acts of the parties and the terms of the contract showed the contrary. The mortgage was made in consequence of a settlement between Forbes and Mitchell for money then due. All prior payments were presumed to be adjusted and taken into the account. It was given for the last two 148*] installments, and the *time extended. The interest upon this extension would amount to a large sum, and the parties must be presumed to have had it in their minds. But it is said that we are not entitled to interest, because the contract was executed in Florida, and by the civil law no interest accrues until the vendee is placed in possession. Also, because there was no person legally authorized to receive the interest. With regard to the first point, where is the evidence, in this record, of any difficulty in obtaining possession? The record of a former case tried in this court shows that these parties then said they had been in undisturbed possession. The petitioners in that case were the assignees of Colin Mitchell.

It is said, also, that by the civil law a sale implies a warranty, and Domat is cited. But Domat does not give the laws of Spain which prevailed in Florida. It might be admitted *that the civil law implies a warranty where* there is a sale of personal property. But it is not the rule as to sales of property where deeds are required. The French law is not the same with the Spanish. For example, Domat says it is not necessary that the vendee must be ousted, to entitle him to bring an action against the vendor. This may, perhaps, have been Roman law, but it is not Spanish. Johnson's laws of Spain 216, 217; in brackets, 195.

The Spaniards seem to have derived their law from the same source from which the common law of England came. In both, there must be an actual eviction. But in this case, the appellants say that they were disturbed in their possession by the United States, when the decision of this court shows that the United States had no title.

The contract is said to have been for the purchase and sale of wild lands which yielded no fruits. 1 Domat, book 3, sec. 14, p. 422, enumerates four classes of cases where interest is chargeable. One is when it depends on the agreement. It is true that in our case nothing is expressly said about interest, either in the contract or mortgage. But the intention of the parties must be the guide, and that can be gathered from the contract. The civil and common law agree in this. If the time of payment was fixed by the mortgage, new security taken and the time extended, these circumstances take the case out of the rule respecting wild lands, because they supervene upon the original contract. It was executed after the treaty with Spain was concluded. The change of flags took place in July, 1821. But in February, 1820, it was known that a treaty was concluded. Mitchell's purchase was in anticipation of the treaty. It is a case, then, to be governed by the civil law, contrary to the intention of the parties and to the equity of the *case? The court below allowed five per [*149 cent interest. But in August, 1822, the laws of Florida, p. 48, gave six per cent. The case cited from Wash. C. C. Rep. 250, is not in point. I refer to the same book, p. 253. On the general subject of interest, all the cases are cited in 2 Fonblanque, 423; in brackets, 425.

But another reason given for not being charged with interest is, that there was no person authorized to receive the money. It is true that Forbes had no administrator in Florida until 1837; but he had an executor in Havana, and the contract was made there. The law is, that the party must show that he was willing and ready to pay before he can be excused. 3 Leigh, 619; Powell on Mort. 367, 368; 2 Tomlins' Law Dict. 247; 1 Ves. 222; Burge's Com. 754.

In the record, the appellants admit their liability to pay interest, and in the settlement with Forbes they actually pay five per cent. interest. If they put it upon the ground of a tender we reply that a tender must be strictly made, so that the tender of a less sum is no bar to interest. Powell on Mort. above; 3 Kent's Com. 450; Randolph, 465.

Payments must first be applied to interest. 1 Halsted, 408; 1 Dall. 124.

As to Blount's power of attorney, he had only authority to receive money on account. He is prohibited in six different places from

giving a release in full. Such power must be strictly construed. Story on Agency, 63.

The appellants knew that we claimed $57,000, and yet took a release in full for $13,000. What did good faith require of them? Certainly, to notify Innerarity; and yet, although the money was paid in October, 1839, he did not know it until May, 1840. As soon as he knew it, he disavowed it. The appellants purposely concealed it. [Mr. Westcott here examined many parts of the record to show this.]

With respect to the number of installments of £375 each which ought to be deducted, the appellants never claimed more than one in their answer, and yet the court allowed them two.

Mr. Jones, on the same side, said that most of the original parties were dead. The affirmative of the questions raised had to be proved by the appellants. They were sued below on a plain question of mortgage, and ought to have presented their defense long ago. Persons and documents were then existing, to clear up things which are now dark. The contract was made in 1817 between Forbes and Mitchell, both residing in the same jurisdiction. The first installment was provided for, leaving a balance of $50,000. Two years afterwards, a mortgage 150*] *was made, and now the appellants wish to go behind the contract and mortgage, too. Their claim is against strong presumption, and requires strict proof.

Mr. Berrien, in reply and conclusion, said that the evidence in the cause is very defective; but it is not the fault of the appellants. It is owing to the prosecution of a stale demand by the other side, after the evidence to resist it has in a great degree perished. The pleadings, also, are very irregular, and the record is strangely arranged; but the questions at issue can be discovered and fairly represented. The bill of Innerarity to foreclose, the answer of Curtis, the amended bill of John Innerarity, and the answer to it, are sufficient, without the proceedings upon the cross bill, to make the questions intelligible. These proceedings show that it is a bill to foreclose a mortgage by John Innerarity, as the administrator of Forbes, claiming $76,000; this claim is then reduced to $67,000, and subsequently to $28,000. In this last, we say there is error in the following points, and that the decree ought to be reversed:

1st. Because interest is calculated on each installment from the respective days of payment, when it ought only to have been allowed from the time of the demand made by filing the bill of foreclosure, or, at most, from the grant of letters of administration on the estate of John Forbes to John Innerarity, one of the complainants.

2d. Because the balance alleged to be due on an unpaid bill of exchange, given by Colin Mitchell, which was not secured by the mortgage, together with damages and interest, are allowed in the decree.

3d. Because the court refused to allow a deduction of £375 to be made from the amount due on the mortgage, notwithstanding the written acknowledgment of John Forbes that such *deduction* should be made.

4th. Because the court refused to allow, as *a payment on the mortgage*; the sum of thir*teen thousand three hundred and fifty-seven* dollars and seventy-three cents, received from the appellants by Thomas M. Blount, the agent and attorney of John Innerarity.

5th. Because costs are decreed against the appellants.

The date of the letters of administration is not in the record, but it must have been between 1835 and 1837.

1. Interest upon the two installments.

The condition of the property was and is notorious. It was wild land, inhabited by Indians, and the record shows it. In the former case, which has been referred to, it is true that there was an averment, that the parties had been in undisputed possession, *but it [*151 was inserted merely to give the court jurisdiction, and is contradicted by the evidence. The Indians were quiet whilst the Spanish government lasted, but became turbulent as soon as the change took place. The purchasers could not get possession of the property. By the civil law, interest is not payable, although a term be fixed for payment, which term has expired, unless the purchaser is put into possession, or the thing purchased is capable of producing fruits. 1 Domat, p. 397, 2d ed. tit. 5, sec. 1, art. 3.

The Spanish law must govern the case. But the same doctrine is maintained in our country. 2 Wash. C. C. Rep. 253.

In Domat, p. 398, art. 5, it is said that if the cause produces no revenue, interest is due only where there is a demand. This court will officially take notice of acts of Congress and treaties, and these prohibit any exercise of ownership by claimant, until the title is settled. It has been said that there was no warranty in the deed. But by the civil law a warranty is implied. 1 Domat, p. 75, tit. 2, sec. 10; Ibid. p. 76.

By our own law, any disturbance would be a ground for an injunction to stay the collection of the purchase money. 2 Johns. Ch. R. 546.

Interest is given for money which is due and payable, but if it is not payable, according to the above case in Johnson, then no interest can be charged.

In the next place interest cannot be claimed because from 1822 to the grant of letters of administration (say in 1837) there was no person legally entitled to receive a payment or to release the mortgage. Forbe's executor in Cuba must be excepted from this remark; but an offer of payment was made to that executor and refused. The refusal is alleged in the bill, and admitted in the answer. How can the debtor be charged with interest, when, if he sought to pay his debt, there was no one to whom he could pay it who could give him a legal receipt? It is said that the debtor must give notice to the creditors that he had the money ready. But in the cases referred to there was some person authorized to receive such a notice; but here there was not. It is also said that we did pay interest, and therefore acknowledged our liability to pay. It is true that interest was paid, but by whom, and when? It was only when letters were taken out, and were not paid by the mortgager, but by the drawer of a bill of exchange—by Colin Mitchell; the mortgagor never paid any, and Colin Mitchell held no legal title. If interest

is due, therefore, it can only be due from 1837.

2d point. As to the bill of exchange.

The bill was not produced in the court be- [*152 low, but the court *say that the payment was made by the parties. But the payment was made by Colin Mitchell, and not the parties in the case. The judge therefore erred in a matter of fact. Payment of the bill could not have been enforced in a suit to foreclose the mortgage. It was given for the first installment due upon the mortgage, and must have been received either as payment or as collateral security. If as payment, then a lesser security than the mortgage has been accepted, and it is just as if we had paid in cash. If it was taken as collateral security, the bill should have been returned when not paid. Under a bill to foreclose the mortgage, it is impossible to collect damages on a protested bill of exchange. They should have sued the drawer, Colin Mitchell, at law upon the bill.

3d point. As to the £375.

The court below say that we claim two allowances of £375, whereas we formerly claimed only one.

[Mr. Berrien here entered into many calculations upon this matter.]

4th point. As to Blount's authority.

The true rule upon this subject has been quoted by Mr. Webster from Story on Agency, secs. 166, 170. Where the acts of the agent within his authority are distinguishable from those beyond it, the former are good, and the latter only are void.

We say 1st. That the order was substantially executed.

2d. That the acts within the power are distinguishable from those beyond it.

The power which Blount had necessarily included a power to state an account and show what balance was due; and the receipt of $13,000 was clearly within the scope of his authority. The court below say that the payment was clogged with a condition which Innerarity could not accept, and therefore he was not bound to bear the loss. But there is nothing in the record to sustain this. Blount was president of a bank, was Innerarity's solicitor in the case, and his bosom friend. Innerarity says he did not know of this transaction until 1840, and the counsel on the other side complain that we were guilty of a fraud in not giving notice. But why should we give notice? The presumption was that the agent would report to his principal. We paid the money, and took a receipt. It was not our duty to give notice of it to the principal.

Mr. Justice Grier delivered the opinion of the court:

It would contribute nothing to a clear apprehension of the merits of this case, to enumerate the various bills, answers, cross bills, etc., constituting the very voluminious and confused [*153 *mass of pleadings and documents spread upon our paper books. The pleadings have been consolidated, by agreement of the parties. We may, therefore, consider the case before us a bill by John Innerarity, administrator of the estate of John Forbes, deceased, against the trustees of the Appalachicola Land Company, for the foreclosure of a mortgage given under the following circumstances:

On the 4th of December, 1818, John Forbes, acting as the executor of William Panton and Thomas Forbes, and as agent of their respective heirs, covenanted to sell to Colin Mitchell "two undivided thirds of a certain tract of land ceded by the Creek Indians unto the house of trade of which said Forbes was the principal partner, lying upon and between the rivers Appalachicola and Appalachee, and containing about one million two hundred thousand acres, for the consideration of $66,666.66, to be paid in the following manner: One fourth, or $16.666, on the 1st of May next, in the city of London, valuing the same at four shillings and sixpence sterling each dollar; the remainder, or $50,000, in four equal yearly installments, reckoning from the date," etc.

This agreement was made and executed in the island of Cuba, where John Forbes then resided. Colin Mitchell purchased for himself, Carnochan, and others, and subsequently took the title in his own name, and continued to hold it till 1820, when he transferred it to Octavius Mitchell, who held it as trustee for the company then and afterwards known as the Appalachicola Land Company. On the 9th of October, 1820, Octavius Mitchell executed a mortgage to John Forbes for the last two installments of $12,500 each, due by the agreement, on the 8th of December, 1820, and the 8th of December, 1821; but further time appears to have been given in the mortgage for these two payments, as they are made payable on the 9th of March, 1821, and the 9th of March, 1822. This mortgage is on the undivided half of the land conveyed to Mitchell, and is the subject of the present suit.

John Forbes, the mortgagee, died in Cuba, in May, 1822, having made a will and appointed executors, who qualified and acted as such in that place, but never proved the will nor obtained letters testamentary in Florida.

John Innerarity first obtained letters of administration in Florida on the estate of John Forbes, on the 5th of July, 1836.

That there is a balance due and unpaid on this mortgage, seems to be admitted; but the parties differ widely in their estimates of its amount. The Superior Court for the County of Escambia, where this case originated, adjudged the balance *due on the mort- [*154 gage to be $50,159.60. On appeal to the Court of Errors of the territory, that court decreed the balance due to be $28,500. From that decree both parties have appealed. At present, we can notice only the exceptions taken by the mortgagors, whose appeal is now under consideration.

They have insisted on three several exceptions to the decree of the Court of Appeals, which will be noticed in their order.

1. Because interest was allowed from the time the money secured by the mortgage became payable, when it should have been allowed only from the time of filing the bill of foreclosure.

2. Because the court refused to allow a credit of £375, which John Forbes admitted should be deducted from the amount claimed.

3. Because a payment of $13,357.73, made

to Thomas M. Blount, was not allowed as a credit.

We shall consider these exceptions in their order, stating the facts of the case bearing on each of them so far as may be necessary to their elucidation.

I. As to the interest.

As the contract for the purchase of these lands, and the mortgage given to secure the balance of the purchase money, were executed in the island of Cuba, the court below allowed the current and legal rate of interest of that place (five per cent.) from the time the respective payments became due.

It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Everyone who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said, that such is the implied contract of the parties. See 2 Fonblanque, Eq. 423; 1 Domat, book 3, tit. 5. The appellants themselves seem to have been fully aware of the justice of this rule, as in all their communications with the mortgagees they have admitted their liability to pay interest, and in their bill, filed in 1837, to have satisfaction entered on the mortgage (which makes a part of the record of this case), they offer "to pay interest at five per cent. from the 8th of December, 1821." This may 155*] not of itself be a sufficient reason *for disallowing their present exception if founded in justice, but it affords a strong presumption that it has no such foundation.

The reasons alleged in support of this exception are, first, that the mortgagors had not possession of the land, or at least received no profits from it, and that, in either case, by the civil law, the purchaser is not bound to pay interest. But we are of opinion that this objection is founded on a mistake both of the law and the fact. The mortgage was given more than two years after the sale to the mortgagors and title executed to them. A large portion of the purchase money had been paid, and no objection made, that the purchasers had not all the possession of which the land was capable. Both parties knew that, although the Indians had ceded their title, they still continued a transient occupancy of the lands for hunting grounds. They may have infested the lands, and rendered it dangerous for the owner to occupy them in time of war; but their possession was not what the law would term adverse, not being with claim of title. There was no covenant by the vendor to expel or exterminate the Indians; the purchasers received such possession of the land as could be given them, cum onere. It was not expected that the Indians should attorn to them or pay them rent. The purchasers of over a million of acres of *wild lands did not expect* to make profits by *actual cultivation or* reception of rents. Their expectation of profit was from the increase in value of the lands from efflux of time and the progress of improvement. These profits they have realized, doubtless to the amount of more than a thousand per cent. on their original investment. Moreover, the record of the Forbes case, decided in this court (and read in evidence in this case, by consent), shows that, in 1828, eleven years after the purchase, the appellants, or those under whom they claim, declared under oath that they had had "peaceable possession" of the land ever since their purchase. If, since that time, or before it, an actual pedis possessio of these lands may have proved difficult or dangerous, owing to Indian wars, it surely cannot be seriously argued, that any warranty, expressed or implied, either by the civil or the common law, makes the vendor liable for the acts of a public enemy, or for a detention or disturbance of the possession by the act of the sovereign power. The purchasers have received full seisin and possession of these lands in the year 1819, under a title proved to be good and indefeasible; the execution of this mortgage is an assertion of the fact; they have neglected to comply with their contract to pay the money secured by the mortgage for ten years, at least, without any apology; and it would be a strange doctrine indeed, and one *equally unknown to the civil [*156 as to the common law, that an accidental disturbance of the possession by the public enemy, happening so many years after such default of payment, could retroact to justify its previous detention, or operate as a defense to the payment either of principal or interest.

Besides, if it were true that, during all this time, the vendee was unable to have such a possession of his land as to receive profits from it, the doctrine of the civil law, as quoted by the learned counsel for the appellant—"that the vendee is not liable for interest where he received no profits from the thing purchased"—has no application to the present case. It applies only to executory contracts, where the price is contracted to be paid at some future day, and the contract is silent as to interest. In such a case, the civil law will allow interest from the date of the contract of sale, if the vendee has had possession and received profits from the thing purchased. In this it differs from the common law, which would not allow interest before the day fixed for payment, unless specially contracted for. But where the purchaser has contracted to pay on a given day, and neglects or refuses so to do, both law and equity subject him to interest as the measure of damages for the breach of his contract.

A second objection made to the payment of interest is, that the purchasers incurred much trouble and expense in obtaining any acknowledgment of their title from the United States, and, although it was finally decided by the Supreme Court of the United States that their title was valid; yet that the courts of Florida had declared it invalid, and thus caused a cloud to hang over it for two or three years, which hindered the settlement, improvement, and sale of the lands.

It is hard to conceive on what grounds these facts should constitute a defense to the payment of interest. The vendor did not, and no sane vendor, would, covenant that his vendee should

enjoy the property in all future time, free from unjust interruption or oppression either by the sovereign power of the State, the public enemy, or individual trespassers. At the time this company purchased this claim from Forbes, the United States and Spain were in treaty for the cession of Florida; and doubtless it was the prospect of this change of sovereign, and the anticipated increase in value in consequence thereof, that moved them to purchase this large claim on speculation, and to covenant to pay the money for it, without waiting to see whether the United States would confirm the title, or without exacting from the vendors any covenant for the payment of any expenses to be incurred in obtaining the confirmation of their title by the new sovereign.

157*] *It may be admitted, also, that a court of equity would have enjoined the vendor from enforcing the collection of the purchase money while the decree of the Florida court as to the title remained unreversed, from an apprehension of a total failure of consideration; yet as that judgment was reversed, and as the vendee was never evicted or put out of possession, he could have no claim to be released from paying interest, even during the time his title was thus unjustly subject to a cloud, much less for any term preceding its existence, or since its removal As we have already said, there was no covenant in this sale, nor is there in this or in any sale, either of real or personal property, any implied warranty by the vendor that his vendee shall enjoy it forever free from all unjust or illegal interference either by the sovereign, or the citizen, or the public enemy.

If the money secured by this mortgage had been paid when it became due, the mortgagee could have retained it with good conscience, and the mortgagor could have shown no right to recover it back on the ground of failure of consideration; for the consideration has not failed, and the title to the lands sold is indefeasible. And such being the case, it is hard to perceive any reason why the mortgagor should not be liable to the legal damages for detaining money which he was bound to pay.

Another reason urged against the allowance of interest in this case is founded on the allegation, that, from the death of Forbes, in 1822, till 1836, when John Innerarity took out letters of administration in Florida, there was no person to whom the mortgagors could legally make payment. But this argument is founded on a mistake of facts, as appears clearly by the record, that, whenever the mortgagors were ready or willing to pay, they found persons ready to receive and give them a good and sufficient acquittance.

John Forbes was a trustee, as to this money, for the heirs of Panton and Thomas Forbes. When the mortgagors called on the executors of John Forbes to make a partial payment on the mortgage, they declined to receive it, but directed the payment to be made to the cestuis que trust, which was accordingly done. In October, 1823, one half of the first installment was paid to William H. Forbes, acting for himself and the other heirs of Thomas Forbes. In the same year, also, the mortgagors paid to James Innerarity, who represented the heirs of Panton, the sum of $2,680.81, and in February, 1825, the further sum of $2,080.87. There is no evidence of any tender of the balance, either to the executors of Forbes or to the cestuis que trust.

This objection is therefore without foundation; and this *exception to the decree [*158 of the Court of Appeals is overruled.

II. The second exception is to the refusal of the court to allow a credit of £375, claimed by the mortgagors.

After three of the five installments into which the price of the lands was divided had been paid, but before the execution of the mortgage to secure the last two, it was discovered that John and James Innerarity, who were owners of one fifth of the Panton interest (or one tenth of the two thirds sold), would not assent to the sale made by John Forbes. Whereupon, as appears by all the testimony and the admissions of the parties, it was agreed to refund to the purchasers a proportional amount (being one tenth) of the purchase money. Accordingly, three several sums of £375 were refunded to John Carnochan, who then represented the purchasers. "Besides which," says Forbes, in his letter of the 10th of December, 1819, "you will have to deduct from the acceptances due in 1820 and 1821 two similar sums at these distinct periods." On the trial below, the mortgagees insisted, that, as the mortgage was given for the balance due on the purchase nearly a year after the above stated letter of Forbes, the fair presumption would be, that all the deductions for the defect of the title in the Panton share had been already made, as the parties were fully aware of the difficulty, and had already refunded large sums on account of it; and, as further time was given in the mortgage for the payment of the last two installments, it would not be probable that the parties had inadvertently given a security for a larger sum than was due. On the contrary, the mortgagors contended that they were entitled to a credit for two sums of £375, according to the admission in Forbes's letter. The Court of Appeals allowed them a credit for one sum of £375, but refused to allow the other; which constitutes the ground of the second exception to the decree.

As the correctness of the position taken by either party, on this point, can be subjected to the test of mathematical calculation based on admitted facts, we are of opinion that this exception has not been sustained. The whole amount of purchase money for the two thirds conveyed was £15,000 sterling. The deduction for the Innerarity interest was one tenth, or £1,500, which would make four installments of £375 each. As the mortgage is given for the last two installments without any deduction, and as it is admitted that three installments of £375 each were refunded, it is plain that the fourth sum of £375 was not deducted from the mortgage, and equally plain that John Forbes was mistaken when he said that two sums of £375 remained yet to be deducted. The origin of this *mistake can easily be [*159 discerned. The first payment was one fourth of the whole purchase money, or £3,750; the one tenth refunded was £375; but as the remaining three fourths were divided into four installments, each of £2,812 10s., the deduction from each would be but £281 5s. He overlooked the

fact that the last four installments, being each one fourth less than the first, the amount to be deducted would be dminished in the same ratio. The oversight or mistake of Forbes in 1819 is not greater than that of both parties in 1820, when they included in the mortgage £375 which they knew was not due. But as the fact is fully established, that the only subject of deduction was one tenth of the whole, and that three sums of £375 had been refunded, and no more, the admission of Forbes, on the one side, and the presumptions of fact drawn from the execution of the mortgage on the other, must both yield to the certainty of arithmetic.

III. The third and last ground of exception urged by the appellants is the refusal of the court to allow them a credit for the sum of $13,357.75, paid to Thomas M. Blount, the agent and attorney of John Innerarity.

Some two years after the commencement of the litigation between these parties, the appellants made a payment to Thomas M. Blount of $13,357.75, under the following circumstances:

It was admitted by both parties that a large sum was due on the mortgage, but they differed widely as to the amount. Innerarity, being willing to receive any amount which the mortgagors were willing to pay, and give them a general credit for so much paid on account, without compromitting his right to recover the whole amount claimed by him, gave a power of attorney to Thomas M. Blount, who was going to New York, where the appellants resided, "to receive from the trustees of the Appalachicola Land Company, in the city of New York, any sum or sums of money on account of and in part payment of the mortgage, etc., and to give such receipt or receipts, release or releases therefor, as may be deemed requisite to exonerate the said trustees from so much of the said mortgage as may be paid by them on account and in part payment, etc., etc.

With this power of attorney, Blount proceeded to New York, and, instead of receiving such sums as the mortgagees might choose to pay on account, and giving such receipts or releases as he was authorized to give, he assumed to adjust and settle with the company the whole balance due on the mortgage, and to act as if he had been authorized to arbitrate and decide all the matters in variance between the parties, in the controversies then pending in the courts of Florida. For the sum of $4,832.35, he gave the mortgagors a discharge

160*] for the balance of *the first installment, including the disputed item of damages on the bill of exchange, claims, etc. And for a further sum of $8,525.38 he gave a discharge of one half the last installment. Both Blount and the appellants well knew that Innerarity had uniformly and tenaciously claimed a much larger amount as due on each of these items; and they ought to have known, that, even if no more was justly due on them than the amounts paid, Blount had no authority to compromise or adjudicate on the justice of Innerarity's claim. Besides these sums of money which are stated in Blount's release to be the whole consideration thereof, he received also a written contract of Messrs. Curtis and Griswold, to pay a further sum of $5,000, on certain conditions; but to whom, or how, or on what contingency, it is difficult to discover from anything that appears on the face of the paper, or the evidence in the cause.

Soon after this transaction (on 20th January, 1840), Innerarity gave notice by letter to the appellants, that he repudiated the act of Blount, and says: "So soon after his return as I saw Mr. Blount, he informed me of the provisional arrangement that he had made with you, subject to my approval. But this involved the suspension of the sum of $5,000, with the corresponding interest, etc., for which your contingent bond was proposed, etc., with the preliminary, however, of the cancellation of the moiety of the mortgage. This proposition, I confess, startled me," etc.

The appellants, though thus informed by Innerarity that he considered "Blount as placed in the position of their agent," and that he was unwilling to ratify "this provisional arrangement," nevertheless proceeded to put on record in Florida the release given them by Blount. When this came to the knowledge of Innerarity, he again addressed them by letter of 19th May, 1840, as follows: "I addressed you a letter on the 20th of January last, and subsequently on the 25th of February, by original and duplicate, in which I advised you, that, having learned from T. M. Blount that he had an arrangement with you subject to my approval, as he stated to me and others, in relation to a discharge of one moiety of the mortgage, etc., I did not feel at liberty, as the representative of the interest of others, for the reasons stated in my said letter of 20th of January, to sanction the provisional contract which he made. To these letters I have received no answer, but to my great astonishment have just seen the deed of release given to you on the 19th of September, by Mr. Blount, in which he proposes to act as my attorney, and which deed professes to discharge the trustees from one moiety secured by the above *mentioned mortgage. In so doing Mr. [*161 Blount has transcended his authority as my attorney, as will appear by reference to my letter of attorney, etc., etc. Feeling it to be my duty to disavow this unauthorized assumption of my attorney, and not less my duty to give you timely warning to protect yourselves from injury, I hereby notify you that I disavow and repudiate the deed of release, etc. I have not received, nor will not receive any part of the money paid by you to Mr. Blount; but will look to you in the original security for the debt due under the said mortgage."

The receipt of these letters is admitted by the appellants in their answer to a supplemental bill filed by Innerarity (June 12th, 1840), for the purpose of having Blount's release delivered up, and the whole transaction between him and the trustees declared fraudulent and void. On the 6th of July, 1840, Carnochan, one of the trustees, filed his cross bill to make Blount a party, and praying that, inasmuch as the money paid to him by the trustees had not been applied to the purpose for which it was designed, it may be paid into court and held under their control. On the 9th of April, 1841, the appellants filed another cross bill, insisting on the full power of Blount in the transaction, and praying the court to confirm and establish the release, and to order satisfaction to be entered on the mortgage accordingly.

And finally, on the 27th of June, 1841, after it was ascertained that Blount and the Bank of Pensacola (of which he was president, and in which he had deposited the money) were both insolvent, and that the money paid to him was lost, the appellants, in their answer to the cross bill, for the first time, offer "to waive the said release," and "be satisfied that payment shall be held and regarded as on account of the mortgage generally, and be credited pro tanto."

On these facts, the appellants contend that they are entitled to a credit for the money paid to Blount, because he was authorized to receive it; and although the settlement he made and the release he gave may be void for want of authority, yet, his acts, so far as they were authorized, were valid and binding on his principal.

"Regularly it is true," says Lord Coke, "that when a man doth less than the commandment or authority committed unto him, then the commandment or authority being not pursued, the act is void. And when a man doth that which he is authorized to do, and no more, then it is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations." Co. Lit., 258. a. And "Lord Coke is well warranted," 162*] says Mr. Justice Story (Story *on Agency, sec. 166), "in suggesting that there are exceptions and limitations. Where there is a complete execution of the authority, and something ex abundanti is added which is improper, then the execution is good and the excess only is void. But when there is not a complete execution of the power, or when the boundaries between the excess and the rightful execution are not distinguishable, then the whole would be void."

It is contended, in the present case, that the excess and the rightful execution are easily distinguishable, and that the receipt of the money was a valid act and binding on his principal, though the settlement and release were void. But we are of opinion, that the appellants have not put themselves in a condition to have the benefit of this principle. Blount's power of attorney was a bare authority to receive money on account of the mortgage then in litigation, if the appellants chose to pay him any, leaving all the questions in dispute between the parties open to future adjustment. But the mortgagors refuse to pay him money on the conditions on which he was authorized to receive it, and give a valid acquittance. On the contrary, the money given to Blount is on their own terms, and in consideration of a settlement, arrangement, and release, which they knew, or ought to have known, Blount had no authority to make. The money paid, the bond given, the receipt taken, discharging them from the balance claimed, on the bill of exchange and from one half of the last installment, constitute one transaction. Having advanced the money on their own terms and conditions, and not on those tendered by Innerarity, they put him into a situation in which he must either affirm or repudiate the whole transaction. For if he accepted the money, they might insist that he could not reject the consideration on which it was given, on the familiar principle of the law, "that the principal cannot ratify a transaction of his agent in part, and repudiate it as to the rest." Story on Agency, sec. 250. Besides, by thus undertaking to enter into a treaty with Blount which they knew could not be binding without the assent of Innerarity, they in fact constituted Blount their ambassador or agent to obtain its confirmation. They had a perfect right to refuse to pay money on the terms dictated by Innerarity in his letter of attorney; and Innerarity had an equal right to refuse it on their terms. And when informed by him, soon after the transaction, that he considers Blount as their agent, and that he had proposed this transaction as a provisional arrangement subject to the approval of Innerarity, they keep silence till he again repudiates the transaction and files a bill to set it aside, and never intimate a willingness *that Innerarity [*163 shall receive the money on the terms he offered, till near two years afterwards, when the money was lost by the insolvency of Blount and the bank. This assent of the appellants to the terms of Innerarity came too late, after the money had been lost by their obstinate pertinacity in endeavors to compel him ta accept it on their own terms.

We are of opinion, therefore, that the Court of Appeals have not erred in refusing to credit the appellants with this sum as a payment on the mortgage.

The decree of the Court of Appeals of Florida is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Territory of Florida, and was argued by counsel; on consideration whereof, it is now here considered and decreed by this court, that the decree of the said Court of Appeals in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum; and that the time of redemption be extended to six months from and after the filing of the mandate of this court in this case in the court below.

NELSON F. SHELTON, Appellant,

v.

CLAYTON TIFFIN and Lilburn P. Perry.

Citizenship, from what inferred—objection on appeal—equity has jurisdiction where fraud alleged—decree a nullity where unauthorized attorney appears for defendant not served—proof of want of authority—Louisiana parish court no jurisdiction over answer where petition abandoned and discontinued.

Where an individual has resided in a State for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such State unless the contrary appear. And this principle is strengthened when the individual lives on a plantation and cultivates it with a large force, claiming and improving the property as his own.

On a change of domicil from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declara-

NOTE.—Effect of appearance by counsel or attorney in an action—unauthorized appearance—what is an appearance.

An appearance admits the regularity of the summons but does not in all cases admit the regularity of the complaint. Shafer v. Humphrey.

tions. An exercise of the right of suffrage is conclusive upon the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient.

The facts, that the party and his wife were residents of Louisiana for more than two years before the commencement of the suit; that he was absent only once, on a visit to a watering place; that he resided the greater part of the time on a plantation which he claimed as his own; that he constructed upon it a more secure and comfortable dwelling house; that he observed to a witness that he considered himself a resident, are sufficient to justify the Circuit Court of Louisiana in exercising jurisdiction in a suit brought against that party by a citizen of Missouri.

Where fraud is alleged in a bill, and relief is prayed against a judgment and a judicial sale of property, a demurrer to the bill, that relief can be had at law, is not sustainable.

Where a citizen of Virginia sued, in the Circuit Court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to 164*] *show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity.

A judgment of a State court, that the debt had been extinguished, given in an action which was not brought for the recovery of the debt, and which action, moreover, had been discontinued by the plaintiff, cannot be set up in bar of proceedings in the Circuit Court for the recovery of the debt, which proceedings had been commenced when the judgment of the State court was given.

Where a worthless promissory note is imposed upon the vendor as part of the cash payment, it would seem that, if any fraud has been practiced upon the vendor by the vendee, the amount of the note still remains an equitable lien upon the land.

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

On the 1st of August, 1837, Clayton Tiffin and Lilburn P. Perry received a deed for a tract of land on the western bank of the Mississippi River, about five miles above the town of Vicksburg, and containing six hundred and forty-four acres.

On the 10th of April, 1838, Tiffin and Perry sold the same land, together with a large number of negroes, to Samuel Anderson, for the sum of seventy-five thousand dollars. The sale was stated to be for cash. But in fact the payment was to be made in this way:

Funds supposed to be as good as cash,	$35,000
Notes secured by mortgage, - -	40,000
	$75,000

John M. Perry, the father of Lilburn P. Perry, and father-in-law of Tiffin, became the agent to receive these funds. The $35,000 was again divided into two classes, viz., a debt of $13,000, which was due to Anderson by Lilburn P. Perry and John M. Perry, and which debt became thus extinguished, and a note for $18,282.65, given by Austin, Ragan, and Bohannon, payable to Anderson on the 1st April, 1839.

The sum of $35,000 being thus arranged, the balance of $40,000 was not provided for until some time afterwards, viz., on the 1st of March, 1839, when Anderson gave the following notes:

$13,333 $\frac{00}{000}$. On or before the first day of January, 1842, we promise to pay Lilburn P. Perry the just and full sum of thirteen thousand three hundred and thirty-three dollars, value received, for land and negroes purchased of Clayton Tiffin and Lilburn P. Perry; for the true payment of which we bind ourselves, our heirs, etc., firmly by these presents. Given under our hands and seals, this the first of March, 1839.

Samuel Anderson, [Seal.]
Ne varietur, July 9th, 1839.
Richard Chs. Downes, [Seal.]
J. judge parish Madison, Louisiana.

*(Indorsed) [*165
For value received, I assign the within note to Clayton Tiffin, October 22d, 1839.
L. P. Perry,
216 Filed 23d Nov., 1839.
John T. Mason, Clerk.
For his agent J. M. Perry.

$13,333 $\frac{00}{000}$. On or before the first of January, 1843, we promise to pay Lilburn P. Perry the just and full sum of thirteen thousand three hundred and thirty-three dollars, value received, for land and negroes purchased of Clayton Tiffin and Lilburn P. Perry; for the true payment of which we bind ourselves, our heirs, etc., firmly by these presents. Given under our hands and seals, this the first day of March, 1839.

(Signed)
Samuel Anderson, [Seal.]
Ne varietur, July 9th, 1839.
Richard Chs. Downes, [Seal.]
J. judge parish Madison, Louisiana.
(Indorsed) 216. Filed Nov., 1839.
John T. Mason, Clerk.

$13,333 $\frac{00}{000}$. On or before the first of January, 1844, we promise to pay Lilburn P. Perry the just and full sum of thirteen thou-

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15 How. Pr. 564: Tuttle v. Smith, 14 How. Pr. 395; Ridder v. Whitlock, 12 How. Pr. 208.

Under the old practice, putting in and perfecting bail, Jones v. Price, 1 East, 81; Chapman v. Snow, 1 B. & P. 132; or merely putting in bail, waived any defect or irregularity in the affidavit to hold to bail. DeArgent v. Vivant, 1 East, 330; Hodgson v. Dowell, 3 M. & W. 285. So merely obtaining time to inquire after bail was deemed a waiver of any irregularity in the notice. Foster's Bail, 2 Dowl. P. C. 586; Moore v. Stockwell, 6 B. & C. 46.

A plaintiff may waive an irregularity in a demurrer interposed by defendant, by noticing the demurrer for argument. Bonton v. Brooklyn, 2 Wend. 395; Farmers' Loan and Trust Co. v. Reid, 3 Edw. Ch. 414.

An act by which a party to an action submits himself to the jurisdiction of a court is an appearance. Cooley v. Lawrence, 12 How. Pr. N. Y. 76; 5 Duer, 605.

This act may consist in the service of a notice of *motion signed by an attorney* for the defendant,"

Kelsey v. Covert, 15 How. Pr. 92; Baxter v. Arnold, 8 How. Pr. N. Y. 445; or of a notice of bail, Quick v. Merrill, 3 Caines, 133; McKenster v. Van Zandt, 1 Wend. 1; or an order extending the time to answer. Quinn v. Tilton, 2 Duer, 648; Ayers v. Western R. R. Corporation, 48 Barb. 132; or a notice of motion to discharge an order of arrest. Dart v. Arnis, 10 How. Pr. 420.

The appearance of an attorney without authority has been held to be a nullity, Bean v. Mather, 1 Daly, N. Y. 440; and for such gross violation of duty he is liable to be disgraced and punished. Brown v. Nichols, 42 N. Y. 26; 9 Abb. Pr. 1.

If, however, a defendant is regularly brought into court, and an attorney of the court appears for him, his acts are binding upon the party, until the attorney is superseded, unless collusion is shown, and the remedy of the party is against the attorney for acting without authority. Hamilton v. Wright, 37 N. Y. 502; 5 Trans. App. 1; Blodget v. Conklin, 9 How. Pr. 442; Ellsworth v. Campbell, 31 Barb. 134.

The court has power to relieve a party to an ac-

sand three hundred and thirty-three dollars, value received, for land and slaves purchased of Clayton Tiffin and Lilburn P. Perry; for the true payment of which we bind ourselves, our heirs, etc., firmly by these presents. Given under our hands and seals, this the first day of March, 1839.

(Signed)

Samuel Anderson, [Seal.]

Ne varietur, July 9th, 1839.

Richard Chs. Downes, [Seal.]

J. judge of parish Madison, Louisiana.

(Indorsed) 216. Filed 28 Nov., 1839.

John T. Mason, Clerk.

On the 9th of July, 1839, the remaining part of the agreement was carried into effect, by Anderson's executing a mortgage to Lilburn P. Perry, and in favor of whomsoever may become the legal holder and owner of the above notes, of the property, land, and slaves, which had been conveyed to Anderson by the deed from Tiffin and Perry.

On the same 9th of July, Anderson executed another mortgage, reciting that he was justly indebted to Nelson F. Shelton, of Goochland County, in the state of Virginia, in the sum of $45,550, and mortgaging the same property to 166*] secure it, *"it being understood that this mortgage is posterior to that granted by the said Samuel Anderson in favor of Lilburn P. Perry on this day." This sum of $45,550 was divided into two notes, payable on the 1st of January, 1845, and 1st of January, 1846. Whilst upon the subject of this last mortgage, it may be as well to say that another was substituted for it, with the consent of all parties, on the 17th of March, 1840, in which Robert Anderson, of Virginia, was also included, as a creditor to the amount of $3,000. This, like the other, referred to the prior mortgage given to Perry.

It is proper now to go back a few months in the order of time.

In January, 1839, Hillery Mosely and William W. Bouldin, citizens of Virginia, filed a petition in the Circuit Court of the United States against John M. Perry and Lilburn P. Perry, alleging that the Perrys were indebted to the petitioners in the sum of $7,560, upon a promissory note. As the proceedings upon this suit, as far as the appearance of Lilburn P. Perry was concerned, were drawn into question, it is better to go through with this branch of the case entirely before recurring to any other part of it. On the 12th of January, an order of court was directed to Lilburn P. Perry, commanding him to file his answer within ten days, to which the marshal made the following return:

"Defendant, L. P. Perry, could not be found, after diligent search and inquiry. Returned Feb. 23, 1839.

"J. P. Walden, Deputy-Marshal."

A writ of arrest was then issued, directing the marshal to seize the bodies of John M. Perry and Lilburn P. Perry, and confine them till they should give security not to leave the State without permission of the court, to which the marshal made the following return:

Marshal's Return.

Received 12th January, 1839; and on the 18th, same month, arrested and took defendant, John M. Perry, into my custody, from whence he was released by giving bond, with Z. H. Rawlings, Charles Johnson, and H. Lewis, as sureties, in the parish of Madison, 450 miles from New Orleans, in the Eastern District of Louisiana; which bail bond is herein returned; and Lilburn P. Perry could not be found, after diligent search and inquiry, and executing this writ in all other things as the law directs. Returned February 23d, 1839.

(Signed) J. H. Holland, Marshal.

*After this, B. A. Crawford, calling [*167 himself "attorney for defendants," filed an answer for John M. Perry, and Lilburn P. Perry, and the cause regularly proceeded to trial, Mr. Crawford attending to it in all its stages as attoney for both defendants. In June, 1839, it was tried, and the jury found a verdict for $7,560. In July, a fi. fa. was issued, the return to which was, "no property." In October, an alias was issued, to which the marshal made the following return, viz.:

Marshal's Return.

Received 23d day of October, 1839, and on the same day made demand of the amount of the within fi. fa., at the residence of the within named defendants, John M. Perry and Lilburn P. Perry, which was refused. I seized, on the 23d day of November, 1839, a debt due by Samuel Anderson to the within named Lilburn P. Perry, for forty thousand dollars. There was three notes given by said Anderson to said Perry, and mortgage on fifty slaves and six hundred and forty acres of land, to receive

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tion from a judgment or order obtained against him by reason of the negligence, ignorance or fraud of his attorney. Sharp v. Mayor of N. Y. 31 Barb. 578; Elston v. Schilling, 7 Rob. 74, Quinn v. Lloyd, Id. 538.

A party will be let in to repudiate the appearance of an attorney when unauthorized, or the negligence of an incompetent attorney, when justice requires, although the attorney be responsible. Bean v. Mather, 1 Daly, 441; Sharp v. Mayor, 19 How. Pr. 193; 31 Barb. 578.

The remedy is properly in the suit in which the unauthorized appearance was made. Brown v. Nichols, 42 N. Y. 26. But see Howard v. Smith, 42 How. Pr. 300; 33 N. Y. Super. Ct. 129; 35 N. Y. Super. Ct. 131; People v. Dowell, 25 Mich. 162.

Although the record of the judgment of another State show jurisdiction of the defendant, and an appearance by him, he may plead the facts showing that jurisdiction of his person was not in fact acquired, and that the appearance was unauthorized by him, in which case he is not bound by the judgment. Andrews v. Heriot, 4 Cow. 524, note; McDermott v. Clary, *107 Mass. 501; Kerr v. Kerr, 13 L. ed.* 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight, etc., 19 Wall. 58; Bosworth v. Van De-Walker, 53 N. Y. 597; People v. Dowell, 25 Mich. 247; Kerr v. Condy, 9 Bush, Ky. 372; Garrison v. McGowan, 48 Cal. 592; see Bicknell v. Field, 8 Paige, 440; Hill v. Mendenhall, 21 Wall. 452.

An attorney who commences or defends a suit in the name of a party without his retainer or authority is liable to him for the damages for his so doing. The court will also stay proceedings. O'Hara v. Brophy, 24 How. Pr. 379; Madry v. Newman, 1 Cromp. Mees. & Rose, 402; 4 Tyrwh. 1023; Hubbart v. Phillips, 13 Mees. 702; Bayley v. Buckland, 1 Exch. 1; Might v. Castle, 3 Merivale, 12; Town of Lyons v. Cole, 3 T. & C. N. Y. 431.

The proceedings will be set aside on motion of the party injured. Allen v. Stone, 10 Barb. 547; Bean v. Mather, 1 Daly, 441; Williams v. Van Valkenburgh, 16 How. Pr. 144; Hamilton v. Wright, 37 N. Y. 502, 506.

That appearance cures defects in service of process, or its non service, see note to Knox v. Summers, 3 Cranch, 496.

the payment of said debt to satisfy this fi, fa., and after advertising the said claim ten entire days from the last day of the notice of seizure, and having appraisers appointed according to law, who appraised said property to be worth twenty-eight thousand dollars, cash valuation, on the 10th day of December, 1839, and then, on the same day, offered the property for sale for cash, and repeatedly crying it; there was no sale for want of a bid to the amount required by law, and then I advertised the same property, and sold the same on the 4th day of January, 1840, on a credit of twelve months, when Samuel Anderson became the purchaser thereof for the sum of five thousand dollars, he being the highest and last bidder, for which he gave his bond, with John B. Bemiss and Aaron Lilly as security; which bond I received, and the said bond is herewith returned; four hundred and thirty miles from New Orleans.

(Signed) M. Marigny, U. S. Marshal.
By John N. Donohue,
Deputy U. S. Marshal.

In January, 1840, a capias ad satisfaciendum was issued against both the Perrys for the balance of the judgment after deducting the proceeds of the sale to Anderson, to which writ the marshal made the following return:

Marshal's Return.

Received Thursday, the 16th January, 1840, and after diligent search and inquiry, the within named defendants, John M. Perry and Lilburn P. Perry, could not be found in the East-
168*] ern *District of Louisiana—distance five hundred miles from New Orleans.

(Signed) M. Marigny, U. S. Marshal.
By John N. Donohue,
Deputy U. S. Marshal.

The marshal soon afterwards executed the following conveyance to Anderson:

State of Louisiana, Parish of Madison:

Whereas, I, John N. Donohue, deputy United States marshal in and for the Eastern District of the State of Louisiana, by virtue of a writ of fieri facias issued from the Circuit Court of the United States for the Ninth Circuit in and for the district and State aforesaid, at the suit of Mosely & Bouldin v. John M. Perry and Lilburn P. Perry, I did seize a certain debt owing by Samuel Anderson to said Lilburn P. Perry, as evidenced by three promissory notes, dated 1st of March, 1839, due in the years 1842, 1843, and 1844, each for the sum of thirteen thousand three hundred and thirty-three dollars, payable by said Samuel Anderson to the said Lilburn P. Perry, which notes are "paraphin" on the 9th of July, 1839, together with the mortgage intended to secure said notes or debts, recorded in the office of the parish judge of the parish of Madison, in the parish and State aforesaid, in the record book of conventional and legal mortgages, pages 27 and 28, where there are fifty slaves and six hundred forty acres of land mortgaged to secure the payment of said notes and mortgage, seized as the property of said Lilburn P. Perry, and having exposed the same to public sale as aforesaid, on a credit of twelve months, when Samuel Anderson became the purchaser thereof at the price of five thousand dollars, for which he gave his bond with John B. Bemiss *and Aaron Lilly as his securities, payable in twelve months after the date* thereof, all in due form of law, and which bond I hereby acknowledge to have received.

Now, therefore, know all men by these presents, that I, the said deputy as aforesaid, do, in consideration of the premises, and by virtue of the act in such cases made and provided, grant bargain, sell, assign, and set over to the said Samuel Anderson, his heirs and assigns, all the right, title, and interest or demand, which the said Lilburn P. Perry had, in and to the said debt, notes, and mortgage, as before described on the twenty-third day of November, A. D. 1839, or at any time since, or to any part thereof; to hold the same to the said Samuel Anderson, his heirs and assigns forever, hereby subrogating (as far as my act in the premises can) said Samuel to all the rights which the said Lilburn P. Perry had or has, in, *un- [*169
der, and to the aforesaid mortgage; and the said Samuel Anderson being present hereby accepts this conveyance, and hereby specially mortgages the above described debt and mortgage to secure the final payment of the purchase money, and all interest and costs that may accrue in the premises.

Done and passed in the State and parish aforesaid in presence of John B. Bemiss and Aaron Lilly, competent witnesses, who have signed with me, said deputy U. S. Marshal and Samuel Anderson, this 4th day of January, 1840, ——— and said Samuel Anderson before signing.

(Signed) John N. Donohue.

Having traced this suit to its termination, we must turn our attention to another.

On the 23d of November, 1839, Lilburn P. Perry, by Martin, Richardson, and Stacy, his attorneys, filed a petition in the District Court in and for the parish of Madison, setting forth Anderson's indebtedness to him upon the mortgage and notes above described for $40,000, and stating his belief that Anderson was about to leave the State of Louisiana, and that he would, unless restrained by the conservative process of the court, remove his property out of the State before the debt or any part of it became payable. He therefore prayed for a writ of attachment to be levied upon the plantation, crops, and negroes. At the time of filing this petition, Perry filed also the original promissory notes, being three in number, for $13,333 each, payable 1st of January, 1842, '43, '44. With the petition was filed also the affidavit of John M. Perry, signing himself "agent for L. P. Perry," who was stated to be absent from the State of Louisiana.

The attachment was ordered and issued; but on the 27th of November, John M. Perry filed in court the following, viz.:

Instructions.

Lilburn P. Perry v. Samuel Anderson. } 9th District Court.—An attachment.

I, John, M. Perry, acting as agent for Lilburn P. Perry, plaintiff in above entitled suit, hereby direct Thomas B. Scott, of the parish of Madison, to return the writ of attachment now in his hands, in the suit of Lilburn P. Perry v. Samuel Anderson, No. 216, on the docket of said District Court for the parish of Madison, to the clerk's office of said court, without making any seizure or service on said

*200 Howard 6.

writ of attachment; and I furthermore hereby direct said sheriff and clerk, that all proceed-
170*] ings *had, or to be had, under said attachment, be dismissed and discontinued.

(Signed) John M. Perry,
Agent for L. P. Perry, Clayton, Tiffin, J. H. Martin, Geo. W. Grove.

Received on the 27th November, A. D. 1839, and served on the 28th of the same month and year, by handing a certified copy of this writ of attachment to the defendant, Samuel Anderson, in person, at the court-house in Richmond, and then was instruct[ed by] the plaintiff in this case not to levy the attachment, but to return it to the clerk's office, as will be seen by reference to the within order from him. Service $2.

(Signed) T. B. Scott, Sheriff.

The cause remained in this condition for nearly a year, when Anderson filed the following answer, on the 18th of November, 1840:

Lilburn P. Perry
v.
Samuel Anderson

The defendant came into court, and for answer to plaintiff's petition in this suit filed, denies all and singular the allegations therein contained and set forth. And for further answer thereto he says, that the notes mentioned and appended to plaintiff's petition were executed and delivered to the petitioner, as set forth therein; also, that the mortgage set forth was executed as set forth, and for the purposes as shown in said mortgage.

This defendant for further [answer] sets forth, that on the 23d day of November, A. D. 1839, John N. Donohue, deputy United States marshal, in virtue of a writ of fieri facias, then in his hands, which issued from the Circuit Court of the United States for the Ninth Circuit, in the Eastern District of Louisiana, at the suit of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, seized upon the several promissory notes mentioned in, and appended to, plaintiff's petition, and the mortgage securing the same; and afterwards, to wit, on the 4th day of January, A. D. 1840, proceeded to sell the said notes and mortgage, in satisfaction of the said fieri facias of Mosely and Bouldin v. John M. Perry and Lilburn P. Perry, when this defendant became the purchaser of said notes and mortgage, at the last and highest bid. All of which will more fully appear by the annexed copy of said marshal's sale, which is herewith filed, and made part of this answer.

This defendant further shows, that, at the time of the seizure of the said notes and mort-
171*] gage, they were due and payable *to Lilburn P. Perry only, and were his property at the time of said seizure by the deputy-marshal as aforesaid. And defendant further shows, that the indorsement made on the back of one of the notes due on the 1st of January, 1842, was not made at the date thereof, to wit, on the 22d of October, 1839, but was made after the said seizure so made by the marshal as aforesaid; and said assignment was only dated for the purpose of evading said seizure. All of which this defendant will be prepared to show on the trial of this suit.

This *defendant therefore shows and alleges,* that by virtue of the purchase made by him at the marshal's aforesaid, the said debt, mentioned and shown by said note sued on, and the mortgage securing, have been discharged and extinguished by confusion, and by this defendant's becoming the owner of the said debt and mortgage.

Defendant therefore prays that plaintiff's demand be rejected, and that the notes sued on and mortgage may be decreed to be discharged and extinguished by the confusion created by said sale, as before set forth.

(Signed) John B. Bemiss,
At'ty for def'ts.

On the 18th of May, 1841, the counsel of Perry made the following motion:

Lilburn P. Perry
v.
Samuel Anderson

Plaintiff by his undersigned counsel moves that this suit be dismissed at his costs.

Martin, Richardson & Stacy,
Attorneys.

And on the 20th of May, 1841, the following was entered on the minutes of the court:

Lilburn P. Perry
v.
Samuel Anderson

Motion filed by plaintiff's counsel to dismiss this suit at plaintiff's costs.

Ordered that the motion to dismiss be sustained, and that this suit be dismissed at plaintiff's cost, by consent of the parties. It is also ordered, that the three notes on file in said suit be not withdrawn therefrom by either party, unless upon an order of this court, previously and contradictorily rendered with the other party, after due notice to him; and defendant has leave to withdraw documents marked A, by leaving a certified copy with the clerk.

*Motion. [*172

Lilburn P. Perry
v.
Samuel Anderson. } 216.

The defendant herein moves this honorable court for a rule on plaintiff, to show cause why the notes sued on in above entitled suit should not be given up to him upon his leaving a certified copy of said notes, they being the property of said defendant, etc.

Bemiss & Pierce,
Att'ys for defendants.

Judgment.

By reason of the law and the evidence in this case, and by reason of a motion of plaintiff's counsel thereto, it is ordered, adjudged and decreed, that judgment be rendered as if nonsuit in this case, and that the notes herein filed be not withdrawn until leave [be] obtained; and that the plaintiffs pay the costs of suit to be taxed. Read and signed in open court, this 3d day of June, A. D. 1841.

B. G. Tenny, Judge 9th Dist.

The cause remained in this position for nearly a year, a bill having been filed in the meantime, viz., on the 21st April, 1842, in the Circuit Court of the United States, by Tiffin and Perry against Anderson and Shelton. This bill (which is the present case) will receive particular notice after the history of the proceedings in the Parish Court shall have been finished.

On the 11th of May, 1842, the following motion was made in the Parish Court:

Motion to withdraw notes filed, and it is ordered by the court, that L. P. Perry, the plaintiff in this suit, show cause on Thursday, the 19th instant, why the application should not be granted.

Answer.

Lilburn P. Perry v. Samuel Anderson. } Ninth District Court, parish of Madison.

The plaintiff, Lilburn L. Perry, for cause against the rule taken upon him by Samuel Anderson, why the notes sued on should not be withdrawn and delivered up to said Anderson, shows, that the plaintiff has taken a voluntary nonsuit in the above cause, after issue joined, which issue has never been either tried or decided; but that plaintiff now stands on the record as the owner of said notes, and he denies that said Anderson can have an order of this court for the delivery to him of said notes until it shall have been decided in a suit, regularly brought for that purpose, that said 173*] Anderson is the owner of *said notes, which issue he denies can be tried upon the said defendant's rule to show cause; wherefore, and for other reasons equally apparent; he prays that defendant may be discharged at his costs.

D. S. Stacy, Att'y for pl'ff.

On the 19th of May, 1842, the court overruled the above exceptions, and ordered the trial of the rule to proceed; when a motion was made on the part of Perry for a continuance, and an affidavit of John M. Perry filed in support of the motion. The affidavit stated the absence of a material witness, viz., Crawford, the attorney in the suit of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, and that he expected to prove by him that he, Crawford, put in an answer by mistake for the said Lilburn P. Perry, and that he said Crawford, never had any authority from the said Lilburn P. Perry, or from any duly authorized attorney or agent of said Lilburn P. Perry, to put in said answer, or to make any answer or plea of any description whatever, or in any manner whatever to represent said Lilburn P. Perry in said suit. John M. Perry also filed the following affidavit:

"John M. Perry, agent and attorney in fact of the plaintiff in the above entitled suit, makes oath, that he is the agent of Lilburn P. Perry, the said plaintiff; that said Lilburn P. Perry is absent at this time from the State of Louisiana, and he, said Lilburn P. Perry, resides in the State of Missouri and has resided in said State of Missouri for several years past; that Lilburn P. Perry has not been within the vicinity of the State of Louisiana for nearly or quite two years past, and that ever since the said Lilburn P. Perry left the State of Louisiana, which affiant believes was in the fall of the year 1838, and became a resident in the State of Missouri; affiant has been, as he is now, the agent and attorney in fact of the said Lilburn P. Perry.

"Affiant swears, that not until Wednesday, the 18th day of May, in the year 1842, was affiant apprised that any such motion as that now before the court, made on the part of Samuel Anderson, had been made, nor had affiant any knowledge that any such motion was intended to be made on the part of said Anderson, or anyone claiming under him.

"Affiant swears further, that Bennet A. Crawford, who resides in the city of New Orleans, is a witness whose testimony is material for the substantiation of the claims of the said Lilburn P. Perry on the trial of said motion; that the said Lilburn P. Perry cannot go safely to trial without the evidence of said Crawford, and that he expects to prove by said Crawford *such facts as will show the said Ander- [*174 son has no title in and to said notes.

"Affiant swears, also, that since he was informed of the existence of said motion, he has not had time to procure the testimony of said Crawford, and that he cannot procure said testimony of said Crawford in time to go to trial at the present term of this court, but he, affiant, expects to procure said testimony of said Crawford so as to go to trial at the next term of this honorable court; and finally, that this affidavit is not taken for the purpose of delay, but only to obtain substantial justice.

"John M. Perry."

The court having ordered the trial of the rule to proceed, the counsel of Perry declined to make any further appearance, and took a bill of exceptions which was signed by the judge.

Anderson then offered in evidence the proceedings consequent upon the judgment in the case of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, the execution, the sale to Anderson, and the deed to him by the marshal, all of which have been stated above.

On the 19th of May, 1842, the court rendered the following judgment:

"On a rule to show cause.—By reason of the law and the evidence being in favor of the defendant, and against the plaintiff, Lilburn P. Perry, and the defendant's answer to the plaintiff's petition, and the evidence being considered, and the defendant Samuel Anderson, having proved to the satisfaction of the court, that he has, since the institution of this suit, become the true and legal owner of the three notes sued on, and the indebtedness set forth in plaintiff's petition having been extinguished by confusion, it is ordered, adjudged and decreed, that the defendant, Samuel Anderson, have judgment in his favor, and against the plaintiff, Lilburn P. Perry, and that said Samuel Anderson be decreed to be the true and legal owner of the said three notes, the same being extinguished by confusion, and that the same be adjudged and decreed to be delivered up to said defendant, Samuel Anderson, and that the said L. P. Perry pay the costs of this suit, to be taxed. Done and signed in open court, this ——, 1842. Thos. Curry.

"District Judge, Ninth Judicial District."

From this judgment an appeal was prayed and granted to the Supreme Court of the State of Louisiana.

On the 3d of December, 1842, Anderson received the original notes from the clerk of the court.

*We must now turn our attention to [*175 another suit.

It has been already stated, that on the 17th of March, 1840, Samuel Anderson acknowledged himself indebted to Nelson F. Shelton, of Virginia, to the amount of $45,550, and to Robert Anderson, also of Virginia, to the amount of $9,000; and that he mortgaged all the property which he had purchased from Tiffin and Perry to secure those debts, making this last mortgage posterior to that to Tiffin and Perry.

On the 3d of April, 1841, Nelson F. Shelton and Robert Anderson filed a petition in the Ninth District Court for the State of Louisiana, holding sessions in and for the parish of Madison, setting forth the mortgage, and praying that the sheriff might be ordered to seize and sell, for cash, so much of the mortgaged property as would pay their respective debts.

On the 12th of April, 1841, the judge issued the order, as prayed.

On the 10th of July, 1841, the sheriff returned that he had offered the property at public auction, "and Nelson F. Shelton, Sen., and Robert Anderson, the plaintiffs herein, being present, bid for said property the sum of thirty-six thousand dollars, which being the highest bid or offer made, and being over and above two thirds of the cash valuation of the same, the said property was adjudicated to Nelson F. Shelton, Sen., and Robert Anderson, at and for the said sum of thirty-six thousand ($36,000) dollars, subject to all the privileges and mortgages encumbering the same; wherefore, in virtue of the premises herein set forth, and of the law in such case made and provided, and for and in consideration of the price above described, I, Thomas B. Scott, sheriff as aforesaid, do sell, transfer, and convey unto the said Nelson F. Shelton, Sen., and Robert Anderson, in proportion to the claim of each plaintiff in said writ of seizure, all the right, title, and interest of the said defendant, Samuel Anderson, in and to the before described, and all the appurtenances thereunto belonging, unto them, the said Nelson F. Shelton, Sen., and Robert Anderson, and their heirs or assigns forever.

"In testimony whereof, I have hereunto set my hand, at the parish of Madison, State of Louisiana, on this the sixteenth day of June, eighteen hundred and forty-one, in the presence of Alexander T. Steele and Edmond Cavelier, competent witnesses, who have signed with me, the said sheriff.

(Signed) "Tho. B. Scott,

"Sheriff of the Parish of Madison, Louisiana."

It is not necessary to insert in this statement two suits which are inserted in the record, 176*] which were carried on, one in the *Circuit Court of the United States by Tiffin, upon his own account, against Anderson, upon three promissory notes, amounting in the whole to $12,065, and the other in a court of Mississippi by Anderson, for the use of Clayton Tiffin, against Austin, Ragan, and Bohannon, upon the note for $18,282, which Anderson had considered a part of his cash payment, as above narrated. Both these suits ended in judgments which produced no fruits.

We come now to the suit in the Circuit Court, which was the basis of the present appeal.

On the 21st of April, 1842, Clayton Tiffin and Lilburn P. Perry filed a bill on the equity side of the Circuit Court of the United States. They state themselves to be residents of the city of St. Louis and citizens of the State of Missouri, and file the bill against Samuel Anderson, Robert Anderson, Nelson F. Shelton, Hillery Mosely, and William W. Bouldin. The bill recites the sale to Samuel Anderson, the deficiency in the cash payment, the execution of the notes and mortgage by Anderson, the suit against him by Lilburn P. Perry, the suit against Perry by Mosely and Bouldin, the judgment, the sale of the whole interest to Anderson for $5,000, the foreclosure of Shelton's mortgage with an intent to defraud, and then avers, that, at the institution of the suit by Mosely and Bouldin against Perry, the latter was not a citizen of Louisiana, but of Missouri; that he was never served with process, and never employed anyone to appear for him; that the judgment was thereby wrongfully recovered, and is void; that admitting the validity of the judgment, yet the subsequent proceedings were irregular; that the land and slaves never were the sole property of Perry, and that Anderson knew it; that the first note was specially indorsed to Tiffin as a part of his share; that this was done before it was seized as being the property of Perry. The bill then prayed that the judgment of Mosely and Bouldin might be set aside, that their mortgage might be foreclosed, and for general relief, and for an injunction.

The defendants, Samuel Anderson and Nelson F. Shelton, demurred to the bill for want of equity, which being overruled, they severally pleaded to the jurisdiction of the court, that said Shelton, and all the other defendants except Samuel Anderson, were citizens of the State of Virginia. Upon these pleas, evidence was taken on both sides, and on that evidence the pleas were overruled.

The defendants who had pleaded and Robert Anderson then put in their answers to the bill. The grounds of defense set up and relied upon by the defendants were:

1st. That it was part of their original contract of purchase *that the complain- [*177 ants would receive, in satisfaction of the cash payment, the debt due to Samuel Anderson by John M. and L. P. Perry, and the note on Austin, Ragan, and Bohannon; that complainants knew the drawers and the value of the note, and that, but for their agreement to receive these notes, he would not have given the price at which he purchased; and that, therefore, they have no right to claim of him anything on account of their failure to collect said note of the drawers.

2d. That, before the execution of the three notes secured by the mortgage, Samuel Anderson and John M. Perry gave three notes, for about the aggregate amount of $12,000, to the said Clayton Tiffin, with the understanding and agreement, that thereafter, when the said mortgage notes were executed, one of them was to be given to him for the said three first mentioned notes, which were then to be surrendered up. That this had not been done. On the contrary, the complainants retained all the three mortgage notes, and that said Clayton Tiffin had not only not surrendered the three other notes given to him, but had sued on them

in the same United States Circuit Court, and had recovered judgments thereon, and that, therefore, the mortgage debt ought to be credited by the amount of those judgments.

3d. That Samuel Anderson had, in good faith, purchased and paid for the said three mortgage notes, amounting to $40,000, when seized and sold on the 4th of January, 1840, by the marshal, under execution from the same United States Circuit Court, on a judgment therein obtained by Mosely and Bouldin against the said Lilburn P. Perry and John M. Perry, that the said Lilburn P. Perry appeared to that suit by a licensed attorney at law; that all the proceedings in the suit, and in virtue of the execution, were regular and legal; and that the sale under said execution, and his purchase, had been decided to be valid by the District Court of the Ninth District of Louisiana (a State court), in a suit of Lilburn P. Perry against the said Samuel Anderson; and that thereby the said mortgage debt was "extinguished by confusion," as was adjudged by the said State court; and that, on the faith of the validity of said proceedings, the said defendants, Nelson F. Shelton and Robert Anderson, had instituted a suit, in April, 1841, in the said District Court for the Ninth District of the State of Louisiana, on a mortgage in their favor, given to them by the said Samuel Anderson (subsequent, however, to the mortgage given to the complainants), and on the 14th of June, 1841, by virtue of an order of seizure and sale in the said suit, caused the said mortgaged property (the same previously mortgaged to complainants) to be sold by the sheriff, and be-178*] came themselves the *purchasers (at the price of $36,000), and took possession under their purchase. To prove all this, they refer to the record of said suit, and rely on these several purchases of Samuel Anderson, and of Nelson F. Shelton and Robert Anderson, as extinguishing or precluding the claim of the complainants.

The complainants filed a general replication.

With respect to the third ground of defense, the testimony of Mr. Crawford was taken, who, it will be recollected, was the attorney who appeared for Lilburn P. Perry in the suit against him by Mosely and Bouldin.

Evidence of Mr. Crawford.

1st. Are you a counsel and attorney at law, practising as such at the bar of the State of Louisiana, and were you in the year 1839?

He answers, Yes.

2d. Did you appear in your aforesaid capacity in the defense of a suit instituted by Mosely and Bouldin, in ———, 183—, against John M. Perry and Lilburn P. Perry, in the Circuit Court of the United States for the Eastern District of Louisiana?

To the 2d. He answers, Yes.

3d. Will you please state if you ever received any authority, either directly or indirectly, from Lilburn P. Perry, or from anyone on his behalf, to appear and represent and defend his interest in said suit?

To the 3d. He answers, he has no recollection of having received any authority, either *directly or* indirectly, from Lilburn P. Perry, *or from anyone on his* behalf, to appear and *represent and defend his* interest in said suit, other than what might be inferred in a letter from John M. Perry; informing him that he would see upon the records of the court of the United States a suit, commenced against him and others by H. Mosely and Bouldin, and his wish to employ him to defend it. In no other part of his letter is reference made to the name of Lilburn P. Perry.

4th. Were you, or not, employed by John M. Perry alone for his defense, without any direction or request to appear on behalf of Lilburn P. Perry; and was, or not, your appearance on behalf of the defendants in said suit an inadvertence on your part?

To the 4th. He answers, he was employed by J. M. Perry in said letters aforesaid, and without any directions or request to appear on behalf of Lilburn P. Perry, other [than] what may be inferred from the letters aforesaid. Deponent regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertence on his part.

*5th. Did you, or not, know, at the [*179 time of your said appearance, that the said Lilburn P. Perry had never been served with process of citation in said suit, and that, at the time of its institution, he was a citizen of Missouri, residing in the city of St. Louis?

To the 5th. Deponent did not know, at the time of his said appearance, that Lilburn P. Perry had never been served with process of citation, and only presumed that it has been done; and accordingly misled him, as far as it has been done in the answer of John M. Perry. Deponent did not know, of his own knowledge, that, at the time of the institution of the said suit, Lilburn P. Perry was a citizen of St. Louis, Missouri.

Cross-Interrogatories.

1st. If you filed an answer and amended answer to the suit of Mosely and Bouldin against John M. Perry and Lilburn P. Perry, in the federal court, early in 1839, in the name of both defendants, did you never receive any instructions from Lilburn P. Perry to do so, or as to the suit? Did he never converse with you about the suit, either before or since? Did he never write to you in relation to it, either before or since?

To the first cross-interrogatory, he saith: In relation to the answers referred to in the said interrogatory, deponent has no recollection of having received any instructions from Lilburn P. Perry on the subject; nor of his having conversed with him about the suit before filing said answers; nor of his having conversed with him about the said suit until after the rendition of judgment against him; nor of his having ever written to him in relation to it, either before or since its institution.

2d. Was not John M. Perry his agent or attorney in fact? Did you not see in his hands authority to act for Lilburn P. Perry? Have you not reason to believe, and what reason, that he had authority to defend that suit?

To the 2d cross-interrogatory. Deponent does not know that John M. Perry was agent, or attorney in fact; deponent never saw in [his] hands any authority to act for Lilburn P. Perry; deponent had no reason to believe that John M. Perry had authority to defend the said suit for Lilburn P. Perry.

3d. Was not John M. Perry the father of Lilburn P. Perry? Was he not his agent generally in Louisiana? Did not Lilburn P. Perry at some time avow and ratify the act done by John M. Perry for him?

To the 3d cross-interrogatory. John M. Perry has been regarded as the father of Lilburn P. Perry; deponent has no knowledge of his being his agent generally in Louisiana; deponent has no knowledge that Lilburn P. Perry ever avowed or ratified the acts done by John M. Perry for him.

180*] *4th. Was there any defense for Lilburn P. Perry which John M. Perry did not make? Are you not satisfied that the claim of Mosely and Bouldin against him was perfectly just?

To the 4th cross-interrogatory. I know of no other defense for Lilburn P. Perry, than what is stated in my answers to the interrogatories of the plaintiff, and in my answers to the foregoing cross-interrogatories. I have no personal knowledge of the claim of Mosely and Bouldin, and have not heard or seen anything to satisfy me that it is just.

5th. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

To the 5th. I do not know, nor can I set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of my examination, or the matters in question in the cause.

On the 27th of June, 1843, the Circuit Court pronounced the following decree:

Tiffin and Perry v. Saml. Anderson et al. } Circuit Court, United States. — In Equity, June, 1843.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, and adjudged and decreed, that the complainants are justly, legally, and equitably entitled to payment of the sum prayed for in their bill of complaint, as the unpaid consideration money for the purchase of the plantation and slaves described in said bill, and purchased from the complainants by the respondent, Samuel Anderson; that said sum has not been paid, satisfied, or extinguished, notwithstanding the allegations and matters of defense set forth in the answer of the respondents; that the entire property mortgaged by the respondent, Samuel Anderson, to the complainant, Lilburn P. Perry, is in law and equity subject to the payment of said sums; that the lien and mortgage exist upon said property, in the possession of the respondents, Robert Anderson and Nelson F. Shelton, the third possessors thereof, notwithstanding the matters of defense which they have severally set forth in their answer to the bill of complaint. And therefore, in order to carry into effect this decree, and secure to the complainants their legal and equitable rights, it is ordered, that the marshal of this

181*] *court do forthwith take into his possession the property described in the mortgage from Samuel Anderson to Lilburn P. Perry, and restore the same to the possession of the complainants, or their legal representative; and if, within sixty days thereafter, the said respondent shall well and truly pay, or cause to be paid, the complainants, or their legal representative, the sum of forty thousand dollars, with interest thereon from the first day of January, 1842, until paid, the same being the unpaid consideration for the purchase of said property from the said complainants, then said property shall be relinquished to respondents.

And it is further ordered, that the complainants, upon being restored to the possession of said property, do give bond, in the sum of twenty thousand dollars, conditioned for the restoration of said property, and the proceeds thereof, from the time of their being placed in possession by the marshal, to the respondents, in case said respondents shall see cause to appeal from this decree to the Supreme Court of the United States, and the decree of this court be reversed upon said appeal.

It is further ordered, that the respondents pay the costs of this suit.

(Signed) Theo. H. McCaleb,
U. S. Judge.

An appeal from this decree brought the case up to this court.

It was argued by Mr. Jones for the appellant, Shelton, and Mr. Crittenden for Tiffin and Perry; but the length to which this case has already reached renders it impossible to give any other than a very brief sketch of their argument.

Mr. Jones, for the appellant, objected to the jurisdiction of the court upon two grounds:

1. Four of the five defendants are averred, in pleas and answers under oath, to have been citizens, not of Louisiana, but of Virginia, at the time of the institution of the suit; and two of them, Mosely and Bouldin, being admitted not to have been citizens of Louisiana, we maintain that the other two, R. Anderson and Shelton, are proved to have been in the same predicament. But we hold the admitted defect of citizenship in the first two above fatal to the jurisdiction, whatever may be the weight of evidence as to the citizenship of the other two.

2. The case made out by the bill is not one susceptible of relief in equity; but one wherein a plain, adequate, and complete remedy might have been had at law.

Taking up the second point first, he contended that it was not a case where equity would interpose, because the Louisiana code gives a more simple remedy. The object of the complainants *is to set aside the [*182 judgment of Mosely and Bouldin against Perry. This can be done by an action of nullity and rescission. Code of Practice, 604-616; 7 Cranch, 88, 90.

1st. point. There are five parties here, and four not citizens of Louisiana. But parties must be of the same State with each other. 3 Cranch, 267; 5 Wheat. 424, 434.

There is a difference between citizenship and residence in a State. Merely residing there does not confer citizenship. In Louisiana, a person wishing to acquire citizenship must give notice. 2 Dig. Laws La. 308.

As to setting aside the judgment, the rule is, that a party may justify under a judgment. 6 Peters, 8; 10 Peters, 449; 6 Cranch, 173; 4 Dall. 8; 4 Cranch, 328.

The fact of an attorney's having authority to appear is not traversable. The only remedy to the party aggrieved is an action against the attorney. 1 Tidd, 95; 3 Howard, 343.

Mr. Crittenden, for the appellees, said that the objection to the jurisdiction of the court, founded on the allegation that there was a sufficient remedy at law, could not be maintained. How has this court lost this branch of its equity jurisdiction? In Pennsylvania, they try equity cases in an action of ejectment; but this court has not considered this as a sufficient reason for waiving its equity jurisdiction. So, in Louisiana, law and equity are all mixed up together. Besides, here is an equitable lien on the property for the cash payment, which can only be enforced in equity.

As to citizenship. The proof is, that the parties lived in Louisiana for three years, and built a house upon the property. We found them there. They claim the option of being citizens. A citizen of the United States residing in any State is a citizen of that State. 6 Peters, 762.

As to the judgment of Mosely and Bouldin. Perry was represented in court by an unauthorized attorney, and therefore the judgment does not bind him. 9 Wheat. 829; 1 T. R. 62; 2 Desaus. 280; Calwells v. Sheilds, 2 Rob. (Va.) 305; 6 Johns. 296; Ibid. 317, 318; 2 Watts, 493; 3 Pa. Rep. 75; Judge Grier says this has been overruled; 3 Robinson, 94; Code of Practice, art. 605.

Even if the judgment was valid, the sale was not made according to law. If the property was immovable, then the requisite notice has not been given. Code of Practice, art. 670.

Slaves are considered immovable. Civil Code, art. 461. Here everything was sold, land, slaves, and notes. Civil Code, art. 462, 2424, 3249.

All formalities must be complied with in a forced sale. 3 La. Rep. 421; 4 Ib. 150, 207: 11 Martin, 610, 675; 8 N. S. 246.

183*] * The thing sold was the entire debt of $40,000. But it did not all belong to the defendant, and was bought for $5,000 by the very man who owned the $40,000, and who must have known that one half belonged to Tiffin. The evidence shows that Anderson knew that the first note had been indorsed to Tiffin. [Mr. Crittenden here referred to and commented upon it.]

By the civil Code, art. 2622, Anderson must be a trustee for his vendor, who can reclaim the property by repaying what it cost. Story, Eq. secs. 789, 1211, 1212, where cases are cited; Grattan's Rep. 188; 2 Mylne & Craig, 361; 7 Dana, 46; Civil Code, art. 21, 1958-1960, 2619.

[Mr. Crittenden then commented upon the proceedings of the Parish Court.]

Mr. Jones, in reply and conclusion:

As to the judgment of Mosely and Bouldin. It is objected, that the defendant never was served with process; but that is cured by an appearance. Was there one? The record says *yes. A sworn attorney* appeared and answered *for both defendants.* If the correctness of this is impeached, it is for the other party to do it, and they must do it clearly. There must be the plainest evidence. Crawford is the only witness. We might object to the interrogatories. They are all leading ones. But he shows that he had authority. He was employed to defend the suit. What suit? Against both defendants. He refers to letters. Why did he not produce them? Is there any evidence that John M. Perry had no authority to employ counsel? There is not. Why did he not swear so? He was as good a witness as Crawford. In an affidavit, John M. Perry swears that he is the agent and attorney of Lilburn P. Perry. A bond is signed L. P. Perry, "by his attorney, John M. Perry." Crawford's evidence is therefore only negative.

[Mr. Jones then proceeded to reply to the other arguments of Mr. Crittenden upon the facts of the case.]

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery from the Circuit Court for the Eastern District of Louisiana.

On the 10th of April, 1838, the complainants below sold to one Samuel Anderson a plantation and negroes situated in the parish of Madison, Louisiana, for seventy-five thousand dollars. Thirty-five thousand dollars of this sum were paid in part by surrendering a note which Anderson held against Lilburn P. Perry, the complainant, and his father, John M. Perry, for thirteen thousand dollars; and by the assignment of a note on H. R. Austin, J. Ragan, and Wylie Bohannon, of the State of *Mississippi, for eighteen thousand two [*184 hundred eighty-two dollars and sixty-five cents, payable to Samuel Anderson on the 1st of April, 1839.

A mortgage was executed on the plantation and slaves, to secure the payment of forty thousand dollars, the residue of the purchase money. At the same time, three notes or bonds were executed to Lilburn P. Perry by Samuel Anderson, each for the sum of thirteen thousand three hundred and thirty-three dollars, payable on the first day of January, 1842, 1843, and 1844.

On the 11th of January, 1839, Mosely and Bouldin, citizens of Virginia, instituted a suit in the Circuit Court against L. P. Perry and John M. Perry, and obtained a judgment against them for seven thousand five hundred dollars. An execution was issued, in virtue of which, under the laws of Louisiana, the marshall levied upon the three notes above stated and the mortgage, which were sold by him, on a credit of twelve months, to Samuel Anderson, the mortgager, for five thousand dollars.

Some time after this purchase, Robert Anderson, the father of Samuel, and Nelson F. Shelton, his uncle, having procured a judgment against Samuel Anderson in the State court of Louisiana, sold the mortgaged property and slaves, and they became the purchasers thereof and have the possession of the plantation and slaves under the purchase, claiming that the mortgage by Anderson to Perry has been extinguished.

The decree of the Circuit Court was entered against Samuel Anderson, Robert Anderson,

and Nelson F. Shelton et al., that within sixty days they should pay to the complainants forty thousand dollars, with interest from the first day of January, 1842, and in default of such payment that they should deliver to the complainants the possession of the plantation and slaves. From this decree Shelton only has appealed.

The defendants pleaded that the Circuit Court had no jurisdiction of the case, as Mosely and Bouldin, Robert Anderson, and Shelton were citizens of Virginia, and the complainants were citizens of Missouri. Shelton being the only appellant, the objection of citizenship must be limited to him.

Under the act of Congress, jurisdiction may be exercised by the courts of the United States "between a citizen of the State where the suit is brought and a citizen of another State." "But no person shall be arrested in one district for trial in another, in any civil action." If Shelton be not a citizen of Louisiana, having raised the question of jurisdiction by a plea, this suit cannot be sustained against him.

In the declaration or bill an allegation of citizenship of the parties must be made, as it has been held that an averment of 185*] *residence is insufficient. But the proof of citizenship, when denied, may be satisfactory, although all the privileges and rights of a citizen may not be shown to have been claimed or exercised by the individual.

Shelton and wife, they having no children, became residents of Louisiana in the fall of 1840, more than two years before the commencement of this suit. Since their residence commenced, they have been absent from the State only once, a short time, on a visit to a watering place in Mississippi. They have resided the greater part of the time on the plantation in controversy, cultivating and improving it by the labor of the slaves. Within this time, a more comfortable and secure dwelling-house has been constructed. In the winter of 1840 or 1841, Shelton observed to a witness, that he considered himself a resident of the State of Louisiana.

There is no proof that he has voted at any election in Louisiana, or served on a jury. At one time he refused to vote, but that was after this suit was commenced. Some of the witnesses say that he sometimes spoke of returning to Virginia, whether on a visit or to reside there permanently does not appear.

Where an individual has resided in a State for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such a State, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, as in the case of Shelton, claiming and improving the property as his own.

On a change of domicil from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. The facts proved in this case authorize the conclusion, that Shelton was a citizen of Louisiana, within the act of Congress, so as to give jurisdiction to the Circuit Court.

The defendants also demur to the plaintiff's bill, on the ground that the complainants have plain and adequate relief at law.

The demurrer is clearly unsustainable. Fraud is alleged in the bill, and relief is prayed against a judgment and a judicial sale of the property in controversy. These and other matters stated in the bill show that if the complainants shall be entitled to relief, a court of equity only can give it.

The great question in the case arises out of the judicial sale *of the mortgage debt [*186 to Anderson, the mortgagor, under a judgment obtained by Mosely and Bouldin against L. P. Perry and John M. Perry. If by this sale the mortgage debt has been extinguished, no relief can be given to the complainants.

Had the Circuit Court which rendered that judgment jurisdiction of the case? The plaintiffs were citizens of Virginia, John M. Perry was a citizen of Louisiana, and L. P. Perry of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants, and defense was made to the action. This being done by a regularly practicing attorney, it affords prima facie evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process, and appear voluntarily.

John M. Perry acted in some matters as the agent of L. P. Perry; but it does not appear that he had authority to waive process and defend the suit. And Crawford, the attorney, testified, that "he had no recollection of having received any authority directly or indirectly from L. P. Perry, or from anyone in his behalf, to defend the suit. He received a letter from John M. Perry, informing him that he would see upon the records of the court of the United States a suit commenced against him and others by Mosely and Bouldin, and he wished to employ him to defend it." And he says, that "he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertence on his part."

This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. Had the entry been, that L. P. Perry came personally into court and waived process, it could not have been controverted. But the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property.

An execution sale under a fraudulent judgment is valid, if the purchaser had no knowledge of the fraud. But in this case L. P. Perry was not amenable to the jurisdiction of the court, and did no act to authorize the judg-

ment. He cannot, therefore, be affected by it, or by any proceedings under it.

187*] *In this view, it is unnecessary to consider the objections to the procedure under the execution. The debt of forty thousand dollars was sold as the property of L. P. Perry, when one of the notes had been assigned to Tiffin, and an equal interest in the other two belonged to him. Of this Anderson, the purchaser, had notice. It would be difficult to sustain this sale on legal principles. Anderson, it is insisted, at the marshal's sale, purchased a "litigious right," and by article 2622 of the Civil Code, "he against whom a litigious right has been transferred may be released by paying the transferee the real price of the transfer, together with interest from its date."

The judgment being void for want of jurisdiction in the court, no right passed to Samuel Anderson under the marshal's sale; consequently the mortgage remains a subsisting lien. Nor is this lien affected by the mortgage subsequently executed by Samuel to his father, Robert Anderson, and his uncle, Shelton. After the mortgage to the complainants was supposed to be extinguished by the judicial sale, Robert Anderson and Shelton procured in a State court a foreclosure of their mortgage which had been previously given on the plantation and slaves, and they became the purchasers at the sale for thirty-six thousand dollars. If this procedure were bona fide, the purchase was made subject to the prior mortgage.

On the 23d of November, 1839, a bill was filed in the District Court for the parish of Madison, by L. P. Perry, against Samuel Anderson, representing the debt due, secured by mortgage, and that he was in possession of the plantation and slaves; and, fearing that he might remove the slaves or other property, an attachment was prayed. No service was made of this writ, and the suit was discontinued, the 28th of November, 1839. A judgment seems to have been irregularly entered by default, the 17th of November, 1840, and on the next day an answer was filed by Anderson, setting up the sale and extinguishment of the mortgage debt, and praying that the notes and mortgage might be decreed as extinguished, and be delivered up. Afterwards, on the 20th of May, 1841, this suit was dismissed by the order of the court. And on the 19th of May, 1842, motion having been previously made and argued in the District Court, on proof that "the defendant, Samuel Anderson, since the institution of this suit has become the true and legal owner of the three notes sued on, and the indebtedness set forth in plaintiff's petition having been extinguished by confusion, the court decreed that they should be delivered up." And this decree is relied on as a bar to the present suit.

At the time the above decree was made, this

188*] suit was pending *in the Circuit Court, to enforce the payment of the notes directed to be given up by the District Court. The object of the petition before that court was not the recovery of the money, for the notes were not due when it was filed, but to prevent Samuel Anderson from moving the negroes, *wasting* the crops, etc., on the plantation. But this petition had been discontinued for more than a year, when Anderson filed his answer, setting up his purchase of the notes under a judicial sale, and that the mortgage debt was extinguished. And on this case, made in the answer in no way responsive to the petition, which had long before been abandoned, the parish judge, on motion, founded his decree that the mortgage debt was extinguished, and directed the notes to be delivered up.

It is difficult to characterize in proper terms this proceeding of the State court. The petition having been abandoned, there was no pretense of jurisdiction for the subsequent steps taken at the instance of Anderson. There was nothing in the petition, had it not been abandoned, which would have authorized such a procedure. The circumstances under which this judicial action was had show a fraudulent contrivance, on the part of Anderson, to defeat his adversaries by the interposition of the State court. The whole case was pending in the Circuit Court of the United States, and this interference of the State court was wholly unauthorized and void.

The Mississippi note for eighteen thousand two hundred and sixty five dollars, which was assigned to complainants in part payment of the purchase money, was worthless. The parties to it were insolvent when it was assigned to the complainants, which fact was known to the assignor, Samuel Anderson. He acted fraudulently in representing the note to be good, when he knew it was valueless. By his own confession, after the assignment, the fraud is established.

It is insisted, that, this note having been imposed upon the complainants as a good note, by the fraudulent representation of Anderson, they as vendors have an equitable lien on the plantation and slaves for the amount of it. If the receipt of a note of a third person *in* payment of the purchase money be a waiver of an equitable lien on the real estate conveyed, yet it would seem, where a fraud had been practised in the assignment of the note, there would be no waiver. But however this may be, it is not strongly urged, as it is believed that the mortgage debt, with the interest, will be nearly equal to the value of the plantation.

The history of this case shows a successful course of fraudulent combination, rarely exhibited in a court of justice. Samuel Anderson purchased the plantation and slaves of the complainant, *for seventy-five thou- [*189 sand dollars. He gave up a note on L. P. Perry for thirteen thousand dollars, which was in fact the only payment of any value. The Mississippi note was worthless, and the mortgage debt he purchased, on a credit of twelve months, for five thousand dollars. He must have received more than that sum as the product of the plantation. So that in fact he acquired the plantation and negroes for thirteen thousand dollars, which he purchased at seventy-five thousand dollars. By this operation he saved of the purchase money sixty-two thousand dollars. Such a result must strike everyone as having been procured through fraud.

It is unnecessary to consider the means through which Robert Anderson, the father of Samuel, and his uncle Shelton, acquired title to the above property. The lien of the complainant's mortgage is paramount to any title or lien which they assert.

No deduction will be made from the mortgage for the five thousand dollars which Samuel Anderson may have paid to Mosely and Bouldin, under whose judgment he purchased the mortgage debt. He has received from the products of the plantation, while in possession of it, more than that sum. But if this were not the case, his fraudulent act in the transfer of the Mississippi note is a sufficient ground for the refusal of the credit.

In their decree, the Circuit Court directed the sum of forty thousand dollars to be paid, with interest from the first day of January, 1842. In this the court erred. The three notes were each for thirteen thousand three hundred and thirty-three dollars; the first being payable the first of January, 1842, the second, the first of January, 1843, and the third, the first of January, 1844. The interest should have been calculated on the notes from the time they respectively became due. With this modification of the decree of the Circuit Court, a decree will be here entered, to be transmitted to the Circuit Court, and if the money shall not be paid within ninety days from the filing of this decree in the Circuit Court, the mortgage shall be foreclosed, and the complainants put in possession of the property.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the said Circuit Court erred in directing the interest to be computed on the ($40,000) forty thousand dollars from the first day of January, 1842, instead of computing the interest on 190*] each of the three *several notes for ($13,333.33⅓) thirteen thousand three hundred and thirty-three dollars and thirty-three and a third cents from the times the said notes respectively became due; and that if the money shall not be paid within ninety days from the filing of the mandate of this court in the said Circuit Court, that then the said mortgage shall be foreclosed, and the complainants put in the possession of the property, and that in that case the equity of redemption therein be forever barred and precluded; and that if the said money, with interest as aforesaid, be duly paid as aforesaid, that then the said mortgage should be held discharged, and Nelson F. Shelton put in possession of the said property. Whereupon it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed; that each party pay his own costs in this court, and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

WILLIAM T. PEASE (impleaded with John Chester and Tarleton Jones), Plaintiff in Error.

v.

WILLIAM DWIGHT.

To support title to, indorsee of promissory note may show that one appearing as payee never had any interest therein.

Where a promissory note was payable to the order of several persons, the name of one of whom was inserted by mistake, or inadvertently left on when the note was indorsed and delivered by the real payees, one of whom was also the maker of the note, the indorsee had a right to recover upon the note, although the names of all the payees were not upon the indorsement, and had a right, also, to prove the facts by evidence.

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

On the 1st of January, 1837, the following promissory note was executed:

Detroit, January 1, 1837.

Two years from date I promise to pay to the order of Walter Chester and Pease, Chester & Co. one thousand five hundred dollars, for value received, at the Farmers' and Mechanics' Bank of Michigan, with interest.

(Signed) John Chester.

Indorsed by Pease, Chester & Co. but not by Walter Chester.

The firm of Pease, Chester & Co. was composed of William T. Pease (the plaintiff in error), John Chester, and Tarleton Jones.

*The note having passed into the [*191 hands of William Dwight, a citizen of Massachusetts (the defendant in error) and not being paid at maturity, Dwight brought suit in the Circuit Court against Pease, Chester, and Jones. The course which Pease took will be stated presently. Chester pleaded bankruptcy, which was demurred to, but the demurrer overruled, and the plea sustained. Jones was a citizen of Illinois, and could not be found.

There were several counts in the declaration, but the only one upon which judgment was rendered, and which it is material now to state, was the following:

"For that whereas one John Chester heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and thirty-seven, at Detroit, in said district, made his certain promissory note in writing, bearing date the same day and year aforesaid, and thereby then and there promised, two years from the date thereof, to pay to the order of Walter Chester and the said defendants, until the copartnership name and style of these said defendants, Pease, Chester & Co., one thousand five hundred dollars, for value received, at the Farmers' and Mechanics' Bank of Michigan, with interest; and then and there delivered the said promissory note to the defendants; who then and there, using their copartnership name and style of Pease, Chester & Co., indorsed said note, and delivered the same to the plaintiff;

NOTE.—Transfer of bills and notes by delivery or assignment—obligation of assignor or transferrer.

The assignor of the legal title, although not a party to the bill or note payable to bearer, or indorsed in blank, where the assignment is by delivery and the paper is transferable by delivery, is

and the said plaintiff avers that the said John Chester was one of the said persons using the name and style of Pease, Chester & Co., and that the name of the said Walter Chester was inserted in the said promissory note as one of the persons to whose order the said sum of money should be payable by the said John Chester, for the purpose of, and with the intention on the part of the said John Chester, of procuring the said Walter to indorse the said note for the accommodation and benefit of the said John Chester, and for no other purpose; that the said note was never delivered to the said Walter Chester, and that the said Walter Chester never had at any time any interest or property, or any rights therein, or to the money specified and mentioned therein.

"That the said note was by the said John Chester delivered to the said Pease, Chester & Co. alone, who received the same and indorsed it solely, who waived the indorsement of the said Walter Chester, and having solely indorsed the same, delivered the said note, so indorsed as aforesaid, to the said plaintiff. And the said plaintiff avers, that afterwards, and when the said promissory note became due and payable, according to the tenor and effect thereof, to wit, on the fourth day of January, 192*] *in the year eighteen hundred and thirty-nine, at the said Farmers' and Mechanics' Bank of Michigan, the said note was presented and shown to and at the said bank for payment thereof, and payment thereof requested; but that neither the said John Chester, nor any other person, did or would pay the said sum of money therein specified, but then and there wholly neglected and refused to do so; of all which said several premises the said defendants then and there had due notice."

Pease demurred to this count, and filed the following causes of demurrer:

"1st. Because it is not averred in said first count, that Walter Chester, one of the joint payees of the said promissory note described in said counts, ever indorsed or delivered the same to the said plaintiff, or any other person whatever.

"2d. For that said first count is in other respects informal, insufficient and defective."

Dwight put in a joinder in demurrer.

In November, 1845, the Circuit Court overruled the demurrer, entered up judgment for the plaintiff, and assessed his damages at $2,427 and costs. To review this judgment, a writ of error brought the case up to this court.

It was argued by Mr. Bates for the plaintiff in error Pease, and by Joy and Porter, with whom was Mr. Ashmun, for the defendant in error, Dwight.

The argument on behalf of the plaintiff in error was as follows:

The first count of the declaration sets forth the particular circumstances under which the note was made and indorsed, and the demurrer of course admits them to be true. John Chester, the maker of the note, was one of the firm of Pease, Chester & Co.; he made the note with the intention of procuring the indorsement of Walter Chester and Pease, Chester & Co., as accommodation indorsers for his benefit. Walter Chester declined to indorse the note, and then John Chester indorsed his note with the copartnership name of Pease, Chester & Co., and delivered it to De Garmo Jones, who delivered it to the plaintiff.

The demurrer which was originally interposed to the first and second counts (the second having been subsequently nolle pros'd) sets forth as the ground of demurrer, the first count does not set forth a right of action in the plaintiff, as there was no indorsement or transfer of the note by Walter Chester, one of the joint payees thereof, and that no right of action can be acquired to a promissory note, made payable to the order of joint *payees, [*193 without the indorsement by them and each of them; that in no other manner can there be a legal transfer of such a note, or the cause of action thereon. This is the only point involved in the decision of the court below, and which this court is now called upon to revise. The plaintiff claims to recover as the holder of a negotiable note; and such is the instrument declared on in the count under examination. He does not seek to recover on a special contract, but on a note, transferred and delivered by the single indorsement of one of the joint payees. (Does the first count show a right to recover as against the other joint indorsers?) He claims to recover, too, against William T. Pease, one of the firm of Pease, Chester & Co., who, he states, were mere accommodation indorsers of John Chester. It is quite unnecessary to cite to this tribunal the general rule laid down in all the books: "If a bill or note be payable to several persons not in partnership, the right to transfer is in all collectively, not in any individually; and an indorsement by and in the name

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liable for failure of consideration, or if it turn out that the bill or note was fictitious or originally forged, or subsequently altered either in the signatures or amount. Bell v. Dagg, 60 N. Y. 530; Whitney v. Nat. Bank, 45 N. Y. 305; Ross v. Terry, 63 N. Y. 613; Lyons v. Miller, 6 Grat. 439; Merriam v. Wolcott, 3 Allen, 258; Bell v. Cafferty, 21 Ind. 411; Cabit Bank v. Morton, 4 Gray, 158; Coolidge v. Bingham, 1 Metc. Mass. 547; 5 Id. 68; Barton v. Trent, 3 Head, 167; Snyder v. Reno, 36 Iowa, 329; Markle v. Hatfield, 2 Johns, 455; Swanzey v. Parker, 50 Penn. St. 441; Jones v. Ryde, 5 Taunt. 488; Bigelow on Estoppel, 446; Chitty on Bills, 245; Byles on Bills, 157; Story on Notes, sec. 118; Story on Bills, sec. 111; Aldrich v. Jackson, 5 R. I. 218; Contra, Daniel on Neg. Instr. sec. 731; Hussey v. Sibley, 66 Me. 192; Gifford v. West, 37 Wis. 115.

The contract of sale may be made in such form *as to exclude* the warranty of genuineness, which *would otherwise be implied.* Bell v. Dagg, 60 N. Y. 530; *Ross v. Terry,* 63 N. Y. 615.

*400

The transferrer is also liable, if the bill or note is not a valid subsisting obligation, binding in law, according to its purport, because it is not what it was held out to be. Bell v. Dagg, 60 N. Y. 530; Littauer v. Goldman, 9 Hun, N. Y. 234; Fuke v. Smith, 7 Abb. Pr. N. S. 106; Hurd v. Hall, 12 Wis. 112; Gompertz v. Bartlett, 2 El. & B. 854; Young v. Cole, 3 Bing. N. C. 724; Morrison v. Lowell, 4 West Va. Hagans. 350.

So if it was void for usury. Delaware Bank v. Jervis, 20 N. Y. 228; Webb v. Odell, 49 N. Y. 583; Littauer v. Goldman, 9 Hun, N. Y. 232.

So, the transferrer is liable, if a prior party be not competent to contract, as, if the party be an infant, lunatic, married woman, or otherwise under incapacity. Baldwin v. Van Deusen, 37 N. Y. 487; Lobdell v. Baker, 1 Metc. 193; 3 Metc. 469; Hussey v. Sebley, 66 Me. 192; Gifford v. West, 37 Wis. 117; 33 Wis. 623; but see Loan Association v. Topeka, 20 Wall. 655.

If the transferrer had no lawful title to the instrument, the transfer of it as his property is a fraud both upon the owner and the transferee, and

Howard C.

of one only will not give the indorsed a right to sue." Bayley on Bills, 49.

Chitty on Bills, page 123, says: "If a bill has been made or transferred to several persons not in partnership, the right of transfer is in all collectively, and not in any individually." Carvick v. Vickery, 2 Douglass, 653, p. 134, note; Smith v. Whiting, 9 Mass. Rep. 334; 7 Cowen, 126; 9 Greenleaf, 85. Story, in his volume on Promissory Notes, page 131, section 125, lays down the same rule in the following language: "If a note be made payable or indorsed to several persons not partners, as to A, B, and C, then the transfer can only be by a 'joint indorsement' of all of them." In Story on Bills, section 197, page 218, the same rule is again laid down in the following language: "If a bill be made payable or indorsed to several persons not partners, as to A, B, and C, then the transfer can only be by a 'joint indorsement' of all of them."

Such is the rule established by all the elementary writers, and the decisions of the courts of England and this country, on the subject. It is not pretended, nor does the count demurred to set forth, that Walter Chester was a partner of Pease, Chester & Co. Such was not the fact, and the pleadings show it. Of course this note could only be transferred or assigned to the plaintiff by the indorsement of both Walter Chester and Pease, Chester & Co., the joint payees thereof.

Let us now examine briefly the only case cited by the attorneys of the plaintiff on the argument of this demurrer in the court below, the only case on which that decision can be sustained, and the court will see, by a glance 194*] at the facts, that it *has no real application to the present case, that it contains no exception whatever to the general rule cited from authors above referred to.

What are the facts of that case as set forth in 4 Carrington & Payne's Reports, 466, Leaf et al. v. Gibbs? That was an action brought by the payee of two promissory notes made by the defendant and two ladies, named Gibbs and White, which were given in payment of an account due from Gibbs and White. The defendant signed the notes, with the understanding, at the time of his signature, that his mother should sign them with him, as a joint and several promisor; but she refused to do so. The notes were, so far as we can discover from the report of the case, joint and several notes, to which the defendant had placed his name. On the trial, the plaintiffs and the payee proved that the defendant had placed his name there with the understanding that his mother was to unite as a maker. The defendant was liable on the face of the notes by their tenor as a joint and several maker. He sought to establish as a defense, that, at the time of the making, he agreed to sign with his mother, a fact of course known to the payees; and the court properly charged the jury, that, if they were satisfied from the evidence adduced that he had not waived, by his own conduct, the joint and several signatures of his mother, they must find for him, the defendant. In this case, we insist there is no legal liability of the defendant on the note set forth in the declaration, without the joint indorsement of Walter Chester, which was never obtained. There can be no legal liability, as indorser of the note set forth in this case, without the joint indorsement of all the payees of it. There can be no legal transfer to the plaintiff, or anyone else, of the note set forth in the first count, unless it is done by the joint indorsement of Walter Chester and Pease, Chester & Co. In the case of Leaf v. Gibbs, the defendant was liable on the face of the note itself; here the defendant is not; there he set up facts dehors the note, to show that he was discharged; here we rely on the face of the note itself. The two cases are as entirely dissimilar in the facts set forth as they are in the principles of law which govern them. The case cited in no particular sustains the principles contended for by the plaintiff's counsel in the present case.

The argument on behalf of Dwight, the defendant in error, was as follows:

The declaration in this cause is against the defendants as indorsers of a promissory note made by John Chester, payable to the order of Walter Chester and the defendants, and avers *that the note was made by John Ches- [*195 ter, payable to the order of Walter Chester and the defendants, with the intention of procuring Walter Chester to indorse the same as an accommodation indorser; that the said note never was delivered to said Walter Chester; that he had no property therein, had no interest in the moneys specified therein, and was in no way whatever interested in the said note; but that the said note was delivered to the said defendants alone, who indorsed and delivered the same to the said plaintiff, and expressly waived the indorsement of the said Walter Chester.

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if the transferrer knew that there was a good defense to the instrument, or that the amount could not be realized on account of insolvency of the parties, his suppression of such knowledge is a fraud upon the transferee, and the latter may hold him responsible. Fenn v. Harrison, 3 T. R. 759; Popley v. Ashley, 6 Mod. 147; Holt, 121; Canridge v. Allenby, 6 Barn. & Cress. 373; Story on Bills, sec. 225; 2 Parsons, N. & B. 41; Kennedy v. O'Conner, 35 Ga. 199; Bridge v. Batchelder, 9 Allen, 394.

There is a conflict of authority as to whether the transferrer of a bill or note, without indorsement, is bound to refund the consideration, if, without his knowledge at the time of the transfer, the maker or principal party to the bill or note was insolvent and the instrument in fact worthless. Some authorities hold that the loss, in such cases, should fall upon the party who held the bill or note at the time the insolvency occurred. Roberts v. Fisher, 43 N. Y. 159; Lightbody v. Ontario Bank, 11 Wend. 1; 13 Wend. 107; Henley v. Thornton, 2 Hill (So. Car.), 509; Fogg v. Sawyer, 9 N. H. 365; Wainwright v. Webster, 11 Vt. 576; Thomas v. Todd, 6 Hill, N. Y. 340; Townsend v. Bank of Racine, 7 Wis. 185; Westfall v. Braley, 10 Ohio St. 188; Story on Notes, sec. 119; Story on Bills, sec. 225.

Other authorities hold that the loss should fall upon the party holding the bill or note at the time when the insolvency was made known to him. Edmonds v. Digge, 1 Grat. 359; Young v. Adams, 6 Mass. 182; Scruggs v. Cass, 8 Yerg. 175; Lowery v. Murrell, 2 Port. 282; Bayard v. Shunk, 1 Watts & S. 92; Corbet v. Bank of Smyrna, 2 Har. (Del.) 235; Ware v. Streat, 2 Head, 609; Barton v. Trent, 3 Head. 167; Daniel on Neg. Instr. sec. 737; see Story on Bills, sec. 225; Thomson on Bills (Wilson's ed.), 187, 188; Byles on Bills (Sharswood's ed.) [*154], 276. See, also, Belcknall v. Waterman, 5 R. I. 43; Burgess v. Chapin, 5 R. I. 225; Beckwith v. Farnam, 5 R. I. 230; Aldrich v. Jackson, 5 R. I. 218; Fydell v. Clark, 1 Esp. 447; Emly v. Lye, 15 East, 7; Bank of England v. Newman, 1 Ld. Raym. 442.

The presentment and notice are also alleged in the usual form.

The facts stated by Mr. Bates in his brief, as to Mr. Chester's indorsing the copartnership name of the defendants and transferring the note to Jones, and that Walter Chester declined to indorse the note, are not in the declaration, and are not true.

The facts alleged in the declaration are admitted to be true by the demurrer, and are unquestionably true.

The question, then, is, whether, upon the facts alleged and admitted to be true, the plaintiff is entitled to recover; and of this we think there can be no question.

It strikes us that the question is simply this, viz.: Where a promissory note has been made payable to four individuals, with the intention to procure all to indorse it, and three actually conclude to indorse it without the other, can they strike out the name of the other payee, and whose name was inserted only for the purpose of procuring him to indorse for accommodation? This is the legal effect of indorsing and delivering the note without his joint indorsement, and an express waiver of his indorsement at that time, which is tantamount to an agreement by the three to become liable without him. The making of a promissory note is not the making of a contract, nor is an indorsement for accommodation a contract; it is the delivery which gives effect to all; it is then that the contract becomes operative. Now, what was the contract at the time of the delivery to the plaintiff? Chester had made his note payable to the order of Walter Chester and the defendants, with the intent to procure Walter to indorse solely and only for his accommodation. The defendants, among whom was John Chester, the maker of the note, finding some difficulty in procuring Walter's indorsement, conclude to forego it, he having no interest whatever in the matter, and indorse it themselves without him; the plaintiff agrees to take the note with their indorsement alone. Now, up to this time there is surely no contract at all in virtue of the paper; but now it is delivered and accepted, upon the full understanding by all parties that Walter Chester should [*196] be *no party to the security, although, in the hurry of a commercial transaction, the pen was not drawn across his name before delivery.

Now, was he ever in any way a party to the note, either as payee or indorser? He had no interest in it which would entitle him to have it delivered to him. It was not delivered to him, or to another for his benefit, which alone would make him a party to it. It is not by delivery, then, that he is a party to it. He did not indorse it, which would have made him a party. In legal effect, therefore, he never did become a party to it; and the transaction, so far as he is concerned, is precisely the same as if his name had never appeared upon the paper, or had been struck out at the time of delivery.

It was delivered to the defendants, which made them parties to it. It was by them indorsed, and with a waiver of the indorsement of Walter Chester. It was accepted with a waiver. What was the contract, then, which *took effect?*

Let it be remembered that the maker of this note is one of the firm of Pease, Chester & Co., the indorsers; that it was payable by one of the firm to the order of the copartnership and another person, whose name was to be procured to strengthen the note; that it never passed from the hands of the maker, and therefore never took effect, till the maker, together with his copartners, indorsed and delivered it, and waived the indorsement of the other intended surety.

How can it be pretended that Walter Chester was ever a party in any way to this note? And how can the doctrine of the cases cited on the other side, which say that all parties to a note as payees must indorse it in order to transfer it, apply? It is undoubtedly true, that parties jointly interested in a promissory note as payees, holding property in the note, must join in the indorsement to pass the property in the note. Two cannot transfer the property of three. All this is clear and unquestionable. But here Walter Chester never was in law a party, and never had any property in the note in fact, as admitted by the defendants themselves, in their demurrer.

In this view of the facts, it is similar to the case of a bond, reciting in the body that one person is bound as principal and four others as sureties, evincing an intention, at the time of writing the bond, of procuring four sureties. The bond in fact is signed by only three sureties, and by them is executed and delivered with the knowledge that the other does not execute it, and whose execution of it by the others is waived, but whose name is through inadvertence not struck out of the instrument. This point has been decided. See Duncan v. United States, 7 Peters, 443.

*It is the same as if the note had [*197 read, "We, John Chester as principal, and Walter Chester and Pease, Chester & Co. as sureties, agree to pay to the order of William Dwight," etc., and the parties had signed it except Walter, and delivered it, waiving his signature and consenting to become bound without him. There can be no doubt in such a case. See Leaf et al. v. Gibbs, 4 Carr. & Payne, 466; same case, 19 English C. L. R. 475.

In the case before the court, it having been the understanding clearly of all parties, that Walter's signature or indorsement should be waived, it was competent for Dwight to strike his name out of the body of the note, as being no party to it; and in legal effect he is no more a party to the note than if his name had been struck out at the time of delivery. His name has been permitted to remain, though legally there never was any contract with him; and we may recover upon the facts as well as if we had struck out his name, and declared upon the note as payable to Pease, Chester & Co. alone, which in legal effect was the case.

But we may set out the instrument in the declaration, either as it is written, and let the court say what the legal effect is, or we may set it out according to its legal effect.

This, too, is an action against the men who indorse and deliver the note, and waive the indorsements of the other party. They deliver the note in its present shape as a good contract, and now resist a suit upon the ground that there is no transfer. They do not deny the contract, but say we cannot sue the maker,

because Walter Chester has not indorsed. We say they have contracted, and therefore we sue them. They ought to be, if they are not, estopped from denying our right to maintain an action against them.

Mr. Justice Wayne delivered the opinion of the court:

We think that the only point presented by the record in this case for the decision of the court was rightly ruled by the Circuit Court.

That point is, whether a promissory note payable to the order of several persons, one of whom inceptively refused to be a payee of it, and who was treated by the drawer and other payees, both in the delivery of the note and in its negotiation, as no party and having no interest in it, can be transferred by the indorsement of the real payees, so as to give the ownership of it to the indorsee, and a right of action upon it ex directo, under the statute of 3 & 4 Anne, c. 9.

The statute is, that "any person, to whom a promissory note that is payable to any person 198*] or his order is indorsed or *assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money, either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange."

The statute requires a transfer to be made by the indorsement of the person to whom the note is payable, and the interpretation of it is, that, where a note is payable to the order of several persons not in partnership, all must separately sign their names as indorsers. The object being, that, before an indorsee shall recover the contents of the note in his own name, he shall show he has acquired a property in it, by a transfer from those who were the original payees, or from others who were their indorsers. The statute is not merely a form, requiring all the payees to indorse, but a substantial requisition, upon the presumption that all the payees upon the face of the paper have an interest in it, and that they have indorsed it. We have, then, the rule, and the reason of the rule. And it seems to us, that to permit it to comprehend a case of an undertaking between the real parties, because a name had been mistakenly inserted, or had been inadvertently left upon the face of the paper, when the note was delivered to the real payees by the drawee, would be to wrest the statute out of its meaning, and to sacrifice the substantial intention of it merely to form. The statute meant to deal with real parties. The omission to erase the name in such a case does not lessen the drawer's obligation to pay his note to the real payees, or their right of action upon it against the drawer as a note of hand. If, then, the real payees shall indorse the note to a third person, they are within the words of the statute as indorsers, and the indorsee, in an action against them or the drawer, may be permitted to prove the real character of the undertaking, by showing that the name of a person had been inadvertently left upon the paper as a payee, who had refused to be such, and who had been waived as a party to the note, both by the drawer and the real payees, when the contract had been completed between them by the delivery of the note. In the case before us, the declaration recites the particular circumstances under which the note was made and indorsed. The demurrer admits them. That is, that the paper had been indorsed by the real payees of it, but not by the nominal payee, who never was an actual payee nor ever had any interest in the note by being in any way a party to it. It would really be going very far to say, that the statute giving the indorsee a right of action for such sum of money, either against the person signing such note or against any of the persons who indorsed the same, did not *mean it to be exercised [*199 because a person's name was upon the face of the paper who never had been a party to it. No such decision has been made. It may be because no case of this kind has ever occurred before. We can find none like it. In the absence of all authority against our conclusion, we must take upon ourselves the responsibility of announcing it as an original application of the statute to this case, and for any case of a like kind which may occur, without intending it to go further. We think, however, that the interpretation is sustained by what has been the practice under the statute in some other particulars—that it is within the spirit of the principle upon which the statute has been administered. For instance, the statute requires the indorsement of a note to be made by the person to whom it is payable, and one of several partners may indorse in the partnership name; but though a note be made payable to a partnership, a transfer in the name of one partner alone will pass the partnership interest, if it be proved that it has been the practice of the firm to indorse for them in the name of one only. South Carolina Bank v. Case, 8 Barn. & Cress. 436. So if one partner transfer in the name formerly used by the partnership. Williamson v. Johnson, 1 Barn. & Cress. 146; 2 D. & R. 281.

Also, where a bill is drawn upon a firm, and one partner writes "Accepted," adding only his own name, it will bind the firm, if they were in partnership at the time of the acceptance. An indorsement by the cashier of a bank of a note payable directly to the bank is good, upon the ground that he represents the interest of the bank in it, though he is not officially or otherwise a payee upon the face of the note. In Goddard v. Lyman, 14 Pick. 268, it is said, a negotiable note payable to three persons may be legally transferred by indorsement by two of them to the third payee and a stranger, and, if this were doubtful, the indorsement of the third payee to the stranger will clearly pass the property to him. In Snelling v. Boyd, 5 Monroe, 173, it is said, one of several joint holders of a bill of exchange may transfer the whole interest in it by indorsement. Where the maker of a promissory note indorsed the same, for his own benefit, in the payee's name, by virtue of a parol authority for that purpose communicated to him by the payee, it was held to be well indorsed, and that the payee was liable upon such indorsement in the same manner as if it had been made by himself in his own hand. Turnbull v. Trout, 1 Hall, 336. The foregoing, it will be perceived, are all of them cases in which parol

proof has been admitted to show the character of the agencies by which notes or bills have been transferred or accepted, without any one 200*] of *the notes having been indorsed within the exact letter of the statute, though all of them are within its spirit.

But we rely altogether in this case upon the fact, that the note was transferred by the indorsement of those who were its real payees—by those who had the absolute property in it. We think the true meaning of the statute is, that such as have the property in the note have the right to indorse, though there shall be a name upon the paper of another person, which was inserted by mistake as a payee, or inadvertently left in when the note was delivered, and that in an action by the indorsee he should be permitted to prove such a fact. Upon this point of the right of those to indorse who have the absolute property in a bill or note, we will cite what was said by the learned Chief Justice Willes in the conclusion of his opinion in the case of Stone v. Rawlinson, Willes, 562: "On the strength of this case I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill, made payable to one or his order, may assign it as he pleases, within the provision of the statute, and such assignee may maintain an action in his own name; the executor or administrator of a person to whom such bill is made payable has the absolute property in it, and therefore he may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name." This was said in answer to an objection, that an executor or administrator cannot assign a promissory note made payable to a person or order, so as to enable the indorsee to bring an action in his own name. So, a bill or note made payable or indorsed to a feme sole, who afterwards marries, or where it is made during the coverture, the right of transfer vests in the husband, so as to give his indorsee a right of action upon it in his own name, and the husband may be sued as an indorser. Neither the case of the executor nor that of the husband is within the letter of the statute, but both are according to the spirit and intention of it, to permit indorsements to be made by those who have a property in promissory notes, so as to enable their indorsee to maintain an action in his own name.

The judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

201*] *SAMUEL L. FORGAY and Eliza Ann Fogarty, Wife of E. W. Wells, Appellants,

v.

FRANCIS B. CONRAD, Assignee in Bankruptcy of Thomas Banks.

Appeal—who may have—when decree final—duty of Circuit Court in making decree—*interlocutory not final.*

A decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes, and then said decree concluding as follows, viz., "and so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the pemises, and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs," was a final decree within the meaning of the acts of Congress, and an appeal from it will lie to this court.

But a decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court, is interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be finally adjudicated. From such a decree no appeal lies.

The attention of the circuit courts is called to the propriety of merely announcing their opinion in an interlocutory order, and withholding a decree setting aside titles and conveyances until the case is ready for a final decree.

The difference between the English and American practice upon this subject explained.

Where the defendants claimed separate pieces of property, conveyed at different times by separate conveyances, and the decree against them was several, it was not necessary for all to join in an appeal.

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

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

Mr. Sergeant moved to dismiss the appeal, because the decree of the court below was not final, and because the appeal was not regularly brought up. On the second point, he said that there were several defendants, one only of whom had appealed. But all the parties must join. 7 Peters, 399. He referred the court, however, upon this point, to Todd v. Daniel, 16 Peters, 521. A case must not come up in fragments. 3 Peters, 307; 3 Dall. 188.

To show that the decree was not final, he referred to The Palmyra, 10 Wheat. 502; Chace v. Vasquez, 11 Wheat. 429; Brown v. Swann, 9 Peters, 1; Young v. Grundy, 6 Cranch, 51; Rutherford v. Fisher, 4 Dall. 22; Lea v. Kelly, 1 Peters, 213; Young v. Smith, 12 Peters, 287.

Mr. May, contra:

Against the motion to dismiss, it is submitted—

1st. There are proper parties to this appeal.

The appellants have separate and distinct interests, and the *decree is several. Todd [*202 v. Daniel, 16 Peters, 523; McDonough v. Dannery, 3 Dallas, 188, 193, 198.

On order of court. The petition for an appeal by appellants alone is found in the record p. 198. This was notice to the other defendants below of the appeal.

2d. The decree is final.

It decides the title of all the property in di

NOTE.—As to what is a final decree or judgment from which an appeal lies, see notes to 5 L. ed. U. S. 302; 4 L. ed. U. S. 97; 49 L. ed. U. S. 1001; 62 L.R.A. 575.

pute, decrees that it be delivered up to the complainant, and that execution issue, etc. Wilson v. Daniel, 3 Dallas, 404. The whole law of the case, so far as the appellants are concerned, is settled by the decree; nothing is left to be done but the ministerial duty of stating an account, which in this case is in the nature of an execution to carry out the decree; the principles of the account are prescribed. It is like the case of Ray v. Law, 3 Cranch, 179; explained in 10 Wheaton, 503. Whiting v. Bank of the United States, 13 Peters, 15.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to dismiss this appeal, upon the ground that the decree in the Circuit Court is not a final decree, within the meaning of the acts of Congress of 1789 and 1803.

The bill was filed by the appellee, as the assignee in bankruptcy of a certain Thomas Banks, in the Circuit Court of the United States for the District of Louisiana, against the appellants, and Banks the bankrupt, and three other defendants. The object of the bill was to set aside sundry deeds made by Banks for lands and slaves, which the complainant charged to be fraudulent, and for an account of the rents and profits of the property so conveyed; and also for an account of sundry sums of money which he alleged had been received by one or more of the defendants, as specifically charged in the bill, which belonged to the bankrupt's estate at the time of his bankruptcy.

The case was proceeded in until it came on for hearing, when the court passed a decree declaring sundry deeds therein mentioned to be fraudulent and void, and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him eleven thousand dollars, received from the bankrupt in fraud of his creditors, and "that the complainant do have execution for the several matters aforesaid, in conformity with law and the practice prescribed by the rules of the Supreme Court of the United States." The decree then directs that the master take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the 203*] filing *of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants (who has not appealed) in fraud of the creditors of the bankrupt, and concludes in the following words: "And so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises; and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs."

Among the deeds set aside as fraudulent is one from the bankrupt to Ann Fogarty, otherwise called Ann Wells, for two lots in the city of New Orleans and sundry slaves which she afterwards conveyed to Fogarty, the other appellant. Both of these deeds are declared null and void, and the lots, with the improvements thereon, and the negroes, directed to be delivered to the complainant for the benefit of the bankrupt's creditors. This part of the decree is one of the matters of which the complainant was to have execution. But the account of the rents and profits of this property is, like other similar accounts, referred to the master, and reserved for further decree.

The appeal is taken by Samuel L. Forgay and Ann Fogarty, otherwise called Ann Wells; and they alone are interested in that portion of the decree last above mentioned. The bankrupt and the three other defendants have not appealed. These three defendants claimed other property, which had been conveyed to them at different times and by separate conveyances, as mentioned in the proceedings. And it was not, therefore, necessary that they should join in this appeal. Todd v. Daniel, 16 Peters, 523.

The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

In the case of Whiting v. The Bank of the United States, 13 Peters, 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground, that the decree of foreclosure and sale was final upon the merits, and the ulterior *proceedings but a mode of [*204 executing the original decree. The same rule of construction was acted on in the case of Michaud et al. v. Girod et al., 4 Howard, 503.

The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the circuit courts. If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights We think, upon sound principles of construction, as well as upon the authority of the cases

referred to that such is not the meaning of the acts of Congress. And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court 205*] *until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled. We, however, feel it our duty to say, that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal.

In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal and the execution of the order is suspended until the decision of the appellate court But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference betwen the right of appeal as practiced in the English chancery jurisdiction and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise, where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.

In the case before us, for example, it would certainly have been proper, and entirely consistent with chancery practice, for the Circuit Court to have announced in an interlocutory order or decree the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity *for passing immediately a [*206 final decree annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal, and the object and policy of the acts of Congress upon this subject carried into effect.

These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced; but in order to call the attention of the circuit courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen, that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the Circuit Court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one.

Order.

On consideration of the motion filed by Mr. Sergeant, of counsel for the appellee, to dismiss this appeal, and of the arguments of counsel thereupon had, as well against as in support of the said motion, it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

JOHN PERKINS, Appellant,

v.

EDWARD F. FOURNIQUET et ux. and Martin W. Ewing et ux.

Appeal—when decree not final.

Where the Circuit Court decreed that the complainants were entitled to two sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and

NOTE.—As to what is a final decree or judgment from which an appeal lies, see notes to 5 L. ed. U. S. 302; 4 L. ed. U. S. 97; 49 L. ed. U. S. 1001; 62 L.R.A. 515.

then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to this court.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana, the circumstances of which are stated in the opinion of the court.

207*] *Mr. Henderson and Mr. Fendall moved to dismiss it, for want of jurisdiction, because the decree of the Circuit Court was not a final decree. The motion was opposed by Mr. Mayer and Mr. Coxe.

Mr. Henderson, in support of the motion:

The record shows that the appeal taken in this case is upon an interlocutory decree to account, and before any account taken or any final decree made.

The appellees move to dismiss the case, for the reason that in this state of the record this court has no jurisdiction. Appeal only lies from a "final decree." Act of 1789, sec. 22; 9 Peters, 1-3; 2 Howard, 64.

It seems this court, in the case of Michoud et al. v. Girod, 4 Howard, 534-537, did entertain an appeal from an interlocutory decree, but the fact, it is presumed, escaped notice. The like omission is noticed as having occurred in the case of The Washington Bridge Co. v. Stewart; but the court say, had the defect been noticed the appeal would have been dismissed. 3 Howard, 424. The appeal in this case, being now shown to be prematurely taken, will of course be dismissed.

Mr. Mayer and Mr. Coxe, against the motion, referred to and commented upon the cases in 4 Howard, 524; 3 Howard, 424; 3 Cranch, 179; 4 Cranch, 216; 10 Wheat. 503, in which last the court review the former cases.

Mr. Fendall, in support of the motion, cited and remarked upon the following authorities: Judiciary Act, 24 September, 1789, sec. 22, 1 Statutes at Large, 60; Canter v. American Insurance Company, 3 Peters, 318; Rutherford v. Fisher, 4 Dall. 22; Young v. Grundy, 6 Cranch, 51; Houston v. Moore, 3 Wheat. 433; Gibbons v. Ogden, 6 Ibid. 448; The Palmyra, 10 Ibid. 502; Weston v. City of Charleston, 2 Peters, 464, 465; Boyle v. Zacharie and Turner, 6 Ibid. 648; Brown v. Swann, 9 Ibid. 1; Young et al. v. Smith, 15 Ibid. 287; McCollum v. Eager, 2 Howard, 61; Pepper et al. v. Dunlap, 5 Ibid. 51; Mayberry v. Thompson, 5 Ibid. 126; Clagett v. Crawford, 12 Gill & Johns. 275.

Mr. Chief Justice Taney delivered the opinion of the court:

This, like the case just decided, is a motion to dismiss the appeal, upon the ground that the decree in the Circuit Court was not a final one.

In the preceding case, we have stated the construction which this court has given to the acts of 1789 and 1803 upon this subject; and we have stated it more fully than the case itself required, in order that the circuit courts 208*] might distinctly understand *the opinion entertained by this court, and to prevent, in future, appeals from decrees and orders merely interlocutory in their character. Appeals from decrees of this description appear to be a growing evil, imposing at every term useless labor upon the court, and subjecting the parties to unnecessary expense and delay. For, having no jurisdiction in such cases, they are not legally before the court upon the appeal, and must of course be dismissed without any decision upon the matters in dispute.

The case now before us may be stated in a few words. It is an appeal from the Circuit Court of the United States for the District of Louisiana; and it appears by the record that Harriet J. Fourniquet and Mary T. Ewing are two of seven heirs and representatives of Mary Perkins, who was the wife of the appellant, and who died about twenty years before the filing of this bill; that the appellees above named were the children of a former marriage, and with their respective husbands filed the bill now before us, against the appellant, charging that, during the marriage of the appellant with their mother, there existed a community of acquests and gains in certain property, and praying that the appellant might be compelled to account and pay over the amount due them as heirs of their mother. The appellant denied, in his answer, that any community existed, and the case was proceeded in to hearing, when the Circuit Court passed a decree declaring that the community did exist, and that the appellees, as heirs of their deceased mother, had a right to recover two sevenths of all their mother's rights of community which accrued during her marriage with the appellant; and also two thirds of one seventh, as representatives of so much of the interest of a deceased brother; and referred the matter to a master in chancery, to take and report an account of the acquests and gains; and prescribing fully and with proper precision the principles and manner in which the lands acquired were to be divided and the accounts taken; and the decree concludes by reserving all other matters in controversy between the parties until the coming in of the master's report.

This clearly is not a final decre in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, wherever the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the master, or a partition made, cannot be prescribed by the court until it first determines the rights of the parties by an interlocutory order or decree; and the case cannot proceed to final hearing without it. And the appellant is *not in- [*209 jured by denying him an appeal in this stage of the proceedings. Because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time.

The decree in the case before us being interlocutory only, the appeal must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. And it appearing to the court here that the decree of the said Circuit Court is an interlocutory and not a final decree, it is therefore now here ordered and decreed by this court, that this appeal be, and the same is hereby dismissed for the want of jurisdiction.

SAMUEL T. PULLIAM et al., Appellants,

v.

EDMUND CHRISTIAN, Assignee in Bankruptcy of William Allen.

Appeal does not lie from decree setting aside deed and ordering commissioner to report, etc.— decree not final.

A decree of the Circuit Court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last mentioned sums in order to a final decree, is not such a final decree as can be appealed from to this court.

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

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

It was argued by Mr. Lyons for the plaintiff in error, and Mr. Brooke and Mr. Myers for the appellees.

It is not deemed necessary to insert the arguments of counsel upon the merits of the case.

Mr. Lyons stated the case, and argued the preliminary question of jurisdiction, as follows:

William Allen, of the city of Richmond, a merchant tailor, being very much embarrassed 210*] in his affairs, though he believed *himself solvent, on the 20th day of January, 1842, executed a conveyance to the plaintiffs, as trustee, by which he conveyed his whole property of every kind for the purpose of satisfying his debts. The conveyance provides for all the creditors of Allen full satisfaction of all their debts, if the assets be sufficient, but divides them into two classes, and the first is to be fully paid before the second receives anything. The trustees took possession of the trust subject, and proceeded to convert it into money. On the 13th of August, 1842, the said Allen filed his petition, praying to be declared a bankrupt. His petition was allowed, and on the 7th of September, 1842, he was declared a bankrupt, and on the 11th of January, 1843, he was duly discharged by the decree of the court, after due notice to all persons interested, to show cause against the discharge.

On the 23d of August, 1842, two of the creditors of Allen notified the trustees that they intended to impeach the deed under the bankrupt law, and claim an equal distribution of the funds; and on the 20th of September, 1842, Edmund Christian, the general assignee in bankruptcy in Virginia, exhibited his bill before the Circuit Court of the United States for the Eastern District of Virginia, in which he impeached the deed as fraudulent within the meaning of the bankrupt law, and prayed that it might be set aside.

The trustees and many of the creditors answered the bill, denying that the deed was made in contemplation of bankruptcy, and denying that it was embraced by the bankrupt law, or could be reached by any proceeding under it, as it was made before the law went into operation, and therefore made when there was no bankrupt law. The Circuit Court held that the deed was fraudulent within the meaning of the bankrupt law, and decreed that it should be set aside; and that the trustees should surrender the entire trust subject in their hands to the plaintiffs; and render an account before a commissioner of the court. From this decree the appeal was taken, and the question upon the merits is, whether the word "future," in the second section of the bankrupt law, can properly be construed to embrace conveyances which were made before the law went into operation.

Before proceeding to consider this question a word may be bestowed upon a preliminary point, which is alluded to by the counsel for the appellee in their note, but not formally made, viz., whether the appeal in this case was well taken, being, as it is said, from an interlocutory decree. It is submitted, that, on this point, there can be no difficulty. The decree may be regarded as interlocutory in one sense, that is, as being made before the cause is finally ended and removed from the docket of *the court; but in respect to its own [*211 effect and operation the decree is a final one, because it adjudges and determines the rights of the parties to the property in controversy, and all that remains now to be done is in execution of this decree. The finality of a decree does not depend upon its termination of the whole case, but upon its effect in settling the principles of the cause, and adjudicating the rights of the parties to the subject in controversy. The decree in this cause performs all these functions. It settles all the principles of the cause. It adjudges the rights of all the parties, plaintiffs and defendants, to the subject, and it directs the defendants who have the subject to deliver it up to the plaintiffs. All that remains now to be done is simply in execution of that decree. A judgment is not interlocutory because execution must be made of it. The decree might have directed the assignee to distribute the fund, as soon as received from the defendants, among the creditors of Allen, or the next decree may do it, and yet not end the cause, and when the fund is distributed an appeal may be wholly unavailing, because the payees of the fund may be insolvent.

NOTE.—As to what is a "final decree" or judgment from which an appeal lies, see notes to 5 *L. ed. U. S. 302, 4 L. ed. U. S. 97; 49 L. ed. U. S. 1001; 62 L.R.A. 515.*

Again. Why should the parties be continued in expensive litigation in the court below, as the consequence of the decree already pronounced, if that decree be erroneous, and when no such litigation and expense will be incurred if that decree be set aside and a correct decree pronounced?

The counsel for the appellees submitted the question of jurisdiction to the court without arguing that branch of the case.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal in chancery from the Circuit Court of the Eastern District of Virginia.

This case arises under the bankrupt law. William Allen, a merchant tailor in Richmond, being embarrassed, conveyed his whole property to the plaintiffs, as trustees, to pay his debts. In the trust deed he divides his creditors into two classes, the first of which was to be fully paid before the second received anything. Shortly after this, he took the benefit of the bankrupt law. The assignee in bankruptcy filed his bill to impeach the above conveyance, as fraudulent under the bankrupt law.

In their decree, the Circuit Court ordered that the deed executed by Allen, as above stated, should be set aside. And, without deciding how far the trustees may be liable to the assignee for the sums received for the proceeds of the property, which may have been paid 212*] over by them to the creditors of *Allen before they received notice, etc., the court ordered and decreed that the trustees should deliver over the property conveyed to them which had not been disposed of, and that they render an account to one of the commissioners of the court of all the property which came to their hands, or either of them, by virtue of said deed, and of money paid to the creditors, etc.; which account the said commissioner is directed to state and settle, and report the same to the court, with any matters specially stated deemed pertinent by himself, or which may be required by the parties, in order to a final decree.

This decree is final only as to the trust deed. All the matters arising under the trust are referred to a commissioner for a statement of the account, to enable the court to enter a final decree. There is no sale or change of the property ordered which can operate injuriously to the parties.

Under such circumstances, the decree not being final as to the whole matter in controversy, the appeal must be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel; on consideration whereof, and it appearing to the court here that the decree of the said Circuit Court in this cause is an interlocutory and not a final one, it is thereupon now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

12 L. ed.

THE PRESIDENT AND DIRECTORS OF THE BANK OF THE METROPOLIS, Plaintiffs in Error,

v.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE NEW ENGLAND BANK

Jury—proper instructions on new trial.

Referring to the case of The Bank of the Metropolis against the New England Bank, reported in 1 Howard, 234, the following instructions to the jury upon the second trial would have carried out the opinion of this court, viz.:

1st. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills or notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.

2d. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

*3d. But if the jury found, that, in the [*213 dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were, from time to time, suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the Bank of the Metropolis is entitled to retain against the New England Bank for the balance of account due from the Commonwealth Bank.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington.

It was the same case which was before this court at January Term, 1843, and is reported in 1 Howard, 234. It is unnecessary, therefore, to state again the facts of the case which existed prior to that report.

The Supreme Court having reversed the judgment of the Circuit Court, and directed it to award a venire facias de novo, the cause came up again for trial in the Circuit Court, at March Term, 1844. The result of the second trial was a judgment in favor of the New England Bank for $4,245.24, with interest upon parts of this sum from various times.

The evidence offered on the part of the plaintiff, and also that on the part of the defendant, are stated in the bill of exceptions, with a reference to a great number of letters and accounts. This evidence must be inserted in substance, in order to render intelligible the prayers to the court. The first prayer was made by the defendant, and does not appear to have been excepted to by the plaintiff, although granted by the court; but the plaintiff then made a prayer for himself, which was also granted by the court, and excepted to by the defendant, and upon this exception the case came up. But the case cannot be fully understood without spreading all this upon the report of it.

409

Evidence on the part of the plaintiff, viz., the New England Bank.

On the trial of this cause, the plaintiffs, to maintain the issue on their part joined, offered evidence tending to show, that, from the year 1834 to the year 1838, there had been extensive mutual dealings between the Bank of the Metropolis, in the city of Washington, and the Commonwealth Bank, a bank in Boston, in the State of Massachusetts, at which place the plaintiff's bank is also situated; that both of these banks (the Metropolis and the Commonwealth) were selected by the government of the United States as deposit banks, and in consequence became extensively employed as agents for other banks, and for individuals, in the transmission of negotiable paper for collection 214*] *in the manner usual among such institutions; that the usage well known and established universally in the District of Columbia, and throughout this country, in such cases, is for the holder of negotiable paper to indorse and deliver it, without any consideration, to a bank (or, if the bank is the holder, to another bank), to be indorsed and delivered by such bank with which it has been so deposited to another bank, and so on to transmit it from bank to bank till it reaches its place of destination; that when it is paid, the proceeds are credited to the bank by which it was last indorsed, and by that bank to its indorser, and so on back to the owner; but it is not usual for the banks to remit the precise amount so collected at the time of such collections, but to place the same to the general credit of the bank from which it was received, to be settled by drafts or otherwise, as might be most convenient for such banks respectively; and in case of nonpayment, the costs thereof and postage are charged from the one bank to the other till the owner is charged therewith; that it is also the usage and custom of the banks receiving such paper to treat it in all respects as they do their own paper, but it is not usual for any bank to purchase negotiable paper from another bank. That the said Bank of the Metropolis and the said Commonwealth Bank were extensively engaged in collecting and remitting to each other for collection, on account of other banks and individuals, negotiable paper, deposited with either for that purpose, and in that business they conformed to the usage aforesaid in the mode of transmitting such paper by indorsement, and also in the mode of keeping their accounts of such business; and it was the uniform practice of the said Commonwealth Bank, in transmitting such paper, to accompany the same with a letter, advising the Bank of the Metropolis that it was "forwarded for collection" (letters copied in pages 22, etc.); but in some instances they transmitted negotiable paper by letters in the following form (copied in pages 25, etc.); that in the course of the said dealing between the said two banks, repeated instances occurred in which the Bank of the Metropolis directed the said Commonwealth Bank to deliver to third parties negotiable paper, which had been forwarded by the former to the latter; and such direction was complied with, and the paper delivered according to such order, without reference to the state of the accounts between the said two banks; and also, that either of the said two banks drew upon the other, from time to time, or directed remittances to be made, without having regard to the negotiable paper which had been before them, or was expected to be remitted for collection.

They further offered evidence tending to show that, during *the fall of the year [*215 1837, the plaintiffs, being the holders of certain negotiable paper coming due in the District of Columbia, at various times during the said fall and winter, indorsed and delivered such paper to the said Commonwealth Bank, without consideration, as the agent of the plaintiffs for that purpose, and according to the usage and custom above stated, to be transmitted by said Commonwealth Bank to the said District for collection; and the said Commonwealth Bank, from time to time, as it received the said paper from the plaintiffs, indorsed and delivered the same, without consideration, and according to the said usage and custom, to the said defendants, and in delivering them to defendants, they advised defendants that such paper was forwarded for collection.

That on the 13th day of January, 1838, there were in the hands of the defendants certain bills and notes, the property of the plaintiffs, and which had been indorsed and delivered by plaintiffs to the Commonwealth Bank, in manner and according to the usage and custom above stated, for collection, without consideration, and which had been indorsed by the last mentioned bank to the Bank of the Metropolis, and forwarded to the said defendants in letters, advising them in every instance that the said paper was forwarded for collection; that on the said 13th day of January, 1838, the said Commonwealth Bank gave to the plaintiffs an order in writing, addressed to the defendants, as follows (copied in page 27, etc.); that the said letter was immediately forwarded by due course of mail to, and received by, the defendants; that the said negotiable paper amounts to the sum of $4,466.75; that none of the said paper was due or had been paid to the defendants at the time of the receipt by them of said order of the 13th January, 1838, except the sum of $241.01, and that sum had been carried to the credit of the Commonwealth Bank in the general account with said bank, and that the residue of the said paper was afterwards, and before the bringing of this suit, paid to the said defendants; that the said negotiable paper, in the said order of the 13th January, 1838, mentioned, was part of the paper indorsed and delivered in the fall of 1837, as above stated, to the Commonwealth Bank by the plaintiffs, according to the usage and custom above stated, without consideration, to be collected for the plaintiffs, according to the said usage and custom, and was at the time of such delivery, and ever after, the property of the plaintiffs.

And the plaintiffs further offered in evidence the following deposition of Charles Hood, viz.:

"I, Charles Hood, now of Dorchester, in the County of Norfolk, *in Massachusetts, [*216 formerly of the city of Boston, in the County of Suffolk, on oath depose and say, that I was cashier of the Commonwealth Bank from the time of its commencing to the time of its closing business; said bank having been a bank established by law in the Commonwealth of Massachusetts, and having transacted business in Boston. I further depose and say, that the

papers exhibited by me to the magistrate taking my deposition, for the purpose of being annexed thereto, and marked A, B, and C (copied in page 33, etc.), are original accounts current rendered by the Bank of the Metropolis, in Washington city, to said Commonwealth Bank.

"The said papers are all the accounts rendered by the said Bank of the Metropolis to the said Commonwealth Bank, which I can now find; said Bank of the Metropolis rendered one or more accounts subsequent to these, which I cannot find, the same having been lost or mislaid. I cannot find any previous account rendered by said Bank of the Metropolis. The principal part of the items on the credit side of said account consists of checks and drafts drawn by said Bank of the Metropolis on said Commonwealth Bank; each draft or check being indicated in the account by its number. I further depose and say, that there was not, to my knowledge, at any time any agreement or understanding between said two banks, that the balances due, from time to time, from one bank to the other, should be suffered to remain in the hands of either, to be met by the proceeds of negotiable paper already transmitted, or expected to be transmitted, in the usual course of business between them. If there had been any such understanding or agreement between said banks, I have not the least doubt I should have known it. There was no usage or practice between said banks to allow any such balances due to the Commonwealth Bank to remain undrawn for, to be met by the proceeds of negotiable paper transmitted, or expected to be transmitted. I do not know of any usage or practice on the part of the Bank of the Metropolis to allow balances due to said bank from the Commonwealth Bank to remain undrawn for, to be met by proceeds of paper transmitted, or to be transmitted, in the usual course of business between said banks. I further depose and say, that, in fact, the Commonwealth Bank drew on the Bank of the Metropolis for its balances as often as its business or convenience required, without reference to the negotiable paper held at the time, or expected to be transmitted in the usual course of business, for payment or collection, between said banks. This practice was uniform. I further depose and say, that, in pursuance of an understanding between said banks, each of them occasionally 217*] overdrew *upon the other, as its convenience required. I further depose and say, the two papers exhibited by me to the magistrate taking this deposition, for the purpose of being annexed thereto, marked D, E (copied in page 55, etc.,) are true copies of letters transmitted by said Commonwealth Bank to said Bank of the Metropolis, at or about the time of their respective dates. I further depose and say, that the said two banks were, among others, originally selected as deposit banks by the government. The deposit banks became extensively the agents of other banks and institutions, for the purpose of making collections in various and distant parts of the United States. It has never been the practice of banks, as far as I know, to purchase negotiable paper held by other banks, and take the indorsement of such other banks, or without such indorsement.

"Charles Hood."

The plaintiffs also offered in evidence a great number of letters and accounts which had been transmitted between the Bank of the Metropolis and the Commonwealth Bank.

The evidence offered on the part of the Bank of the Metropolis was as follows:

"And the said defendants, in order to maintain and prove the issue on their part, gave to the jury competent and legal evidence tending to prove that it is and has long been the uniform practice and usage of the banks in the District of Columbia, when commercial paper is transmitted to it for collection by banks or individuals, when indorsed by the party so remitting it, and in the absence of information that any other person or party has an interest therein, to treat and deal with the party so making the remittance as the owner of the same, the proceeds, when received, are credited to his account, and he is charged in said account with all the expenses attending the same, as costs, protests, postage, etc. That this usage and practice uniformly prevailed in the dealings between the said Commonwealth Bank and the Bank of the Metropolis; that they mutually transmitted funds and paper of different kinds to each other, government drafts, certificates of deposit, bills, notes, and drafts of private individuals; that all, of every description, were carried into the general accounts current between the two institutions, which are both banking institutions, regularly and duly chartered, and engaged exclusively in the business of banking; that, in the account current, each bank was regularly credited by the other with the proceeds of all such commercial paper thus received by it from the other, when collected, and charged with the costs of collection, protests, and postage connected with the same. That on the 13th of *January, 1838, the said Bank of the [*218 Metropolis was in the possession of the bills, drafts, notes, etc., being all commercial and negotiable paper, enumerated and mentioned in the said letter from C. Hood of that date, the same having been, from time to time, transmitted by said Commonwealth Bank to said Bank of the Metropolis, in the course of their said mutual dealings and business, in letters; which letters from said Commonwealth Bank, so far as they are deemed material, are as follows (copied in the record). That each of said drafts, bills, notes, etc., was indorsed by the payees thereof, respectively, to the New England Bank, specially indorsed by the cashier of said New England Bank to the cashier of the Commonwealth Bank, and by him likewise specially indorsed to the cashier of the Bank of the Metropolis, that the same had all been transmitted within the two or three months preceding the said 13th of January; that all said paper was indorsed and transmitted in the same form in which paper the property of the bank remitting the same was indorsed and sent. That the said Commonwealth Bank failed, and became publicly insolvent, early in January, 1838, before the said letter of the 13th of January was written; that said letter contained and gave the first information, or notice, ever received by the Bank of the Metropolis, that said New England Bank was, or claimed to be, the owner of said paper so held by the Bank of the Metropolis. That the accounts between said parties, so kept as aforesaid, were regularly received by, and transmitted from, said banks respectively

(the Commonwealth and Metropolis banks), and no objection was ever made to the form or manner thereof, the last of which is here inserted (A, defendants' statement, copied in the record); that the balances were sometimes large, sometimes small, sometimes in favor of the one, sometimes of the other; that on the 24th of November, 1837, the balance was in favor of the Commonwealth Bank to the amount of $2,200; that at the time the said letter of 13th of January, 1838, was written and received, the balance due to the Bank of the Metropolis was $3,541.17½."

Defendant's Prayer.

Whereupon the defendants, by their counsel, prayed the court to instruct the jury—

That if, from the evidence aforesaid, they shall find that the course of dealing between the said Commonwealth Bank and the Bank of the Metropolis, as stated in said evidence, actually existed, and had continued for several years prior to January, 1838; that their dealings had been mutual and extensive; that accounts current existed between them, in which [*219] they were respectively *credited with the proceeds of all notes, bills, drafts, etc., transmitted to the other for collection when the same were received, and charged with all the expenses attending the same, as postage, costs of protests, etc.; that from time to time such accounts were regularly transmitted from each to the other, which accounts were mutually acquiesced in without objection; that the balances on the account current fluctuated from time to time, according to the amount of money, bills, notes, etc., remitted; that upon the credit of such negotiable paper thus transmitted or expected to be sent, or upon the credit of such mutual dealings, each party was in the practice of drawing and accepting drafts and orders on or by the other; that said banks uniformly received the notes, bills, drafts, etc., transmitted by the other for collection, and always regarded and treated them as the property of the other; that the notes, drafts, and bills enumerated in the letter from C. Hood to G. Thomas of the 13th of January, 1838, were also received, regarded, and treated; that the defendants had no notice or knowledge, until the receipt of said letter of the 13th of January, 1838, that said Commonwealth Bank was not the absolute and only owner of the same; or that plaintiffs had any interest in, or claim to, the same; that said Commonwealth Bank became insolvent some few days prior to the said 13th of January, 1838, at which time the Bank of the Metropolis had in its possession, so held and received in the course of said mutual business, the notes, bills, etc., mentioned in said letter of 13th of January, 1838; that in the course of said mutual business, it was the practice and usage of each of said banks (the Commonwealth and the Metropolis) to draw upon the other, as its exigencies or conveniences required, even beyond the amount of the balances then due to it on general account, which drafts it was also their usage and practice to accept and pay on the credit of anticipated remittances of negotiable paper or funds, or on the credit of such mutual dealings and course of business; and it was also the practice and usage of both said banks to suffer and permit ascertained balances to lie undrawn for on the same credits; that at the time the said Commonwealth Bank became insolvent, and when said letter of January 13th, 1838, was written and received, there was a balance of $2,900, or other sum due on said general account from said Commonwealth Bank to the Bank of the Metropolis; then the defendants were entitled to hold and retain the said notes, drafts, bills, etc., so in their possession, and the proceeds of the same, when received, until the tender or payment of such balance; and the plaintiffs are not entitled to recover in this action, until they show, to the satisfaction of the jury, that before action brought *such balance was paid or tendered to [*220 said defendants. Which was given.

Defendants' Bill of Exceptions.

And thereupon, and after the court had given the said instruction to the jury on the prayer of said defendants, the plaintiff prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the notes mentioned in the said letter, dated the 13th day of January, 1838, from Charles Hood, cashier of the Commonwealth Bank, to George Thomas, cashier of the Bank of the Metropolis, were received by the said Commonwealth Bank from the said plaintiffs' and were at the time of such receipt the property of the plaintiffs.

That they were deposited by the plaintiffs with the said Commonwealth Bank, to be transmitted by it for collection only.

That the said Commonwealth Bank received the said notes only as the agent of the plaintiffs, and without giving any consideration for them, or receiving any compensation as such agent to transmit them for collection, and never had any right, title, or interest in, or claim or lien upon, the said notes, except as agent, as aforesaid.

That the said Commonwealth Bank, as agent as aforesaid, and not otherwise, did in fact transmit the said notes to said defendant for collection only.

That the said notes were indorsed by the cashier of the plaintiffs, as cashier, and by the cashier of the said Commonwealth Bank, as cashier, in the mode and form commonly used by banks in the United States in the transmission of negotiable paper deposited with, and transmitted through, such banks for collection.

That the usage to deposit in one bank such paper so indorsed to be transmitted, and for such deposit bank to indorse such paper in the manner aforesaid, and to transmit the same so indorsed to another bank, is a common usage throughout the United States, and that the custom so to indorse such negotiable paper is universal.

That the Bank of the Metropolis and the said Commonwealth Bank were extensively engaged as the agents of other banks, and with each other, in the transmission for collection and in the collection of negotiable paper belonging to third parties, in the years 1836 and 1837, in various and distant parts of the United States; and that the common form of indorsement used in the transmission of such negotiable paper by the said Commonwealth Bank and the Bank of the Metropolis was such as was *used by the said Commonwealth [*221 Bank in the indorsement and transmission of

said notes, for the proceeds of which this suit is brought; and that neither of the said banks, under the said usage and custom, held the other liable upon such indorsement.

That the said notes last mentioned were transmitted to the said bank of the Metropolis in letters, notifying the defendants that they were transmitted for collection in the form commonly used by said banks in transmitting negotiable paper for collection, and with no other intention as to who was the real owner of such negotiable paper; then it is competent for the jury to infer from the facts aforesaid, that the defendants had notice that the said paper was transmitted by the said Commonwealth Bank as agent, and not as the owner thereof. And if the jury shall so find, then the plaintiff is entitled to recover, notwithstanding the jury shall find that the said Commonwealth Bank and the Bank of the Metropolis treated each other as the true owners of the paper so remitted; and notwithstanding they shall further find that balances were, from time to time, suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited, or expected to be transmitted, in the usual course of dealing between them; and notwithstanding the course of dealing stated in the instruction heretofore given at the instance of the defendants.

To the giving of which instruction, as prayed, the counsel for the defendant objected; but the court overruled such objection, and instructed the jury as requested; to which the defendant, by his counsel, excepts, and prays the court to seal this bill of exceptions, which is accordingly done, this 6th day of September, 1844. W. Cranch, [seal.]
James S. Morsell. [seal.]

Upon this exception the case came up to this court.

It was argued by Mr. Coxe for the plaintiff in error, and Mr. Bradley for the defendant in error.

Mr. Coxe, for the plaintiff in error:

This cause was before this court in 1843, and is reported in 1 Howard, 234.

The proceedings remain as they originally stood. The evidence on the second trial is supposed to be substantially the same as on the first.

On the former argument, this court decided, that, wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of 222*] *his general balance, unless such securities were delivered to him under a particular agreement. 1 Howard, 239. That the paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without consideration, as its agent, in the ordinary course of business, it being usual, and indeed necessary, so to indorse it in order to enable the agent to receive the money. Yet the possession of the paper was prima facie evidence that it was the property of the last mentioned bank; and, without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or owner. Ibid.

The instructions asked of the court by the parties respectively, *are found in the present* record, pp. 31-33. The court gave both, as asked. In the defendant's statement, the facts given in evidence are detailed. In the instruction given at the instance of plaintiff, some portion of these facts is stated. The main difference between the two seems to consist in this. In the defendant's prayer, the supposed state of facts to be found by the jury includes this, "that the defendant had no notice or knowledge, until the receipt of said letter from C. Hood to G. Thomas, of the 13th January, 1838, that said Commonwealth Bank was not the absolute and only owner of the same, or that plaintiff had any interest in or claim to the same."

In the plaintiff's prayer, the court is called upon to instruct the jury, that "it is competent for them to infer, from the facts aforesaid, that the defendant had notice that the said paper was transmitted by the Commonwealth Bank as agent, and not as the owner"; and so finding, their verdict should be for plaintiff.

The main, if not the entire, ground upon which the plaintiff below rested, to establish this fact of notice, is the usage to deposit in one bank indorsed paper to be transmitted to a distant bank for collection, and for the bank with whom such deposit is made to indorse and transmit the same, as was done in this case.

The prayer to the court below, offered on the part of the bank of the Metropolis, was in nearly the words of this court in the former case. [Mr. Coxe then read and compared the prayer with the opinion of the court in 1 Howard, 234.]

Mr. Bradley, for the defendant in error, laid down the following propositions:

1st. There was evidence to go to the jury to sustain each one of the propositions stated in the prayer granted by the *Circuit [*223 Court, and the granting of which is alleged as error.

2d. The inference which the court instructed the jury it was competent for them to draw was fully justified by those propositions. And,

3d. If that inference was drawn by the jury, the instruction of the court was right.

In maintaining these propositions, it is proposed to show—

1st. That the Commonwealth Bank was the agent of the defendant in error for a particular purpose, in the course of a well known and long established business, the usages of which required the employment of sub-agents, who are responsible directly to the principal, and the plaintiff in error was sub-agent.

2d. That no agreement or understanding between the agents could destroy or in any manner impair, the rights of the principal, he being known, and not a party or privy to such agreement.

3d. That no lien could have existed in favor of the plaintiffs in error for any balance, general or otherwise, due to them from their correspondent, the Commonwealth Bank, which could attach to the negotiable paper, or the proceeds thereof, of the defendants in error, forwarded to them by that bank for collection, in the course of the regular business of collecting.

4th. There is abundant evidence to show, that the sub-agents, the plaintiffs in error,

knew, or might and ought to have known, that they were not the property of the Commonwealth Bank, but had been forwarded for account of others. And,

There is no error in the instruction given by the Circuit Court.

On the first proposition, Mr. Bradley cited 9 East, 12; 7 Bingh. 284; 6 Mass. 430; 19 Ves. 299; 1 Rose, 154, 243, 232; 1 Bos. & Pull. 648, 546.

The Commonwealth Bank was an agent in the course of a well understood and long established business, the course of which required the employment of sub-agents. Its whole authority was to appoint a sub-agent. Triplett v. Bank of Washington, 1 Peters, 28, 30, 35.

The known usages of trade and business often become the true exponents of the nature and extent of an implied authority; for in all such cases the presumption is, the agency is to be exercised according to the practics which are allowed and justified by such usages, etc. 2 Kent's Com. lect. 41, pp. 614, 616, 4th ed; Wilshire v. Sims, 1 Camp. 258; Young v. Cole, 4 Scott, 489.

A person who employs a broker must be 224*] supposed to give *him authority to act as other brokers in like cases. Dalton v. Tatham, 10 Adolph. & Ell. 27, 29, 30.

A person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may be ignorant of the rules.

Every authority as agent carries with it or includes all the powers which are necessary or proper or usual as a means to effectuate the purposes for which it was created. In every case it embraces the appropriate means to accomplish the end. Ekins v. Macklish, Ambl. 184, 186; Paley on Agency, Lloyd's 198, note, 290, 291; 1 Livermore, 103, 104; Story on Agency, secs. 97, 85.

And in many cases the power to delegate his authority is implied from the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done. Story on Agency. sec. 14, cites Coles v. Trecothick, 9 Ves. 234, 51, 52; 1 Bell's Com. 387-391; Shipley v. Kymer, 1 Maule & Selw. 484; Cockren v. Irlam, 2 Maule & Selw. 301, 303, note; Laussatt v. Lippincott, 6 Serg. & Rawle, 386; Johnson v. Cunningham, 1 Ala. N. S. 249. And wherever any express or implied authority to appoint a sub-agent is given or allowed by the principal, a privity is created between them. Livermore, ch. 2, sec. 4, pp. 56-59; Story, 201; Goswell v. Dunkley, 1 Str. 681; and see Brandy v. Coswell, 2 Bos. & Pull. 438; Cockran v. Irlam, 2 Maule & Selw. 301, 303, note; Merrick v. Barnard, 1 Wash. C. C. R. 479; Foster v. Preston, 8 Cow. 198.

Second point. That no agreement or understanding between the agents could destroy, or in any manner impair, the rights of the principal, he being known and not a party or privy to such agreement. 10 Adolph & Ell. 27, 29, 30; 1 Peters, 25; 15 Wend. 486; 22 Ib. 216 et seq.; 12 Conn. 303.

3d. That no lien could have existed in favor of the plaintiffs in error for any balance, general or otherwise, due to them from their correspondent, the Commonwealth Bank, which could attach to the negotiable paper, or the proceeds thereof, of the defendants in error, forwarded to them by that bank for collection, in the course of the regular business of collecting. Story, Agency, sec. 360 and cases there cited; Ibid. secs. 362, 379, 381.

Upon the 4th point, Mr. Bradley entered into a minute examination of the letters and accounts.

The grounds of the former decision were two.

1st. That the Bank of the Metropolis received the paper without any notice that it was the property of a third person, and treated it as if the Commonwealth Bank was the true owner, *and was therefore factor, [*225 broker, or banker, of the Commonwealth Bank.

2d. That balances were from time to time suffered to remain in the hands of these banks respectively, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them.

But there is abundant evidence in the present record to show—

1st. Notice.

2d. That they drew without regard to the balances, and also without regard to the negotiable paper.

1. As to evidence of notice.

1st. The forms of the indorsements showed that there was a bank before the Commonwealth Bank, and it "is not usual for any bank to purchase negotiable paper from another bank."

2d. All this paper was transmitted in letters notifying the Bank of the Metropolis that it was "forwarded for collection," while in regard to other paper they adopted a different form.

3d. The usage.

4th. That the parties did not hold each other liable on the indorsements.

5th. That they were indorsed and forwarded by the Commonwealth Bank to the Bank of the Metropolis, without consideration, and with notice that they were for collection.

2. They drew without regard to the balances, and therefore advances were not made on the faith of the notes. This is shown by the accounts current between the parties, by the correspondence between the cashiers, and by the deposition of Mr. Hood, all of which are in the record.

Mr. Coxe, in reply, said that this court had formerly decided, that unless the Bank of the Metropolis had notice of the ownership of the bills, it had a right to hold them for its lien. Was there such notice? The plaintiffs below had tried to make it out, but only made out such a usage as had appeared to this court on the former trial. All the five points discussed by the counsel on the opposite side were before the court in the former case.

[Mr. Coxe then made an examination of them in order to show this.]

Mr. Chief Justice Taney delivered the opinion of the court:

This case was before the court at January Term, 1843, and is reported in 1 Howard, 234,

The judgment of the Circuit Court was then reversed, and the case remanded, with directions to award a venire facias de novo.

226*] *Upon the second trial some additional testimony appears to have been offered, and two instructions given by the court to the jury, one upon the prayer of the defendant, the other upon the prayer of the plaintiff, to the last of which the defendant, who is now the plaintiff in error, excepted; and the judgment of the Circuit Court being against him, he has again brought the case here by writ of error.

The opinion expressed by this court in reversing the former judgment and remanding the case is summed up in the following paragraph in 1 Howard, 240:

"If, therefore," say the court, "the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be and treated each other as the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account."

The only question now open upon this second writ of error is, whether the Circuit Court, in their instructions to the jury, have conformed to this opinion. We have examined them with a good deal of care, and regret to find them so complicated and involved that we have some difficulty in ascertaining the meaning of the Circuit Court. It would seem to be almost impossible for a jury acting under such instructions to comprehend distinctly the issues of fact upon which they were to find their verdict. Indeed, as we understand these two instruction, the last paragraph in the second seems to this court to be inconsistent with the direction contained in the first. And if the last instruction stood by itself, without any reference to the first, it might perhaps be construed to be substantially the same with the directions given by the Circuit Court at the former trial, which were reversed upon the former writ of error.

It is not usual in remanding a case to state in the opinion of this court the particular manner in which the instructions to the jury should have been framed, but to state in the opinion the principles of law which govern the case as it appears in the record, and leave it to the Circuit Court to apply them to the case, as it may appear in evidence upon the second trial, in such manner and form as it may think advisable. From the manner, however, in which the directions of the Circuit Court appear in the record before us, upon the trial under the mandate, we may perhaps prevent future diffi-
227*] culty by stating the *form in which instructions to the jury might have been given so as to carry into effect the opinion of this court, and enable the jury to understand more clearly the points in issue before them. Of course we do not mean to prescribe this form to the Circuit Court when the case again comes before it, because the testimony then offered may differ materially from that now contained in the record. But if, instead of the complex instructions under which the case was decided at the last trial, the following directions had been given, it would have conformed to the opinion of this court when the case was formerly before it, and at the same time have enabled the jury to understand more distinctly the matters of fact in dispute between the parties, and submitted to them for decision.

1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank.

2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of the dealings between the two banks.

3. But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank.

We restate the former opinion of this court in this form, because we presume it must have been misunderstood by the Circuit Court. And as it was not followed in the proceedings under the mandate, the judgment must be reversed, and the cause remanded, with directions to award a venire facias de novo.

*Order. [*228

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

RICHARD BEIN and Mary, His Wife, Appellants,
v.
MARY HEATH.

Husband may be prochein ami of wife on bill in equity where he has no interest—when equity will not lend aid to set aside mortgage given to secure loan in wife's name for benefit of husband.

The Civil Code of Louisiana, article 2412, enacts, that "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

Where a wife mortgaged her property to raise money, and the question did not turn upon her doing so as the surety of her husband, it was not necessary for the lender to prove that the proceeds of the loan inured to her separate use.

The fact of the application of the money may be proved to show the character of the transaction, with a view of establishing collusion or fraud.

The decisions of the State courts of Louisiana upon this subject examined.

Where a wife mortgaged her property, and then sought relief in chancery upon the ground that the contract was void in consequence of her disability to contract, and it was shown that the lender acted in good faith; proceeded cautiously under legal advice, under assurances that the loan was for the exclusive use of the wife, to whom the money was actually paid; the interest upon the loan paid for several years; the mortgaged property insured by her, and the policy assigned to the mortgagee; a bill to relieve her from the contract cannot receive the sanction of a court of equity.

But it is no objection to such a bill, as a rule of pleading, that the husband is made a party to it with the wife. He acts only as her prochein ami.

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

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

It was argued by Mr. Crittenden and Mr. Johnson for the appellants, and Mr. Bradley and Mr. Jones for the appellee. There were also printed briefs for the appellee filed by Mr. Eustis and by Messrs. Elmore and King.

Mr. Crittenden, for the appellants, stated the substance of the case as follows:

The bill in this case was filed by the appellants, Bein and wife, to enjoin proceedings un-
229*] der a writ of seizure and sale *taken out by the appellee, Mary Heath, to sell certain property of the appellant, Mary Bein, under a mortgage from the latter, dated the 8th May, 1838, to secure two notes drawn by her in favor of her husband, and by him indorsed —the one for $10,711.71, the other for $535.59.

The complainants allege that these notes were given for a loan obtained by Richard Bein, the husband, for his own use, and which was so applied; and that in such a case, by the laws of Louisiana, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, is not binding, but void.

The answer of the appellee denies the averment of the bill as to the purpose of the loan, or the use of the money, and evidence was taken on both sides.

And then he contended—

1st. That the loan was for the exclusive use of the husband, and that it was so applied.

2d. That being for such use, and so applied, the notes and mortgage were void as against the wife, and her property; and that, consequently, the injunction prayed by the bill should have been made perpetual.

Upon the first point, Mr. Crittenden said, that Mrs. Bein was a widow when she married Bein, that she was worth $85,000 and free from debt. Her revenue was ample, as she had only two or three children. Bein was a merchant and speculator, in fact insolvent at the time of the loan, although apparently engaged in business. Soon afterwards he became openly an insolvent, and divided little amongst his creditors. In May, 1838, when the loan was made, the witnesses say he could not raise money upon his own responsibility. For whom is it likely, then, that the loan was made? The husband was surrounded with unpaid bills and pecuniary embarrassments of every description. The question is for whom the money was borrowed, and that is the only question under the Louisiana law. We do not find in the record that the wife wanted money. On the contrary, the husband was pressing Heath for the money. A lawyer was consulted, who said the loan must be made to the wife, and an effort was made to give the affair that semblance. Hence the interlineation in the mortgage. Can those written papers prevent the wife from showing the truth of the transaction? Bein paid to one person $4,000 in that same month of May, and also paid other people. But he had no means to pay them with except this loan. He owed Sherman & Co. a debt, which he paid. Not a dollar went to

NOTE.—Of obligation of married woman as surety, or guarantor, for her husband or others—rights as creditor of her husband.

Where a married woman having a separate estate executes a promissory note as surety for her husband or another, such estate is presumably charged with its payment in Ohio. Avery v. VanSickle, 35 Ohio St. 271, and in Maine, Mayo v. Hutchinson, 57 Me. 546; also in Missouri. Lincoln v. Rowe, 51 Mo. 571; Metropolitan Bank v. Taylor, 53 Mo. 444; also in Kansas and California. Wicks v. Mitchell, 9 Kans. 80; Wood v. Orford, 52 Cal. 412.

New York decisions require a distinct written obligation expressing the intention to bind her separate estate, in order to bind the wife where the debt is not contracted for the direct benefit of her separate estate. Yale v. Dederer, 18 N. Y. 265; 22 N. Y. 450; White v. McNett, 33 N. Y. 371; Ledlie v. Vrooman, 41 Barb. 109; White v. Story, 43 Barb. 124; Merchant's Bank v. Scott, 59 Barb. 641; Woolsey v. Brown, 74 N. Y. 82.

A married woman can incur obligations as surety for other persons. Com. Exchange Ins. Co. v. Babcock, 42 N. Y. 613.

Her obligation, in due form to bind her separate estate can be enforced in an action at law. Carpenter v. O'Dougherty, 50 N. Y. 660; Maxon v. Scott, 55 N. Y. 247; Manhattan Co. v. Thompson, 58 N. Y. 80; Third National Bank v. Blake, 73 N. Y. 260.

In Massachusetts, New Jersey, Georgia, Tennessee, Nebraska, and other States, the rule is more restricted, as to her liability on obligation executed by her as surety for another. Willard v. Easthman, 15 Gray, 328; Perkins v. Elliott, 7 C. E. Green, 127; Veal v. Hurt, 63 Ga. 728; Saulsbury v. Weaver, 59 Ga. 254; Robertson v. Wilburn, 1 Lea, 623; State Savings Bank v. Scott, 10 Neb. 83; Harris v. Finberg, 40 Tex. 79.

But the latest legislation in Massachusetts does not require the consideration of a wife's contract to enure to her own benefit, and her joint note with her husband, or her indorsement, binds her to quite, or nearly, the same extent as that of any single woman. Major v. Holmes, 124 Mass. 108;

the benefit of the wife. But according to the forms of the transaction, she received the mon- [*230] ey. It was paid by a check to her, which was placed in her own hands. What is the law of Louisiana in such a case? [Mr. Crittenden then cited the article 2412 of the Civil Code, and all the State authorities set forth in the opinion of the court, upon which he commented.]

Mr. Bradley, for the appellee, made the following points:

1. The loan was made to the wife.

2. She could borrow money and mortgage her property; or,

3. If not loaned to her, it was a fraud practised by the complainants on the defendant.

4. In either case she can have no relief in equity, and there is no error in the decree rendered by the Circuit Court; and,

5. This is a bill by husband and wife, respecting her separate property, in which he is indirectly charged with seeking to injure her. Their interests are adverse. It is his suit. They are improperly joined. Advantage of this can be taken at the hearing, and the bill must be dismissed.

The marriage contract shows that the wife had power to contract. Having this power, she admits that she made this contract in the most formal manner known to the laws, holding out the idea that the loan was for her benefit. We do not say that she can be a surety for her husband. The court ought to protect her in her rights, but there are also other persons to be protected, who were dealing fairly in the transaction. Can she now say that she led the other party into a snare, and that this other party must show that the money was actually expended for her sole benefit? The question is, Upon whom is the burden of proof? We say that the complainants must show that the money did not, in fact, go to her use. We have her declaration before the notary that it was so. In none of the cases which have been cited can such a formal admission be found. The books and payments of the husband cannot be admitted to contradict this notarial act of the wife. Civil Code, art. 2233–2235; 8 Martin, N. S. 693, 694; 10 Martin, 432.

The letters of Heath show that he thought he was making the loan to the wife. These letters were ruled out below, but exceptions were taken. Starkie, Ev. 57, 62–64; Story, Agency, secs. 131, 135.

The declaration of the husband was to the same effect, and he could act for his wife. Civil Code, art. 2330–2333. In this case he was her proper agent. Ibid. art. 2340, 2362, 2363; 2 Rob. 20; 11 La. Rep. 258; 7 Martin, N. S. 144.

There was collusion and fraud between the husband and wife to cheat Heath. Civil Code, art. 1841, defines fraud. 1 Story's Eq. 384, 385.

"If the other side are right in saying [*231] that the lender must look to the manner in which the money is spent, then all married women, under such circumstances, would be placed under the supervision of trustees who might be strangers. She was not a surety for her husband, because he owed us nothing. After borrowing the money, if she chose to lend it to him, she brought herself within the provision of the civil law. Ulpian, book 16, tit. 1.

Bein was insolvent in 1840, two years after the loan was made. But the interest was paid for four years afterwards.

In the admission of facts upon the record is this:

"It is also admitted that the first four years' interest on the loan was regularly paid, and that for that time the policy of insurance on the house mortgaged to secure the loan was regularly assigned, in conformity with the contract of loan.

(Signed) "R. Heath,
"R. Hunt, Complt's sol.
(Signed) "Elmore & King,
"Att'ys for Respondents."

Who paid the interest all this time? The policy, too, was made out in the name of the wife, and indorsed by her. She was returned, also, as a creditor in her husband's schedule. She must, therefore, have been acquainted with the whole affair.

But it has been said, that the decisions in Louisiana require that we should have seen that the money was expended for the wife's separate use. [Mr. Bradley here critically examined these authorities.]

In point of fact, although we are not bound to show it, the record does prove that the money was actually used for her benefit. On the 29th of May, seventeen days after the money was borrowed, Bein paid $5,500 on account of an elder mortgage, which secured a debt of $15,000 due to the wife.

On the 5th point of the brief, the misjoinder of parties, Mr. Bradley cited 1 Sim. & Stu.

Kenworthy v. Sawyer, 125 Mass. 28; Goodnow v. Hill, 125 Mass. 587.

A married woman cannot be sued at law on such a promissory note. Vankirk v. Skillman, 5 Vroom. 109.

In Louisiana a married woman may bind herself as surety for anyone except her husband. Wickliffe v. Dawson, 10 La. Ann. 48.

A married woman's promissory note does not, as a rule, secure her husband's debts, nor does she, by executing it, bind herself lawfully as his surety or guarantor, on a contract not relating to her separate estate, nor for its benefit, so as to render herself liable to suit. Lawyer v. Fernald, 59 Me. 500; Shannon v. Canney, 44 N. H. 592; Debries v. Conklin, 22 Mich. 255; Vankirk v. Skillman, 5 Vroom. 109; Parker v. Simonds, 1 Allen, 258; Keaton v. Scott, 25 Ga. 652; Yale v. Dederer, 18 N. Y. 265; Emory v. Lord, 26 Mich. 131; Schmidt v. Bestel, 63 Ill. 58; Sweazy v. Kammer, 51 Iowa, 642; King v. Thompson, 59 Ga. 380; Athol Machine Co. v. Fuller, 107 Mass. 437; Wolff v. Van Meter, 1[illegible] Iowa, 134; Sweeny v. Smith, 15 B. Mon. 325.

The same rule, nearly, applies to her undertakings for the benefit of third persons, as an accommodation indorser, etc. Shannon v. Canney, 44 N. H. 592; Crane v. Kelley, 7 Allen, 250; Kohn v. Russell, 91 Ill. 138; Bailey v. Pearson, 9 Post. 77; Lyttle's appeal, 36 Penn. St. 131; Peake v. LaBaw, 6 C. E. Green, 269; Bauer v. Bauer, 40 Mis. 61.

Where a husband actually borrows money or property from his wife with the understanding that it shall be repaid, he will be treated in equity as her debtor accordingly. Jaycox v. Caldwell, 51 N. Y. 395.

Such a loan constitutes a valid indebtedness legally enforceable against him or his estate on her behalf as a creditor. Whitford v. Daggett, 84 Ill. 144; Monroe v. May, 9 Kan. 466; Woodworth v. Sweet, 51 N. Y. 8.

She may now, by force of statute, in New York and some other States, become surety or guarantor, in some cases. Woolsey v. Brown, 74 N. Y. 82; Hart v. Grigsby, 14 Bush, 542; N. W. Life Ins. Co. v. Allis, 23 Minn. 337.

185; 2 Ib. 464; 2 Keen, 59, 70-72; 5 Simons, 551-553.

Messrs. Elmore & King filed the following analysis of the Louisiana authorities:

Darnford v. Gros and Wife, 7 Martin, 489. —Decided under the law of Toro.

Lombard v. Guillett and Wife, 11 Martin, 453.—In this case there was no proof that the husband authorized the wife to sign the note with him, nor did she sign the act of mortgage, although it was given by the husband, upon her property.

232*] *Banks v. Trudean, 2 New Series, 39. —In this case, the wife was admitted and proved to be surety for her husband. The case was decided upon the law of Toro. [Wife might bind herself with the husband, provided she renounced the law of Toro.]

Perry v. Gerbeau and Wife, 5 New Series, 10.—In this case the wife was surety.

Sprigg v. Bossier, 5 New Series, 54.—The note sued on was given for property purchased by the husband, and she was surety merely.

McMicken v. Smith and Wife, 5 New Series, 431.—The note sued on was given in part for negroes sold to the husband, and in part for a balance then due by him on another obligation to plaintiff.

Hughes v. Harrison, 7 New Series, 251.— The note sued on was given "for their and plantation use." The wife was surety merely for her husband, for part of the debt. The case was remanded, to enable the plaintiff to prove how much was for the wife's use and benefit.

Brandegee v. Kerr and Wife, 7 New Series, 64.—This action, although decided in the year 1828, was brought on a note for $1,800, dated August 31st, 1821, and due three years after date. This I know, from having examined the record in the Supreme Court. The case was consequently decided under the law of Toro, which had not been repealed before the execution of the note. The court say the husband and wife were bound jointly and severally. This made the case fall completely within the law of Toro. There was no evidence that the note was given for the wife's benefit. Upon this the court lays great emphasis, and upon it, in fact, decides the case.

The court decided, that the circumstance that she received the money was not sufficient evidence that it was for her separate use and benefit. As the law then stood, the wife was not bound at all on the contract or note; it was a nullity on the face of it. She was only bound for what was used for her separate benefit, upon a quantum meruit. Her receiving the money did not at all prove that the note was made for her separate use, or that the money was applied to her separate use.

By our law, as it now stands since the repeal of the law of Toro, there is no impropriety in a wife binding herself conjointly with her husband, provided it be not for a debt contracted by him. A husband may be surety for the wife for debts contracted for her separate benefit, and he may be bound jointly with her for such a debt. The prohibition of article 2412 does not extend, as it did under the law of Toro, to the form of the instrument, but only to a joint contract for the husband's debt.

233*] *To determine, then, whether a contract falls within the prohibition of that article 2412, two things have first to be ascertained.

First. Whether the wife has bound herself for her husband, or as his surety; and,

Second. Whether the debt was contracted by him before or during the marriage. Both of these conditions are absolutely necessary, to bring any case within the prohibition of that article.

It will be seen from the above, that the law under which the case of Brandegee v. Kerr and Wife was decided was very different from the law as it now stands. The facts differed still more widely from the case before the court. In the case of Brandegee v. Kerr and Wife, there was no evidence that the contract was the wife's; there was no notarial act showing this. As the law then stood, the check being given to her was not sufficient evidence of this. In our case, the evidence is conclusive that the original contract was made by the wife. The note and mortgage were not given for a debt of the husband, but of the wife.

Pilie v. Patin et al. 8 New Series, 693.—In this case the wife was clearly shown to have been surety merely for her husband, for a pre-existing debt due to the plaintiff, and at his solicitation gave a mortgage, in which the facts were purposely misrepresented to evade the law. This was clearly proved.

The plaintiff was a party to the whole transaction. In the case before the court, Sherman Heath believed the loan was really made for the benefit of Mrs. Bein, and that the representations enumerated in the act were true.

Guasquet v. Dimitry, 9 Louisiana, 585. This case was widely different, in all its features, from the case before the court. The court decided that a renunciation made by the wife was done for the benefit of the husband, and that the act was prohibited by art. 2412, Civil Code; that the wife was, in fact, surety for her husband.

Davidson v. Stewart et al., 10 Louisiana, 146. —In this case, the court decided, that, although the land for which the note was given was purchased in the name of the wife, yet still it was community property.

Being community property, the husband had as much right to sell or otherwise dispose of it as if it were in his own name; consequently, the price due for it was a debt of the husband's.

Firemen's Insurance Company v. Cross and Wife, 4 Robinson, 509,—In this case, the court say that the money was borrowed for the husband' benefit, that the wife never received a dollar of it, and that the plaintiffs were aware of these facts.

*It will at once be perceived that [*234 the case differed widely from our case, where there is not a particle of evidence showing that Sherman Heath knew this money was borrowed for Bein's benefit. On the contrary, the evidence shows that he believed it was for Mrs. Bein's benefit.

Maddox v. Maddox, Ex. 12 Louisiana, 14; Martin v. Esther Drake, 1 Robinson, 219; Petit Pain v. Therese Palmer, 1 Robinson, 220.—In these cases no principle was decided different from that decided in the others above cited; and they are relied on by the defendant to show that it must be proved by the evidence

whether the loan was made to the husband or the wife.

It is proper to give the views of Mr. Eustis, also, upon this subject, who filed a printed brief, as has been already stated. The following is an extract from that brief:

Some confusion exists in the decisions of the Supreme Court of Louisiana which have been made under the dominion of the Spanish laws. These laws have since been abrogated. They, however, require some explanation, so far as this subject is concerned.

The 61st law of Toro provided:—"From henceforth it shall not be lawful for the wife to bind herself as security for her husband, although it be alleged that the debt was converted to her benefit; and we do also order, that when the husband and wife shall obligate themselves jointly in one contract, or severally, the wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit, and then she shall be bound in proportion to what shall have been so applied." 7 Martin, 489; Novissima Recopilacion, 10, 11, 3.

By the laws of Spain, the wife could bind herself jointly and severally with her husband, provided she renounced this law, in which case [of renunciation], to render her liable, it was not necessary to prove that the debt inured to her benefit. Banks v. Trudeau, 2 Martin, N. S. 40.

Wives were not bound by agreements entered into jointly, or jointly and severally, with their husbands, unless it be shown that they have renounced those laws made for their protection, or that the contract has been profitable to them. Perry v. Grebeau et ux. 5 Martin, N. S. 19.

In the case of Darnfcrd v. Gros and Wife, cited 7 Martin, 489, the court held that this law of Toro was not repealed by the Civil Code of 1809, which contained no repealing clause, and no provision incompatible with this law.

But the Civil Code of 1825, which is now in force, contained a general repealing clause art. 3525*] 3521, which abrogated the *Spanish laws, and among the rest this law of Toro. A subsequent statute destroyed every vestige of the Spanish laws, that is, the laws as contradistinguished from the jurisprudence. The Civil Code, which repealed this provision of the law of Toro, re-enacted it, but without the exception concerning the burden of proof; thus, in article 2412, it is provided, that the wife, whether separated in property from her husband or not, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. That is, in other words, the wife cannot be the surety of the husband.

The effect of the repeal of the law of Toro would undoubtedly leave the wife entirely at liberty to charge her separate estate, except as prohibited in the article 2412, and in all cases the proof would rest upon the general principles of the law of evidence.

The Supreme Court of Louisiana have never considered or adjudicated on this subject of the repeal of the law of Toro; it was never presented by counsel in the different cases cited by the defendant's counsel.

The cases antecedent to and including that of *Brandegee v. Kerr and Wife, 7 Martin, N. S. 64*, were all decided under the law of Toro. This case, though decided in 1828, was on a note dated the 31st of August, 1821, and consequently regulated as to its obligations by the law under which it was made.

If we look back to the reason and origin of these laws which prohibit women from contracting, it will be found that they were made for the purpose of preventing the weakness and good faith of women from being surprised, but were never held to reach a case where any indirection or equivocation of conduct should be apparent; still less, one in which the exemption of the woman from responsibility would produce the grossest injustice. Such was the sense of the Roman laws on this subject, and such has been their interpretation, in modern times, in those countries in which the Roman jurisprudence is adopted.

Merlin says expressly, that if the wife make use of any deceit or fraud, the privilege of the senatus velleianum is denied to her, which is intended to protect good faith, and can never be made to cover any obliquity of conduct. Merlin, Rep. de Jurisprudence, Vol. XXX. p. 349; verbo, senatus consultum Vellein.

The decisions relied upon by the complainants are believed to turn upon the question of fact, whether the debt was or not that of the husband. If it was the husband's debt, the wife *could not bind herself to pay it. [*236 The article of the Code is positive. But if the debt was hers, there is a valid obligation on her part to pay it out of her separate estate.

In Louisiana, the law considers marriage, so far as relates to property, as a civil contract only. Civil Code, tit. 4, art. 87.

Parties may regulate their rights as to property, during marriage, as they please, provided certain rules of public policy are not violated thereby. Civil Code, art. 2305.

The wife is under no disability of contracting with the consent of her husband. Civil Code, art. 124.

The matrimonial conventions of the parties must be made before marriage; but the husband, during marriage, may convey to the wife property to replace that which may have been alienated by him, as was done in this case. Record, pp. 43, 44.

By the Roman law, no effect was produced by marriage on the property of the parties which they possessed at the time of marriage, unless the contrary was provided by an express stipulation. Institutes of the Roman Law, by Mackeldey, sec. 516.

There was no fictitious confusion of persons produced by marriage; it was an institution which raised the wife to the rank of the husband, and rendered her children legitimate. Ibid. 515.

The dotal property was transferred to the husband, but that which was not so transferred remained under her absolute and unlimited control. Ibid. 517, 529.

Here, then, we have a party, laboring under no disability whatever, who has made a contract. Is this contract within the prohibition of article 2412? Did she bind herself for her husband's debt, or for her own? Like every other question of fact, this must be solved by the evidence. So far as the complainant is concerned, it is obvious that she and her agent

money, in good faith, to Mrs. Bein, o her husband. Her husband was in- t the time; who, therefore, would lend cy? We find part of the money loaned to the extinguishment of an incum- of an estate, which, for all the purposes inquiry, must be considered as hers. the 12th of June, 1838, in the act of er of the Nayades Street property from usband, the Hobson mortgage for $15,000 ntioned as existing on the property, which husband binds himself to have released. application of part of the money borrowed n the complainant to the extinguishment of s mortgage is proved by the concurrent tes- hony of several witnesses. Sewell and Wife Cox, MS. case.

237*] *In the embarrassed and complicated tate of the affairs of the husband, it is in the power of no one but himself to trace with cer- tainty the result of any single payment, so as to ascertain who was, or who was not, ulti- mately benefited by it. But that this was the debt of his wife, and not his, and that by no use of the money on his part did either the complainant or his wife become his creditor, we have his solemn oath, made under the pen- alties of the Bankrupt Act.

We have the declarations and the acts of the parties themselves, coincident with their re- spective obligations, which, in a matter of equity, is surely conclusive in a case where no duress or deception is even alleged.

Mr. Johnson, for the appellants, in reply and conclusion:

The case divides itself into the following points:

1st. For whom was the loan made, and to whose benefit did it inure? Not to whom it was made, but for whom. This is a question of fact.

2. Whether, if made for the husband, and inuring to his benefit, the contract is void. This is a question of law.

This latter point gives rise to the two following subdivisions:

1. On which party the onus probandi rests to show the nature of the loan. And,

2. If that onus is on the wife, whether she has not sufficiently shown that it did not inure to her benefit.

1st. For whom was the loan made? Many facts in the case are not disputed. One of them is, that from the middle of 1837, to May, 1838, the husband was insolvent and unable to borrow. The answer says that Heath would not have loaned the money to him. When Bein became openly insolvent, he had no as- sets. It is a fact, also, which cannot be dis- puted, that the record does not show a single word to have passed between the wife and the lender, or between the wife and Smith, the at- torney. She never spoke at all except through the mortgage. Smith says he warned Heath, but it does not appear that he cautioned Mrs. Bein, or informed her of her rights. Mr. Bein brought to the office, and he said every- said. What became of the hands of the hus- ained for his

ceived every cent of the money. The amount of the loan was $10,711.71. In the schedule is the following:

Names of creditors.	Residence.—Nature of debt.	Amounts.	Remarks.
Mrs. Mary Bein.	New Orleans.—for amount received from sale of house, Canal Street.	$ 18,750.00	
	Amount received from sale lot, Union Street.	6,960.00	
	Amount of money received by sale	10,711.71	
	By amount refunded by sale Nayades Street.	90,000.00	
	By or house on Nayades Street.	10,000.00	
	Less her assumption of bond to Bank of Louisiana.	18,000.00	
		654.18	
		2258.12	
		118.00	
		35.00	
		117,040.35	96,440.71
	Balance due Mrs. Bein.	19,401.36	
	Am't of R. A. Martin's draft.		
	" of O. Osborne's account.		
	" M. Connoher's account.		
	" James Varin's do.		

The amount of money received by him from Mrs. Bein, being exactly that of the loan, shows that it was the same money. Moreover, the counsel upon the opposite side put the follow- ing cross-interrogatory to the brother of Mr. Bein.

"Cross-interrogatory 8th. Have you never known Richard Bein to represent that this money was borrowed from some one else than the person you have named? If yes, from whom did he represent that it was borrowed?"

To which the witness answered:

8th. To the eighth he answers, that he never knew said Richard to represent said money, or any money, as borrowed at that time, May, 1838, from any one else than from Sherman Heath."

The counsel on the other side have made th answer evidence.

[Mr. Johnson then entered into arithmeti calculations, from parts of the record, to sh that this money was totally lost to Mrs. Be

2d. Is not such a contract void by the of Louisiana in force after the repeal o law of Toro? The policy of these laws i dent. They are not to protect the wife a strangers, with whom she might contra against the arts of the husband, agai fraud or force. He might induce her tract in her own name, and this is what intended to prevent. A similar princ vails in other States, where a private ation of the wife is required. But th Louisiana intended to strike deeper a the evil by avoiding the cont substance of the law

preserved. It is made the duty of the lender to see where the money goes. 7 Martin, 489. 239*] Both *laws make the illegality of the contract depend upon the application of the money. If this construction is not given to the present law of Louisiana, the protection thrown around married women is destroyed altogether, because the husband may induce them to assume any form of contract.

[Mr. Johnson here entered into a critical examination of the Louisiana cases, to show that they made the contract stand or fall by the fact, to whose benefit the loan inured.]

Upon the point whether there was a misjoinder in the bill, Mr. Johnson read and remarked upon the cases in Sim. & Stu. 185; 2 Ib. 464; 2 Keen, 59, 70; where the whole practice of the court is stated.

Mr. Justice McLean delivered the opinion of the court:

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

The bill was filed by the appellants, Bein and wife, to enjoin proceedings under a writ of seizure and sale taken out by the appellee, Mary Heath, to sell certain property of the appellant, Mary Bein, under a mortgage from the latter, dated 8th of May, 1838, to secure two notes drawn by her in favor of her husband, and by him indorsed—the one for $10,711.71, the other for $535.50.

These notes, the complainants allege, were given for a loan obtained by Richard Bein, the husband, for his own use, and which was so applied; and that in such a case, by the laws of Louisiana, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, is not binding, but void.

The answer of the appellee denies the averment of the bill, as to the purpose of the loan or the use of the money.

It is objected, that, the suit being brought in the name of the husband and wife, it must be considered the suit of the husband, and that a decree would not bind the wife.

On looking into the bill, it appears that the name of the husband is used only as the prochein ami of his wife. He asks no relief. The wife prays an injunction against the sale of the mortgaged property, and a recission of the mortgage and notes, and a release from all liability thereon. The bill was sworn to by the wife, and a rule was entered on the attorneys of the defendant, to show cause why the injunction should not be granted in favor of Mary Bein, and at a subsequent day the writ was granted. An injunction bond was given by the wife, with security, the name of the husband being used only as authorizing the wife to execute the bond. And so throughout the proceedings the wife is treated as the party in interest, the name of the husband being formally used.

240*] *Where the wife complains of the husband, and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice, within the discretion of the court. It is sanctioned in the 63d section of Story's Equity Pleadings, and by Fonblanque. The modern practice in England has adopted a different course, by writing the name of the wife with a person other than her husband, in certain cases. From the frame of the bill, no doubt is entertained that the decree will bind the wife.

Prior to the marriage of Bein and wife, they entered into a marriage contract, in which it was stipulated that neither should be liable for the debts of the other; and each reserved the right of selling and disposing of their property, after marriage, as they might deem proper, with the consent of the other. The wife brought into the marriage, and settled upon herself, as stated, property, real and personal, estimated to be worth eighty-eight thousand six hundred and thirty-five dollars. This contract was entered into in accordance with the Louisiana law.

The loan was negotiated on the 8th of May, 1838, at which time it is proved that Richard Bein was known to be much embarrassed, and, as it appears in proof subsequently, was actually insolvent. In the act of Mortgage, Mrs. Bein declared that she was justly indebted unto Sherman Heath in the full sum of ten thousand seven hundred and eleven dollars and seventy-one cents, being a loan of money made to her, and for her sole benefit, etc. This act had all the sanctions required by law. On the 10th of the same month, a check, payable to Mrs. Mary Bein, or order, for the above sum, was drawn by S. Heath & Co. on "The Citizens' Bank of Louisiana," and handed to Mrs. Bein.

It appears that Heath had knowledge of the embarrassments of Bein, and consulted J. W. Smith, a lawyer, who is a witness, how the loan could be legally made. He was informed that it must be made for the sole benefit and use of the wife, and that the husband should not be interested in or benefited by it. Heath stated that the money belonged to his mother, and he did not wish to receive more than the legal interest, for fear of difficulty; and that he had rather loan the money to Mrs. Bein, believing it to be safe, than to let other persons have it at higher rates. Afterwards, Heath and Bein being present, the witness stated to them that the loan would not be legal unless it was for Mrs. Bein's sole use and benefit; "that no loan could be made legally to him under cover of a *loan to his wife, and that it must be [*241 a bona fide contract with Mrs. Bein." Bein then, in the most positive manner, informed Heath that the proposed loan was a real bona fide loan to Mrs. Bein, that there was no cover or concealment about it. Witness examined the act of mortgage, and filled up the check and handed it to the notary.

For nearly five years Mrs. Bein paid the interest on the loan, kept the property insured, and assigned the policy annually.

On the 2d of April, 1840, Richard Bein filed his petition for the benefit of the Insolvent Act, attached to which was a schedule of his debts; and among others, a debt due to his wife for the same amount above loaned to her. It appears that Bein paid several debts of large amounts shortly after the loan was negotiated, but, independently of his own statements, there is no positive evidence that these payments were made with the money loaned.

The article 2412 of the Civil Code of Louisi-

and declares, "The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

Under this law, a mortgage given by the wife to secure a loan made to the husband, or to the wife covertly for his use, is void. As the loan in question was made to the wife, which appears from the mortgage and the check for the money, a question in the case is, whether these forms were adopted to charge the wife, in fraud of the law, for the benefit of the husband.

No fraud or mistake is alleged in the bill. The complainant states that the loan was made by her husband for his benefit, that she became his surety in violation of the law of Louisiana, and was induced, contrary to her wish, to mortgage her property for the payment of the money. On these grounds, the court are asked to declare the mortgage void.

If this bill be sustainable, it must be on the peculiar provisions of the Louisiana law. In ordinary cases it would be demurrable. Where a feme covert, by the forms of law, has conveyed her property, she can avoid the effect of such conveyance only by showing mistake or fraud. And this must be alleged in the bill. On ordinary principles, an individual is estopped from denying a fact which he has admitted in a sealed instrument.

In making the loan, Heath acted with great caution. He was agent for his mother. He proceeded under legal advice, and consummated the agreement in the presence of his counsel. Bein was known to be irresponsible; conse-
242*] quently Heath *did not rely upon him for payment. The acts of Heath in negotiating the contract, and the account he gave of it, all show that he acted in good faith, and in full confidence that the loan was made to Mrs. Bein. The mortgage was executed by her, under the most solemn declaration "that the money was borrowed for her benefit"—her attention being specially directed to the clause of the mortgage which so declares, as appears from a marginal note—sanctioned by the notary, and signed also by other persons. And the check for the money was paid to the mortgagor.

From these facts it is clear that Heath is not chargeable with collusion. And there is nothing on the face of the contract to excite suspicion. On such a transaction, the mortgagee may well stand and claim the benefit of the security until it shall be impeached by the mortgagor. This is attempted to be done, not by proof of fraud or mistake, but on the ground that the loan did inure to the benefit of the husband, and not to the benefit of the wife. This is a matter subsequent to the contract, and involves the inquiry, whether the person making a loan, with the utmost fairness and caution, to the wife, must, to charge her, see that the money is applied to her use.

The article, which declares that the wife cannot become the surety of her husband, does not superadd the above important condition as to the application of the money. It is not in the law, unless it shall have been put there by judicial legislation. The fact that the money borrowed was paid to the husband or was used for his benefit, as a matter of evidence, may be proved to show the character of the transaction. And, connected with other facts, it may conduce to establish collusion or fraud. But to treat this supposed requisite as a matter of law, under the above article, would violate every known rule of construction. With this general remark, we will examine the Louisiana decisions on this point.

The case of Brandegee v. Kerr and Wife, 7 Martin, N. S. 64), in facts and principle is said to be similar to the one under consideration. That was an "action on the note of the wife indorsed by the husband, alleged to have been received from the wife on a loan made to her by a check delivered to her." And the court say, "that the circumstance of the wife having a separate advantage in the contract, being of the essence of her obligation, must be proven by some other evidence than proof of her having touched the money." And in conclusion they say, "Being of opinion that there is no fact in evidence from which it is possible to infer that the plaintiff's money was employed for the separate use of the wife," etc., "we conclude that the wife is not bound." The court also say, "We cannot distinguish *this [*243 paper from a note joint and several of husband and wife, for they are bound jointly and severally, and the plaintiff has prayed for a judgment joint and several."

It must be admitted, that the court, in the above case, consider proof of the application of the money to the use of the wife as essential to bind her. And unless that case, in its facts or the law under which it was decided, shall be shown to differ from the facts and law of the case under consideration, it will constitute a rule of decision in this case.

If this action were on the notes given by Mrs. Bein and indorsed by her husband, in that respect, and also in the payment of the money to the wife, the cases would be similar. But in the case before us, the action is on the mortgage, in which there is no liability of the husband, and no decree is asked against him. It is true, notes were given similar to that given in the case cited, but the notes of Mrs. Bein, though indorsed by her husband, must be considered as connected with the mortgage which explains the nature of the transaction. And in addition to this, there is evidence that the contract was made with Mrs. Bein, under the strongest assurance that the loan was made for her sole benefit, and under a full conviction by Heath that it was so made. In these important particulars, there is a difference between the cases. The case cited seems to have rested on the face of the note and the check.

But still the ground, as to the application of the money, remains unanswered.

In the above decision, the case of Darnford v. Gros and Wife, 7 Martin, 465, is cited, and it is the only authority referred to in the opinion of the court. The decision in that case was founded on the 61st law of Toro. It is cited by the court as follows: "From henceforward, it shall not be lawful for the wife to bind herself as security for her husband, although it should be alleged that the debt was converted to her benefit; and we do also order, that when the husband and wife shall obligate

themselves jointly in one contract, or severally, the wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit, and she shall then be bound in proportion to what shall have been so applied." "But if the debt so applied to her use served only to procure that which her husband was obliged to supply her with, such as food, clothing, and other necessaries, then we say that she shall not be bound in anything."

The above action was founded on a promissory note subscribed by the wife cojointly with her husband. And the court say, "that the restriction imposed by the Spanish laws on the obligations contracted by the wife jointly with 244*] her husband *has not ceased to be in force, and that, according to it, when the creditor wishes to compel her to the performance of such an obligation, he must prove that the debt was converted to her benefit."

The law of Toro was repealed, with all other Roman, Spanish, and French laws in Louisiana, in every case provided for in the Civil Code by article 3521. The Civil Code was adopted in 1825. But as the case first cited, of Brandegee v. Kerr and Wife, was decided in 1828, after the repeal of the law of Toro, it is contended that the decision could not have been governed by that law. But it seems, from the statement of one of the counsel, that the contract was made under that law. The reference to the case of Darnford v. Gros and Wife shows, as above stated, that the decision against Kerr and wife was made under the law of Toro. This appears clearly from the language of the court.

Great reliance is placed on the case of The Fireman's Company v. Julia Louisa Cross, 4 Robinson, 509. That action was instituted on a promissory note for $7,000, drawn by the defendant, and secured by mortgage on her paraphernal property. It was proved "that no portion of the money loaned was ever paid to the defendant, but that it was paid by the plaintiffs to different persons on orders given by the husband."

The facts in that case show that the wife was the surety of the husband. And the court very properly held, that such proof was admissible, although in the mortgage the wife stated the loan was made to her. Article 2256 declares "that parol evidence shall not be admitted against or beyond what is contained in the acts," etc. But this was held not to apply to contracts made in fraudem legis.

In their opinion the court say: "We are satisfied that the money borrowed was intended for, and was applied to the use of the defendant's husband." "This case," they observe, "is much stronger than that of Brandegee v. Kerr and Wife, in which it appeared that the wife had actually received the money, but there was no proof of its having turned to her separate advantage.

The citation of the case against Kerr and wife is a seeming sanction of the ground on which that case was decided. But the case before the court did not turn upon the application of the loan, as it was clear that the husband received the money, and applied it, by orders on the plaintiffs, to the payment of his own debts. This shows the intent with which the loan was made, and also that the facts were known to the plaintiffs. The reference seems to have been made to the case of Kerr and wife generally, without adverting to the law under which it was decided.

*Of the same character was the case [*245 of Pascal v. Sanvinet et al., decided in 1846, and reported in manuscript.

The husband and wife, by a decree, were separated in property, after which she delegated to him extensive and general powers for the management and administration of her affairs. Two years after this, the husband, under this power, executed the notes and mortgage in question, "stating in the act that the sum was due by his wife, in consequence of a loan made to her by the defendant, and which he, as her agent, acknowledged to have received." And the court say: "There is no proof that any part of this loan passed into the hands of the plaintiff, or that it was applied or turned to her benefit. She was not personally present at the execution of the act, and is not shown to have been aware that the loan had been made or the mortgage granted."

From these facts, there would seem to have been no mode by which the wife could be bound, except by showing that the money was applied to her use. This, on being shown, would, it is supposed, have confirmed the agency. It would have established the bona fide character of the act done by the husband. As a matter of evidence, then, to explain the nature of the transaction, proof that the loan accrued to the benefit of the wife was necessary to bind her.

It must be admitted, that the general language of the court covers the ground assumed by the counsel for the appellant. They say: "It has been settled, by repeated decisions of the late Supreme Court, that it is incumbent on the party claiming to enforce the contract of a married woman to show that the contract inured to her separate advantage." And they cite the case of Brandegee v. Kerr and Wife, and repeat, "That the circumstance of the wife, having a separate advantage in the contract, being of the essence of her obligation, must be proved.

In answer to these remarks, it may be said that the case turned upon the suretyship of the wife, and not upon the application of the money. The act was done by the husband without the knowledge of the wife, which shows that it was done for his benefit.

It was held (2 Martin, N. S. 39) that the wife may bind herself jointly and severally with her husband, provided she renounces the law of Toro in due form. And that, when this is done, the creditor need not prove that the engagement turned to her advantage. But she cannot bind herself as surety for her husband, not even by binding herself in solido with him. That decision was made in 1823.

In Gasquet et al. v. Dimitry, 9 Louisiana, 585, it was held, "where the wife signs an act of mortgage with her husband, *given to secure a debt for his benefit, [*246 in which she renounces formally all her rights, privileges, and mortgages on the property, ceding and transferring them to her husband's creditor, was a contract entered into by the wife conjointly with her husband, binding herself for his debt, which, being prohibited by article 2412, was void."

The court in their opinion say: "The counsel for the appellant, in support of the position, that the agreement on the part of the wife to renounce her claims on the mortgaged property is null and void, relies upon article 2412." After citing the article, they observe: "The question thus presented is to be decided by us without reference to the laws of Toro, which have no longer here the force of laws, and independently of former decisions of this court while guided by the Spanish jurisprudence; but we are called on to say what, in our opinion, is the law of the land on this subject, as established by the code standing by itself."

On a rehearing of the above case, the court held that the wife was the surety of the husband, within "the sense of article 2412, and that the act was consequently void." And it appears that the Legislature, being dissatisfied with the decision, passed an act declaring "that married women aged twenty-one years shall have the right to renounce, in favor of third persons, dotal, paraphernal, and other rights," in a certain form, etc.

In the case of E. Monfort v. Her Husband, 4 Robinson, 453, it was held, "that the purchaser of dotal property, legally alienated, has nothing to do with the investment of the proceeds, and that the husband alone has the administration of the dowry. If he misapplies it, there is a lien of the wife on his property."

The law of Toro declared: "The wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit." In reference to this provision, the court said in the case of Darnford v. Gros and Wife, above cited—"Whether that restriction was attended with inconvenience is not for us to consider. Our duty is to declare the law, not to modify it." But that law being repealed, and another substituted in its place, declaring only "that the wife should not be bound as the surety of the husband," it is not to be supposed that a citation of decisions made under the law of Toro by the court, in cases where the wife was clearly the surety of the husband, was designed essentially to modify the substituted act. That, in many cases, as a matter of evidence, to charge the wife, it may be necessary to prove that the loan was applied to her use, may be admitted. But, 247*] under the above article, *we think that such evidence cannot be required as a matter of law. The cases cited did not turn upon that ground.

But there is another view arising from the facts of this case, which will now be considered.

This is a suit in chancery, and it is governed by the general principles of such a proceeding. No new principle is introduced to affect the relation of the parties, or to modify rights growing out of their contract.

It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity. And we suppose that this principle applies to the case under consideration. A feme covert, acting on her own responsibility, under the liberal provisions of the Louisiana law, may act fraudulently, deceitfully, or inequitably, so as to deprive her of any claim for relief. The results from the capacity to make contracts with which the law invests her.

Heath, the agent, as has already been said, acted in good faith. He proceeded deliberately, under legal advice, and there is no ground to charge him with unfairness or collusion against Mrs. Bein. Assurances were made to him, in the presence of his counsel, by Bein, acting in behalf of his wife, that the loan was for her; that it was bona fide, and without any concealment. Resting upon these and other assurances, the contract of loan was made, the mortgage was executed by Mrs. Bein, and the money paid by Heath to her, under the direction and sanction of his counsel. Now, if these representations were false, and Heath was thereby induced to part with the money, can the complainant have a standing in equity?

Such a proceeding would be fatal, it is supposed, under the law of Toro. For if it were admitted, that, to make the loan binding on the wife, it must be proved to have inured to her use, yet if, through the fraudulent intervention of the husband, she negotiated the loan, giving to it her special sanction, equity would not relieve her. A doctrine contrary to this would enable the wife to practice the grossest frauds with impunity.

For nearly five years after the loan, the interest was punctually paid by Mrs. Bein, the house and lot were insured, and the policy annually assigned for the benefit of the mortgagee. These facts, connected with the representations which induced Heath to loan the money, show, if the loan was in fact for the husband, a deliberate fraud on her part. Under such circumstances, we think the complainant cannot invoke the aid of a court of chancery. She has acted against conscience, in procuring *the funds of the mortgagee. The law [*248 protects her, but it gives her no license to commit a fraud against the rights of an innocent party.

In the repeal of the law of Toro, and in substituting in its place article 2412, the Legislature gave the most unequivocal evidence against the policy of that part of the repealed law which required proof to charge the wife that the money borrowed was applied to her use.

But in affirming the decree of the Circuit Court we place our opinion upon the unconscientious acts of the wife.

The decree of the Circuit Court is affirmed.

Order.

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

JOHN D. BOWLING, Plaintiff in Error,
v.
JILSON P. HARRISON.

Note—where indorser lives in same town where note is payable, notice must be personal—usage, evidence of—Mississippi.

Where the holder of a protested note and the party entitled to notice reside in the same city or town, notice should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business.

The term "holder" includes the bank at which the note is payable, and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest.

A memorandum upon the note, and that the "third indorser, J. P. Harrison, lives at Vicksburg," was not sufficient to go to the jury as evidence of an agreement upon his part to receive notice through the postoffice.

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

It was a suit by the indorsee, of a promissory note against the indorser. Bowling, the indorsee, lived in Maryland, and Harrison, the indorser, in Mississippi.

The note was as follows:

$5,800. Vicksburg, November 26, 1836.

Two years after date, I promise to pay to the order of W. M. Pinckard five thousand eight hundred dollars, for value received, negotiable and payable at the office Planters' Bank, Vicksburg.

(Signed) A. G. Creath.

249*] *Indorsed: "Pay Pinckard and Payne, or order. W. M. Pinckard." "Pay J. P. Harrison, or order. Pinckard and Payne." "Pay John D. Bowling, or order. J. P. Harrison."

At the foot of said note, and on the face thereof, was the following memorandum: "Third indorser, J. P. Harrison, lives at Vicksburg."

At May Term, 1840, suit was commenced by Bowling against Harrison, and the cause came on for trial at May Term, 1842. The jury, under the instructions of the court, found a verdict for the defendant, when the following bill of exceptions was taken by the counsel for the plaintiff:

Bill of Exceptions.

The plaintiff proved, by Alexander H. Arthur, a witness, who was sworn, that said memorandum was in the handwriting of the defendant, J. P. Harrison, and thereupon said memorandum was read to the jury. The plaintiff then proved, by said Arthur, that said note was deposited in the office of the Planters' Bank at Vicksburg, Mississippi, on the 29th day of November, 1838, for collection, and that on that day the 29th day of November, 1838, he demanded payment thereof of the teller of said bank, who refused to pay the same; that on the same day he deposited in the postoffice at Vicksburg a written notice of the nonpayment of said note, directed to said defendant, Jilson P. Harrison, informing him of the nonpayment of said note. The said witness further stated, that he acted as the agent of the Planters' Bank in making demand of payment, and giving notice of nonpayment of said note. Said witness further stated, that Jilson P. Harrison, the defendant, lived in the town of Vicksburg, in which is and was the office of the Planters' Bank, when the note sued on was payable at the date of the maturity of said note. That for several years prior to the maturity of said note, it had been the usage of the Planters' Bank at Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note appointing some place at which notice would be received; and if there was a memorandum on the note designating a place where notice was to be served, then the notice was left at such place. That this usage applied to notes discounted or deposited in bank for collection. That the language of these agreements was generally as follows: "Indorser will receive notice at Vicksburg postoffice," etc., though sometimes they were in the language of the one attached to the note sued on; that seeing the defendant's name written at the foot of this note sued on, he supposed it to be an undertaking on his part to receive notice through the Vicksburg *postoffice according to the [*250 usage of the bank, and accordingly gave him notice of the nonpayment of the note, by depositing the same in the Vicksburg postoffice, addressed to him at Vicksburg, and that he gave no other notice of the nonpayment of the note to defendant. This being all the evidence in the cause, the court instructed the jury, that to charge an indorser, if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by the custom and usage of the bank at which the note is made payable, notice of nonpayment was left at the postoffice. That the memorandum attached to the note sued on was not a sufficient agreement to receive notice at the postoffice and dispense with personal service on the indorser. The court further instructed the jury, that the custom and usage of the bank, as proved in this case by the witness, Arthur, was not sufficient to dispense with personal notice. To which opinion of the court, the plaintiff, by his attorney, excepted before the jury retired from the box, and presented this his bill of exceptions, and prays that the same be signed, sealed, enrolled, and made a part of the record in this cause, which is done accordingly. J. McKinley. [Seal.]

Upon this exception the case came up to this court.

It was argued by Mr. Jones for the plaintiff in error, and by Mr. Crittenden and Mr. Fendall for the defendant.

Mr. Jones, for the plaintiff in error:

The single objection, and the only question raised in the court below, turned on the point of diligence in the matter of serving the notice on defendant.

Upon this evidence, the court below delivered the following instructions to the jury.

NOTE.—Bills and notes—as to usage as controlling and varying demand, notice and days of grace, see note to 6 L. ed. U. S. 512.

Banking customs as to demand and notice, see note to 21 L. R. A. 441.

As to notice of demand and nonpayment, when and how given, see note to 5 L. ed. U. S. 215.

As to its being immaterial whether the indorser receives notice or not when due diligence is used in sending it, see note to 11 L. ed. U. S. 1000.

1. "That to charge an indorser, if he lived in the town where the note was payable, the notice must be personal, unless he had agreed to receive it elsewhere; or unless, by the custom and usage of the bank where the note was payable, notice was left at the postoffice."

2. "That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the postoffice, and to dispense with personal service on the indorser; and that the custom and usage of the bank, as proved in this case, was not sufficient to dispense with personal notice."

Against these instructions the plaintiff contends—

1. That the rule, allowing service of the no- [*251 tice through the *postoffice, is quite erroneously enunciated in the first of said instructions; which vitiates that mode of service, because the indorser lived in the same town where the note was payable. He insists, that, as the indorser and indorsee had their separate residences in different towns and States, the precise relations between the parties existed, and all the circumstances concurred, which were proper and necessary to bring the case within the very terms of the rule allowing service of the notice through the postoffice; that the postoffice at Vicksburg, where the indorser lived, was the proper and only postoffice to which the notice could have been sent for delivery, within the terms of the rule; and that the circumstance of the bank where the note was payable happening to be situate in the same town was utterly immaterial.

2. Had it been necessary (and we hold it clearly unnecessary) to invoke the aforesaid memorandum and the bank usage in support of the notice through the postoffice in this case, then we should insist that the aforesaid memorandum, with the aforesaid evidence of the bank custom and usage, was sufficient and proper to be left to the jury as evidence, to be weighed and considered by them, of the defendant's consent to waive personal service of the notice, and to receive it through the postoffice; consequently, that such evidence was far too peremptorily ruled out, and the instructions so ruling it out trenched very far within the true boundaries of the jury's province and function.

Mr. Crittenden, for the defendant in error, said that it was not proved where the plaintiff lived; but the place of his residence was a matter of no consequence. The rule as to parties referred to the parties to the note, and not parties to the suit.

For the insufficiency of the notice, he referred to Bank of Columbia v. Lawrence, 1 Peters, 583; Williams v. Bank of the United States, 2 Ib. 101; Wilcox, etc., v. McNutt, Howard, Miss. Rep. 776; 6 Ib. 615; Ireland v. Kip, 10 Johns. 490; 11 Ib. 231; Smedes v. Utica Bank, 20 Ib. 372; 7 Howard, Miss. Rep. 565.

With respect to the rule having been dispensed with by agreement of parties, it is evident that the person who gave the notice was misled. He supposed that it was an agreement that it should be sent through the postoffice; but it cannot be so construed, nor would a jury be justifiable in putting such a construction upon it. The court, therefore, was right in withholding the evidence from the jury.

*Mr. Fendall, on the same side: [*252

In this case, two questions are presented by the record. The first is, Was the notice sufficient in law? The second is, If the notice was not sufficient in law, is it made sufficient by any lawful usage, or by any agreement between the parties?

As to the first question. It is not denied, on the other side, that where the party entitled to notice and the holder reside in the same place, notice must either be given to the party entitled to it personally, or must be left at his dwelling or place of business. But, it is said, in this case, Bowling, the holder, resided in Maryland, and Harrison, the party entitled to notice, at Vicksburg; and that, the parties thus residing in different places, the notice sent through the postoffice is sufficient.

It is a good answer to this, that the record does not show that Bowling and Harrison did reside at different places. It describes Bowling as a "citizen of the State of Maryland," which he may have been, and yet have been residing at Vicksburg when the note was dishonored. The judicial presumption arising from the record is, that he was then residing at Vicksburg. A fact so important, according to the argument on the other side, as his residence at a different place, and so capable of being proved, would, it may be fairly supposed, have been proved, if it existed.

But another and a conclusive answer is, that the Planters' Bank, the agent for collecting the note, was in Vicksburg, the place where Harrison resided. The note was made payable at the Planters' Bank at Vicksburg, where it was the duty of the holder to be, and demand payment. He was there, either personally or by his agent, who resided in Vicksburg, and did demand payment at the bank. The notice given by the collecting bank, being an act within the scope of its agency, was the act of Bowling, the holder of the paper. "For all the purposes of the law, the agent or banker is, in such cases, treated as substantially a distinct and independent holder. Indeed, upon any other ground, it would be impracticable for the real holder, in many cases, to make due presentment, and give due notice of the dishonor of the note, so as to charge the antecedent indorsers, especially if he lived at a distance from the place where the presentment and dishonor took place." Story on Promissory Notes, sec. 326, 2d ed.

The general rule on the subject of notice is so well settled, that, even were it merely arbitrary, public policy and commercial convenience require that it should be strictly observed. But it is not arbitrary. It rests on a sound principle. "The object of the notice is to afford an opportunity to the drawer to obtain security from those persons to whom they are entitled *to resort for indemnity." 3 [*253 Kent's Com. 107, 2d ed. It follows, as a corollary to this proposition, that the notice should be early, and either personal to the party entitled to it, or sent to the place where he is most likely to receive it promptly. As he is presumed to be habitually at his dwelling and place of business, and may not go or send regularly to the postoffice, a notice left at one or the other of the former places is more likely to reach him, and to reach him promptly, than

when left at the postoffice. Hence the general rule, that the notice must either be personal, or be left at the dwelling or place of business of the party noticed. "The law," says Judge Story, "requires that the notice should be either personal; or at the domicil or at the place of business of the indorser, so that it may reach him on the very day on which he is entitled to notice." Story on Promissory Notes, sec. 322. So far is the doctrine carried in England, that notice must be given at the earliest moment, "omissis omnibus aliis negotiis," and so as, if practicable, to be actually received, that, "in some cases where the indorser's residence is unknown, but he is known to resort during certain hours at a certain place, as at the Royal Exchange, the Bank of England, Corn Exchange, or any public office, the notice ought to be given during those hours." Chitty on Bills, 516, 8th Am. edit. ch. 10. Where the party noticing and the party noticed reside in different places, the law allows the notice to be sent by post; but one reason of this is, that, in many cases, the notice will be sooner received by post than if otherwise conveyed. The adjudged sufficiency of a notice sent through a letter carrier or penny post, though the parties reside in the same city or town, has been sometimes treated as a relaxation of the rule, or an exception to it. It is so, however, only apparently; the letter carrier or penny post being treated merely as an agent or messenger for delivering the notice. Story on Promissory notes, sec. 323.

The general principle is not affected in its application to this case by the authorities cited on the other side. In The Bank of Columbia v. Lawrence, 1 Peters, 584, the question was as to the sufficiency of a notice sent by mail to a person residing in a place different from that where the demand was made. In Williams v. The Bank of the United States, 2 Peters, 101, the question was, whether notice left, under certain circumstances, at the house of a neighbor of the party noticed, was sufficient. In Miller v Hackley, 5 Johns. 375, the parties resided in different places. So, too, in Munn v. Baldwin, 6 Mass. 316, in which it was held that notice sent by mail was sufficient; and that putting a notice in the post-
254*] office is conclusive *evidence of notice. So, too, in Cuyler v. Nellis, 4 Wend. 398, the parties resided in different places; and there being two postoffices in the place where the noticed party resided, having distinct designations, it was held that a notice sent by mail, and directed to him merely at the place where he resided, was insufficient. The rule is precisely stated in the passage cited yesterday from Bayley on Bills, 276, 277, 2d Am. edit: "The sufficiency of a notice sent by the mail is well established in the United States, where the person to be charged resides in a different town or place from that in which the presentment is made. But where he resides in the same place, a notice to him must be personal, or left at his residence or place of business." In many of the cases cited to this passage by the editor, the reasoning of the court substantially sustains the principle as stated in the text; and one of them, that of Smedes v. Utica Bank, 20 Johns. 382, is conceded to do so. In this case, it is observable that the court cite Ireland v. Kip, 10 Johns. 382, as affirming the rule in the terms stated in Bayley. The citation is from the reporter's marginal statement. The words of the court's opinion are different. The case came again before the same court; and they speak of the rule as applying "where the parties reside in the same city or place." Ireland v. Kip, 11 Johns. 232. Thus it appears that in this case, as reported in 10 Johnson, the reporter correctly apprehended the court, and that the court considered the rule requiring notice to be personal, or left at the dwelling, etc., "where the parties reside in the same city or place," as being only another form of the rule requiring the notice to be personal or left at the dwelling, etc., where the party noticed resides in the same place where the presentment is made. And so Judge Story is to be understood in his statement of the rule. Story on Promissory Notes, sec. 312, 2d edit. Among the authorities cited by that learned judge is the passage in Bayley to which we have referred. In the case of Burrows et al. v. Hannegan, 1 McLean, 310, cited by Judge Story, the question was as to the sufficiency of the demand. But the remarks of the court are equally applicable to the notice. In the case of The Louisiana State Bank v. Rowel et al., 18 La. Rep. 508, it was held, that, where the indorser lived within three miles of the postoffice, notice put there was not sufficient. In that case the brief and lucid exposition given by the court of the law merchant on the subject of notice, taken in connection with Story on Promissory Notes, as to the legal identity of the noticing party with his agent, fully sustains the rule as we assert it. In Porter v. Boyle et al., 8 La. Rep. 170, where the indorser resided in a fauxbourg of New Orleans, notice of *protest addressed to him [*255 and deposited in the city postoffice was held to be insufficient, without showing reasonable diligence in endeavoring to give him personal notice. Though the question now before the court is admitted to be one of general commercial law, unaffected by any local law of Mississippi, the cases of Wilcox & Fearn v. McNutt, 2 Howard, Miss. R. 776, Patrick v. Beazley, 6 Howard, Miss. R. 609, and Hogatt v. Bingaman, 7 Howard, Miss. R. 568, which were cited yesterday, have all the weight which elaborate investigation, able reasoning, and consistent adjudication can give to authority. The first of them appears to have been decided before the note in controversy was due. The decision of the highest court in the State had settled the law, so far as such a decision could settle a question not of local jurisprudence. It may be properly referred to here as an impressive, but in this instance disregarded, caution to holders of negotiable paper. In the last of the three Mississippi cases, the principle of the two preceding decisions was reaffirmed; the counsel for the holder of the paper conceding, as a rule beyond denial, that if parties live in the same town, or have a place of business therein, the notice must be personal, or at the dwelling-house or place of business; and the court say, that notice of the demand and protest of negotiable paper cannot be given through the postoffice, unless the same is to be transmitted by mail. The court here substantially re-assert the general principle,

that the mail is a legal instrument of notice in excepted cases only. The holder is not required to give personal notice or to leave it at the dwelling, etc., where the party to be charged lives at a distance; but if he lives in the place where the demand is made, it is as easy to take the notice to him personally, or to his dwelling, etc., as to take it to the postoffice; and in such case the general rule prevails.

As to the second question.

This point, though not pressed in argument, has not been abandoned.

The general rule as to usage is, that usage prevails only where the law is silent. Chitty on Bills, 56, 8th Am. edit. In one of the Mississippi cases which we have cited, the court rebuke the attempts of a few notaries to set up their particular practice as a usage. Wilcox & Fearn v. McNutt, 2 Howard, Miss. R. 784.

But in this case the practice of the Planters' Bank in giving notices was proved to be conformable to law. The witness says, "that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident 256*] *in Vicksburg, unless there was a memorandum on the note appointing some place at which notice would be received." In this case, at the foot of the note were written, in the handwriting of the defendant, the words, "Third indorser, J. P. Harrison, lives at Vicksburg." This unsigned memorandum the witness "supposed to be an undertaking on his part to receive notice through the Vicksburg postoffice," etc. The natural inference from the memorandum is exactly the reverse, namely, that the indorser, having designated the place of his residence and there stopped, expected, should the note be dishonored, the legal incident to follow of notice to himself personally, or left at his dwelling or place of business. The supposition of the witness, who appears to have been the notary employed to protest the note was a mere guess, and a very wild one. It was not evidence. Had there been any evidence of an agreement on the part of Harrison to waive his legal right to personal notice, and to receive notice through the postoffice, the court, we admit, ought to have let it go to the jury, whose province it is to determine on the sufficiency of evidence. But here there was no evidence of such an agreement, and the court, in substance, so told, and properly told, the jury. It was clearly the province of the court to determine the legal import of the written memorandum.

Mr. Jones, in reply and conclusion, insisted that the rule was, that, if the parties lived in the same town, the notice must be personal; but if in different towns, the postoffice was the proper medium. 1 Peters, 583; 5 Johns. 584; 6 Mass. R. 315; 4 Wendell, 398, where all the cases are examined. Either Bowling or the bank must be considered as the holder of the note. If Bowling was the holder, he was entitled to have the note sent to him in Maryland, upon its nonpayment, and it would then become his duty to notify the indorser, Harrison, through the postoffice. But instead of this, he, through his agent, placed the notice at once in the postoffice at Vicksburg. If the bank was the holder, then the case comes under the rule which requires the holder to notify the last indorser, who is then to notify the preceding one, and so on. The bank should, therefore, in this case, also have sent a notice to Bowling in Maryland, whose duty would have been to notify Harrison through the postoffice. But why not take a short cut?

It is said that the Bowling's residence is not proved. But the declaration avers it, and it is too late now to doubt it.

Mr. Justice Grier delivered the opinion of the court:

The first assignment of error in this case is to the instruction *given by the court [*257 to the jury—"That, to charge an indorser if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by custom and usage of the bank at which the note is payable, the notice of nonpayment was left at the postoffice."

As the only question on the trial of the cause was the sufficiency of notice left at the postoffice at Vicksburg to charge an indorser residing there, and not whether a copy left at his dwelling-house or place of business would be proper, the phrase "personal notice" was evidently intended and understood to include the latter in opposition to the former. This instruction is, therefore, not objected to on the ground of any inaccuracy of expression on that point. But the complaint is, that the rule of law on this subject was erroneously enunciated by the court, in stating the conditions under which a personal service of notice on an indorser is required to be "residence in the town where the note was made payable."

It is true, the terms in which the rule of law on that subject is usually stated differ from those used by the court on this occasion. In Williams v. United States Bank, 2 Peters, 101, it is thus stated by this court: "If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling house or place of business."

Mr. Justice Story (Story on Bills, sec. 312) states the rule in these words: "Where the party entitled to notice and the holder reside in the same town or city, the general rule is, that the notice should be given to the party entitled to it, either personally, or at his domicil or place of business."

The indorsee or owner of the note in this case resided in Maryland, and the indorser in Vicksburg; and it is contended that, as they are the only parties, and do not reside in the same place, the rule is inapplicable to the case.

But we are of opinion, that, whether we regard the reasons upon which this rule is founded, or a correct construction of the terms in which it is usually stated, the instruction given by the court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them.

The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling. De-

positing a notice in the postoffice affords but presumptive evidence of its reception, and is permitted to be substituted for the former only 258*] where the latter would be too *inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice; and therefore, in the practical application of the rule, the relative position of the person giving the notice and the party receiving it forms the only criterion of the necessity for relaxing it.

A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last indorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest, and gives notice of its dishonor to the indorsers; if they live in the same town or city where the bank is situated and the demand made, and "where the note was payable," he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest postoffice, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

This practical application of the rule is correctly stated by the court in their instruction to the jury as connected with the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the "holders" of this note for collection, and were bound to give notice to all the indorsers. Smedes v. The Utica Bank, 20 Johns. 372. The notary, also, who held the note as agent of the owner for the purpose of making demand and protest, may be properly considered as the "holder" within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances, also, the rule has been stated in the terms used by the court below. See Bayley on Bills.

An exception is taken, also, to the instruction of the court—"That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post-259*] office, *and to dispense with personal notice on the indorser; and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice."

The memorandum is in the following words: "Third indorser, J. P. Harrison, lives at Vicksburg." The only direct evidence of usage was, "that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place." This is, in fact, no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg postoffice; and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconstruction, of this memorandum. The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage.

It is true, the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion.

It is of the utmost importance to commercial transactions, that the rules of law on the subject of notice which is to charge an indorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform, and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows, that notaries, in many places, fall into loose ways of performing their duties, either through negligence or ignorance; and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note, "The indorser, J. P. Harrison, agrees to receive notice at the Vicksburg postoffice," as to write it in its present form; and one can hardly conceive of the possibility of a well known and established usage, that a written memorandum should be construed without any regard to its terms or plain meaning. Those who affirm the existence of such a strange usage should be held to *strict proof of it; and the court were [*260 right in not submitting it to the jury to infer such an improbable and unreasonable custom, by forced or astute construction of equivocal expressions from a willing witness.

Let the judgment be affirmed.

Order.

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

JOHN C. SHEPPARD et al., Plaintiffs in Error,
v.
JOHN WILSON.

Territory law—Iowa—bill of exceptions taken after trial, of no effect—courts of record can amend at subsequent term so as to make them conform to truth.

The statutes of Iowa provide a mode for taking bills of exceptions, by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception, nunc pro tunc, after the trial.

Such is also the English practice under the Statute of Westminster 2, and such is the practice recognized by this court.

Therefore, where a bill of exceptions was signed two years after the trial, the Supreme Court of Iowa were right in striking it out of the record.

Where, after a verdict, a motion was made for a new trial, which was held under a continuance, and an entry was afterwards made that the motion was overruled, and judgment entered on the verdict, but, at the time of such entry and judgment, the court was not legally in session, it was no error in the court, at a subsequent and regular term, to treat the entry thus irregularly made as a nullity, to decide the motion, and enter up judgment according to the verdict.

The difference between this case and that of The Bank of the United States v. Moss, 6 Howard, 31, pointed out.

A continuance, relating back, may be entered at any time, to effect the purposes of justice.

THIS cause was brought up by writ of error from the Supreme Court of the Territory of Iowa.

It was an action commenced in the District Court of Scott County, in the Territory of Iowa, by Wilson against Sheppard and others, for a breach of a contract for hiring a steamboat. It is not necessary to state the facts in the case, or any other circumstances than those upon which the decision of this court turned.

On the 7th of October, 1841, the cause came on for trial in the District Court of Scott County, when the jury found a verdict for the plaintiff, and assessed his damages at $1,837.50.

A bill of exceptions, containing a recapitula-
261*] tion of the evidence *upon both sides and sundry prayers to the court, is found in its proper place in the record; but the date of its signature by the judge is the 21st day of December, 1843, whereas the trial took place in October, 1841.

A motion for a new trial was made by the counsel for the defendants upon several grounds, which it is not necessary to specify.

In April, 1842, the court commenced in Scott County on the 4th, and in Clinton County, in the same district, on the 11th. But on the 12th of April, whilst the court was in session in Clinton County, the following entries were made in Scott County:

John Wilson
v. } Assumpsit.
John C. Sheppard et al.

And now come the parties by their attorneys, and the defendants move for judgment on the motion for a new trial, made and argued at the last term of this court in this cause, and held under advisement until the present term.

Judgment.

It is considered by the court, that said defendants take nothing by their said motion; and thereupon the plaintiff moves the court for judgment upon the verdict rendered by the jurors aforesaid at the last term of this court in this cause. It is therefore considered by the court, that the plaintiff recover of the defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages aforesaid in form aforesaid assessed, besides his costs by him about his suit in this behalf expended, and that execution issue therefor.

Appeal granted.

And thereupon, the said defendants, by their attorney, pray an appeal, which was allowed.

Whether or not this appeal prevented the District Court of Scott County from correcting the erroneous entry was one of the questions before this court.

At October Term, 1842, the following proceedings, took place in the District Court of Scott County:

Plaintiff's Motion for Judgment.

And afterwards, to wit, on the third day of October, in the year of our Lord 1842, the said plaintiff filed in the court aforesaid the following motion for judgment in this cause, to wit:

Wilson
v.
Sheppard et al.

And now, at this day, October Term, 1842, comes the said plaintiff, by Mitchell & Grant, his attorneys, and moves the *court to [*262 enter up judgment in this cause, as of the last fall term of this court.

Mitchell & Grant, for Plaintiff.

Second Judgment.

And afterwards, to wit, on the 7th day of October, in the year last aforesaid, the following proceedings were had, to wit:

Wilson
v. } Assumpsit.
Sheppard et al.

This day came the said plaintiff, by his attorney, and it appearing to the court, that, at a previous term of this court, to wit, the October Term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit: they find the issue for the plaintiff, and assess his damages at the sum of eighteen hundred and thirty-seven dollars and fifty cents.

Appeal prayed by Defendants.

Whereupon, a motion was made by the attorney for defendants for a new trial herein, which motion was, at said October term, taken under advisement by the court; and it further appearing to the court, that this court has not at any time since decided said motion, but that said motion was continued under advisement until the present term, that the order of continuance at last term was not entered of record. It is therefore ruled, that said order of continuance be entered nunc pro tunc; and the court, having now fully considered the said motion for a new trial, doth overrule the same.

And it is further considered by the court, that the plaintiff have and recover of and from the said defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages in manner and form aforesaid assessed, together with his costs by him about his suit in that behalf expended, and that a special execution against the property attached issue therefor; thereupon the defendants prayed an appeal to the Supreme Court.

To this judgment of the District Court, the counsel for the defendants took a bill of exceptions, with a view to carry the case up to the Supreme Court of Iowa.

In January, 1844, the case came before the Supreme Court of Iowa, when the counsel for Wilson moved to strike from the record, and reject from the consideration of the court, the bill of exceptions filed and dated in December, 1843; which motion the court sustained.

The counsel for Sheppard then moved for a mandamus, directed to the judge of the District [*263] Court of Scott County, requiring *him to sign and seal, nunc pro tunc, the bill of exceptions tendered on the original trial. But the court refused to grant the mandamus.

After some other proceedings, which it is not necessary to state, the Supreme Court of Iowa, in January, 1845, affirmed the judgment of the District Court of Scott County.

To review this affirmance, a writ of error brought the case up to this court.

It was argued by Mr. Clement Cox and Mr. Learned (in print) for the plaintiffs in error, and by Mr. Grant for the defendant.

The counsel for the plaintiffs in error assigned twelve causes of error, the last six of which are as follows:

7th. The court erred in entering an order for a continuance of this cause, nunc pro tunc, on motion therefor, at the October Term, 1842, and in rendering a judgment upon the verdict of the jury at said term, upon a mere motion of the plaintiff.

8th. The court erred in rendering a judgment at the October Term, 1842, the second judgment in this record, after a writ of error had been sued out and served, and made a supersedeas by the allowance of a judge of the Supreme Court, which was then pending.

9th. The Supreme Court erred in expunging from the record the defendant's bill of exceptions, tendered at the trial of the cause before the District Court of Scott County.

10th. The Supreme Court erred in refusing the writ of mandamus, on the motion of the plaintiff in error, to the judge of the District Court of Scott County, requiring the said judge to sign and seal, nunc pro tunc, the bills of exceptions tendered at the trial of this cause before the District Court, by the defendants below, or show cause against the said motion.

11th. The said Supreme Court erred in reversing the judgment of the District Court, rendered upon the verdict of the jury on the 12th of April, 1842, on the ground that the supersedeas bond did not appear in the record with the writ of error.

12th. The Supreme Court erred in affirming the judgment of the District Court, rendered on the 7th of October, 1842, being the second judgment rendered in said cause, and which said judgment was rendered when a writ of error was pending, and after the cause had been removed thereby from the jurisdiction of said District Court.

The argument on behalf of the plaintiffs in error, upon the above points, was as follows:

We will now examine the 7th and 8th errors assigned, as *they are connected in sub- [*264 stance, and inquire what this first judgment of April was in its character.

Suppose the plaintiffs in error had acquiesced in this judgment, and had not taken any steps to have it reversed, could not the plaintiff below have enforced his judgment? Was it not a final judgment in the cause, conclusive on its face, upon the parties to it, upon the subject matter embraced in the suit? Suppose the plaintiff below had issued his execution, levied it upon property, and sold the same in satisfaction of the judgment, while the judgment remained unreversed, and without any supersedeas to restrain its operations, could an action have been maintained against the officer for levying upon, taking, and selling the defendants' property in satisfaction of the judgment debt? We say it could not; and the defendant in error thought so, too, for he did issue his execution upon this judgment, which appears by the records, and the officer made his full return thereof before the writ of error to reverse the judgment was sued out. In 6 Peters, 8, the Supreme Court decide, "If execution issue upon an erroneous judgment, the party who acts under it is justified until it is reversed, for it is the act of the court." So in 9 Peters, 8, the court say: "A judgment of a court of competent jurisdiction" (which means, I suppose, a court having a legal jurisdiction of the subject matter of the suit), "while unreversed, concludes the subject matter of it between the parties to it." In 3 Cranch, 300, the court decide, that "a judgment of a court of competent jurisdiction, although obtained by fraud, has never been considered void, and all acts done under such judgments are valid as respects third persons." Such judgments, then, by these authorities, would protect the sheriff acting under the authority of an execution to enforce them. Such is the case of the first judgment rendered in this cause, as the record will show. Again, in 3 Dallas, 401, the court say, that "although a judgment of an inferior court be defective, yet, if in its nature it is final, and one on which an execution can issue, the party is entitled to his writ of error." This judgment of the 12th of April, 1842, was not only final by its terms, but it was one on which an execution could issue—one on which the plaintiff below did actually issue, and have a legal return of his execution, and one on which we were entitled to a writ of error. We obtained our writ of error, and made it a supersedeas, as the record proves.

The court erred, then, in rendering a judgment at the October Term, 1842, in this cause, after a writ of error had been sued out and was pending, and which was made a supersedeas to the former judgment by allowance of a judge of the Supreme *Court. We contend [*265 that the writ of error was a supersedeas, and stayed all proceedings of the District Court upon this judgment after its date; that the District Court was, from that hour, held in

abeyance in relation to the whole cause and every matter connected with it, until the writ of error was disposed of in the appellate court. For this point I refer to 1 Blackford, 483, where the court say: "A writ of error is a supersedeas, so far as to stay all proceedings until the writ of error is disposed of." If this be law—and the books are full of similar decisions—then we say that the District Court of Scott County had no power, at the October Term, 1842, nor at any subsequent term, to render the second judgment in this cause, which was brought there to be reversed by the second writ of error appended to the record, even if the cause was otherwise open for the action of the court, and a judgment might have been legally rendered at that term. But I contend that the District Court had no power or legal authority to alter or amend a final judgment, at a subsequent term after it is rendered. It can only amend as to mere form. We refer the court to 1 Ohio Reports, 375, where this doctrine is fully laid down; also to 2 Ohio Reports, 32, and 3 Ohio Reports, 306. In both of these last cases, the same principles are decided. In 2 Washington's C. C. R. 433, the court decide, that "where there is error in entering a judgment, the court, at a subsequent term, cannot set it aside, unless it was entered by misprision of the clerk, by fraud." This is a strong case, from high authority, and is as directly in point, it seems to me, as language can make a case. In 3 Marshall's Ky. Rep. 268, the court say: "A court possesses no power, at a subsequent term, to modify, set aside, or alter, on motion, a judgment of a previous term. This proceeding must be by writ of error." In the case at bar, the court not only set aside a final judgment rendered at a preceding term, but in defiance of a writ of error issued to reverse that judgment; and this was done on the motion of the party who voluntarily asked to have the erroneous judgment, as he termed it, rendered.

In 1 Greenleaf, 369, the court decide, that "the judgment of a court of competent jurisdiction cannot be affected by entries on the record, except upon a writ of error." How much less, then, should an entire judgment be annulled, however erroneous it may be, and a new judgment entered at a subsequent term, upon a mere motion, and without any rule for the opposite party to show cause against it, as was the case at bar. It is decided in 1 Blackford, 168, that "a grant erroneously made, until it is reversed, is a bar to a suit." The reasoning, from all these authorities, seems to 266*] me to be this: *that an act done by legal authority, appearing on its face to have been correctly done, however erroneous, can only be corrected in a legal manner, and by the proper tribunal in whom the law has vested the power to correct the error complained of.

We contend that the court had no power, at the October Term, 1842, to enter any judgment whatever in this cause; that the court had not then any jurisdiction over it. The cause had been discontinued from the docket of the court, and could not be brought before the court again, either by motion or by any other process, but by a writ of procedendo from the Supreme Court, reversing the judgment of April upon a writ of error. After the judgment of April, the case was no longer on the docket of the court, and the court had no authority to enter a continuance, nunc pro tunc, to regain a jurisdiction over the cause, when its judicial functions had ceased to exist in relation to it. As well might the court docket a new case, nunc pro tunc, with all its previous proceedings made out in form, and proceed to render a judgment upon motion, without a rule to the opposite party to show cause against it, as to do what appears by this record was done, so far as either proceeding would be justified by the law. For an authority that there was a discontinuance of this cause, and that the District Court could not again assume any jurisdiction over it, except the case had been remanded from the Supreme Court, I refer the court to Graham's practice, 493, to 8 Petersdorff, 387, and the cases there referred to. In the first case, where a venire was returnable on the first day of the term, and the distringas was dated the day after, the court held it to be a discontinuance, because every process must be tested on the day it is awarded. Here there was a space of one day, when the court had no jurisdiction over the case, and it was adjudged a discontinuance. In the case at bar, there were six months when the court had no jurisdiction over the action, and execution had been issued and returned, and a writ of error was pending; yet the court resumed a jurisdiction, entered a continuance contrary to the fact, when the case was never intended to be continued in contemplation of law, and rendered a judgment. So, in 8 Petersdorff, No. 13,-390, the court say: "There is a discontinuance, because the action was not regularly continued from term to term." Here, in the case at bar, the record shows that there was not any continuance of the cause whatever. In No. 15, same page, the court say: "On a writ of error, if a continuance be not alleged, it shall be intended a discontinuance, for it is so in fact."

How the court could preface their second judgment by the *declaration that no [*267 judgment had been rendered on the verdict, when the first judgment was staring it in the face, is, to me, inconceivable. It is something more than a legal fiction.

We think the Supreme Court erred in rejecting the bills of exceptions referred to in the 9th error assigned. In the statute of Iowa of January 25, 1839, section 19, entitled, "An Act regulating practice in the district courts," etc., page 375, will be found the law of the territory relating to bills of exceptions. The statute simply requires that they should be reduced to writing during the progress of the trial. The other provisions of the statute are not material to this cause. This was done in our case. See the transcript, page 24. The bills were prepared during the progress of the trial; they were then reduced to writing, as the exceptions arose. The counsel not agreeing to all the facts stated in the bills, they were submitted to the court for correction, in its discretion, according to the facts, and to sign, seal, and deliver them into the office of the clerk, with the papers in the cause, in the event that the motion for a new trial, held under advisement, should not prevail. The court

mislaid the bills, but never refused to sign them. At length they were found, signed, and returned, as seen by the record. The Supreme Court rejected them because they were not filed in time.

We hold it to be both law and universal practice, that when any controversy arises between parties, in settling a bill of exceptions, an application can only be made to the court to correct the bill, according to the facts, which the court is always presumed to possess and retain. The bills become a part of the record of the court, and are always under its control, and the court is as much bound, as an important part of its duty, to see its bills correctly made out, as it is to inspect and correct any other portion of its records and proceedings. In relation to this matter, all that we could do was to reduce our exceptions to writing, as we understood the facts to be. If the other party objected to any of our statements, a reference could alone be made to the court to decide the matter between us, and to correct the bills according to the facts. This we did, and in proper time under the statute. We submitted our bills to the court for its judgment upon them. The court held them, with the papers in the cause, to decide the motion for a new trial. The court mislaid the bills, found them again, signed and sealed them, as we had prepared them, without an alteration; the best evidence, one would think, that they were deemed, by the court, to be correct.

But the Supreme Court rejected them be-268*] cause they were not *in time, although the judge held them in his hands from the time of the verdict until he signed and filed them. Was it our fault that they were not sooner in the record? The cause had not come on for trial before the Supreme Court, upon the writs of error. We then applied for a mandamus to the judge below, to sign the bills, nunc pro tunc, as of the term of the trial, and when they were placed in his possession. This would have taken them out of the objections to our exceptions. But the court overruled our motion. In the haste with which this argument has been prepared, I have not been able here to refer the court to authority upon this point of our case. Most of the decisions of the courts, arising upon the subject of bills of exceptions, are based upon the particular facts of each case, or limited by statutory provisions—a case analogous to the one at bar is, probably, not to be found reported.

The eleventh error assigned has been noticed in a previous part of this argument. That the court erred in reversing the first judgment of April 12th, 1842, upon the ground assumed by the court, we cannot doubt. We think the court erred, in a still greater degree, in affirming the second judgment of the 7th of October; the second judgment, which is our 12th specific error assigned. If the District Court erred, in reversing its own judgment at a subsequent term, or striking it out of the record after an execution had been issued and returned after the cause had been removed from the jurisdiction of the court by a writ of error that was then pending, it seems to us that the Supreme Court doubly erred in sustaining both proceedings and in affirming the second judgment.

Mr. Grant's argument, for the defendant in error, upon the above points, was as follows:

The 9th assignment of error is the first one for the consideration of this court, to wit: "Striking the bill of exceptions of 21 December, 1843, from the records of the Supreme Court."

In discussing this point, we make this preliminary question, that this bill of exceptions is not a part of record here, and the propriety of rejecting it cannot be examined by the court. True, the clerk has sent it here, but unless it be a part of the record, the court will not examine it.

"Nothing but what constitutes the record of the court below will be examined here." Davis v. Packard, 6 Peters, 411.

"The plaintiff relies for a reversal of the judgment on his having been entitled to a continuance, in consequence of an affidavit alleged to have been made in his behalf, and on his having objected to the cancelling the order of continuance. These grounds of error, however, do not appear of record. The affidavit *and objection of the plaintiff could [*269 only be shown by a bill of exceptions. The transcript of the record, to be sure, contains a copy of the affidavit of continuance, together with a statement of the clerk, that he objected to proceeding to trial after the order of continuance, and that he tendered a bill of exceptions to the opinion of the court ordering the trial, which the court refused to sign. These circumstances, however, are only the statements of the clerk, and constitute no part of the record." Wilson v. Coles, 2 Blackford, 403.

The bill of exceptions, filed with the record in the Iowa Supreme Court, was stricken from the record; it constituted a part of the record no longer, and to make it a part of the record here, it must have been embodied and made a part of the bill of exceptions to the decision of the Iowa Supreme Court. It was not. See record, pages 32 and 33.

On this point, we refer to the following authorities: Huston v. Brown, 1 Blackford, 429; Henderson v. McKee, 1 Ib. 347; Hays v. McKee 2 Ib. 11; Vanlandingham v. Fellows, 1 Scammon, 283; Huff v. Gilbert, 4 Blackford, 20.

A bill of exceptions is a "pleading of the party, and is to be construed most strongly against him who alleges the exception." Rogers v. Hale, 3 Scammon, 6.

"A bill of exceptions is the method of placing on the record matters which do not properly belong to it, and it should contain the matter so intended to be placed on the record. A reference in the bill is not sufficient. Berry v. Hale, 1 Howard, Miss. 315.

"When the clerk transcribed certain records intended to be placed in the bill of exceptions, and stated that they were the records and executions referred to in the bill of exceptions; held, it did not spread them on the record." Maundrig v. Rigby, 4 Howard, Miss. 222.

The bill of exceptions in this case, pages 32 and 33, does not identify the paper referred to.

"The bill of exceptions refers to some ex-

trinsic paper or document, which is said to be marked B, and to be considered part of the bill of exceptions; but what that document is we do not know, for, in looking through the record, we find no document which has such a mark, or is otherwise identified. It is true, there is in the subsequent history of the case a document, but it has no mark of identity with the one referred to by the judge in the bill of exceptions." Oliver v. State, 5 Howard, Miss. 14–18.

"Nothing which does not properly belong to the record is part of it, unless inserted in the bill of exceptions."

A bill of exceptions, stating that "the fol- [*270] lowing evidence *was offered," then adding, 'here insert the same," is incomplete, and does not make part of the record of the evidence thus attempted to be embraced in it, though contained in the transcript of the record. Rankin v. Holloway, 3 Smedes & Marshall, 614.

"It is said there was a motion to quash the writ, and that the motion was improperly overruled; but as the writ is not inserted in the record, we have no means of examining the objection, and must presume the decision correct." State Bank v. Brook, 4 Blackford, 485.

[Opinion in the text, near bottom of page; there is no reference to it in the marginal note.]

The bill of exceptions of the District Court of Scott County was stricken from the records of the Supreme Court of Iowa; how can it be made a part of the record here, unless included in the bill of exceptions taken to their decision? Strike it out of pages 16 et seq., and what is there in the bill of exceptions, pages 32 and 33, to bring it before this court?

But admit that it is properly here, we say that the 9th error is not well assigned; the Iowa Supreme Court decided correctly in striking it from the record.

The plaintiffs in error, in their printed argument by Learned, produce no authority on this point, place great stress on the supposed fact, nowhere existing in reality, and nowhere appearing on the record, that the exceptions were by counsel reduced to writing during the progress of the trial, and by inference tendered to the court, and that the Iowa Supreme Court rejected the bill of exceptions, because it was not filed during the trial.

"Most of the decisions of the courts," says Learned, for plaintiffs in error, "on the subject of bills of exceptions, are based upon the particular facts of each case, or limited by statutory provisions. A case analogous to the one at bar is, probably, not to be found reported." If by this he refers to his side of the case, we shall not deny it, but we show both authority and statutory provisions in favor of rejecting this bill of exceptions. The words, "no entry of record," that the bill of exceptions was tendered at the trial, are emphasized in the statement of the counsel for the plaintiffs in error, thereby intending, we suppose, to convey the idea that it appears in some other way.

"The statement of the bill of exceptions, as to the time when it was taken, will prevail over the memorandum of the clerk." Carpnew v. Carravan, 4 Howard, Miss. 370.

"The bill of exceptions must show affirmatively that the exception was taken at the trial, and if it does not so appear, the error will be fatal." Patterson v. Phillips, 1 Howard, Miss. 572.

*Perhaps Howard's Mississippi Re- [*271] ports are not high enough authority for counsel. Hear the opinion of this court.

"It is not necessary," under laws of the United States, "that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the court, and may afterwards, during the term, be reduced to form, and signed by the judge; but in such case it is signed nunc pro tunc, and purports on its face to be the same as if actually reduced to form and signed during the trial; it would be a fatal error if it were to appear otherwise." Walton v. United States, 9 Wheat. 651.

The bill of exceptions in this cause was taken, reduced to writing, "signed and sealed this 21st December, 1843," in record, pages 23 and 24. The trial took place in October, 1841, nearly two years before.

It appears conclusively from the bill of exceptions, that it was not taken or tendered during the progress of the trial.

The statutory provisions of the Territory of Iowa will not assist the plaintiffs in error. Indeed, they are perfectly conclusive on this point in favor of the defendant in error.

The Act of the Legislature of Iowa, approved January 25, 1839, (see first edition of Iowa Laws, printed at Dubuque in 1839), section 19, provides (375 of the statutes):

"If, during the progress of any trial, in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said bill of exceptions; and to sign and seal the same; and said bill of exceptions shall thereupon become a part of the records of such cause; and if any judge refuse to allow and sign said bill of exceptions tendered, and the same is signed by three or more disinterested by-standers, or attorneys of said court, the judge shall then permit the said bill to be filed, and become part of the record," etc.

Mr. Grant then examined the cases from Missouri and Illinois, which States had statutes similar to Iowa, citing 7 Missouri, 351; 3 Scammon, 6, 17, 24, 63; 2 Scammon, 253–256, 490. And cited, also, 9 Johns. Ch. 345; 3 Cowen, 32.

This court has decided no less than fifteen causes on bills of exceptions, down to 13 Peters. We will cite only such as bear directly on the case at bar.

Walton v. United States, 9 Wheaton, 657, has been referred to. Ex parte Martha Bradstreet is, to our mind, conclusive for our client.

"On the trial of a cause in the District Court of New York, exceptions were taken to the opinions of the court, delivered during the progress of the trial; and, some time after the trial *was over, a bill of exceptions was [*272] tendered to the judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time altering the bill so tendered, so as to conform to his recollections of the facts, and inserting in the bill all that he deemed proper to be contained in the same; which bill, thus altered, was signed by the judge."

"A rule was granted to show cause, and the judge returned the foregoing facts.

"By the court. This is not a case in which a judge has refused to sign a bill of exceptions. The judge has signed such a bill of exceptions as he thinks correct. The object of the rule is to compel the judge to sign a particular bill of exceptions which has been offered him. The court granted a rule to show cause, and the judge has shown cause by saying he has done all that can be required of him," etc.

"The law requires that a bill of exceptions should be taken at the trial. If a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to file it after the term must be understood to be matter of consent between the parties, unless the judge has made an express order in term, allowing such a period to prepare it." Ex parte Martha Bradstreet, 4 Peters, 102.

10th error. "The Supreme Court erred in refusing the motion of the plaintiff in error for a mandamus to the judge of the District Court." How comes this assignment of error in the case of Sheppard et al. v. Wilson, defendant in error, here?

That was an ex parte proceeding against Judge Thomas Wilson of the District Court, to compel him, by mandamus, to sign a bill of exceptions. Has any writ of error been sued out against Judge Wilson? Has he been cited to appear here? The proceedings against him form no part whatever of the suit of Sheppard et al. v. John Wilson; but if they did, and this court can examine the question, it is settled by the case of Ex parte Martha Bradstreet.

The counsel for Sheppard et al. made a motion for a writ to compel Judge Thomas S. Wilson to sign and seal a particular bill of exceptions, or show cause; the motion is based on a statement of facts, ex parte, which shows that no exceptions were tendered during the trial; that the next day after the trial the bill was tendered, and, the parties not being able to agree as to the bill, Sheppard's counsel delivered the bill to the court, requested the judge to correct, and, when corrected, to sign it.

The bill of exceptions was not tendered dur- [*273
273*] ing the trial, as the *law of Iowa requires. No other time was appointed or allowed for tendering, as the laws of the United States require. It was not, when tendered after the trial, such an one as the judge could sign until he had corrected it by his notes. In other words, the party requested the judge to do what the law requires him to do—to prepare a correct bill of exceptions; and because the judge neglected to prepare a new one, they wish the court to compel him to sign a particular bill, which they admit was imperfect.

But a mandamus will not lie, in Iowa, to a judge, to compel him to sign a bill of exceptions. This writ issues only when there is no other adequate remedy. By the laws of Iowa of 1839, already quoted, if the judge refuses to sign a bill of exceptions, the by-standers may do it; and if the judge refuse to allow it, when signed by them, to be placed on the record, the Supreme Court, on affidavit, admits it to the record. *No mandamus can issue in Iowa in such a case; the Legislature have provided a party another remedy.*

[The remainder of Mr. Grant's argument is omitted.]

Mr. Justice Grier delivered the opinion of the court:

When this case was before this court at the last term, on a motion to dismiss the writ of error (see 5 Howard, 211), one of the reasons urged was, "That, Iowa having been admitted into the Union as a State since the writ of error was brought, the act of 1838, regulating its judicial proceedings as a Territory, is necessarily abrogated and repealed; and consequently there is no law in force authorizing this court to re-examine and affirm or reverse a judgment rendered by the Supreme Court of the Territory, or giving this court any jurisdiction over it." And the court there say: "This difficulty has been removed by an act of Congress, passed during the present session, which authorizes the court to proceed to hear and determine cases of this description." It afterwards appeared that this court had been misinformed on this subject, and that by mistake the State of Iowa had been omitted in the act of 22d February, 1847. Since that time (at the present session of Congress), an act has been passed to remedy this omission (see Act of 22d February, 1848), and the court have proceeded to hear and determine the case on the errors assigned.

Of the numerous errors assigned in this case, but three can be noticed as coming properly under the cognizance of this court. The cause was originally tried before the District Court of Scott County, and removed, by writ of error, to the Supreme Court of the Territory of Iowa. That court struck from the record the bills of exceptions alleged to have been taken on the *trial in the court below. Consequent- [*274
ly, the matters said to be contained in those bills are not before this court.

But bills of exceptions were taken by the plaintiffs in error to the ruling of the Supreme Court of Iowa, in rejecting the bills sealed by the District Court, and in refusing to grant a mandamus to the judge of the District Court to sign a bill of exceptions nunc pro tunc; and this rejection and refusal are now assigned for error in this court. It has been questioned whether the action of the Supreme Court of Iowa on these points is the proper subject of a bill of exceptions, or can be reviewed in this court. But as we perceive no error in the course pursued by the court, it will be unnecessary to notice these objections.

The case was tried in the District Court of Scott County at October Term, 1841, and the bill of exceptions which was struck from the record was dated on the 21st of December, 1843. It did not purport to have been taken on the trial, nor was there any evidence on the record that any exceptions were taken or noted by the judge. And, assuming the fact as stated by the counsel for the defendant below, that he had taken the exceptions during the trial, and had reduced them to form afterwards, yet the bill was not settled during the term in consequence of objection made to certain matters therein by the opposite counsel; and the judge, though he signed a bill two years after the

trial, refused to sign it nunc pro tunc, as if taken on the trial.

The act of Assembly of Iowa regulating the practice of their courts provides, that "if, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court and reduce the same to writing, it shall be the duty of the judge to allow said exceptions and to sign and seal the same; and the said bill of exceptions shall thereupon become a part of the record of such cause; and if any judge of the District Court shall refuse to allow or sign such bill of exceptions tendered, and the same is signed by three or more disinterested by-standers or attorneys of said court, the judge shall then permit the said bill to be filed and become a part of the record; if the judge refuse, the Supreme Court of the Territory may, when such cause is brought before them by writ of error or appeal, upon proper affidavit of such refusal, admit such bill of exceptions as part of the record."

This act requires that the exceptions must be taken during the progress of the trial, reduced to writing, and tendered to the judge, and gives ample remedy to the party injured, in case of a refusal to sign them or permit them to be made a part of the record. If the party does 275*] not avail himself of the remedy *given him by the act, he has no one to blame but himself. It is true, judges may, and often do, sign bills of exception after the trial, nunc pro tunc, the bills being dated as if taken on the trial; but the propriety of their refusal to do so on particular occasions depends on so many circumstances which cannot appear on the record, and are known only to themselves, that we ought not to presume they have acted improperly in the exercise of their discretion. Certainly a judge ought not to be called on to make up a bill of exceptions two or more years after a trial, where the counsel have disagreed as to the facts, and failed to settle the exceptions at the term in which the cause was tried. It is too plain for argument, also, that a bill purporting to be taken more than two years after the trial cannot properly be made a part of the record, by any possible construction of this act. It is much more stringent in its requirements as to the time and mode in which a bill of exceptions shall be obtained and placed on record, than the Statute of Westminster 2, which first gave the bill of exceptions. Yet under that statute, the courts have always held that the exception should be taken and reduced to writing at the trial. Not that they need be drawn up in form; but the substance must be reduced to writing whilst the thing is transacting. 1 Bacon's Abr. tit. Bill of Exceptions.

The practice is well settled, also, by the decisions of this court. See Ex parte Martha Bradstreet, 4 Peters, 106, and the case of Walton v. The United States, 9 Wheaton, 657, which is precisely parallel with the present. There the objection was made, that the bill of exceptions was not taken at the trial, but purported on its face, as in this case, to have been taken and signed after judgment rendered in the cause. "It is true," said the court, "that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court. So, that, in fact, it might be true that the objection was made, and yet not insisted upon by way of exception. But the more material consideration is, that the bill of exceptions itself appears, on the record, not to have been taken at all until after the judgment. It is a settled principle, that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say that it is necessary (and in point of practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge. And so, in fact, is the general *practice. But in [*276 all such cases, the bill of exceptions is signed nunc pro tunc, and it purports on its face to be the same as if actually reduced to writing during the trial. And it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before verdict."

These cases are conclusive as to the correctness of the proceedings of the Supreme Court of Iowa, in striking out the bill of exceptions and refusing to award a mandamus to compel the district judge to sign a bill nunc pro tunc, It will be unnecessary, therefore, for this court to express any opinion on the questions, whether, under the peculiar provisions of the statute of Iowa, a party who had neglected to pursue the course pointed out by it would be entitled, under any circumstances, to the remedy of a mandamus; and if so, whether a refusal by the Supreme Court to grant it could be alleged for error in this court.

The only other assignments of error which can be noticed by this court are those numbered 11 and 12—"That the Supreme Court erred in affirming the action of the District Court in regard to the judgment of April 12, 1842, on the ground that the supersedeas bond did not appear on the record with the writ of error. And in affirming the judgment rendered by the District Court at October Term, 1842."

To understand the nature of these objections, it will be proper to state that this case was tried in the District Court of Scott County, at October Term, 1841, and a verdict rendered for the plaintiff; and the defendants having moved for a new trial, the case was continued under a curia advisare vult. Owing to a mistake (the cause of which it is unnecessary to explain), the court did not meet at the time appointed by law for the April Term in Scott County, but on the week following, which had been fixed for the term of a neighboring county. On the 12th of April, 1842, an entry was made on the record, overruling the motion for a new trial, and rendering a judgment on the verdict. The mistake was soon after discovered, and the defendants sued out a writ of error to reverse this judgment, as being coram non judice; but before the writ was served, at the next regular term of the District Court, in October, 1842, that court, treating the entry made on the rec-

ord in April as a nullity, because entered by the clerk without any authority from the court, made the following entry of judgment:

"This day came the said plaintiff, by his attorney, and it appearing to the court that, at a previous term of this court, to wit, the October Term, 1841, the issue previously joined 277*] in this *cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit: They find the issue for the plaintiff, and assess his damages at the sum of $1,837.50; whereupon a motion was made by the attorney for the defendants for a new trial herein, which motion was, at said October Term, taken under advisement by the court. And it further appearing to the court, that this court has not, at any time since, decided said motion, but that said motion was continued under advisement until the present term; that the order of continuance at last term was not entered of record; it is therefore ruled that said order of continuance be entered, nunc pro tunc. And the court, having now fully considered the said motion for a new trial, doth overrule the same; and it is further considered by the court, that the plaintiff have and recover," etc. (completing the entry of a judgment in the usual form).

In this action of the court we can see no error, or any just ground of complaint on the part of the plaintiffs in error. If the court had ordered the prior entry, made in April, to be stricken from the record, as a mistake or misprision of the clerk, being made without the authority or order of the court, the record could not have been successfully assailed. The court certainly had full power to amend their records, and are the sole judges of the correctness of the entries made therein; and although they have not said in direct terms that this entry should be erased or stricken from the record, they have done so by violent implication, when they adjudge that the court had never decided the motion for a new trial, and treat the record as if the entry of the 12th of April was not upon it, or had been entirely erased from it. The objection, that the record was beyond the reach of amendment, because the writ of error had become a supersedeas and removed it to the Supreme Court, is not founded in fact. The writ of error had not been served on the court, and the record was therefore legally, as well as physically, in possession of the District Court, and subject to amendment. In order to a supersedeas, the statute of Iowa evidently requires a service of the writ upon the court below, and not only so, but "that one of the judges of the Supreme Court shall indorse upon the transcript of the court below allowance of said writ of error for probable cause; and in such cases, the party issuing such writ shall give bond to the opposite party, with good security," etc. There is no evidence on the record, that any of these requisites had been complied with.

It is, perhaps, hardly necessary to state that this case bears no resemblance to that of The 278*] United States Bank v. Moss, *decided at this term. There, the Circuit Court had set aside a regular valid judgment entered by the court at a former term, after a verdict and trial on the merits; not on the ground that the clerk had made the entry by mistake or without proper authority from the court, but because of some supposed error in law. This case exhibits a question of amendment, and nothing more; it was, therefore, wholly within the discretion of the court below, who were acquainted with all the facts, and belonged appropriately and exclusively to them. Matheson v. Grant, 2 Howard, 263, 284. Besides, the action of the court wrought no injury to the plaintiffs in error. If they had removed the record to the Supreme Court by the first writ of error before this amendment was made, and obtained a reversal of the judgment because it was entered without the authority of a properly constituted court, the Supreme Court would have remitted the record, with orders to proceed and enter a regular judgment on the verdict.

The objection, that the court below could not make this amendment for want of a continuance, is hardly worthy of notice. The entry of C. A. V. operates as a continuance, and if it did not, a continuance could be entered at any time to effect the purposes of justice. Such technical objections have long ceased to be of any avail in any court, and are entirely cut off by the statute of jeofails of Iowa of 24th January, 1839, section 6.

The judgment of the Supreme Court of Iowa must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

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*THE UNITED STATES, Plaintiffs in [*279
Error,
v.
A. HODGE and Levi Pearce.

Taking time mortgage from principal debtor as collateral when no discharge to sureties—motion for new trial no waiver of writ of error unless party waives right, on record before motion—in Louisiana sureties may be sued without principal.

Where the bill of exceptions appears upon its face to have been regularly taken, the court cannot presume against the record.

Where a mortgage was given by a postmaster to secure the Postoffice Department, and the Circuit Court was asked to instruct the jury, that, according to the true interpretation of the mortgage, there was contained therein no stipulation or agreement to extend the time, or preclude the govern-

NOTE.—When agreement for delay or variation of contract discharges sureties, see note to 6 L. ed. U. S. 190.

As to liabilities of sureties on official and other bonds, see notes to 3 L. ed. U. S. 709; 6 L. ed. U. S. 577; 42 L. ed. U. S. 987, and 51 L.R.A. 222.

As to rights and liabilities of sureties, see note to 12 L. ed. U. S. 66.

As to what forbearance or extension of time to principal debtors will discharge surety, see note to 12 L. ed. U. S. 111.

ment from suing the principal and sureties upon the postmaster's bond, and the court refused, upon the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage; this was an error in the court. It is the duty of the court to construe all written instruments given in evidence, as a question of law.

Payment under this mortgage could not be enforced until after the lapse of six months from its date. But its acceptance by the government did not release the sureties upon the bond, because, in order to discharge the surety by giving time, the time which is given must operate upon the instrument which the surety has signed. The mortgage here was only a collateral security, which was beneficial to the surety.

A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits the right should be waived upon the record, before the motion for a new trial is heard.

The practice in Louisiana allows the sureties to be sued without joining the principal.

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

It was an action brought against the defendants in error, as the securities upon the bond of the postmaster of the city of New Orleans. The facts of the case are sufficiently set forth in the opinion of the court.

It was argued by Mr. Clifford (Attorney-General) for the United States, and by Mr. May and Mr. Brent for the defendants in error. Of the argument of the Attorney-General the reporter has no notes.

Mr. May and Mr. Brent, for the defendants in error, divided their arguments into three heads, viz.:

I. That the mortgage discharged the defendants from all liability on their bond to the plaintiffs.

II. That the exceptions were not properly taken.

III. That the action was erroneously brought.

Before entering upon the argument, the preliminary remark was made, that although the court below may have erred in refusing to instruct the jury, yet if the party was not prejudiced by it, this court would not reverse. 5 Peters, 135; 9 Gill & Johns. 430.

If in point of law the judgment ought to be affirmed, the court will affirm it, notwithstanding error. 8 Peters, 214.

I. The mortgage discharged the defendants from all liability on their bond.

280*] *This proposition involves three, viz.:

1st. The facts attending the execution of the mortgage.

2d. The law authorizing it.

3. The law applying to and expounding it,

With respect to the first subdivision, viz., the facts, the counsel examined the record, to show that the execution of the mortgage was concealed from the sureties; that it was exhibited to the Postmaster-General; and by him referred to the auditor, in whose office it was filed on the 19th November, 1839, and nothing further was done until the 7th January, 1840.

2d. The law authorizing it. [This branch of the argument is omitted, as the court did not appear to question it, inasmuch as the acceptance of the mortgage is considered to be the act of the United States.]

3d. The law applying to and expounding it. This is the important inquiry in the case. The defendants were sureties of Ker, who was the principal in the bond, on which this suit is brought. The United States agree with the principal, without the knowledge or consent of the sureties, in order to secure the payment of his debt, and agree for a large and valuable consideration to give him time for the payment of the debt. The United States receive from the principal a mortgage of valuable property to secure the whole of their debt. This discharges the sureties, because time for the payment of the debt is given, and it is a higher security for the debt.

It is a general rule of law, lying at the foundation of all these contracts, that "a party taking a surety is bound to notice the nature of his engagement, and protect him." Hence, the law on this subject is very strict. 7 Price, 132; Pitman on Princ. and Surety, 167, 170, 182, 183; 3 Merivale, 277; 1 Moore & Payne, 759; Holt's Nisi Prius Cases, 84; 2 McLean, 74; 10 Peters, 266, 268; 7 Johns. 337; 7 Taunt. 53; 2 Marsh, 363.

That time for the payment of the debt is given by this mortgage, the following authorities show: 12 Wheat. 554, 505; 5 Howard, 206; 3 Wash. C. C. R. 71; 3 Younge & Collyer, 188, 189; 7 Harr. & Johns. 103; 8 Bing. 156.

A creditor, by giving time of payment, undertakes that he will not during the time given receive the debt from any surety of the debtor; for the instant any surety paid it, he would have a right to demand and recover it from his principal. 4 Bing. 719.

If giving time might injure the surety, he is discharged. It is not necessary that in point of fact he is injured. The law is the same even if he is benefited. He is the judge of that. 7 Price, 225, 232, 234.

*This mortgage was also a higher [*281 security for the debt. In Louisiana, it amounted to a judgment. Code of Practice, art. 732, 733; 6 Martin, N. S. 465; 15 Peters, 170.

A judgment is a security of a higher nature, and merges a bond. 1 Chitty, Pl. 49, 50; 1 Peters, C. C. R. 301; 18 Johns. 477; 11 Gill & Johns. 14, 15; 6 Cranch, 253; 2 Harr. & Johns. 474.

This mortgage is then a confession of judgment, with a stay of execution for six months, and will discharge the surety. 6 Munf. 6; 3 Call, 69; 6 Gill & Johns. 168.

III. The action was erroneously brought. [The counsel cited many cases from the English authorities and from other States, to show that all the obligors should have been sued, and the following authorities from Louisiana.] Code of Practice, 330, note; 4 New Series, 435; 4 La. Rep. 107; 2 Robinson, 389.

Mr. Justice McLean delivered the opinion of the court:

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

William H. Ker, being appointed postmaster of the city of New Orleans, in 1836, gave a bond, with the defendants as his security, in the sum of twenty-five thousand dollars, for the faithful discharge of his duties as postmaster. Having failed to perform those duties, an action was commenced on the bond against his securities, alleging a large defalcation, by Ker, and claiming the penalty of the bond.

In their defense the defendants set up a mortgage which was executed by Ker the 15th of August, 1839, on property real and personal to secure the payment to the Postoffice Department of a sum not exceeding sixty-five thousand dollars, or such sum as might be found due on a settlement, from and after six months from the date of the mortgage. This instrument, which gives time for the payment of the indebtment by Ker, it is pleaded, releases the defendants as the sureties of Ker.

A jury, being impanelled, found a verdict for the defendants. A motion for a new trial was made and overruled. No exception lies to this decision. The motion is made to the sound discretion of the court.

The questions arise on certain instructions to the jury prayed for by the district attorney; none were asked by the defendants.

It is objected, that it does not appear that the exceptions were taken on the trial, and signed by the judge during the term. The bill of exceptions states, that, "on the trial of the 282*] cause, *the district attorney requested the court to charge the jury," etc., and at the close, "to which opinions of the court, refusing to charge as requested, the district attorney excepts, and prays that the bill of exceptions, with the documents referred to therein, be signed, sealed, and made a part of the record, which is accordingly done," and which is signed by the judge. Upon its face, this bill of exceptions appears to have been regularly signed; and the court cannot presume against the record.

The first, fifth, seventh, ninth, and tenth instructions, refused by the court, are not so connected with the case as to require a consideration. Nor is it deemed necessary to consider the instructions given as asked or as modified by the court, until we come to the eleventh and last prayer. In this the district attorney requested the court to instruct the jury, "that, according to the true interpretation of said mortgage, there was and is contained therein no stipulation or agreement to extend the time, or preclude the government from suing the principal and sureties on said bond." This the court refused to give, on the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage. In this the court erred. It is its duty to construe all written instruments given in evidence, as a question of law.

Payment under the mortgage could not be enforced until after the lapse of six months from its date. And it appears that the mortgage was designed to cover the whole amount of Ker's defalcation. But the important question is, whether this mortgage suspended the legal remedy of the department on the official bond of the postmaster. There is no provision in the mortgage to this effect. And it cannot be successfully contended, that taking collateral security merely can suspend the remedy on the bond. The holder of a bill of exchange, by taking collaterial security of the drawer, not giving time, does not release the indorser. James v. Badger, 1 Johns. Cas. 131; Kennedy v. Motte, 3 McCord, 13; Hurd v. Little, 12 Mass. 502; Ruggles v. Patten, 8 Mass. 480.

Giving time for payment, to discharge the indorser, must operate upon the instrument indorsed by him. Now, if the Postoffice Department had, by the mortgage, suspended the right of action on the bond for the time limited in the mortgage, it might have released the sureties. But no such condition is expressed, and none such can be implied. The mortgage does not purport to be given in lieu of or in discharge of the bond. It is merely a collateral security, which operates beneficially to the defendants. For if they shall pay the defalcation of Ker, or so much of it as shall amount to the penalty of the *bond, and [*283 the mortgaged property shall be sufficient to cover the whole indebtment, there can be no question that the sureties would be subrogated to a due proportion of the rights of the department in the mortgage.

The principle is in no respect different from that which arises on a promissory note or bill, where collateral security is taken. In the authorities above cited, it was considered that where an indorser takes an indemnity for indorsing a note, he waives a notice of demand. But if the holder of the note take additional security from the drawer, the indorser is not released. And it cannot be material of what character the collateral security may be. It may consist of promissory notes not due, a mortgage payable on time, or anything else, it does not affect the remedy on the original instrument. This can only be done by an express agreement, for a valuable consideration. The remedy on the collateral instrument is wholly immaterial; unless it discharges or postpones that on the original obligation. There is no such condition in the mortgage under consideration, and consequently it can in no respect affect or suspend the remedy of the Postoffice Department on the bond.

If the remedy on an instrument is suspended, for a valuable consideration, the indorser or security is released, because his right to discharge the obligation and be subrogated to the rights of the holder of the paper is also suspended. But a contract to give time is void, and does not release the security, unless it be founded upon a valuable consideration. It must be a contract which a court of law or equity can enforce. Now, there is no contract in the mortgage which suspends the right of action on the official bond. Consequently, no injury is done to the sureties on that bond, They are left free to act for their own interest, as they could have acted before the mortgage. The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured. But by no possibility can they be injured in the case under consideration. On the contrary, it is clear that the mortgage may operate beneficially to them, if they shall pay the amount of their bond. And the Circuit Court should have instructed the jury to this effect.

The motion for a new trial was not a waiver of a writ of error. In some of the circuits there is a rule of court to this effect. But effect could be given to that rule only by requiring a party to waive on the record a writ of error, before his motion for a new trial is heard. In the greater part of the circuits no such rule

exists. It does not appear to have been adopted in Louisiana.

284*] *It is insisted that "the action is brought wrong; and that, if the judgment be reversed, the plaintiffs cannot recover, because of the nonjoinder of Ker as a defendant."

The action against the sureties, omitting the principal, is sustained by the Louisiana Practice. In Maria Griffing, Adm'x, v. Caldwell, 1 Robinson, 15, it was held that a creditor has the right, but he is under no obligation, to include the principal and surety in the same suit. And in Smith, Adm'r., v. Scott, 3 Robinson, 258, it is said a surety, who binds himself with his principal, in solido, is not entitled to the benefit of discussion, and may be sued alone for the whole debt. So in Curtis v. Martin, 5 Martin, 674, it is laid down, that the surety may be sued without the principal.

In Barrow v. Norwood (3 Louisiana Rep., 437, the court held, where the obligation is joint, all the obligors must be made parties to the suit. But that was not a case of suretyship. The action was brought against one of three indorsers.

On the grounds above stated, the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, conformably to this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

JOHN D. BUSH, Appellant,

v.

JACOB MARSHALL and William B. Whitesides.

Mortgagor estopped from denying his seisin in suit to foreclose—true title subsequently acquired by grantor enures to benefit of grantee—in action by vendor for purchase money, vendee who has purchased better outstanding title, can only recoup amount fairly paid.

Where the holder to a pre-emption right to lots in the town of Dubuque sold them to another person, the facts that the vendor had received certificates of his right, although the land officers were not satisfied with their sufficiency, and that the vendor acted as the undisputed owner, were sufficient to negative the charge of fraud in his representing his title to be good.

The relinquishment, by the vendor, of his title to the United States, with a view to a public sale and completion of his title, was not fraudulent towards the vendee, if it was the purpose of the vendor to enable himself to convey a perfect title to his vendee.

If, at the public sale, the vendee himself became the purchaser, he became a trustee for his original vendor; and if, at the public sale, the original vendor became the purchaser, the title enured to the benefit of his vendee.

*THE following statement of the [*285 case was the brief of Mr. Howard, who argued it:

This was an appeal from the Supreme Court of Iowa Territory, sitting as a court of equity, under the following circumstances:

On the 2d of July, 1836, Congress passed an act (chap. 262, 5 Statutes at Large, 70) for laying off the town of Dubuque, amongst other towns, under the direction of the Surveyor General. The 1st section directed lots to be laid out in a certain manner, and a plat returned to the Secretary of the Treasury, and within six months thereafter the lots should be sold to the highest bidder. The second section directed the lots to be classed according to their value into three classes, viz., at $40, $20, and $10 per acre, respectively; and gave a right of pre-emption to those persons who had obtained a permit to settle, or who had actually occupied and improved the lots, paying for the lot according to its class.

On the 3d of March, 1837, Congress passed another act (chap. 36, 5 Statutes at Large, 178), amendatory of the former, substituting a board of commissioners for the surveyor. They were empowered, to "hear evidence, and determine all claims to lots;" to reduce the evidence to writing, which they were directed to file with the register and receiver, together with a certificate in favor of each person having the right of pre-emption. Upon payment for the lot being made to the receiver, the receiver was directed to give a receipt for the same, and the register to issue a certificate of purchase, to be transmitted to the commissioner of the general land office, as in other cases of the sale of public lands.

The 3d section directed the register and receiver to expose the residue of the lots to public sale, after advertising, etc.

On the 8th of February, 1839, Marshall and Whitesides sold to Bush a pre-emption right to two lots in the twon of Dubuque, viz., No. — and No. 194. The deed is not upon the record, but the consideration is stated in the bill, and admitted in the answer (Rec. 3, 6) to have been three thousand dollars, one half of which, viz., $1,500, was paid in cash by Bush. To secure the payment of the other half, Bush executed a mortgage to Whitesides, and also gave a promissory note to Marshall for $1,790, payable on or before the 1st of October, 1839. This $1,790, $1,500 was for the purchase of the lots, and the remaining 290 was for rent in arrear, which was transferred to Bush.

It appears from the evidence of B. R. Petkin, the register in the land office in the town of Dubuque, that "Bush came frequently to the land office to enter the lots No. 7 and No. *194, under the pre-emption law, but [*286 was not allowed to do so by the land officers because the proof filed by William B. Whitesides with the commissioners, under the law laying off the town of Dubuque, did not satisfy the land officers as being sufficient to maintain a right under the law in favor of Whitside's pre-emption."

Howard

NOTE.—As to estoppel by deeds and by recitals in deed, see note to 7 L. ed. U. S. 761.

As to when a vendee is estopped from denying the title of his vendor, see note to 10 L. ed. U. S. 878.

It appears, also, from the same evidence, that the land officers "had received instructions from the general land office, to expose all lots to public sale where the claimants should relinquish their right to pre-emption (under the law laying off the town) to the United States."

In September, 1840, the lots in the town of Dubuque were offered at public sale. Bush went to the land office, and protested against the lots No. 7 and No. 194 being offered at public sale.

Previous to the sale, however, it appears, from the testimony of Dougherty, that a "committee of arrangements had been appointed for the purchase of lots in the town of Dubuque;" that there was a "public bidder," who was a person selected by the claimants to lots in the town of Dubuque, to purchase the lots they claimed, as they were offered at the public sale.

It appears from the evidence of Dougherty, that the committee of arrangements called on Bush, and informed him that the committee desired him to make his relinquishment to lot No. 7, which he positively refused to do. The committee then erased the name of Bush, and inserted the name of Whitesides, and informed Whitesides immediately of the same; when he, the said Whitesides, came before the committee, and made his relinquishment to said lot.

It appears, also, from the testimony of Petrikin, the register, that Whitesides came to the land-office, and produced the deeds in relation to the property before the officers of the land office, and the said officers considered that the said Whitesides had a right to relinquish his pre-emption right, and thereupon the said Whitesides did relinquish; in consequence of which the lots No. 7 and No. 194 were put up at public sale.

The following statement of facts was agreed upon in the court below:

It is agreed the following statement of facts may be used, in the same manner as if the same were proved by witnesses on the hearing of the above causes:

1st. That the lots mentioned in the foregoing pleadings were sold at a public sale of lots in the town of Dubuque, by the United States, in —— last, at which sale John D. Bush, above named, became the purchaser of lot No. 7, and the above named William B. Whitesides of lot No. 194.

287*] *2d. That said lots would not have been put up and sold at said sale, unless the said William B. Whitesides had relinquished all claim to the same to the United States previous to said sale; and that said Whitesides did thus relinquish, previous to the same being put up to sale, and for the express purpose of having them sold at said sale.

3d. That said Bush objected and protested to said Whitesides against the said Whitesides thus relinquishing.

4th. That previous to said sale, and at the time of said relinquishment, and subsequent thereto (but previous to the sale), said Bush was informed by E. C. Dougherty and Whitesides, and by said Whitesides's agent, that his object in having the said lots put up to sale was expressly with a view that the title to them might be perfected in said Whitesides, so that he could make a good title to said Bush, upon said Bush paying the *purchase money* for said lots. And also that said Whitesides, by himself, or agent duly authorized for said purpose, did propose and offer to said Bush, that if said Bush would bid for said lots, and agree that his purchase should be under the contract for them set out in the pleading in the above causes, said Whitesides would make no opposition to his so doing, but was perfectly willing said Bush should become the purchaser with this understanding; but that said Bush utterly refused so to do; when said Bush was informed by said Whitesides, or by his agent, that said Whitesides would bid for said lots at said sale, in order to enable him to comply with his contract with said Bush. That said Whitesides and Bush were the only bidders for said lots at said sale, and that Philip S. Dade was the bidder for said Whitesides, of which the said Bush, previous to and at the time of said sale, was advised and informed. That the memorandum at the foot of the deed or mortgage, that said Bush was to furnish the money to pay for said lots, was there inserted by the express agreement and understanding of said Bush, at the time of executing said deed and mortgage.

The public sale took place in September, 1840, after Bush had refused to purchase under his contract. At the sale, the public bidder and Bush were the only bidders for the two lots No. 7 and No. 194, the public bidder bidding for Whitesides, of which Bush was informed previous to and at the time of said sale. The lot No. 7 was bid off to Bush, and No. 194 to Whitesides.

In April, 1841, Whitesides and Marshall filed a bill in the District Court of Dubuque County, praying a foreclosure of the mortgage and sale of both lots. After an answer and a general replication, the court decreed for the complainants, and ordered both lots to be sold. An appeal was taken to the Supreme Court [*288 of Iowa, where the decree of the court below was affirmed, and the cause was brought by appeal to this court.

It was argued by Mr. Berry (in a printed argument) and Mr. Howard for the appellant, and Mr. May for the appellees.

Mr. Justice Grier delivered the opinion of the court:

This suit originated in the District Court for Dubuque County, in the territory of Iowa. It was a bill in chancery to foreclose a mortgage given by the appellant, Bush, to Whitesides. The property mortgaged consisted of two lots (number 7 and 194) in the town of Dubuque, which Whitesides had sold and conveyed on the same day to the mortgagor, for the sum of $3,000; and the mortgage (dated 8th February, 1839) was given to secure the sum of $1,500, the balance of the purchase money.

At the time of this transaction, the United States had not yet offered the lands on which the town of Dubuque was situated for sale. But notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements, under the expectation of the grant of a right of pre-emption from the government, or, at least, that they could complete their title by purchase from it, when the lots should be offered for sale.

These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subjects of contract and sale by conveyances in the forms usual for passing a title in fee. On one of the lots which was the subject of the mortgage in question, a tavern house and other improvements were erected, for which the tenant paid a rent of seventy dollars per month at the time of this purchase. The deed from Whitesides to Bush was not put in evidence, but, from the recitals of the mortgage and admissions of the answer, it appears to have been a deed in fee simple, with a covenant of general warranty. The mortgagor is estopped by his deed from denying seisin, and cannot make out a sufficient defense unless by proving payment of the money, want of consideration, or fraud which will avoid the contract.

Accordingly, the appellant, in his answer, has set up two grounds of defense by way of avoidance of his deed. First, fraudulent misrepresentation by the vendor to induce him to make the purchase; and, second, want of consideration from failure of title.

1st. The fraudulent misrepresentation charged consists of three particulars. First, that the 289*] vendor represented "that he *held a valid pre-emption right to the lots, by virtue of the laws of the United States in relation to town lots in the town of Dubuque;" second, that he represented that the fixtures in the tavern, to wit, the bar shelves and counter, formed a part of the property sold, whereas they were claimed and taken away by Hale, the tenant, and the house much injured by the moving and tearing away of said fixtures; and, third, that by falsely representing Hale, the tenant, to be punctual in his payments, Bush was prevailed on to give his note to the complainants for the sum of $290, for the rent of the unexpired term; whereas Hale was not punctual, and defendant was unable to collect the rent from him.

The latter two of these charges may be summarily disposed of by the remark that there is no evidence in the case of any representations by the complainants on the subject; and as the matter alleged in the answer is not responsive to the bill, but set up by way of avoidance, the defendant was bound to prove it.

But the first is the one chiefly relied on in the argument, and deserves more particular notice.

It is proved by Davis, the scrivener who drew the deed and mortgage, that Whitesides told Bush "that he, Whitesides, had a pre-emption to the property." Was this representation false? The only evidence on the subject is in the testimony of Petrikin, the register of the land office, who swears, "that the commissioners, appointed under the act of Congress laying off the towns of Dubuque, etc., filed in the land office certificates in favor of Whitesides's pre-emption to these lots, No. 7, and No. 194." He states, also, "that the land officers had instructions from the general land office to expose all lots to public sale, where the claimants should relinquish their right of pre-emption to the United States." He states, moreover, "that the land officers were not satisfied with the regularity or sufficiency of Whitesides's certificate;" but whether these doubts or opinions were well founded or not does not appear from any testimony in the case. The facts, also, that Whitesides was permitted to relinquish the pre-emption right to the United States, and that no other person laid any claim to the possession and pre-emption of these lots except Whitesides, and Bush, claiming under him, are conclusive, when taken in connection with evidence of a certificate in his favor by the commissioners, to show that the representation of Whitesides was not false or fraudulent, and that defendant has wholly failed to support this allegation, as set forth in his answer.

But it has been contended, that this relinquishment, made by Whitesides to the United States against the consent of Bush, *was fraudulent, and injurious to the [*290 interests of Bush. To this argument two answers may be given, either of which is conclusive. First, that there is no allegation in the pleadings on the subject; and, second, the evidence clearly shows, that, although Whitesides did relinquish his pre-emption to the United States, and that, too, without the consent of Bush, yet the act was not fraudulent, as it was not intended, and did not tend, to do any injury to Bush. Whitesides, by his warranty, was bound, under penalty of $3,000, to obtain a good title for Bush, cost what it may, while Bush was bound to pay only the minimum or pre-emption price. The relinquishment of his pre-emption right by Whitesides was not intended as an abandonment of his claim, but was a plan adopted by himself, in common with the other claimants of lots in Dubuque, as the most convenient method of obtaining a title. By thus suffering them to be exposed to auction, they ran the risk of being compelled to pay more than the minimum or pre-emption price for a title, but could not get it for less. The record admits that Bush knew "that Whitesides's object in having the lots put up to sale was expressly with a view that the title to them might be perfected in said Whitesides, in order that he could make a good title to Bush." It is not easy to apprehend how fraud can be predicated of the conduct of Whitesides, who, it is admitted, was using every endeavor to fulfill his contract, and obtain a good title for his vendee. As to the alleged fraud on the government by the conduct of the people in Dubuque on this occasion, it is sufficient to say that the question is not raised in the pleadings, nor the fact proved in the evidence.

We are of opinion, therefore, that the appellant has wholly failed to show any fraud or misrepresentation on the part of his vendors, which would justify a court of chancery in annulling an executed contract.

Indeed, the facts of the case tend rather to show that the fraud, if any, in this transaction, may be more justly charged to the party who is so liberal in imputing it to others.

If Bush could have thwarted Whitesides in his endeavors to procure the legal title for him, if he could hold the lot on which the tavern house and improvements were situated (and valued at $2,200) for his bid of less than twenty dollars, and then recover the $2,200 from Whitesides, on his warranty, he will have effected what is commonly called a speculation;

but one in the perpetration of which he ought not to expect the aid of a court of equity. The anxious disavowal of an intention "to defraud or wrong the complainants," contained in the defendant's answer, was not called out by 291*] any charge *in complainant's bill, but seems rather to have resulted from a consciousness that his conduct was justly liable to such an imputation.

II. The other ground of avoidance is failure of consideration.

The answer alleges, that, at the public sale by the United States, lot No. 7 was purchased by defendant himself, and therefore the vendor is unable to comply with his contract by making him a title, and, moreover, that Whitesides has become the purchaser of lot No. 194, and therefore he, Bush, was without title to it.

This defense seems founded on an entire mistake or ignorance of the law; as the facts alleged lead to a directly contrary conclusion, and show that the defendant has a complete legal title. If Whitesides sold to him with covenant of warranty, and afterwards purchased the legal title, as the answer asserts, with regard to lot No. 194, then is the title vested in Bush, the vendee, by estoppel, and no further conveyance is necessary.

As to lot No. 7, Bush, having obtained possession under Whitesides, cannot, by the purchase of an outstanding title, defeat the claim of his vendor. It is a well established rule of equity, "that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." "Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title by the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title. See Galloway v. Findlay, 12 Peters, 295, and cases there cited.

In the present case, the vendee has bought in, for twenty dollars, the legal title to a property worth more than two thousand, the possession of which he received from his vendor; and not only so, but, contrary to good faith and fair dealing, he has interfered to overbid his vendor, who was using every endeavor to purchase the title for the use of his vendee, in fulfillment of his own covenants. The appellant has paid no more (or, if more, so little as to be unworthy of notice) than he agreed to pay for the purpose of getting a legal title. He has got a good title to the property, and ought in justice and equity to pay for it the full consideration which he has covenanted to pay.

The decree of the Supreme Court of Iowa 292*] must therefore *be affirmed, with costs, with leave to the appellees to sell the mortgaged property in the mode prescribed by law, unless the appellant shall pay the amount of said decree, with interest thereon and the costs, within sixty days from the filing of the record in this case in the proper court of the State of Iowa.

12 L. ed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum, with leave to the appellees to sell the mortgaged property in the mode prescribed by law, unless the appellant shall pay the amount of said decree, with interest thereon, and the costs, within sixty days from the filing of the mandate in this case in the proper court of the State of Iowa.

CHARLES McMICKEN, Plaintiff in Error,

v.

AMOS WEBB, Mary Ann Smith, in her own right and as Tutrix, etc., and Ira Smith, in his own capacity and as Tutor to the Minors, Catharine and Sarah Smith.

Action on note—plaintiff not allowed to prove mistake varying contract of sureties.

Where a promissory note, payable to a firm, was signed by one of the partners in the firm together with two other persons, and suit was brought upon it against these two other persons in the name of the payee partner, upon the ground, that the note was intended for his individual benefit, and that the insertion of the name of the firm as payees was an error, it was clearly his duty to prove such error upon the trial.

If these two other persons were merely sureties (a fact for the jury), proof of such error would not make them liable beyond the terms of their contract, unless they were privy to and agreed to the same. Neither a court of law nor equity will lend its aid to affect sureties beyond the plain and necessary import of their undertaking. This is the doctrine of this court, of the State courts, and of England.

The payee partner having brought into the evidence the terms upon which the partnership was dissolved, by which it appeared to be his duty to collect the assets, pay the debts, and settle the concerns of the partnership, it was competent for the jury to judge whether the note was given provisionally and designed to abide the settlement of the affairs of the firm, and if so, then it became necessary for the payee partner to prove the fulfilment of these duties before any right of action upon the note accrued to him.

The note being drawn by one of the partners payable to his own firm, this drawer partner was entitled to one half of it, and the obligation of the sureties was diminished pro tanto.

Where the plaintiff excepted to the opinion of the court, which opinion was more adverse to the defendants than to the plaintiff, this court will not, at the instance of the plaintiff, reverse the judgment, although there may have been error in the instructions, provided that error consisted in giving the plaintiff too much.

*THIS case was brought up by writ [*292 of error from the Circuit Court of the United States for the District of Louisiana.

It was formerly, in a preliminary stage of it, before this court, and is reported in 11 Peters, 25.

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

NOTE.—That a party to bill or note cannot vary his contract by parol, see note to 8 L. ed. U. S. 316.

As to oral evidence as applicable to written con-

It was argued by Mr. Coxe for the plaintiff in error, and Mr. Jones, for the defendant.

Mr. Justice Daniel delivered the opinion of the court:

The record in this cause being encumbered with matter deemed wholly irrelevant to the true points in controversy between the parties, much of this matter the court will pass over, embracing within its view such portions of the record only as regularly present those points, and the rulings of the Circuit Court with respect to them. In this view, little else need be presented except the pleadings in the cause, the note on which this action is founded, the fact of a copartnership between the plaintiff in error and James H. Ficklin, and the agreement comprising the terms on which the copartnership was dissolved, these three last mentioned documents being referred to in the pleadings and appealed to by the parties on both sides of this cause to sustain the positions on which they respectively rely; and, lastly, the instructions prayed by the parties and given by the Circuit Court.

This is, according to the peculiar proceedings in the State of Louisiana, an action at law, although, from the mode of proceeding by petition, from the introduction into that petition of various matters dehors the instrument set out as the immediate cause of action, and from the converting in one proceeding parties standing sui juris with those who sustain a representative character, it bears a striking resemblance to a suit in equity.

The petition states, that, sometime in the year 1815, the plaintiff and one James H. Ficklin formed a copartnership and transacted business under the name of McMicken & Ficklin; that about the 8th of September, 1817, the said copartnership was dissolved by mutual consent; that at the time of said dissolution there was a stock of goods on hand, which said Ficklin took and purchased at cost, with five per cent. addition thereon, and for the payment of one half of said stock of goods he gave to the petitioner a promissory note, dated September 20th, 1817, due and payable on the 1st day of March, 1819, to the order of McMicken & Ficklin, for the sum of $4,866.93½, executed by said Ficklin, by Jedediah *Smith, and Amos [*294 Webb, the defendant, whereby the drawers became bound to pay the whole of the said note, which note is annexed as a part of the petition.

The petition then proceeds as follows:

"Your petitioner further shows that said obligation was erroneously made payable to McMicken & Ficklin, though in truth and in fact said note was dated and executed subsequent to the said dissolution of said firm, and was made towards and in behalf and for the sole and individual benefit of your petitioner, the joint name, or the name of the late firm, being used and intended for your petitioner's sole benefit, said Ficklin being in no wise a party or interested therein except as one of the obligors.

"Your petitioner further shows, that since the execution of the said note or obligation, the above mentioned Jedediah Smith, one of the co-obligators thereof, died, leaving his wife, the said Mary Ann Smith, and two minor children, Catharine and Sarah, all of whom now own and possess all the property and estate by the said Jedediah Smith left at his decease.

"The mother in right of her community, and said minors as heirs, and the said Mary Ann Smith, the widow of said deceased, has since married one Ira Smith, the said defendant herein, by reason of which said several premises, the said Mary Ann, Catharine, and Sarah have become obligated and bound, in solido, to pay your petitioner the whole amount of said note or obligation, together with interest, according to the tenor and effect thereof, which they refuse, though often and amicably demanded to pay."

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tracts, see note to Bradley v. Wash. etc., Steam Packet Co. 13 Pet. 89.

Immaterial and authorized alterations of a bill or note.

If the legal effect is not changed the instrument is not altered. The following changes are immaterial:

Writing out the name of the bank, after the signature "Cashier," which was intended to bind the bank. Bank of Genesee v. Patchin, 3 Kern. N. Y. 309; Folger v. Chase, 18 Pick. 63.

The insertion of the dollar mark before the numerals expressing the amount in dollars. Houghton v. Francis, 29 Ill. 244.

Changing the marginal figures so as to conform them to the written amount. Smith v. Smith, 1 R. I. 398; Bank of Commonwealth v. Curry, 2 Dana, 142; Bank of Limestone v. Pennick, 5 Mon. 25; Norwich Bank v. Hyde, 13 Conn. 279.

The addition in full of the Christian names of the drawers whose surnames had been affixed before acceptance. Blair v. Bank of Tennessee, 11 Humph. 84.

The interlineation of the surname of the payee after delivery. Manchet v. Casson, 1 Brev. 307.

The running of a pen through the words "Providence Steam Pipe Co.," which was one name under which a firm did business, and writing over it their style in the copartners' names. Arnold v. Jones, 2 R. I. 345.

Changing the address in a bill from "A. B. & Co.," to "A. & B.," on its being accepted by the firm by the name "A. & B.," there being no question as to the identity of the firm intended, and the acceptors being liable either way. Farguhar v. Southey, Moo. & M. 14.

Erasing "R" where the payee's name was written "B. R. C." instead of "B. C." as intended. Cole v. Hills, 44 N. H. 227.

Correcting "Franklin E." so as to read "Francis." Desby v. Thrall, 44 Vt. 414.

In no case is a change in the phraseology of the instrument material, when it does not change essentially its legal effect. Holland v. Hatch, 15 Ohio St. 464.

Immaterial memoranda on the margin or other portions of the bill or note, are also of no effect to avoid the instrument. Batchellor v. Priest, 12 Pick. 399; Thomson on Bills, 113; Commonwealth v. Industrial Savings Bank, 98 Mass. 12; Berdsell v. Russell, 29 N. Y. 220.

As, where a party's residence is noted, after his name. Struthers v. Kendall, 5 Wright, 214.

So, of other memoranda noted thereon. Walter v. Cubley, 2 Cr. & M. 151: City of Elizabeth v. Force, 29 N. J. Eq. 591; overruling 28 N. J. Eq. 587.

Tearing off the words "Trustees of the First Universalist Society," appended to the signatures of the makers where the note was the personal undertaking of the signers, and so remained unchanged in its effect. Burlingame v. Brewster, 79 Ill. 515.

The following are immaterial changes: Retracing a faded name in clear ink, Dunn v. Clements, 7 Jones Law, 58; writing over in ink a word written in pencil, Reed v. Roark, 14 Texas, 329; correcting a misspelling, Leonard v. Wilson, 2 Cromp. & M. 589; changing the number of a negotiable bond, Commonwealth v. Emigrants Bank, 98 Mass. 12; inserting "paid in gold, gold having been the consideration," when the consideration was gold, and the parties knew the consideration was gold, when they severally signed. Hausen v. Crawley, 41 Ga. 303.

The note on which this action was instituted and referred to in the petition is in the following words:

St. Francisville, Sept. 20th, 1817.

$4,866.93½. On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. interest after due until paid.

James H. Ficklin,
Jed. Smith,
Amos Webb.

The only remaining documentary evidence referred to in the petition, and in accordance with which it is alleged that the note in question was executed, is found in the agreement entered into by McMicken & Ficklin upon the dissolution of their copartnership, and is in the following words:

295*] *"Memorandum of an agreement, made and entered into this 8th day of September, 1817 between Charles McMicken, Jun., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm name of McMicken & Ficklin; that they have this day by mutual consent dissolved their copartnership aforesaid, and that Charles McMicken Jun., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all the dues and demands owing to the said firm, either at law or otherwise, by exchange or re-exchange of notes or accounts, or any other mode he may think advantageous to the concern; and when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same, until full and final payment and settlements are made; and to employ at his discretion such person or persons as he shall think necessary, for the completion of the business; and that James H. Ficklin take all the goods on hand at cost, with an advance of five per cent. on the whole amount, payable as follows, viz., three thousand by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in the same manner (or some good house in New Orleans in their stead) for any further sum to meet the one half of the whole amount of goods, payable on the 1st day of May, 1818, and for the remaining half he gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st day of March, 1819; and by the non-compliance of James H. Ficklin in giving the aforesaid acceptances and note, this agreement to remain null and void, so far as the sale of the goods to him; and all the sales of goods by him, for the period of thirty days, the time allowed him to comply with the foregoing, shall be carried to the joint benefit of the last firm.

"In witness whereof we hereunto subscribe our names, the day and date above written.

"James H. Ficklin,
"Charles McMicken."

Several pleas were interposed by the defendants or respondents below to the demands in the petition. The court deem it necessary to advert to such of these pleas only as are connected with the points comprised in the rulings of the judge at the circuit.

Thus in the 3d plea it is denied that the note in question was made to the petitioner, and that Ficklin, Webb, and Smith ever promised to pay the money therein mentioned to McMicken alone, or that the note was made on behalf of McMicken, or that the partnership name of McMicken & Ficklin was intended to *be used for the benefit of McMicken [*296 alone. They insist upon the contract as apparent on the face of the note, and call for strict proof of the allegations of the petitioner. They aver that it was well known that Webb and Smith signed the note as sureties—that, if there ever was any consideration for their obligation, it has failed, and that neither Ficklin, as principal, nor Webb and Smith, as sureties, were ever bound to pay this note.

4. They plead further, and specially, a want of consideration, averring that Ficklin, as partner, was entitled to one half the stock; that he paid McMicken for one half by drafts and acceptances, mentioned in the article of dissolution, which were paid; that the demand of McMicken for the note of Ficklin, Webb, and Smith for the other half was a fraudulent contrivance, or an error or misconception of the parties, and could form no legal consideration for the note.

5. They further plead, that the note was executed by Ficklin, as principal, and Webb and Smith, as sureties, to McMicken & Ficklin, of which firm Ficklin was a partner; that by the dissolution of the firm one half of Ficklin's responsibility was extinguished by confusion, and Webb and Smith became thereby absolved pro tanto; that, under the agreement for the dissolution, McMicken had received $10,000 more than was requisite to pay the debts of the firm, for which excess he was accountable by the above agreement, and that thereby the note, to which Webb and Smith were mere sureties, was paid.

They further plead, that the note became due by its terms on the 1st day of March, 1819; that Ficklin died in 1817, leaving a will and appointing executors; that his estate has been regularly represented by executors since his death, and that by the laches of McMicken, in not settling the affairs of the concern or suing on the note from 1819 to 1835, he is barred by his negligence and by lapse of time.

And, lastly, they insist that, upon the dissolution of the firm of McMicken & Ficklin, McMicken had received all the books, notes, and claims due to the firm, and bound himself to settle all the affairs of the concern out of these funds, so far as they should prove adequate; that Ficklin was to take the goods on hand, to pay McMicken for one half of that stock in certain acceptances, and to execute his note, with Webb and Smith, as sureties, for the remaining half in value, subject to a contingent responsibility upon the settlement of the concern by McMicken; that McMicken had not made such settlement according to the terms of the agreement of dissolution, and therefore had no right of action against the representatives of Ficklin or the respondents.

*At the trial of this cause the fol- [*297 lowing instructions prayed for by the defendants were given by the court and made the subjects of exception by the plaintiff:

1st. That as plaintiff had alleged that there was error in making the note sued on, drawn

in favor of and payable to McMicken & Ficklin, and that said note ought properly to have been made in favor of Charles McMicken only, plaintiff could not recover without proving such error and mistake; and if no such error or mistake was proved, the verdict of the jury ought to be in favor of defendants; for, without such proof, McMicken alone could not recover on a note drawn in favor of McMicken & Ficklin.

2d. That if the jury were satisfied that Webb and Smith were originally only sureties, and that whatever consideration there was for the note passed between McMicken as one party, and Ficklin as the other party, in such case an express written contract on the part of sureties is to be strictly construed in their favor, and they could only be made liable on their contract in the form and manner in which they had entered into it; and no proof of any error or mistake, as between the principal parties to the contract, could make mere sureties liable beyond the terms of the contract, unless they were privy to and agreed to the same; and if plaintiff could only recover against the principal party to the contract sued on by showing error or mistake in that contract, the verdict of the jury as regarded the sureties should be in their favor.

4th. That if the jury believed that the note sued on grew out of the settlement of the partnership affairs of McMicken & Ficklin, and was given provisionally in relation thereto, and that McMicken had charged himself with the settlement of the partnership affairs, that then McMicken cannot recover on this note without a final liquidation and settlement of the partnership affairs; and that if, under the circumstances aforesaid, McMicken persists in submitting the suit on this note to the decision of the jury, their verdict ought to be for the defendant.

5th. That if the jury believed that the note sued on was given to attend on a settlement and liquidation of the partnership affairs of McMicken & Ficklin, and McMicken charged himself with the liquidation and settlement of the partnership affairs of McMicken & Ficklin, and that McMicken has received partnership assets sufficient to pay the debts of the partnership, in such case plaintiff McMicken ought not to recover, and the verdict of the jury ought to be for the defendants.

6th. That if the jury believed that Ficklin was a partner of the house of McMicken & 298*] Ficklin, to whom the note was *payable, and that the said house has long since been dissolved, and that the same Ficklin was principal debtor, and Amos Webb and Jedediah Smith were only sureties in the note sued on, that these facts created a confusion of the characters of creditor and debtor; and whenever such event happened, there was a payment of the note to the extent of the correlative characters of debtor and creditor, which in this case was one half.

7th. That if the jury believed that the note sued on was given in pursuance of the terms of the dissolution of partnership between McMicken & Ficklin, and under an implied agreement that, if the debts due to the partnership were not sufficient to pay the debts due by the partnership, then Ficklin and his sureties were to make good and supply one half of the deficiency, and that McMicken charged himself with the liquidation of the partnership affairs in 1817, and that McMicken had not rendered an account of such liquidation before bringing this suit, it was competent for the jury to say that there was such a laches, neglect, and default on his part as discharged the sureties.

1st. We can perceive no objection to the ruling of the court in this instruction; neither argument nor authority can be called for, to sustain a position so elementary and so trite as that the allegation and proof must correspond. In this case, the petitioner alleges a separate and exclusive right in himself; the proof which he adduces discloses an equal right in another. He avers this discrepancy to be the result of error; he must certainly reconcile this contradiction, or his claim is destroyed by conflict with itself.

2d. This second instruction we hold to be correct. Even as between principals, a court will not bind parties to conditions or obligations to which they have not bound themselves, according to a fair interpretation of their contract. How far any written contract may be explained, as between parties confessedly principals, by evidence aliunde, is a nice and difficult question, always approached with doubt and caution; but as against a surety, neither a court of law nor a court of equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not, as against him, assist in completing an imperfect or defective instrument; much less will it add a new term or condition to what he has stipulated. He must be permitted to remain in precisely the situation in which he has placed himself; and it is no justification or excuse with another, for attempting to change his situation, to allege or show that he would be benefited by such change. He is said to possess an interest in the letter of his contract. *That this is the doctrine in England [*299 we see in the cases of Nisbet v. Smith, 2 Bro. Ch. R. 579, Rees v. Berrington, 2 Ves. Jun., 540, and Boultbee v. Stubbs, 18 Ves. 20. It is the doctrine of this court, so declared in the case of Miller v. Stewart et al. 9 Wheat. 680. It is probably the doctrine of all the States. Vide. Croughton v. Duvall, 3 Call, 69; Hill v. Bull, 1 Gilmer, 149. If, then, Webb and Smith were mere sureties in the note declared on, the plaintiff could not, by setting up another contract as formed or as intended to be formed between himself and Ficklin, transfer the responsibility of these sureties to such contract, differing in its terms from that which they had in fact executed.

4th and 5th, which should be numbered the 3d and 4th instructions. These two instructions are essentially the same. The petitioner, in his count or petition, sets out the fact of the dissolution of the firm of McMicken & Ficklin, and refers to the agreement of dissolution as evidence of the conditions on which it took place, and of the rights vested and the obligations imposed by that agreement. It is from this document that we gather the facts of the transfer of the goods on hand to Ficklin, in consideration of the acceptances to be procured and of the note to be executed by him, with Webb and Smith as his sureties, and the further facts of McMicken's possession of all

the books, notes, and accounts of the firm, and of his obligation to collect the resources and to pay the debts and settle all the affairs of the concern, so far as the means placed at his command were adequate for these ends. The above facts, disclosed by the petition and the agreement of dissolution, were certainly competent evidence for the consideration of the jury, and from which they might infer the purpose for which the note to McMicken & Ficklin was executed, the duty of McMicken to settle the partnership affairs, and to pay the debts of the concern with the funds placed at his disposal; and if they should infer from these facts, that the note executed to McMicken & Ficklin was given provisionally, and designed to abide the settlement of the affairs of the firm, and that McMicken was bound by the agreement of dissolution to liquidate and settle the affairs of the firm, then the jury were bound to find that the fulfillment of these obligations on the part of McMicken should precede any right of action on the note, and that, without proof of such fulfillment, they were equally bound to find for the defendants.

6th. This instruction affirms a position, as to which, we presume, there can be no room for difficulty or doubt; namely, that on the note given by Ficklin to his own firm of McMicken & Ficklin, with Webb and Smith as sureties, 300*] Ficklin, as a partner, *was entitled to one half, upon the dissolution of the firm, and that thereupon, pro tanto, the obligation of these sureties would cease, as Ficklin could have no right of action against himself to compel payment to himself.

7th. With regard to the instruction numbered 7, given on the prayer of the defendant, we deem it to be in substance the same with Nos. 3 and 4, which having been already examined and approved, it is unnecessary to review in detail the same questions in the last instruction.

There is, also, though not designated by any number, what is denominated in the record an "additional charge" prayed by the defendants. This, upon examination, being found a mere general legal proposition in the language of the 2094th article of the Civil Code, and no immediate application or connection of which to the pleadings or testimony in this case being attempted nor being perceived by the court, it is passed by as immaterial and unimportant.

On the part of the plaintiffs, there are instructions prayed, and designated on the record as No. 2 and No. 3; and in No. 2 by the irregular ordinal arrangement of 4th and 7th; in No. 3 in the arrangement of 1st, 2d, and 3d.

Instruction 4th, in the first division, is in the following words: "That the defendants to this suit, having bound themselves in solido, cannot claim the right or oblige the plaintiff to discuss the property of Ficklin or his succession. Civil Code, art. 3015, 3016. The court below very properly disposed of this prayer (as it might have disposed of what was called the additional charge prayed on behalf of the defendants), by justly remarking, that its applicability to the cause was not perceived, as the defendants were not endeavoring to interfere with the property or affairs of Ficklin any farther than to assert the true import and character of their own contract with McMicken & Ficklin, which they had an unquestionable right to do.

With regard to the prayers 1st, 2d, and 3d, in No. 3, although their relevancy to the true issues taken in this cause is not shown, and the opinion of the court is perhaps not sustainable with respect to them, yet as that opinion, so far as expressed, is more adverse to the defendants than to the plaintiff, and the defendants have not asked its reversal, no right can be recognized in the plaintiff to complain that he has failed to obtain all he required, when he has already obtained too much. Upon an examination of this somewhat anomalous and confused record, we have come to the conclusion that the judgment of the Circuit Court should be, and it is hereby accordingly affirmed.

*Order. [*301

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

THE PLANTERS' BANK OF MISSISSIPPI, Plaintiffs in Error,

v.

THOMAS L. SHARP, Edward Englehard, and Henry Hampton Bridges, Defendants in Error.

MATTHIAS W. BALDWIN, George Vail, and George Hufty, Merchants and Persons in Trade under the Name, Style, and Firm of Baldwin, Vail & Hufty, Plaintiffs in Error.

v.

JAMES PAYNE, Abner E. Green, and Robert Y. Wood, Defendants in Error.

State law prohibiting banks, previously empowered by charter, from transferring bills, notes, etc., unconstitutional.

Where a bank was chartered with power to "have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of what kind soever, nature, and quality, and the same to grant, demise, alien, or dispose of for the good of the bank," and also, "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, and to make loans," etc., and, in the course of business under this charter, the bank discounted and held promissory notes, and then the Legislature of the State passed a law declaring that "it shall not be lawful for any bank in the State to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant"—this statute conflicts with the Constitution of the United States, and is void.

NOTE.—As to repeal of modification of statutes as affecting vested rights and what laws are unconstitutional as impairing the obligation of contracts, see notes to 3 L. ed. U. S. 162; 4 L. ed. U. S. 529.

THESE two cases were both brought up, by writ of error issued under the twenty-fifth section of the Judiciary Act, from the High Court of Errors and Appeals for the State of Mississippi.

They were kindred cases, and were argued together. Although the court pronounced an opinion in each case separately, yet the dissenting opinion of Mr. Justice Daniel treats them as they were argued, and hence it becomes necessary to blend the two cases together. The facts in each case will be stated, then the arguments of counsel, and then the opinions of the court, with the separate opinion of Mr. Justice McLean, and the dissenting one of Mr. Justice Daniel.

Planters' Bank v. Sharp et al.

On the 10th of February, 1830, the Legisla-
302*] ture of Mississippi *passed "An Act to establish a Planters' Bank in the State of Mississippi."

The sixth section of the charter enacts, among other things, that the bank "shall be capable and able, in law, to have, possess, receive, retain, and enjoy to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, not exceeding in the whole six millions of dollars, including the capital stock of said bank, and the same to grant, demise, alien, or dispose of for the good of said bank."

The seventeenth section gives power "to receive money on deposit and pay away the same free of expense, discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the States in the nature of discount on real property, secured by mortgage," etc.

The twenty-second section enacted, "that it shall not be lawful for said bank to discount any note or notes which shall not be made payable and negotiable at said bank."

By a supplement to the charter, passed in 1831, and accepted by the bank, it was provided that "such promissory notes shall be made payable and negotiable on their face at some bank or branch bank."

On the 24th of May, 1839, Sharp, Englehard, and Bridges gave their promissory note to the Planters' Bank for one thousand dollars, due twelve months after date. A copy of the note is not to be found in the record, but the declaration states it to have been "payable and negotiable at the office of the Planters' Bank of the State of Mississippi, at Monticello."

On the 21st of February, 1840, the Legislature of Mississippi passed "An Act requiring the several banks of the State to pay specie, and for other purposes," the seventh section of which was as follows: "It shall not be lawful for any bank in this State to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant."

In October, 1841, the Planters' Bank brought a suit upon the note in the Circuit Court of Lawrence County (State court). The defendants pleaded the general issue, and a jury was sworn. The declaration and note having been read, the defendants filed the following plea.

"And now, at this day, that is to say, on the second day of the term aforesaid, until which day this cause was last continued, come the said plaintiffs, by attorney, and the said defendants, *by attorney; and the said [*303 defendants say, that since the last continuance of this cause, that is to say, since the sixth day of the May Term, 1842, of this court, from which day this cause was last continued, and before this day, that is to say, on the 10th day of June, in the year 1842, at the county aforesaid, the said plaintiffs then and there being the owners of the said note sued on in this cause, and then and there being a bank in the State of Mississippi, and within the intent and meaning of the statute of this State, entitled 'An Act requiring the several banks in this State to pay specie, and for other purposes,' transferred the aforesaid note to the United States Bank of Pennsylvania, contrary to the statute in such cases made and provided; and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiffs ought further to be answered in this said action, and that the same may abate.

"Personally appeared in open court Thomas L. Sharp, one of the defendants in the above stated case, who, being duly sworn, upon his oath says, that the matters and things set forth in the above plea are true in substance and fact. Sworn to and subscribed in open court. Thomas L. Sharp."

The plaintiffs demurred to this plea, upon the following grounds:

1st. Because said plea is not assigned by counsel.

2d. Because said plea does not state the day, year, time, and place of the transfer of said note.

3d. Because the plaintiffs have a right by law to deal in promissory notes, bills of exchange, etc., secured by charter.

4th. Because the statute, the title of which is recited in said plea, is, so far as relates to transfers of notes, bills receivable, or other evidence of debt, unconstitutional.

5th. That said plea does not state to what term said cause was continued.

6th. That said plea does not allege that said note was transferred for value received.

7th. That said plea is a plea in bar of this action, but does not conclude in manner and form as provided by law.

8th. That said plea was not presented until issue joined under the plea of non assumpsit, and the declaration and note read, and a jury impaneled to try said issue.

9th. That the statute referred to in said plea does not affect the plaintiffs.

10th. That the said defendants did not tender the costs of suit in said case, up to the time of their tendering said plea, with said plea.

*11th. That said plea is not entitled [*304 in this cause.

12th. That the affidavit subjoined to said plea is not sufficient.

The defendants having joined in demurrer, the court, after argument, overruled it, and

leave being granted to the plaintiffs to reply to the plea, an issue was joined in short by consent, and the cause proceeded, when the jury found a verdict for the defendants.

A bill of exceptions was taken by the plaintiff's counsel, as follows, viz.:

"Be it remembered that on the trial of the above cause at the term aforesaid, after the case was submitted to the jury, and after the plaintiff had introduced his evidence upon the issue joined, the defendant introduced a witness, who proved that, since the suit in the above case was instituted, the note had been transferred to the United States Bank of Pennsylvania, the defendants offered a plea, in the words and figures following, to wit.: [Then followed the plea above recited.]

"To the reception of said plea the counsel for the plaintiffs objected, which objection was overruled; to which opinion of the court the counsel for plaintiffs except, and having reduced their exceptions to writing before the jury retired, pray the same may be signed [and] sealed.

"Given under my hand and seal this 6th December, 1842.

(Signed) "A. G. Brown. [Seal.]"

Upon this exception, the case was carried up to the High Court of Errors and Appeals, which, at December Term, 1842, pronounced the following judgment:

"This cause having been submitted at a former term of this court, and the same having been duly considered by the court, it is ordered and adjudged that the judgment of the Circuit Court of Lawrence County, rendered against the plaintiffs in error at the December Term thereof, A. D. 1842, be, and the same is hereby reversed, because rendered as a judgment in bar; and this court, proceeding to render the judgment that should have been pronounced by the court below, doth order and adjudge that the plaintiffs in error, the plaintiffs in the court below, take nothing by their writ, and that the suit be abated."

To review this judgment, a writ of error brought the case up to this court.

Baldwin, Vail, and Hufty v. James Payne et al.

Matthias W. Baldwin, George Vail, and George W. Hufty, copartners, brought this ac- *305*] tion on the 15th April, 1841, in the *Circuit Court of Jefferson County, Mississippi, against James Payne, Abner E. Green, and Robert Y. Wood, the makers, and the Mississippi Railroad Company, the indorsers, of two certain promissory notes, each in the sum of $6,283.95, payable at the Merchants Bank, New Orleans, the first, sixty days after December 4, 1839, and the other ninety days thereafter. The notes were without date on their face, and were discounted, at the instance of Payne, one of the makers, by the Mississippi Railroad Company, under their banking powers, on the said fourth December, 1839, to whose order they were made payable, and were by said company, on the 1st day of April, 1841, indorsed over, transferred, and delivered to the plaintiffs for a valuable consideration.

The defendants, Payne, Green, and Wood, were served with process, and appeared and pleaded the generel issue. They also pleaded the following special plea, viz.: That the said promissory notes, in the declaration of the said plaintiffs mentioned, were executed and delivered by them, the said defendants, to, and discounted by, the Mississippi Railroad Company, on the 4th day of December, in the year 1839, at the county aforesaid, and thereby became and were the property of the said Mississippi Railroad Company, to wit, on the day and year aforesaid, at the county aforesaid; and that the said promissory notes continued to be and were the property of the Mississippi Railroad Company from the day and year last aforesaid until and after the 26th day of April, in the year 1840, at the county aforesaid, after which 26th day of April, in the year 1840, to wit, on the 1st day of April, 1841, at the county aforesaid, the said Mississippi Railroad Company, by their indorsement thereon, transferred the said two promissory notes, in the said declaration mentioned, to the said plaintiffs; and this they are ready to verify. Wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them."

To this special plea the plaintiffs demurred, and the defendants joined in demurrer.

The Circuit Court, on the 11th of November, 1842, sustained the demurrer, and awarded judgment of respondent ouster, but the defendants refusing further to plead, the court thereupon gave judgment upon said demurrer to the second plea for the plaintiffs.

On the same day the cause, being dismissed as to the Mississippi Railroad Company, came on for trial before a jury, on the general issue, against the other defendants, and a special verdict was found, as follows, viz.: "We, the jury, find that defendants, James Payne, Abner E. Green, and Robert Y. Wood, *executed the two several promissory [*306 notes (described in the plaintiff's declaration) on the 4th day of December, 1839, and on the same day delivered the said notes to the Mississippi Railroad Company, to be discounted for and on account of said James Payne; one of which said notes is for the sum of $6,283.95, payable sixty days after the said 4th of December, 1839, to the order of the said Mississippi Railroad Company, at the Merchants' Bank in the city of New Orleans; and the other of the said notes is for the sum of $6,283.95, also payable ninety days after the said 4th of December, 1839, to the order of the said Mississippi Railroad Company, at the Merchants' Bank in the city of New Orleans. That said two notes were discounted by said Mississippi Railroad Company, under their banking powers, on the said 4th of December, 1839, at the instance of the first drawer, said James Payne, and the proceeds thereof were received by him, and the said company thereby became the holder of said notes. That the said notes, or either of them, were not paid at maturity, and were presented for payment at maturity, and protested for nonpayment, and that no part of them, nor any interest, has been paid by said defendants, or either of them. That the Mississippi Railroad Company, on the 1st day of April, 1841, being indebted to the plaintiffs, Baldwin, Vail, and Hufty, transferred and delivered said two several promissory notes to said plaintiffs, for a

valuable consideration, in payment of said debts. If, upon the facts, the court is of opinion that the law is in favor of the plaintiffs, we find for the plaintiffs, and assess their damages at $15,300.90. But if, upon these facts, the court is of opinion that the law is for the defendants, Payne, Green, and Wood, then we find in their favor."

The Circuit Court gave judgment, upon this special verdict, in favor of the plaintiffs and the defendants thereupon took a writ of error to the High Court of Errors and Appeals. The cause was argued in the Court of Errors, and on the 11th day of November, 1844, the said court rendered their final judgment, viz.: "That the judgment of the Circuit Court of Jefferson County be reversed and for nothing held, and that the defendants in error, the plaintiffs below, take nothing by their writ, and that the suit is abated."

The charter of the Mississippi Railroad Company was conferred by an act of the Legislature of Mississippi, approved February 26, 1836, entitled "An Act to incorporate the Mississippi Railroad Company." By the first section of a supplementary act, passed May 12th, 1837, the company were "authorized and empowered to exercise all the usual rights, powers, and privileges of banking which are permitted to [*307] banking *institutions within this State, subject to the limitations and restrictions hereinafter mentioned." And by section eighth of said supplementary act, the company were, among other things, made capable "to purchase and sell real and personal estate, and to hold and enjoy the same to any amount not exceeding in value at any time $500,000 over and above the property in and necessarily connected with said railroad." By the same section, its "banking privileges, rights, and powers were secured to said company until the 30th day of December, 1858."

The Planters' Bank of the State of Mississippi was an incorporated banking institution, existing within said State at the date of the foregoing charter.

From the above statement of these two cases, it is apparent that in the first one, viz., that of the Planters' Bank, the suit was in the name of the original payees of the note, and in the second, it was in the name of the indorsees. being brought in both cases against the makers of the notes. The main question in both was the constitutionality of the statute of Mississippi passed on the 21st of February, 1840.

The two cases were argued, as has already been remarked, together, by Mr. Wharton and Mr. Sergeant for the plaintiffs in error, and by Mr. Coleman, Mr. Gilpin, and Mr. Webster, for the defendants in error.

The counsel for the plaintiffs in error made the following points in the case of The Planters' Bank:

1. That by the final judgment of the High Court of Errors and Appeals of Mississippi in this suit, there was drawn in question the validity of the Act of that State of the 21st day of February, 1840, on the ground of its being repugnant to the Constitution of the United States, and that the decision was in favor of the validity of the act.

2. That by said judgment in this suit, there was drawn in question the construction of the tenth section of the first article of the said Constitution, which declares that "no State shall pass a law impairing the obligation of contracts," and the decision was against the title and right specially set up and claimed by the plaintiffs in error, under such clause of the Constitution.

3. That the charter and supplemental charter of the Mississippi Railroad Company is a contract, within the meaning of the Constitution, between the people of the State of Mississippi, and the stockholders of the corporation and all claiming under the charter.

4. That the said charter authorizes the bank to transfer *notes, bills receivable, and [*308 other evidences of debt, belonging to it, and to destroy this right impairs the obligation of the aforesaid contract.

5. That the charter is an unqualified contract, and is all inviolable in point of obligation; and that the power to acquire and transfer its property aforesaid may, of right, be exercised with freedom from all restraints not contained in the charter, nor imposed by the law of Mississippi when the charter was granted; of which restraints there were none.

6. That the said law of Mississippi cuts off all suit in case of transfer, and is therefore unconstitutional.

7. That the said act is repugnant to the Constitution of the United States, unconstitutional, and void.

In the case of Baldwin, Vail, and Hufty, the following was an additional point:

That the plaintiffs in error were the holders of certain promissory notes put in suit by them, which they had purchased for value from a company that by its charter had the right to sell and transfer them, and that the judgment of the High Court of Errors and Appeals in favor of the defendants below, on the mere ground that the plaintiffs had possession of said notes by transfer from the Mississippi Railroad Company, impaired both the obligation of the contract between the State and the company, and that between the makers of said notes and the holders.

Mr. Wharton, for the plaintiffs in error, stated the circumstances of each case and the difference between them. The point was the same in both, viz., the right to transfer the notes, and the validity of the statute which forbid it. In the case of The Planters' Bank the judgment of the State court was, that the statute not only disabled the bank from transferring, but also that the bank itself had lost the right to sue, in consequence of such a transfer having been made whilst the suit was pending. The suit in this case was in the name of the original payees. In the other case the suit was brought by the indorsees. The transfer was pleaded as a defense, and the court sustained it. Therefore the judgment of the State court was, in the two cases, that neither the payee nor indorsee could maintain an action where a transfer had been made. We say that this decision is contrary to the Constitution of the United States. The principles upon which we stand are elementary. The State law was passed in 1840, after the grant of the charter and after the execution of the notes.

Mr. Wharton then entered into a history of the decisions of this and other courts upon the following propositions.

309*] *1st. That a charter is a contract between a State and the corporation. 6 Cranch, 87, decided in 1810. A grant is an executed contract, and a ..ap of the law cannot set it aside. 9 Cranch, 43, in 1815.

A legislative grant is not revocable. 4 Wheat. 518, in 1819; 1 Greenleaf, 79, in 1820.

A statute granting corporate powers, when accepted, becomes a contract. 15 Mass. 245, in 1819; 8 Wheat. 464, in 1823; 10 Conn. 522, in 1835.

2d. A bank charter is as much a contract as any other charter. This precise point has not often been made. The right of a State to incorporate a bank has been made a question in one case only; viz., Peck, 269; Minor, Ala. R. 23, in 1820; 2 Stuart, Ala. R. 30, in 1829.

In both the last cases the court say that a bank charter is a contract between the State and stockholders, and cannot be changed unless with the assent of both parties. 4 Peters, 514, in 1830, where the tax was held constitutional, but the court say that the contract with the bank must be protected. See p. 560; 3 Wendell, 351, in 1832; 11 Peters, 257, in 1837.

A bank owned wholly by a State is constitutional. 9 Wheat. 407, in 1824.

Such a contract is protected by the Constitution. 3 Howard, 133.

3d. No State can pass a law impairing the obligation of a bank charter. This is a corollary from the other two propositions.

What, then, was the contract in these cases? The power to the Planters' Bank is given in words as comprehensive as possible. The only limitation is as to the amount of property to be held. The railroad charter refers to and adopts the bank charter. In both, there was a power to receive these notes, to hold them, and to alien or sell them. Before the restraining statute was passed, it would not have been easy to doubt these powers. The words, "grant, demise, alien, or dispose of," are as comprehensive as any words that could be used. "Goods, chattels, and effects" must include promissory notes. "Goods and chattels" would do so, but "effects" is still stronger. The legal meaning of "effects" is explained in Cowper, 299. Also 13 Vesey, 39, 47, note.

Corporations, unless restrained by their charter, have control over their property, and may alienate it. 1 Kyd on Corp. 108; 1 Sid. 161, cited by Kyd; Co. Litt. 44 a, 300 b; 10 Coke Rep. 306; 2 Kent's Com. 281, 4th ed.; 3 Pick. 239; 1 Ves. & Bea. 226, 337, 340, 344; 2 Bland, 142; 5 Hammond, 205; 5 Wend. 590; 1 Watts, 385; 6 Gill & Johns. 305;

310*] *11 Vermont, 385; 2 Stuart, 401; 2 Wheat. 372; 5 Watts & Serg. 223.

The next question is, What did the Legislature do to impair these rights? It said that the suit should abate. It is true, there was no final judgment in bar, but the right of maintaining an action was cut off forever. If both judgments of the State court are correct, then neither the original payee nor the transferee can sue. No one can sue. If the Legislature had merely forbidden the transfer, and suffered the original right of property to remain in the bank, then the bank could have sued for the use of the transferee. But the court have said that the fact of transfer abates the suit brought in the name of the bank.

The Legislature could not do this. 1 Murphy, 58, in 1805; 2 Haywood, 310, 374; 2 Mass. 142, 143, in 1806; 7 Cranch, 184, in 1812; 15 Mass. 447, in 1819; Peck, 1; 6 Wheat. 131; 6 Greenl. 112; 2 Penn. Rep. 184; 2 Yerger, 534; 7 Gill & Johns. 7, 134; 2 Fairfield, 118.

This court usually adopts the State construction of State laws. 10 Wheat. 152; 11 Wheat. 361; 3 Wash. C. C. R. 313.

If, then, this court adopts the Mississippi construction of this statute, all suits upon the notes are cut off; the contract is destroyed entirely. There is no difference between taking the whole or a part, if the obligation of the contract is impaired. What is the obligation of a contract? See 4 Wheat. 207, 197; 4 Littell, 34, 47; 12 Wheat. 318.

The constitution refers to a legal, and not a moral obligation, and depriving the party of all remedy impairs the legal obligation. 8 Mass. 430; 2 Gallison, 141; 2 Greenl. 294; 3 Peters, 290; 8 Wheat. 17; 1 Howard, 316, 317; 2 Ib. 608.

Mr. Coleman, for the defendants in error, laid down the following propositions:

1. That the presumption is always in favor of the validity of a law, and that its invalidity or unconstitutionality must be clearly demonstrated by the party attacking it.

2. That corporate powers are to be strictly construed; and that corporations possess only such powers as are specifically granted them, or are necessary for the exercise of those expressly granted.

3. That neither by the charter of the Mississippi Railroad Company, nor by that of the Planters' Bank, nor by those of any of the other banks of Mississippi which were incorporated prior to the year 1837, has the power to transfer promissory notes been expressly given.

4. That the power to transfer promissory notes is not necessary to the exercise or enjoyment of any of the powers that have been expressly granted to said company.

*5. That the transfer or negotiation [*311 of promissory notes is not a legitimate banking operation; but, on the contrary, is subversive of the very end and object for which these institutions are chartered.

6. That the seventh section of the Act of 1840 is neither a partial law, nor does it devest vested rights; and that even were it liable to both these objections, they alone would not render it unconstitutional.

And as a conclusion necessarily flowing from the maintenance of the foregoing propositions, we hold, lastly,

That the seventh section of the act of 1840 neither directly nor incidentally impairs the obligation of any contract entered into by the State of Mississippi with the Mississippi Railroad Company, and is therefore a valid and constitutional law.

Upon the 1st point. 4 Dall. 19; 6 Cranch, 128. The propositions laid down by the counsel on the opposite side are not controverted.

We admit all three; but say that the contract is not impaired.

Upon the 2d point. 4 Peters, 168; 2 Cranch,

167; 4 Wheat. 636; 15 Johns. 358; Angell & Ames, 192, 2d ed. sec. 12; 2 Kent, 298, 299. Kent says that the modern doctrine is so. The cases cited on the other side are exploded.

3d point. If the argument upon the other side should be correct as to the Planters' Bank, it does not follow that it is so as to the railroad company, because only the usual banking powers are conferred upon the latter, and the power to transfer notes is not a usual banking power. The purposes and objects of the company could be attained without this power.

Moreover, to construe the word "effects" as including promissory notes will make two clauses of the charter inconsistent with each other. The capital was three millions, and the amount of notes issued was not to exceed three times the amount of capital paid in. Therefore the bank had a right to issue nine millions. But the sixth section limits the amount of property which it can hold to six millions. If notes are included within the "effects" of the bank, and it can hold only six millions, then the two sections are inconsistent with each other and the only mode of reconciling them is to construe the words "property" and "effects" as exclusive of the banking capital. 3 Smedes & Marshall, 677, this case 8 Rob. La. Rep. 417, 420, a construction of this same statute.

4th and 5th points. The power does not necessarily follow. If so, to what grant of power is this implied one necessary? The bank may keep its notes till they are due, and then collect them. It does not necessarily belong to the jus disponendi. Neither is it necessary to the right of acquisition.

312*] *In the case of Baldwin, Vail and Hufty, the notes were the property of the transferee. But no case decides, that, if the original party had recovered possession of the note, a suit could not be maintained upon it. In the case of The Planters' Bank, why did not the bank reply to the plea, that it had regained possession of the note? This would have brought the question fairly up. The object of the Legislature was not to destroy the note, but merely to repeal its negotiability, conferred first by the Statute of Anne, and afterwards by the Legislature of Mississippi. How. & Hutch. 373, sec. 12.

The argument upon the other side would be sound, if by the charter the bank acquired an indefeasible right to transfer notes; and it is said to be so because no existing statute then prohibited transfers. But the property of negotiability is not essential to a note. It was regulated by a general act of the Legislature, and might with propriety have been repealed.

6th. The objection that this law is partial, and relates only to banks, is not properly made here. This court has nothing to do with such a question. But the proposition is denied, that it is a partial law. 6 Cowen, 512, 169; 15 Wend. 436.

Mr. Gilpin, on the same side, said that the only question before the court was whether or not the law of Mississippi impaired the obligation of its contract with the bank. If it did, no court would be more ready to condemn it than the State court of Mississippi. In this very case that court say: "Legislation which impairs chartered rights is not only at war with the Constitution of the United States, but it is repugnant to a similar provision in our State constitution, and on that account would be inoperative. But if both these instruments were silent as to the power to impair the obligations of contracts, such legislation is essentially repugnant to the protective spirit of a well organized goverment. In a government like ours, such power is totally out of the range of legislative authority," etc., etc.

No State goes further to uphold this clause of the Constitution than Mississippi. 1 Howard, Miss. Rep. 189; 6 Ib. 672; 4 Smedes & Marshall, 507.

Does the law in question impair the obligation of a contract? It only modifies the previous law relating to the assignment of debts or property, bearing only on assignments which took place after the passage of the law; it protects the debtor by saying that he shall not be exposed to different liabilities than those which he took upon himself; it adheres to the original contract; it leaves parties in the same situation where they placed themselves; it changed no obligation, but only forbade *the transfer of that obligation to any- [*313 one else. All that it took from a promissory note was the benefit of a statutory regulation. The common law gave no right to transfer such property. According to Coke, choses in action were not assignable. The right exists only by the Statute of Anne, and courts have always confined the privilege to the letter of the law. 5 Peters, 597, 16 Mass. Rep. 452, 14 Id. 108.

The statute of Mississippi, of 1822, made notes transferable, and her courts recognize this as the only foundation of the right to transfer. 7 Howard, Miss. Rep. 391; 2 Smedes & Marshall, 249.

With this public statute existing, the Planters' Bank was chartered. It was to perform banking operations, and nothing else.

The sixth section enumerates its powers, and, if the right to transfer exists, it must be found here.

The seventeenth prescribes its banking duties—to "receive money," etc.; not a word about the transfer of notes.

The twentieth says it may issue bank notes.

The twenty-second limits its issue to three times the amount of capital paid in and deposits.

The thirty-first says it may sell securities, when they are mortgages. In all this, there is no right to transfer.

There is a distinction, all through the charter and the supplement, between corporate powers and banking powers. The first are only given to enable it to execute the latter.

But if the argument upon the other side be sound, the bank could do anything. Under the general head of acquiring property, it might make a railroad.

The railroad company had less power than the bank. Its duties are specifically pointed out, and it is authorized to purchase and sell bills of exchange, but not a word about notes.

In 1840 (Pamphlet Laws, 13, 21) the Legislature passed laws to remedy the evils of bank, to limit their issues, forbid dealing in cotton, stocks, etc. Are these all violations of the charter? In 1843 the Legislature appointed

commissioners to take charge of the assets of banks. The object of the law of 1840 was to give notice that notes were not transferable, but that the obligors should be protected. The assignee, therefore, took these notes knowingly. But the assignee of a bond cannot sue upon it after receiving notice that it is not to be transferred. Another object of the Legislature was to compel the banks to receive their own depreciated paper in payment of debts. The borrowers had received this paper, and an assignment would cut off the right of set-off. The policy of all these laws will be defeated if the statute is overthrown.

314*] *The following have been adopted as principles in construing State laws:

1st. The presumption is in favor of a State law. 1 Dall. 14.

2d. A contract between a bank and a State must be construed strictly. 2 Cranch, 107; Osborn v. Bank of United States, 9 Wheat. 738; 13 Peters, 587; 15 Johns. 383; 2 Cowen, 700.

In the case before us, we are dealing with the contract between the bank and State, not that between the parties to the note. If it were the latter, the rule is, that a party taking a note, after it is due takes it cum onere. 4 Dall. 370; 13 Peters, 65.

The railroad company had no power to transfer, vested in it by the charter. If it had the right at all, it must be found in the charter as an express grant, or it must have been held by the municipal law, which is always subject to be repealed.

As to the first branch. If granted in the charter, it must be found in the words "usual powers of banking." Does this clause include a power to sell? Even if the Planters' Bank had it specially, it would not pass to the railroad company under this general clause. In other States, the power to sell is not considered one of the usual banking powers. 1 Rev. Stat. N. Y. 178, sec. 6; 9 Mass. Rep. 54; 2 Cowen, 710.

What is the doctrine of this court, as expressed in the cases which have been decided? There are only thirteen where laws have been held unconstitutional, and not one of them is like the present.

[Mr. Gilpin here went through a critical examination of all the cases referred to by the opening counsel.]

Mr. Webster, on the same side, referred to all the laws of the State relating to the case, and also to a territorial act passed in 1812, and afterwards adopted by the State. This made bonds and notes assignable, whether drawn to order or not, but made the assignee liable to all equity occurring before notice of assignment.

Bills of exchange were exempted from the operation of the law of 1840. Why? Because the sale of them is expressly granted in the seventh section of the supplemental act. Selling them might be one of the mischiefs intended to be guarded against. But the Legislature found the power within the charter, and therefore did not attempt to interfere with it.

In the case of the railroad notes, there was a special verdict. The counsel on the opposite side complain of it as a case of hardship. But how is it made out? In December, 1839, two notes were given, one payable in 60, and the other in 90 days. *They were dis- [*315 counted on the same day. Neither was paid. They were protested, and remained so for more than a year. The bank then stopped payment itself. On the 1st of April, 1841, the bank indorsed these notes to the plaintiffs in error. So the jury find. But there is no purchase stated, no money paid. They were transferred to pay a previously existing debt. If the plaintiffs lose this suit, therefore, they are no worse off than they were before. They took the notes to see what they could make out of them, with the law staring them in the face. There is no hardship in the case.

The charter of the railroad company gave all necessary powers. If a case could be shown where it was necessary to sell notes, then the transaction would be within the charter. But it is difficult to make out such a case. The incidental powers of a corporation only reach and include what is necessary. 2 Kent, 298, 4th ed.; Angell & Ames, 195, 2d ed. chap. 5, sec. 2, and the cases there cited.

The amendatory act must be construed by the same rule. The power must be given by express grant, or it must be essential to the proper exercise of some granted power.

1. As to an express grant. There is none such found; on the contrary, it is excluded by the clearest indications of the act.

2. It is not essential. On the contrary, the exercise of it would be dangerous and subversive of the grant.

It has been said, that the express power is in the first and eighth sections of the amendatory act; that the "usual powers of banking" refer to the Planters' Bank, and that the word "effects" includes promissory notes, and the words "dispose of" are equivalent to "transfer." But the court of Mississippi did not think so. The declaration says the notes were "indorsed" to the plaintiffs. The words of the law are that they shall not be "transferred." These two things are not identical. An indorsement is a new contract. The indorser parts with the paper and makes himself liable.

But the seventh section is still stronger. It says that they may "negotiate checks, drafts, and bills of exchange." If promissory notes were intended to be included, here was the place to put them in.

If the sixth section included everything, why insert this at all? The seventeenth section says, "may discount bills of exchange and notes," "may renew notes." This supposes that the notes are lying in the bank, or they cannot be renewed. The twenty-second section says that all notes must be payable at the bank. This also infers that they must be there at all times.

*The limitation of the power to issue [*316 would be effectually destroyed if the bank could sell and indorse notes, because there is no limit to such a proceeding. It is true, that the liability is contingent; but still it has ruined many corporations.

Is the power to transfer notes essential to the proper business of banking? On the contrary, it is entirely subversive of it. It is indorsing other people's paper—mere brokerage. When the paper is assigned, interest upon it

ceases to the bank. No well conducted bank is ever reduced to such an emergency as to be obliged to sell paper.

[Mr. Webster illustrated this by a reference to 3 Anderson's History of Commerce, 143, for a history of the Bank of England, and then examined the decisions of this court which were alleged to be hostile to the positions which he had assumed.]

Mr. Sergeant, for the plaintiffs in error, in reply and conclusion, spoke first of the merits of the cases. The makers of the notes had been represented to be willing to pay in the depreciated notes of the bank. Why did they not? The note fell due and remained in the bank for a long time, during which they could have paid in the notes of the bank. But they were now seeking to avoid the payment of a just debt by setting up the policy of the State. We ask for the benefit of the Constitution of the United States, which is paramount to Mississippi laws. The principles of this court are now adopted by the courts of the States, and it is a mistake to say that they are not acceptable to the people. The States say, pass the law, and if it is wrong the Supreme Court will overthrow it. If in these cases we ask, Did you not make these notes? the answer must be, Yes. Did you not promise to pay? Yes. Have you any defense but the one now set up, viz., the policy of the State? No. But if a whole community are set free from paying their debts, it is a policy which no one ought to wish to establish. This is a far fetched defense. The defendants have reconciled their own consciences to it, but they are under the influence of self-interest. The aggregate of claims involved is two millions of dollars, every one of which is as just as this one. The Planters' Bank was chartered in 1830. Afterwards there were four more, the last in 1837. All these banks had an extensive capital, but the Planters' Bank was the favorite of the State. It was visible and felt everywhere. A mighty machine was set up, and its accounts have now to be settled with the people of the United States. Then came the railroad company, which commenced as such, and was afterwards vested with banking powers. The object of the supplementary charter was to add to, and not diminish, its powers. It conferred 317*] the powers *"usual for banking purposes," "authority to deal in bills of exchange." It has been said that this excludes notes." But by a fair construction it includes them; because it says, also, "checks, bills," etc., and then gives the same power over these checks, etc., referring to notes. There is no sense in the section upon any other construction. They have had a whirlwind in Mississippi, but they sowed the wind. The notes were given in 1839. Then everything was right enough. The bank could not collect them, because the debtors would not pay. What was the bank to do? Keep them in its drawer, and suffer its own creditors to remain unpaid? Keep its harvest locked up in the barn, and not give one sheaf to its creditors? There was no use in keeping the notes. They were given for a real consideration, and when suit was brought there was no pretense of any defense. The record shows that there was none. There was no usury connected with them, and they were negotiable on their face. The result of the two suits together shows that all remedy by suit is lost. This court, in Bronson v. Kinzie, said that no additional burden should be put upon the creditor; but here his remedy is entirely gone.

The statute says that the bank shall not transfer any "note, bill receivable, or other evidence of debt." But it cannot pass these things to its creditor without transferring them, nor can it make a general assignment to trustees without transferring its choses in action. The laws of Mississippi do not prohibit debtors from giving preferences.

This act is retrospective. It acts upon existing contracts. But this is in opposition to the judgment of this court in the case of Bronson v. Kinzie. The opinion of learned and unlearned men would concur in this. We need only to take the notes and the statute, and present the case to any mind. The answer must be, that the claimants are now without remedy, and that they are so in consequence of the law of 1840. Up to the time of assignment, the plaintiff was justly a creditor. Now, his claim is extinguished forever.

The object of the statute has been stated to be, to compel the banks to pay specie. But how can they do this, when they are prohibited from selling the things which will bring them specie? The charter required the bank to take paper which was "payable and negotiable at the bank." How negotiable? The law merchant describes this quality as passing from hand to hand by indorsement and delivery. The object must have been to give the bank the best kind of paper, such as it could use in an emergency by selling. It has been said that the word "enjoy," in the charter, does not imply the *power of selling property; but [*318 how can a hungry man enjoy a dollar in his pocket without spending it?

It is an error to say that notes were not negotiable at common law. There never was a time in England when they were not so. The Statute of Anne only enabled the transferee to sue in his own name.

The State might as well have said that all bonds, mortgages, notes, etc., should be at once void, as to have declared this one so. If the Legislature intended to protect debtors, the system of ethics has become inverted. Hitherto it has been thought to be the duty of a Legislature to take care of creditors also.

They do not profess here to act only upon the remedy. They root up the contract. Before the Act of 1840, the bank had these notes in hand, and they were negotiable. The act stopped their negotiability. It has been said that there is no authority in the charter to negotiate notes. Why? Because the Legislature knew that all individuals had the right, and where a corporation was created, it would necessarily have it also. One great duty of a corporation is to pay its debts. Will it be said on the other side that it cannot do so unless expressly authorized in its charter? Under what law can it make a general assignment? A corporation has no faculty to do wrong. If it can use any other species of property to pay its debts, much more can it use that kind which is most readily applicable, most convenient, and most proper, namely, its own evidences of debt.

Mr. Justice Woodbury delivered the opinion of the court:

Planters' Bank v. Sharp et al.

The question to be considered in this case is, whether an act of the Legislature of Mississippi, passed February 21st, 1840, impaired the obligation of any contract which the State or others had previously entered into with the Planters' Bank.

If it did, the clause in the Constitution of the United States, expressly prohibiting a State from passing any such law, has been violated, and the plaintiffs in error are entitled to judgment.

But, on the contrary, if that act does not impair the obligation of any contract, the judgment below in favor of the defendants must be affirmed.

In considering this question, no peculiar liberality of construction in favor of a corporation, so as to render that an encroachment on its rights which is not clearly so, seems to be demanded of us by any more sacredness in the 319*] character of a *corporation or its rights than in that of an individual; but rather, that its charter as a public grant is not to be construed beyond its natural import. 8 Peters, 738; 3 Peters, 289; 4 Peters, 168, 514. The inviolability of contracts, however, and the faithful protection of vested rights, are due to the one no less than the other, and are both involved in the present inquiry, so far as affecting, by way of principle or precedent, all the various and vast interests of this kind existing over the whole Union.

Mr. Madison denounced laws impairing the obligation of contracts as among those not only violating the Constitution, but "contrary to the first principles of the social compact and to every principle of sound legislation." Federalist, No. 44.

Again, in Payne et al. v. Baldwin et al. 3 Smedes & Marshall, 677, one of the cases now before us, it is truly admitted, that, in a "government like ours, such power is totally out of the range of legislative authority."

At the same time, it is to be recollected that our Legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a fair rather than hypercritical view of well intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the judiciary should be strong to uphold them.

Certainly it will be only when they depart from limitations or qualifications of this character, and so use their own rights as to impair the prior rights of others, that a check must be used, however unpleasant to us, by declaring, that the constitutional restrictions of the general government must control a statute of a State conflicting with them, and thus, for harmony and uniformity, make the former supreme, in compliance with the injunctions imposed by the people and the States themselves in the Constitution. Governed by such views, we proceed to the examination of the questions arising here, by ascertaining, first, what powers the Legislature of Mississippi granted to the plaintiffs, and then what powers it has taken away from them.

On the 10th of February, 1830, "An Act to establish a Planters' Bank in the State of Mississippi" passed, and, among other privileges, in the sixth section, granted that the bank "shall be capable and able, in law, to have, possess, receive, retain, and enjoy, to themselves and their successors, lands, *rents, tene- [*320 ments, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, not exceeding in the whole six millions of dollars, including the capital stock of said bank, and the same to grant, demise, alien, or dispose of, for the good of said bank."

The seventeenth section gives power, also, "to receive money on deposit, and pay away the same free of expense, discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the States in the nature of discount on real property, secured by mortgage," etc.

Doing business with these powers, amounting, as it has been repeatedly settled, to a contract in the charter for the use of them (see cases in The West River Bridge, at this term), the bank, on the 24th of May, 1839, took the promissory note on which the present suit was instituted, and, on the 10th day of June, 1842, transferred it to the United States Bank, having first commenced this action on it, the 11th of October, 1841.

But in the mean time, after the execution of the note, though before its transfer, the Legislature of Mississippi, on the 21st day of February, 1840, passed a law, the seventh section of which is in these words: "It shall not be lawful for any bank in this State to transfer by indorsement or otherwise any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence or debt, that the same was transferred, the same shall abate upon the plea of the defendant." See Acts of 1840, p. 15. This law constitutes the only defense to a recovery in the present case by the plaintiffs. But they contend it is invalid, because, by the Constitution, art. 1, sec. 10, "no State" shall pass any law "impairing the obligation of contracts"; and this law does impair it, in this instance, in two respects. First, in the obligation of the contract in the charter with the State; and second, in the obligation of the contract made by the signers of the note declared on with the bank.

To decide understandingly these questions, it will be necessary to go a little further into the true extent of those two contracts under the powers held by the bank, and likewise into the true extent of the subsequent act of the Legislature affecting them.

That promissory notes are to be regarded as either goods, chattels, or effects, within the sixth section of the charter, can hardly be questioned, when it includes these "of what kind soever, nature, and quality." This addition

evidently meant to remove any doubt or restric- 321*] tion as to the meaning of those *terms as sometimes employed in connection with peculiar subjects, and to extend the description by them to every kind of personal property belonging to the bank. This construction would go no further than sometimes has been done in England, holding the words "goods and chattels" to include choses in action, as well as other personal property (12 Coke, 1; 1 Atkins, 1182), and by the word "goods" alone, in a bequest, it has been held that a bond will pass (Anonymous, 1 P. Wms. 127).

So, in respect to effects, it has been held, when the word is used alone, or simpliciter, it means all kinds of personal estate. 13 Ves. 39, 47, note; Michell v. Michell, 5 Madd. 72; Hearne v. Wigginton, 6 Madd. 119; Cowp. 209. But if there be some word used with it, restraining its meaning, then it is governed by that, or means something ejusdem generis. Here, however, instead of restraining terms being used with it, those most broad and enlarging are added, being "effects of what kind soever, nature, and quality." Hotham v. Sutton, 15 Ves. 326; Campbell v. Prescott, 15 Ves. 500; 3 Ves. 212, note.

The same rule prevailed in the civil law, under the term bona mobilia. 1 P. Wms. 267. And by that law, as well as the common law, promissory notes or choses in action come under the category of movable goods or personal property, as they accompany the person. 2 Bl. Com. 384, 398.

The bank was allowed, also, by the seventeenth section, "to discount bills of exchange and notes;" and, in truth, promissory notes usually constitute a large portion of the property of such institutions. Such notes, also, not only by general usage and established forms, are, in most cases, made to run to banks or their order, and must be expected to run so when the banks please; but it is expressly provided, by the twenty-second section of this charter, that "it shall not be lawful for said bank to discount any note or notes which shall not be made payable and negotiable at said bank," etc. And, again, by an amendatory act, accepted by the bank, it was provided, on the 9th of December, 1831, "that such promissory notes shall be made payable and negotiable on their face at some bank or branch bank."

Bt why made negotiable, if no right was to exist to negotiate or transfer them? The bank, then, as the legal holder of such notes possessed a double right "to dispose" of them; first, from the express grant in the charter itself, empowering them, as to their "goods, chattels, and effects, of what kind soever, nature, and quality," "the same to grant, demise, alien, or dispose of, for the good of said bank" (sixth section); second, by an implied authority, incident to its charter and business, and the express requirement that the notes should be "negotiable 322*] *on their face." We do not refer to the next ground because it is necessary to resort to implication or analogy to establish an authority in the bank under its charter to make a transfer of its notes, when it possesses that authority by the very words and spirit of the contract made in the charter by the State.

But to make the correctness of this conclu-

sion from the specific words of the charter

156

stronger and undoubted, it will be found to be the natural, useful, and proper view of its powers as a bank, under all sound analogy and necessarily implied authority.

To reach this end, it is not indispensable to hold that corporations in modern times possess numerous incidental powers, equal to those of individuals, as was once the doctrine (Kyd on Corp. 108; 2 Kent's Com. 281, and cases in those treaties); but seems now in some respects overruled. Earle v. Bank of Augusta, 13 Peters, 519, 587, 153; 2 Cranch, 167; 12 Wheat. 64. But merely to hold, as it often has been in late years, that what is necessary and proper to be done to carry into effect express grants, and which is nowhere forbidden, may in most cases be lawful.

Though such a power as this last to Congress is expressly added in the Constitution of the United States, yet it has been considered by some that it would exist as a reasonable incident, under reasonable limitations, without any such express addition. 2 Kent's Com. 298, and cases there cited.

Thus a corporation, if once organized, has the implied power to make contracts connected with its business and debts, and through agents and notes as well as under its seal. Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299; 8 Wheat. 338; 12 Wheat. 64; 11 Peters, 588.

So it may hold and dispose of property even in trust, if not inconsistent and unconnected with its express duties and objects. Vidal et al v. Girard's Ex'rs, 2 Howard, 127.

Hence the power to dispose of its notes, as well as other property, may well be regarded as an incident to its business as a bank to discount notes, which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed on the authority to transfer them.

Not that a banking corporation has under its charter a constructive power to follow another independent branch of business, such as manufacturing or foreign trade, but merely the business of banking, and to do such acts as are necessary and proper or usual to carry that business into effect, and such as are in harmony with the letter and spirit of its charter.

*Nor even that it can adopt any [*323 course as an incident, and as necessary and proper, which is merely convenient, or which is expressly forbidden by the charter, or so forbidden by any previously existing laws in the State of a general character.

But in discounting notes and managing its property in legitimate banking business, it must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for a banking-house, and for any "goods and effects" connected with banking which it may properly own. It is its duty to pay in some way every debt. 6 Gill & Johns. 219. This court, in The United States v. Robertson, 5 Peters, 650, has expressly recognized the authority of a bank to give bonds and assignments to pay its deposit debtors. In that case, "the directors agree to pledge to the government of the United States the entire estate of the corporation as a security for the pay-

ment of the original principal of the claim," etc. (p. 648). And such a pledge or transfer was held there to be valid.

It is said, in opposition to this, Why should a bank be considered as able to incur debts? Or why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities? Such inquiries overlook the fact that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates, or bank book credits to individuals, are debts of the bank and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said also of all its bank notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge. See Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 307; 13 Peters, 593.

It may, to be sure, independent of justifications like these, not be customary for banks to dispose of their notes often. But in exigencies of indebtedness and other wants under pressures like those referred to, it may not only be permissible, but much wiser and safer to do it than to issue more of its own paper, too much of it being already out, or part with more of its specie on hand, too little being now possessed for meeting all its obligations. Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of business. Angell & Ames on Corp. p. 104, sec. 9; 4 Johns. Ch. 307; 2 Kent's Com. 283; 11 Serg. & Rawle, 411. Both may sell notes to liquidate their 324*] debts, both sell their lands *acquired under mortgages foreclosed or acquired under the extent of executions not redeemed. Both, too, must be able to sell all kinds of their property, when proceeding to close up their business, or find it impracticable. Nor is there any pretense here that any clause in the charter of this bank restricted it from selling its notes or other property under any circumstances, and much less under those, connected with indebtedness and with banking, which have just been referred to. It will be seen, in this way, that all analogies seem to sustain the right which exists by the express grant in this charter to "alien and dispose of" all its "goods, chattels, and effects, of what kind soever, nature, and quality, for the good of said bank." But to avoid differences of opinion, we place the right here solely on the express grant. It ought, perhaps, to be added, that the courts of Mississippi once put a more limited construction on this charter. Baldwin et al. v. Payne et al. 3 Smedes & Marshall, 661.

But as that very case is now before us for revision, on the ground that it was erroneous, we feel obliged, for that and other reasons, which need not be here enumerated, to put such construction on the charter, and on the law supposed to violate it, as seems right according to our own views of their true intent.

Having thus ascertained the extent of the contract made by the State with the bank in the charter, we proceed next to examine the character and scope of the contract between the maker of the note and the bank.

We have already seen that the bank was not only authorized, but expressly required, to discount notes, which were negotiable, or, in other words, which contained a contract or stipulation to pay them to any assignee. Nor is it pretended there was any law of Mississippi, when this charter was given or when this note was taken, which prohibited selling it, and passing to an assignee all the rights, either of property or of bringing a suit in his own name, which then existed with individuals and other banking institutions.

What law existed on this point when the note was actually transferred is not the inquiry, but what existed when it was made, and its obligations as a contract were fixed. The law which existed at the transfer, so far from being the test of the force of a contract made long before and under different legal provisions, is the violation of it, and the very ground of complaint in the present proceeding.

This contract, then, by the bank with the maker, when executed, enabled the former to sell or assign it, and the indorsee to collect it, not only by its express terms, but by the general law of the State, then allowing transfers of negotiable paper *and suits in the [*325 name of indorsees. Howard & Hutchinson's Laws, 373.

Indeed independent of the last circumstance, it is highly probable, that by the principles of the law of contracts and commercial paper, such choses in action may be legally assigned or transferred everywhere, when not expressly prohibited by statute. This was done before the Statute of Anne, in England. And it is done since, as to paper both negotiable and not negotiable, independent of that statute.

If such notes cannot be sued in the name of the indorsee, when running to order, without the help of a statute, they certainly can be sued in the name of the payee, for the benefit of the indorsee, when the transfer is legal in its consideration and form.

The State itself, by passing this law prohibiting the transfer of notes by banks, recognizes the previous right, as well as custom, to transfer them; otherwise the law would not be necessary to prevent it. Nor is this law supposed to have been founded on any prior abuse of power in negotiating or selling its notes, which, if existing, might obviate the above inference. But it is understood, from the record and opinions of the State court, that the design of the law was to secure another provision of statute not previously existing, but made by the Legislature at the same time, requiring banks to receive their own notes in payment of their debtors, though below par. That design, too, would still recognize the prior authority to sell or transfer.

We are not prepared to say that a State, under its general legislative powers, by which all rights of property are held and modified as the public interest may seem to demand, might not, where unrestricted by constitutions or its own contracts, pass statutes, prohibiting all sales of certain kinds of property, or all sales by certain classes of persons or corporations. 14 Peters, 74. Such has often been the legislation as to property held in mortmain or by aliens or certain prescribed sects in religion.

This is, however, very invidious legislation,

when applied to classes or to particular kinds of property before allowed to be held generally. Legislation for particular cases or contracts, without the consent of all concerned, is of very doubtful validity. Merrill v. Sherburne et al. 1 New Hamp. 199. Under our system of government, and the abuses to which in various ways and to various extents that kind of legislation might lead, several of the State constitutions possess clauses prohibitory of such a course where it affects contracts or vested rights, and more especially does the Constitution of the United States expressly forbid any such [*326] legislation, whenever it goes to *impair the obligation of a contract. Hence, the general powers which still exist under other governments, or might once have prevailed here in the States, to change the tenure and rights over property, and especially the jus disponendi of it cannot now, under the federal Constitution, be exercised by our States to an extent affecting the obligation of contracts.

The next and final question, then, is, Did the act in question impair the obligation, either of the contract by the State with the bank, or of the contract by the maker of the note with the bank?

We have already ascertained the true extent of both of these contracts before this act passed; that by the State with the bank clearly allowing it to take negotiable notes, and to sell or transfer them, and that with the maker clearly enabling the bank to assign his note, and a recovery to be had on it after a transfer, by the assignee. In this condition of things, with this note taken and held, accompanied by such rights and obligations, the Legislature of Mississippi passed the law already quoted, and now under consideration. It expressly took away the right of the bank to make any transfer whatever of its notes, and virtually deprived an assignee of them of the right to sustain any suit, either in his own name or that of the bank, to recover them of the maker.

The new law, also, conferred in substance on the maker a new right to defeat any action so brought, which he would otherwise have been liable to. These results vitally changed the obligation of the contract between him and the bank, to pay to any assignee of it, as well as changed the obligation of the other contract between the State and the bank in the charter, to allow such notes to be taken and transferred. It is true that this new law might bear a construction, that the transfer was only a voidable act, and not void, and that if cancelled or waived, a recovery might afterwards be had on the note by the bank; and this seems to have been the view of some of the court in 3 Smedes & Marshall, 681, as well as in Hyde et al. v. The Planters' Bank, 8 Robinson, 421. Yet the State court in Mississippi appears finally to have thought it meant otherwise, and to have decided that no suit at all can be sustained on such a note by anybody after a transfer. This was the view which they think influenced the Legislature. See Planters' Bank v. Sharp et al., 4 Smedes & Marshall, 28. We are disposed to acquiesce in the correctness of this construction, as it seems to conform nearest to the real designs of the Legislature. But this view is *not adopted, because* a decision by a State *court on a State statute*, though generally governing us, is to control here in the very cases which, on account of that decision, are brought here by appeal or writ of error.

*The rights of a party under a con- [*327 tract might improperly be narrowed or denied by a State court, without any redress, if their decision on the extent of them cannot be reviewed and overruled here in cases of this kind; while their decision, if restricting or enlarging the prohibitory act, might more safely stand, as doing no injury in the end, if we hold the act null wherever it is construed by them or us so as to conflict with prior rights obtained under contracts. See Commercial Bank v. Buckingham's Ex'rs. 5 Howard, 317.

If the State courts of Mississippi should hereafter adopt the dissenting opinion of Judge Sharkey, in 4 Smedes & Marshall, 28, and go back to what they appear to have before held, in 3 Smedes & Marshall, 661—namely, that the right to sue by the bank, after a transfer, was not taken away, if the plaintiff replied that the transfer had been rescinded, and the interest was now solely in the bank—and should that construction be adopted here, the force of this new law, as impairing the obligation of the contract, might not be so extensive and clear as now. But still it would seem to impair the contract in some respects; yet whether in such way and extent as to render the obligation itself changed must be left to be decided definitively when such a case is presented for our decision. In the present instance, however, as before explained, the extent and operation of the prohibitory law being regarded as forbidding any transfer whatever, and, if it takes place, as barring every kind of remedy on the note, the decisive question may be repeated, How can this happen without injury to the plaintiff's contracts? When every form of redress on a contract is taken away, it will be difficult to see how the obligation of it is not impaired. Green v. Biddle, 8 Wheat. 76; Howard, 317; 4 Smedes & Marshall, 507; Kin[illegible] v. Dedham Bank, 15 Mass. 447.

If any right or power be left, under the note, by this act, after a transfer is made, it is of no use, when it cannot be enforced and no benefit be derived from it, but an action abated toties quoties as often as it is instituted. 8 Wheat. 12; 1 Bl. Com. 55. In the mildest view, a new disability is thus attached to an old contract, and its value and usefulness restricted; and these of course impair it. Society for Propagating the Gospel v. Wheeler, 2 Gall. 139.

One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. The Commercial Bank of Rodney v. The State of Mississippi, 4 Smedes & Marshall, 507. So, if the obligation of a contract is to be *regarded as the [*328 duty imposed by it, here the duty imposed by the State to adhere to its own deliberate grant, and the duty imposed on the signer of the note to make payment to an assignee, as well as to the bank itself, are both interfered with and altered.

In answer to this supposed violation of the

contract between the maker of the note and the bank, some objections have been urged which deserve further notice here.

It is sometimes stated, with plausibility, that States may pass insolvent laws, suspending or taking away actions on contracts, where the debtor goes into insolvency, and hence, by analogy, can do it here. But there another remedy is still given on the contract, before the commissioners of insolvency, and a payment is made pro rata, as far as means exist. Here there is no other remedy given, or any part payment made. Indeed, it seems that a forfeiture of all right to recover on the note, in any way, is inflicted here as a penalty for making that very transfer which the bank before, by the act of incorporation, as well as by the note itself, was authorized to make. Again, State insolvent laws, if made, like this law, to apply to past contracts and stop suits on them, have been held not to be constitutional except so far as they discharge the person from imprisonment, or in some other way affect only the remedy. When so restricted, they do not impair the obligation of the contract itself, because the obligation is left in full force and actionable, and future property, as well as present, subjected to its payment, and the body exonerated only as a matter connected merely with the form of the remedy. Cook v. Moffat, 5 Howard, 316, and cases there cited. The case in 8 Robinson, 421, appears also to have been one on a note executed after the prohibitory law, and not, as here, before. But where future acquisitions are attempted to be exonerated, and the discharge extended to the debt or contract itself, if done by the States, it must not, as here, apply to past contracts, or it is held to impair their obligation. Ogden v. Saunders, 12 Wheaton, 213; Sturges v. Crowninshield, 4 Wheaton, 122; 6 Wheaton, 131; 2 Kent's Com. 392; Bronson v. Kinzie, 1 Howard, 311; McCracken v. Hayward, 2 Howard, 608; 1 Cowen, 321; 16 Johns. 237; 1 Ohio, 236; Cook v. Moffat, 5 Howard, 308, 314. Congress alone can do this as to prior contracts, by means of an express permission in the Constitution to pass uniform laws on the subject of bankruptcy; and which laws, when not restrained by any constitution or clause like this as to States impairing contracts, may in that way be made to reach past obligations.

The misfortune here is, that the Legislature, 329*] if meaning *merely to insure to bill holders of the bank, when debtors, the privilege of paying in the bills of the bank (as is supposed, 4 Smedes & Marshall, 1, 90), have not said so, and no more, by providing that promissory notes, though assigned by banks, should still be open to set-offs by their debtors of any of their bills which they then held. This would have been equitable, and no more, probably, than they would be entitled to, on common law principles, if an assignee purchased, as here, after the promissory notes fell due, and perhaps with a knowledge of the existence of such a set off.

Chief Justice Marshall, in The United States v. Robertson, 5 Peters, 659, says, independent of any statute, "every debtor may pay his creditor with the notes of that creditor. They are an equitable and legal tender." Equally just and reasonable would have been a declaratory law as to the allowance of such bills as a set-off, where an assignment had been made collusively between the parties with a view to prevent such a set-off. 8 Robinson, 421.

But instead of resorting to such measures, the Legislature adopted a shorter and more sweeping mode of attaining the end of preventing assignments which might embarrass or defeat set-offs. They did it by cutting off all assignments whatever, and all remedies whatever upon them. And they accompanied this by another statute, enabling debtors of the bank who held its notes, when their debts fell due, to pay in them, or set them off, and even virtually authorized them to make payment in depreciated bills or notes afterwards bought up for that purpose, and thus to gain an undue advantage over set-offs and by other debtors in other matters.

The act as to this last topic was passed the next day after the act prohibiting transfers. Mississippi Laws, 2 February, 1840, p. 21, sec. 2. It was in these words: "All banks above alluded to, and all other banks in this State, shall at all times receive their respective notes at par in liquidation of their bills receivable and other claims due them." These two acts, though undoubtedly well meant, and designed to give an honest preference to bill holders (see Sharkey's dissenting opinion) as to a paper currency which ought always to be kept on a par with specie, were unfortunately, in the laudable zeal to avert a great apprehended evil, passed, without sufficient consideration of the limitations of the powers imposed by the Constitution of the Union on the State Legislatures, not to impair the obligation of existing contracts. Nor was it necessary to go so far to secure any legitimate results. Some other laws are referred to, which are upheld, and which affect the whole community, and seem to violate some of the important incidents of contracts *between individuals, or between [*330 them and corporations. But it will usually be found that these are such laws only as relate to future contracts, or if to past ones, relate to modes of proceeding in courts, to the form of remedy merely, to priority to some classes of creditors (5 Cranch, 298), to the kind of process (9 Peters, 319; 10 Wheat. 51), to the length of the statute of limitations (6 Wheat. 131; 2 Mason, 168; 3 Johns. Ch. 190; 4 Wheat. 200; 1 Howard, 315, to exempting the body from imprisonment (4 Wheat. 200), or tools and household goods from seizure (16 Johns. 244; 1 Howard, 15; 11 Martin, 730), or affecting some privilege attached to the person or territory (Story on Confl. of Laws, 339, etc.), and not to the terms or obligations of any part of the contract itself. Cook v. Moffat, 5 Howard, 295; Towne v. Smith, 1 Wood. & M. 132; 7 Greenl. 337; 3 Burge on Col. & For. Law, 234, 1046.

And if, in professing to alter the remedy only, the duties and rights of a contract itself are changed or impaired, it comes just as much within the spirit of the constitutional prohibition. Bronson v. Kinzie et al., 1 Howard, 316; 2 Howard, 612; 2 Madison Papers, 1239, 1581.

Thus, if a remedy is taken away entirely, as here, or clogged "by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired." Green v. Biddle, 8 Wheat. 75. And the test, as before suggested, is not the extent of the violation of the contract, but the fact, that in truth its obli-

gation is lessened, in however small a particular, and not merely altering or regulating the remedy alone. 2 Howard, 612; 8 Wheat. 1.

Having, it is believed, assigned sufficient reasons to show that the obligation of both of these contracts was impaired, it is now proposed briefly to refer to a few precedents bearing on the correctness of this conclusion, chiefly in respect to the most important of the contracts—that between the State and the bank. On an examination of the various decisions which have taken place in this court on the violation of the obligation of contracts, it will be found that this case does not come within the principle of any of those where the decision was, that the new laws were no violation; but, on the contrary, is much like several where the decision annulled them as a clear violation. Thus, where a new law has taken the property of a corporation for highways under the right of eminent domain, which reaches all property, private or corporate, on a public necessity, and on making full compensation for it, and under an implied stipulation to be allowed to do it in all public grants and charters, no injury is committed not atoned for, nothing is [*331]done not allowed *by pre-existing laws or rights, and consequently no part of the obligation of the contract is impaired. See case of The West River Bridge, and authorities there cited, in 6 Howard, 507.

So, when the Legislature afterwards tax the property of such corporations in common with other property of like kind in the State, it is under an implied stipulation to that effect, and violates no part of the contract contained in the charter. Armstrong v. Treasurer of Athens County, 16 Peters, 281; see Providence Bank v. Billings, 4 Peters, 514; 11 Peters, 567; 4 Wheat. 699; 12 Mass. Rep. 252; 4 Gill & Johns. 132; 4 Durn & East. 2; 5 Barn. & Ald. 157; 2 Railway Cases, 23.

So, when no clause existed in a charter for a bridge against authorizing other bridges near at suitable places, it is no violation of the terms or obligation of the contract to authorize another. Charles River Bridge v. The Warren Bridge et al. 11 Peters, 420.

Nor is it, if a law makes deeds by femes covert good when bona fide, though not acknowledged in a particular form; because it confirms rather than impairs deeds, and carries out the original intent of the parties. Watson v. Mercer, 8 Peters, 88.

Or if a State grant lands, but makes no stipulation not to legislate further upon the subject, and proceeds to prescribe a mode or form of settling titles, this does not impair the force of the grant, or take away any right under it. Jackson v. Lumpkin, 3 Peters, 280.

Nor does it, if a State merely changes the remedies in form, but does not abolish them entirely, or merely changes the mode of recording deeds, or shortens the statute of limitations. 3 Peters, 280; Hawkins v. Barney's Lessee, 5 Ib. 457.

It has been held, also, not only that a Legislature may regulate anew what is merely the remedy, but some State courts have decided that it may make banking corporations subject to certain penalties for not performing their *duties—such as paying* their notes on demand *in specie, and that* this does not violate any *contract. Brown* v. Penobscot Bank, 8 Mass. Rep. 445; 2 Hill, 242; 5 Howard, 342. It is supposed to help enforce, and not impair what the charter requires. But on this, being a very different question, we give no opinion.

But look a moment at the other class of decisions. Let a charter or grant be entirely expunged, as in the case of the Yazoo claims in Georgia, and no one can doubt that the obligation of the contract is impaired. Fletcher v. Peck, 6 Cranch, 87.

So, if the State expressly engage in a grant that certain lands shall nexer be taxed, and a law afterwards passes to tax *them. [*332 State of New Jersey v. Wilson, 7 Cranch, 164 Or that corporate property and franchises shall be exempt, and they are then taxed. Gordon v. Appeal Tax Court, 3 Howard, 133.

So, if lands have been granted for one purpose, and an attempt is made by law to appropriate them to another, or to revoke the grant. Terrett v. Taylor, 9 Cranch, 43; Town of Pawlet v. Clark, 9 Cranch, 292.

Or if a charter, deemed private rather than public, has been altered as to its governmen and control. Dartmouth College v. Woodward 4 Wheat. 518.

Or if owners of lands, granted without conditions or restrictions, have been by the Legislature deprived of their usual remedy for mesne profits, or compelled to pay for certain kinds of improvements, for which they were not otherwise liable. Green v. Biddle, 8 Wheat. 1.

Or if, after a mortgage, new laws are passed, prohibiting a sale to foreclose it, unless two thirds of its appraised value is offered, and enacting further that the equitable title shall not be extinguished till twelve months after the sale. Bronson v. Kinzie, 1 Howard, 311; McCracken v. Hayward, 2 Ib. 608.

These last cases in Wheaton and Howard are very near in point to the present one, though in my view, a less strong and decisivie encroachment on a previous contract than this is.

So are the cases very near where all remedy whatever is taken away, and it is held that the obligation of the contract is thus impaired. See some before cited, and 8 Mass. Rep. 430; 2 Gall. 141; 2 Greenl. 294; 1 Howard, 311; 3 Peters, 290; 2 Howard, 608.

The whole usefulness and value of a note or contract is in this way destroyed, and that without any reference to the contract itself.

For these reasons the judgment below must be reversed.

Baldwin et al. v. Payne et al.

This case involves several of the questions just discussed in that of The Planters' Bank v. Sharp et al.

Some of the points of difference are merely nominal; as, for instance, that the charter of the Mississippi Railroad Company, which transferred the notes in this case, is different. But, it being subsequent in date to the charter to the Planters' Bank, and with "all the usual rights, powers, and privileges of banking which are permitted to banking institutions within the State," the court seemed, by mutual consent of parties, to regard those conferred on the Planters' Bank as extensive as any, and therefore a correct guide here.

*Other differences may be more ma- [*333 terial in appearance, as that the transfer in this

case was found by the special verdict to have been in payment of a debt of the bank; and another, that the suit here is in the name of the indorsee, and not, as in the former case, in the name of the promisee.

Its being assigned in payment of a debt is, however, no more than was presumed might have been the truth in the other case. And its being sued in the name either of the indorsee or payee can make little difference on the final construction given by the State court to the prohibitory law in the action of The Planters' Bank v. Sharp et al. That construction, we have seen, was, that it is the transfer itself which is prohibited and made in some degree penal, rather than the action in the name of the indorsee being all which is prohibited. It will be remembered, also, that if the State might be able, by a general repealing law, to prevent a suit in the name of an indorsee, without impairing any contract in the charter itself, as is argued for the defense, it could hardly do this without impairing the other contract, between the bank and the maker, by which the latter promises to pay any indorsee.

Certainly the new prohibitory law ought not to have attempted more than a repeal of the statute allowing suits by indorsees of negotiable paper in their own name. Then the indorsees of notes negotiable, as of notes not negotiable, would still possess a right to sue their notes in the names of the payees.

In such a case, there would be some plausibility in the idea, that, though the action would not lie in the name of the indorsee, yet if it could in the name of the payee, for and on his account, the prohibitory law would chiefly affect the remedy, and not the right of action in some form or other.

But even then, if the obligation or force or duty of the contracts, whether with the bank by the State, or with the maker, was impaired in any degree, though under cover of affecting the remedy only, it would come within the constitutional restriction.

But how much more must it so come in this case, as well as the other, where, instead of merely changing the obligation so as to render a recovery on the contract not permissible in the name of an assignee, but more inconvenient, expensive, dilatory, and often difficult in the name of another, the payee, the State court of Mississippi hold, that the Legislature, by the prohibitory law of 1840, not only meant to abate a suit in the name of an indorsee, but in the name of the payee, if a transfer had once been made. Substantially, they consider any suit on the note, by anybody, after it has once 334*] been transferred, as *illegal, and the right to enforce the contract to be lost or forfeited forever.

This view of the statute of 1840 being regarded as established in Mississippi, renders it clear that in this case, as well as the case of The Planters' Bank v. Sharp et al., the law under which this action has been abated must be considered as having impaired the obligation of contracts; and therefore to be in this respect unconstitutional, and the judgment of the State court erroneous.

The judgment below must therefore be reversed, and as a special verdict was found in this case, judgment must be entered on it in *favor of the original plaintiffs.*

11 L. ed.

Mr. Chief Justice Taney and Mr. Justice Daniel dissented.

Mr. Justice McLean:

So far as the seventh section of the act in question has been construed, by the Supreme Court of Mississippi, to invalidate the note between the bank and the payee, it is unconstitutional. The fair import of the provision takes away only the negotiability of the instrument. But the courts of Mississippi have decided, where a note has been assigned in violation of the statute, that no suit can be sustained on the note, either in the name of the assignee or of the payee. This impairs the obligation of the contract, which the Constitution inhibits.

The argument, that, where the bank, attempts to transfer a note by a void indorsement, it must be re-indorsed to enable the bank to sue in its own name as payee, is unsustainable. A void indorsement is no indorsement, and it can have no effect on the validity of the note. The section declares, that "it shall not be lawful for any bank in this State to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant."

The object of the statute was to secure the right of the debtors of a bank to pay their debts in its own paper. This they could not do, if the notes, before they were payable, had been assigned by the bank. No fair construction of the seventh section can authorize a forfeiture of the note, by reason of the illegal indorsement. It is, therefore, unnecessary to consider whether such a provision would be constitutional.

The bank had the power, under its charter, to assign promissory notes. If this were not so, the law to prohibit the *assignment [*335 would have been unnecessary. There being no express power in the charter of the bank to indorse notes, it must be considered as exercising the power under the general law making notes negotiable; and in this respect it must stand on the same ground as an individual. And this presents the question, whether the repeal of the law making notes negotiable by banks can affect notes executed before the repeal. A majority of the judges hold that a provision so construed is void, as it impairs the obligation of the contract. I dissent from this conclusion.

An individual holds a note, which, under the statute, is negotiable; but the statute is repealed. Does this take away the negotiability of the note? I think it does. There can be no doubt of this, unless such a construction shall impair the obligation of the contract. Now, what obligation is violated by this construction? It is said, that the maker of the note promised to pay to the assignee of the payee. This is admitted. But until the note be assigned, there can be no assignee. The indorsement is a new contract between the indorser and the indorsee; and when this contract is made, it can no more be impaired than the contract between the maker and the payee of the note.

A promise to pay to A B or his assignee is

no contract with the assignee, until the new contract of assignment be made. The promise is to pay to the indorsee, if the payee of the note shall indorse it. But the payee is under no obligation to indorse the note. And if there be no obligation, how can it be impaired? A contract binds a party either to do or not to do a certain thing. The maker of the note, on a certain contingency, binds himself to pay the indorsee, and that contingency depends upon the will of the payee; but until that will is exercised, there is no obligation by the maker. The payee has power to bind the maker of the note to pay its contents to some other person; but until that power is exercised, there is no contract which can be impaired.

Suppose a power of attorney was given to A by B, to enable him to bind B, by a written instrument, to do a certain thing which may legally be done, but, before the instrument is executed, the thing is made unlawful; does this impair the obligation of the contract? The instrument contemplated has no existence; B cannot complain that he has not been bound to do the act, and on what ground can A complain? Is his contract impaired? He has no contract. He had the power to make a contract, which he failed to exercise. And this is the principle involved in the case now under consideration. The payee had a discretionary 336*] power to bind the maker of the *note, but he did not exercise it until the assignment of the note was made illegal. Is a mere power of attorney to make a contract within the Constitution? It is essential, to constitute a contract, that there shall be two parties bound by it. Now, the payee is not bound to assign the note, though the maker has authorized him to assign it. This, then, is a mere power to make a contract, which may, or may not, at the discretion of the payee, be exercised. It is a mere unexecuted power to make a contract, and is, in my judgment, not within the Constitution.

If the charter of the bank had contained a special provision, authorizing it to assign promissory notes, no subsequent act of the Legislature could repeal or modify such provision, against the consent of the bank.

Mr. Justice Daniel:

Differing from the majority of the court in the decision just pronounced, I might, nevertheless, have been disposed to acquiesce in that decision, had it related to questions merely of property or of individual interests; but embracing as it does a construction of the Constitution, and annulling at the same time a legislative act of a sovereign State, I cannot feel warranted in yielding by silence a seeming approbation of conclusions which my judgment entirely repels. My deliberate opinion, then, is, that the statute of Mississippi of February 21st, 1840, by its seventeenth section, comes not in conflict with the tenth section of the first article of the Constitution; that it in no wise impairs the obligation of any contract between the State and the Mississippi Railroad Company, formed by grant of the charter of that company, nor as existing with the plaintiffs in error as claiming under them. An elaborate review of the arguments on which the pretensions of the plaintiffs in error are urged is not here deemed necessary, nor will I enter much in detail upon the reasons by which those arguments appear to be met and overthrown, but will content myself with succinctly stating the decisive conclusions of my own mind upon the only question properly presented by this record, and the legal grounds on which those conclusions are bottomed. The rights of the plaintiffs in error, whatever they may be, it must be borne in mind, are derived from the charter of the Mississippi Railroad Company, or from that of the Planters' Bank of Mississippi, as supposed to possess rights and power more comprehensive than those vested in the former company; but from whichsoever of those companies the plaintiffs in error may choose to deduce their rights, these must be restricted to the rights and authority vested in the source from which they are *drawn. Both the Mis- [*337 sissippi Railroad Company and the Planters' Bank of Mississippi are corporations created by statute, deriving their existence and every power and attribute they ever possessed from the laws which gave them existence, and from these only. The doctrine has been long and repeatedly affirmed by this court, that, in interpreting the powers and rights of corporations, an essential distinction must be taken between corporations existing by the common law (often, nay, necessarily, traceable to a remote and obscure antiquity), and those which are created by statute, whose constitutions and powers are defined and ascertained by accessible and visible proofs. Into the composition or practices of the former, tradition, implication, or usage may enter, and thus give room for assumptions of power; with respect to the latter, no such rule, or rather misrule, has obtained or been permitted, especially by the settled decisions of this day. The adjudications of this court, as has been already stated, are too explicit to admit of doubt on this subject. Thus in the case of Head and Amory v. The Providence Insurance Company, 2 Cranch, 127 Chief Justice Marshall says: "Without ascribing to this body (the Insurance Company), which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur, to ascertain powers, and to determine whether it can complete a contract by such communications as are in this record."

In the case of Dartmouth College v. Woodward, 4 Wheat. 636, it is said by the court, that "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." In the case of The Bank v. Dandridge, 12 Wheat. 64 this court said: "Whatever may be the implied powers of aggregate corporations at the common law and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself." In the case of The Bank of

Augusta v. Earle, 13 Peters, 587 the several authorities just mentioned are cited in the opinion of the court; all of them approved, 338*] and none of them, *it is presumed, will be questioned as not laying down the law with perfect accuracy.

Such being the well settled rule of this court with respect to statutory corporations, let us inquire into its operation on the case before us. Neither by the charter granted to the Mississippi Railroad Company, or to the Planters' Bank of Mississippi, nor to any other banking corporation within the State, was the power ever directly given to assign bonds, bills, or promissory notes. Is this power necessarily implied in any of the express grants contained in the charters now under consideration? It is admitted on all sides that the clause in this charter of the Planters' Bank which authorizes the bank to discount bills of exchange and notes, and to make loans, contains no such direct grant; but it is said that the bank is authorized to possess and receive lands, rents, tenements, hereditaments, goods, chattels, and effects, to a certain amount, and to grant, demise, alien, or dispose of the same for the good of the bank; and that this authority confers the power of assigning notes discounted by the corporation. Could the doctrine of implied powers, in contravention of the express decisions of this court just cited, be extended in its utmost latitude to these statutory corporations, still it would seem difficult, even by the greatest violence of construction, to torture the language of this charter into an expression of the meaning here ascribed to it. The right to acquire and to dispose of effects cannot, by the natural import of language, nor by any received intendment, be made to signify the power to discount bills and notes; much less can it be interpreted to mean the power to transfer bills and notes discounted, or securities of any description, and beyond this, even, the power (in opposition to the principles of the common law in reference to choses in action) of investing the assignee with the right of maintaining an action at law in his own name. The extravagance of the construction contended for on behalf of the plaintiffs may be seen by bringing it to another test. Let it be supposed that the charters of these companies contained not one word about rights and powers of banking, as then permitted to other corporations in the State of Mississippi; suppose, too, they had been silent as to any right to discount bills and notes, and had been limited to the simple power of receiving and possessing goods, chattels, and effects, and of disposing of such effects for the good of the bank; would it be pretended that, under this latter provision, the power of discounting bills or notes, or of discounting at all, was given by the mere import of the word "effects"—that the power of receiving and disposing of effects meant the power of discounting bills and notes? This can 339*] *hardly be pretended. If, then, this term be not synonymous with the words "bills" and "notes" when taken in connection with the power of discounting and of making loans, how can it become so by being connected with the right of acquisition and enjoyment, or with the jus disponendi? The power to sell or assign discounted notes cannot be deduced from the clause in the charter which authorizes the exercise of the usual banking powers granted to the banks of Mississippi, first, because in no charter granted by the State is it shown that such a right is expressly conferred; second, it is manifest that a traffic in the sale of its own paper, or in notes or bills discounted, is conformable neither with the regular functions of a bank, nor reconcilable with the purposes of its institution. Banks are usually created for the purpose of making loans, and this in a medium, in theory at least, equal to money; not for the purpose of borrowing, or of raising means to eke out their daily existence by selling off their securities or their own paper. Their establishment rests upon the idea of their possessing funds of their own as the foundation of their credit and of their circulation. The practice of becoming brokers for the sale of their own paper or the paper of their customers, to put themselves in funds, is not, therefore, one of their regular functions, and can flow only from an abuse of these functions, and is a perversion of the legitimate ends of their creation. So, too, it is entirely inadmissible to place this practice of brokerage by the bank upon the mere absence of an inhibition in the charter; such a mode of reasoning cuts up entirely the admission that the banks have no power except such as is expressly granted or necessarily implied. The fallacy of the idea, that the right to dispose of effects conferred by the charter of the Planters' Bank implied the right of an habitual and unrestricted sale or brokerage of discounted notes, is exposed by adverting to another provision of the charter, by which the amount of effects of every kind which the bank was permitted to acquire and dispose of was positively limited to a specified amount. The power of the bank being thus restricted, that power could by no sound reasoning be made coincident or co-extensive with regular and permanent operations on the part of this corporation; for if its banking powers were deducible from such a limited privilege, or were dependent upon it, of course, when this permitted limit should be attained, the operations of the bank would be at an end. It is clear, therefore, that these corporations, restricted as are all statutory corporations under the decisions of this court, to the express grants contained in their charters, and to implications necessary to and inseparable from those grants, never were by the provisions of *their charters invested with the power [*340 to assign bills or notes, and much less by such assignment to invest their assignee with the right of suing at law; that whatever power of assignment these corporations at any time may have possessed, and whatever the effect implied in such assignment, both were conferred upon them in common with all other persons, natural or artificial, within the State, by a general public law, subject at all times to modification or repeal by the authority which enacted it. Vide section 12 of the statute, Howard and Hutchinson's Laws of Mississippi, p. 373.)

The actual repeal of such a statute cannot correctly be regarded as the violation of any vested right, or the impairing of the obligation of a contract, for no one can claim to have a perfect and vested right, through all future time, in the mere capacity to do an act, from

the absence of a law forbidding that act. A pretension like this would forestall and prevent legislation upon every subject. A wholly different state of things would have existed had the assignment to the plaintiffs been made anterior to the repeal of the statute, for then the rights of these parties would have been vested and complete; but the assignment was in this instance subsequent, by more than a year, to the passage of the repealing statute, was a new and separate contract, and entered into with necessary knowledge of its provisions, and made apparently in defiance thereof. This view of the question is clearly and forcibly presented by the Supreme Court of Louisiana, in the case of Hyde et al. v. Planters' Bank of Mississippi, 8 Robinson, 416, a case arising upon the laws and charters now under consideration, and in all its features essentially, nay, mutato nomine, literally, the same with the present. It has been said, that, in the case from 8 Robinson, the note was made after the enactment of the repealing statute, I think that this statement is not warranted by the statement of facts in that case. Certainly the reasoning of the court rests on no such hypothesis, for it covers the whole of the language and policy of the statute of Mississippi, and vindicates them to the utmost extent. In this case, the note was assigned after the enactment of the repealing law, and with full knowledge thereof, and the assignment was an independent and posterior contract which the law had forbidden. The question, then, as to the validity of the statute of Mississippi seems to resolve itself into this inquiry, whether a sovereign State of this Union possesses the right within her own territory to regulate the formation of contracts, to define the rights and interests such contracts shall give to the parties thereto, and to declare the modes and extent in and to which these may be enforced by her own 341*] tribunals. *To such an inquiry I can give none but an affirmative answer; and any other, I feel assured, is not evoked either by the language or spirit of the federal Constitution, and would be highly unjust and inconvenient with respect to the States.

With regard to the plaintiffs in error no injustice nor hardship of any kind is perceived in enforcing against them the provisions of the statute of 1840. In the first place, they have, with full knowledge of the law, placed themselves directly in the attitude of resistance thereto; for they have entered into an agreement explicitly inhibited upon grounds of public policy, and this long after such inhibition was proclaimed to every person within the State. In the next place, there surely can be no merit in a combination, the effects and manifest purposes of which were to deny to the holders of the notes of these banking corporations the power of making payment to them in their own currency, and to enable the latter to seize or to appropriate to themselves or their favorites the substance of those very note holders to whom such right of payment was denied. A proceeding thus subversive of justice has not been heretofore sanctioned by this court, and in one instance has been, to a certain extent—*indeed*, as I think, to the whole length of the *present case—directly* condemned. The case of The United States v. Robertson, 5 Peters, 641, was a case in which a judgment had been recovered by the United States against the Bank of Somerset for an amount of money which had been deposited by a collector in that bank. By an act of Congress of the year 1818, it was provided that in any suit thereafter instituted by the United States against any corporate body for the recovery of money upon any bill, note, or other security, it should be lawful to summon as garnishees the debtors of such corporation, who were required to state on oath the amount in which they stood indebted at the time of serving such summons, for which amount judgment should be entered in favor of the United States, in the same manner as if it had been due and owing to the United States. On the 9th of February, 1819, a year after the act of Congress giving the remedy by attachment to the United States, the Legislature of Maryland passed an act declaring that, in payment of any debt due to or judgment obtained by a bank within that State the notes of such bank should be received. Attachments were laid in behalf of the United States, after their judgment against the Bank of Somerset, on debts in the hands of various debtors to the bank, and on some of these attachments judgments had been obtained. It was contended in behalf of these garnishees, that they had a right to discharge their debts in the notes of the Bank of Somerset, as well in those cases in *which judgment had been obtained [*342 on atachment by the United States as in those wherein there were no judgments. Upon this question Chief Justice Marshall, in delivering the opinion of the court (p. 659), remarks, first, upon the Act of Congress, of 1818, "That it operates a transfer from the bank to the United States of those debts which might be due from the persons who should be summoned as garnishees. They become, by the service of the summons, debtors of the United States, and cease to be debtors of the bank. But they owed to the United States precisely what they owed to the bank, and no more." 2. "That the Act of the Legislature of Maryland of 1819, so far as respects debts on which judgments have not been obtained, embodies the general and just principles respecting effects, which are of common application. Every debtor may pay his creditor with the notes of that creditor. They are an equitable and legal tender. So far as these notes were in possession of the debtor at the time he was summoned as garnishee, they form a counter claim, which diminishes the debt due to the bank to the extent of that counter claim. But the residue becomes a debt to the United States, for which judgment is to be rendered, May this judgment be discharged by the paper of the bank? On this subject the court are divided. Three of the judges are of opinion, that, by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank, which original right remains in full force against the United States, who come in as assignees in law, and not in fact, and who must therefore stand in the place of the bank. Three of the judges are of opinion that the right to pay the debt in the notes of the bank does not enter into the contract." Mr. Howard

not this decision, I inquire, be considered as substantially covering the whole ground of the case before us? For, after stating that the garnishees became by the service of the summons the debtors of the United States, and ceased to be the debtors of the bank, it goes on to declare, that they owed to the United States what they owed to the bank, and nothing more; that, by the just and general principles of set-off, every debtor may pay his creditor with the notes of that creditor, which as to him are an equitable and legal tender. And by the unanimous declaration of the court, not until after the claim against the garnishee was carried into a judgment, and after the allowance of all rights of tender and set-off in the notes of the bank, could payment be coerced from him in any other medium than the notes of the bank. One half the court deemed the garnishee, even after judgment, entitled to the same privileges against the creditor of the bank which he pos-
343*] sessed *against the bank itself. This right, as between note holders and the assignees of a failing or insolvent bank, is fully sustained by the Court of Appeals of Maryland in the case of The Union Bank of Tennessee v. Elicot, Morris, & Gill, 6 Gill & Johns. 364, and in that of The Bank of Maryland v. Ruff, 7 Ib. 448, in which last case the authority of this court is relied on. But, at all events, the principles of these decisions are broad enough to vindicate the legislation of Mississippi, and the objects of that legislation, against the imputation of oppression or hardships as respects these plaintiffs, and all who may occupy a similar position, if legislation can need vindication or apology, the purposes of which are to prevent, if possible, the paper of these corporations, spread over the community by them, from utterly perishing on the hands of the note holder, and to disappoint dishonest combinations to set the public laws at defiance, and, further, to oppress and ruin the note holder by taking his property, and leaving him the worthless and false and simulated representatives of an equivalent.

I am of the opinion that the judgment of the Supreme Court of Mississippi should in both these cases be affirmed.

Order.

The Planters' Bank v. Sharp et al.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the State of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said High Court of Errors and Appeals in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

Order.

Baldwin et al. v. Payne et al.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the State of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said High Court of Errors and Appeals reversing the judgment of the Circuit Court of Jefferson County in this cause be, and the same is hereby reversed, with costs, and held as entirely void, and that the said judgment of the said Circuit Court of Jefferson County be in all things affirmed and *remain in full [*344 force and virtue, the said judgment of the said High court notwithstanding; and that this cause be, and the same is hereby remanded to the said High Court of Errors and Appeals, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

THE NEW JERSEY STEAM NAVIGATION COMPANY, Respondents and Appellants,

v.

THE MERCHANTS' BANK OF BOSTON, Libelants.

Common carrier—owner of specie, employing expressman to carry may maintain suit for loss against owners of steamboat, contracted with by expressman—owner's rights controlled by such contract—stipulation that carrier is not responsible for loss, does not excuse from ordinary care—U. S. courts, admiralty jurisdiction over libels.

A decree of the Circuit Court of Rhode Island affirmed, which was a judgment upon a libel in personam against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound.

THIS was an appeal from the Circuit Court of the United States for the District of Rhode Island, in the exercise of admiralty jurisdiction.

In February, 1839, the State of New Jersey chartered a company by the name of The New Jersey Steam Navigation Company, with a capital of five hundred thousand dollars, for the purpose of purchasing, building, repairing, and altering any vessel or vessels propelled by steam, and in the navigation of the same, etc., etc.; under which charter they became proprietors of the steamboat Lexington.

On the 1st of August, 1839, the following agreement was made:

"This agreement, made and entered into this 1st day of August, A. D. 1839, in the city of New York, by William F. Harnden, of Boston, Massachusetts, on the one part, and Ch. Overing Handy, President of the New Jersey Steam Navigation Company, of the other part, witnesseth:

"That the said William F. Harnden, for and in consideration of the sum of two hundred and

NOTE.—From what liability a contract, that a common carrier is not to be responsible for loss or damage, exonerates.

A special contract between the owner of goods and a common carrier, limiting the common law liability of the latter, is valid. Davidson v. Graham, 2 Ohio St. 131; Nicholson v. Willan, 5 East.

fifty dollars per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via Newport and Stonington, not to exceed once on each day, from New York and from Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st of December, A. D. 1839, and from this date.

"The following conditions are stipulated and 345*] agreed to, as *part of this contract, to wit: The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company.

"Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:

" 'Take notice,—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be, and is transported, in respect to it or its contents, at any time.'

"Further, that the said Harnden is not to violate any provisions of the postoffice laws, nor to interfere with the New Jersey Steam Navigation Company in its transportation of letters and papers, nor to carry any powder, matches, or other combustible materials of any kind, calculated to endanger the safety of said boats, or the property or persons on board of them.

"And that this contract may be at any time terminated by the New Jersey Steam Navigation Company, or by the said Harnden, upon one month's notice given in writing.

"Further, that a contract made by the said Harnden with the Boston and New York Transportation Company, on the 5th day of July, A. D. 1839, is hereby dissolved by mutual consent.

"In witness whereof, the said William F. Harnden has hereunto set his hand and seal, and the president of the said New Jersey Steam Navigation Company has hereto affixed his signature and the corporate seal of the company.

"Wm. F. Harnden, [L. S.]

"Ch. Overing Handy, President.

"Sealed and delivered in presence of

"Roswell E. Lockwood."

It is proper to remark, that, prior to the date of this agreement, Harnden had made a similar one with the Boston and *New [*346 York Transportation Company, which became merged in the New Jersey Steam Navigation Company on the 1st of August, 1839. Harnden, having begun to advertise in the newspapers in July, 1839, whilst his contract with the Boston Company was in force, continued to use the name of that company in the following advertisement, which was inserted in two of the Boston newspapers until the end of the year 1839.

"Boston and New York Express Package Car.

—Notice to Merchants, Brokers, Booksellers, and all Business Men.

"Wm. F. Harnden, having made arrangements with the New York and Boston Transportation, and Stonington and Providence Railroad companies, will run a car through from Boston to New York, and vice versa, via Stonington, with the mail train, daily, for the purpose of transporting specie, small packages of

507; Grace v. Adams, 100 Mass. 505; 1 Am. Rep. 131; Derwont v. Loomee, 21 Conn. 246.

It was formerly held that such a contract was against the policy of the law, and void. Cole v. Goodwin, 19 Wend. 751; Gould v. Hill, 2 Hill, N. Y. 623; Jones v. Voorhies, 10 Ohio, 145; Fish v. Chapman, 2 Kelly (Ga.) 349; Wyld v. Pickford, 8 Mees. & W. 443; Hinton v. Dibbin, 2 Q. B. 646.

But the doctrine of these cases has been expressly overruled. Dorr v. Steam Nav. Co. 4 Sandf. N. Y. 136; S. C. 8 N. Y. Leg. Obs. 345; S. C. 11 N. Y. 1 Kern, 485; Parsons v. Monteath, 13 Barb. 353; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, N. Y. 115; Austin v. Manchester Railway Co. 11 Eng. Law & Eq. 506; Carr v. Lancashire Railway Co. 7 Ex. 707; 14 Eng. Law & Eq. 340; Peek v. North Staffordshire Railway Co. 10 H. L. Cas. 473, 494.

And the validity of an express contract between the owner of goods and a carrier, limiting the general responsibility of the latter, is well established. Kimball v. Rutland R. R. Co. 26 Vt. 256; Wallace v. Matthews, 39 Ga. 617; Reno v. Hogan, 12 B. Mon. Ky. 63; Roberts v. Riley, 15 La. Ann. 103; Mobile R. R. Co. v. Weiner, 49 Miss. 725; Camden R. R. Co. v. Baldauf, 16 Penn. St. 67; Falkenau v. Fargo, 55 N. Y. 642; Walker v. York R. R. Co. 8 Car. & Kir. 279; Slim v. Northern R. R. Co. 26 Eng. Law & Eq. 297; 14 C. B. 297.

A common carrier may limit his common law liability as insurer; but there must be an express agreement, not a mere notice, and the limitation *cannot extend to exempt him from damages for actual negligence of himself* or his servants. The *Pacific, Deady, 17; Phila* R. R. Co. v. Derby, 14 How. 486; The York Company v. Central Railroad, 3 Wall. 107; Walker v. The Transportation Co. 3 Wall. 150; Express Company v. Komitze Brothers, 8 Wall. 342; Railroad Company v. Manf. Co. 16 Wall. 318; Steamboat New World v. King, 16 How. 469; Mobile and Ohio R. R. Co. v. Hopkins, 41 Ala. 486.

And the fact that the bill of lading contains words limiting the liability is not enough, without proof that the consignor assented. The Pacific, Deady, 17; Bostwick v. Baltimore and Ohio R. R. Co. 45 N. Y. 712; Hill v. Syracuse R. R. Co. 8 Hun, 296.

But these exemptions from liability by contract must be such only as are just and reasonable in the eye of the law. Statute 17 & 18 Vict. ch. 31, sec. 7; Peed v. North Staffordshire Railway Co. 10 H. L. Cas. 473, 493; Railroad Co. v. Lockwood, 17 Wall. 357; S. C. 10 Am. Rep. 366.

So, a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. Laing v. Colder, 8 Penn. St. 479; Camden and Amboy R. R. Co. v. Baldauf, 16 Penn. St. 67; Goldey v. Pa. R. R. Co. 30 Penn. St. 242; Pa. R. R. Co. v. Henderson, 51 Penn. St. 315; Farnham v. Camden R. R. Co. 55 Penn. St. 53; Empire Transp. Co. v. Wamsutta Oil Co. 63 Penn. St. 14; 3 Am. R. 515; Knowlton v. Erie R. R. Co. 19 Ohio St. 260; 2 Am. Rep. 395; Graham v. Davis, 4 Ohio St. 362; Welsh v. Pittsburgh R. R. Co. 10 Ohio St. 75 = Jones v. Voorhies, 10 Ohio, 145; Fillebrown v. G. T. Railway Co. 55 Me. 462; Sager v. Portmouth, 31 Me. 228; Michigan Southern R. R. Co. v. Heaton, Howard

goods, and bundles of all kinds. Packages sent by this line will be delivered on the following morning, at any part of the city, free of charge. A responsible agent will accompany the car, who will attend to purchasing the goods, collecting drafts, notes, and bills, and will transact any other business that may be intrusted to his charge.

"Packages for Philadelphia, Baltimore, Washington, New Haven, Hartford, Albany, and Troy, will be forwarded immediately on arrival in New York.

"N. B.—Wm. F. Harnden is alone responsible for any loss or injury of any articles or property committed to his care; nor is any risk assumed by, or can any be attached to, the Boston and New York Transportation Company, in whose steamers his crates are to be transported, in respect to it or its contents, at any time."

The above mentioned contract with the New Jersey Steam Navigation Company being about to expire, Harnden addressed letters, on the 7th and 16th of December, to the President, expressing a desire to renew it, and, on the 31st of December, received a letter from Mr. Handy, the President, renewing the contract for one year from the 1st of January, 1840.

The New Jersey Company also published the following notice:

"Notice to Shippers and Consignees.

"All goods, freight, baggage, bank bills, specie, or any other kind of property, taken, shipped, or put on board the steamers of the New Jersey Steam Navigation Company, must be at the risk of the owners of such goods freight, baggage, etc.; and all freight consisting of goods, wares, and merchandise, or any other property landed from the steamers, if not 347*] taken away *from the wharf without delay, will be put under cover at the risk of the owners of said goods, freight, baggage, etc., in all respects whatsoever."

The bills of lading, or receipts given by the company, were in the following form:

"New Jersey Steam Navigation Company.

"Received of ———— on board the Steamer ——, ————, master, ———— marked and numbered as in the margin, to be transported to ————, and there to be delivered to ———— or assigns, danger of fire, water, breakage, leakage, and all other accidents excepted; and no package whatever, if lost, injured, or stolen, to be deemed of greater value than two hundred dollars.

"Freight as customary with the steamers on this line.

"N. B.—The company are to be held responsible for ordinary care and diligence only in the transportation of merchandise, and other property, shipped or put on board the boats of this line.

"Dated at ———— the ————, 18—.

"(Contents unknown.)"

In January, 1840, Mr. Harnden received from the Merchants' Bank in Boston a large amount of checks and drafts upon New York, which he was to collect in specie, and transmit the proceeds to Boston.

On the 13th of January, 1840, the sum of eighteen thousand dollars, in gold and silver coin, was shipped by William F. Harnden, and received on board of the steamboat Lexington, said boat being the property of the New Jersey Steam Navigation Company, and employed in making regular trips between New York and Stonington in Connecticut. The shipment was made at New York. The boat left New York about half past four o'clock in the afternoon, and in the course of a few hours a fire broke out, which totally destroyed the boat, the lives of nearly all the passengers and crew, and the property on board. The money, amongst the other property, was lost. As the circumstances under which the loss took place were much commented on in the argument, it may be proper to insert the narrative of Stephen Manchester, the pilot, who was examined as a witness:

"To the third interrogatory he saith: She

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on, 37 Ind. 448; Adams Express Co. v. Fendrick, 38 Ind. 150; Ohio & Miss. R. R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; School District, etc., v. Boston R. R. Co. 102 Mass. 552; Adams Express Co. v. Stettanen, 61 Ill. 184; 14 Am. Rep. 57; Nashville R. R. Co. v. Johnson, 6 Heisk. (Tenn.) 271; Ketchum v. American Express Co. 52 Mo. 390; N. O. Mut. Ins. Co. v. N. O. R. R. Co. 20 La. 302; Southern Express Co. v. Moon, 39 Miss. 822; Steele v. Townsend, 37 La. 247; Berry v. Cooper, 28 Ga. 543; Swindler v. Hilliard, 2 Rich. (S. C.) 286; Flinn v. Phil. etc. R. R. Co. 1 Houst. (Del.) 469; Parsons v. Monteath, 13 Barb. 353; Moore v. Evans, 14 Barb. 523.

That a common carrier may exempt himself by contract from liability for loss occasioned by ordinary negligence has been held in following cases: Balt. & Ohio R. R. Co. v. Brady, 32 Md. 328; Ashmore v. Pa. etc. Co. 4 Dutch. (N. J.) 180; Lawrence v. N. Y. etc. R. R. Co. 36 Conn. 63; Peck v. Weeks, 34 Conn. 145; Hawkins v. G. W. R. R. Co. 17 Mich. 57, 427; Adams Express Co. v. Haynes, 42 Ill. 89, 458; Mann v. Birchard, 40 Vt. 326; Kimball v. R., etc., R. R. Co. 20 Vt. 427.

So in New York it has been held that a common carrier may stipulate the exemption from losses through his own negligence or that of his servants. Mangin v. Dinsmore, 56 N. Y. 168; Poucher v. New York Central R. R. Co. 49 N. Y. 263; Knell v. U. S. B. Steamship Co. 1 Jones & Sp. 423.

Contract limiting liability is valid if free from fraud or imposition. Dana v. N. Y. C. R. R. Co. 30 How. 428.

Where upon delivery of goods and before shipment carrier delivers a bill or receipt limiting his liability, and shipper receives same without objection, he is chargeable with notice of its contents, and is bound by its terms; and prior parol negotiations in regard to immediate shipment of goods, cannot be resorted to, to vary its terms. Hill v. Syr. Bing. & N. Y. R. R. Co. 73 N. Y. 351; S. C. 29 Am. R. 163; Rev'g 8 Hun, 296; to the same effect, Kirkland v. Dinsmore, 62 N. Y. 171; S. C. 20 Am. R. 475; Germania F. Ins. Co. v. Memphis, etc. C. R. R. Co. 72 N. Y. 90; S. C. 28 Am. R. 113; Soumet v. Nat. Exp. Co. 66 Barb. 284.

Contract should not be held to include negligence from general words, nor will it be so construed unless expressed in unequivocal terms. Mynard v. Syr. Bing. & N. Y. R. R. Co. 71 N. Y. 180; S. C. 27 Am. R. 28; Rev'g 7 Hun, 399; Nicholas v. N. Y. C. & H. R. R. R. Co. (Ct. of App.) 15 Week. Dig. 20.

If the general words can be given effect without including negligence, contract will not release from it. Holsapple v. Rome, W. etc. R. R. Co. 86 N. Y. 275; Mynard v. Syr. Bing. & N. Y. R. R. Co. supra.

Where the carrier by contract limits his liability to a certain amount, unless the value of goods is stated at time of shipment, silence as to value on part of shipper, although no inquiry is made by carrier, and no artifice used to deceive him or conceal the value, will operate to relieve him from liability for ordinary negligence beyond the amount limited. Maguin v. Dinsmore, 70 N. Y. 410; S. C. 26 Am. R. 608; Aff'g 40 N. Y. Supr. Ct. 512, & 42 N. Y. Supr. Ct. 16; S. C. 60 N. Y. 35; 20 Am. R. 442; 50 How. 457; see, also, 51 N. Y. 166; 57 N. Y. 1; 4 Daly N. Y. 490.

was near Huntington light-house, some four miles east of the light, and between forty and fifty miles from New York. It was about half 348*] *past seven o'clock in the evening. I know the hour, because we always take down on a slate the hour that we pass every light-house. This was the business of the pilot. I was in the wheel house when I heard that the boat was on fire. Some one came to the wheel house, and told the wheelman and myself that the boat was on fire. I stepped out of the wheel house and went up to the smoke pipe. I saw the fire blazing up through the promenade deck, around the smoke pipe. The promenade deck was on fire, and was blazing up two or three feet. I looked down a scuttle which went through the promenade deck, and which was about three or four feet on the larboard side, a little abaft of the smoke pipe; it was not exactly abreast of it or abaft of it, but quartering. The scuttle led down between the after part of the boiler and the forward part of the engine. In looking through the scuttle I saw blaze and smoke, as if she was on fire there. I can't say whether or not the main deck was on fire at that time. I next returned to the wheel house, and hove the wheel hard over aport, which would sheer the boat to the southward, for the purpose of running the boat ashore to the nearest land, which was Long Island shore. Just as I got the wheel hove aport, Captain Childs came in and put his hand on the spoke of the wheel. As he took hold of the wheel, the starboard wheel rope gave way. Within an instant from that time, the smoke broke into the wheel house, so that we were obliged to leave it. Captain Childs went out of the wheel house and went aft, and I did not see anything of him after that. I then stepped out, and called to some of our people on the forecastle to get out the fire engine. They got it out. I then told them to get out the hose and the fire buckets. The fire then spread so between decks that they could not get at the hose or buckets. I then went to the lifeboat, and found some men there casting off the lashings with which she was fastened to the promenade deck. I caught hold of the lashings, and told them not to cast them off till we had attached a hawser to the boat. I sang out to some one on the forecastle to pass up a hawser to attach to the boat, which was done. I then told them to take the hawser attached to the boat, and to fasten it to the forward part of the steamer. The fire then was burning up through the deck and around the lifeboat, and I cut the lashings, and told the men to throw the boat overboard; I then jumped down on to the forward deck, caught hold of the hawser, and found that it was not made fast to the steamboat, as directed. I found the boat was getting away from us, and I sang out to the people about there to hang on to the hawser, or we should lose her. They let go of the hawser, one 349*]after another, until they let the boat *go. The promenade deck was at that time all of a blaze to the bulkhead. It was about fifteen or twenty minutes after I first heard of the fire that the lifeboat was let go. The lifeboat was somewhat burnt before she was thrown over. The next thing I, with the others on the forecastle, did, was to empty the baggage cars, and attach lines to them, and throw them overboard for any one to save himself that could. Some of those on the forecastle drew water with what buckets we had, and threw it on the fire. I then took the flagstaff and another spar that we had knocked off the bulwarks, and fastened them to those two spars to make a raft to get on to. I threw the raft overboard, and several persons, some two or three, got on to it; but it was not buoyant enough to hold them up. That was all we could do, excepting to throw water, which we did as long as we could. The boat was then nearly burnt to the water's edge, and the forward deck was burnt and had fallen in. We then got cornered up so that we had no chance to throw water, and were obliged to leave the boat to burn. I [illegible] left on the forecastle, some eight or ten in number, then asked me what they could do to save themselves. I then told them that I saw no chance; that we had done all that we could do. We then began to get overboard; some hung on to the crates at the forward part of the boat, and some got on to the guard. I got down on to the raft I have before mentioned. I found it sinking under me, and I lifted myself up again by a piece of rope which I had, and which I whipped over a spike. Then I jumped from the raft on to the piece of guard; and from this guard I got on to a bale of cotton. I found a man by the name of McKinney on the bale. After I had got on, a man standing on this piece of guard asked if there was room on the bale of cotton for another man. I made him no answer. He jumped to get on to it, and in doing so knocked off McKinney. I hauled McKinney on to the bale again, and the man returned to the guard. I found the bale was lashed to this piece of guard, and I took my knife and cut away the lashings; I took up a piece of board which was floating by, and shoved the bale clear of the guard, and let it drift down the Sound before the wind. McKinney froze to death about daylight the next morning, and fell off the bale. Between eleven and twelve o'clock the next day, I was picked up by the sloop Merchant, Captain Meeker. When I first heard that the boat was on fire, I had been in the wheel house after taking my tea, for about twenty-five or thirty minutes."

On the 10th of February, 1842, the Merchants' Bank filed a libel in the District Court of the United States for the District of Rhode Island, against the New Jersey Steam Navigation *Company, as the owners of the [*350 Lexington, for "a cause of bailment, civil and maritime." As the libel is not long, and the circumstances of this case are peculiar, it is deemed proper to insert it.

"To the Honorable John Pitman, Judge of the District Court of the United States within and for the District of Rhode Island.

"The libel and complaint of the President, Directors and Company of the Merchants' Bank of Boston, a corporation incorporated by the Legislature of the Commonwealth of Massachusetts, against the New Jersey Steam Navigation Company, a corporation incorporated by the Legislature of the State of New Jersey, owners of the steamboat Lexington, for a cause of bailment, civil and maritime.

"And thereupon the said President, Directors and Company of the Merchants' Bank of

Boston do allege and articulately propound as follows:

"First. That the respondents, in the month of January, in the year of our Lord one thousand eight hundred and forty, were common carriers of merchandise on the high seas from the city of New York, in the State of New York, to Stonington, in the State of Connecticut, and were then owners of the steamboat Lexington, then lying at the port of New York, in the State of New York, and which vessel was then used by the respondents as common carriers, as aforesaid, for the transportation of goods, wares, and merchandise on the high seas from the said port of New York to the said port of Stonington, in the State of Connecticut.

"Second. That the complainants, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, on the thirteenth day of January, A. D. 1840, contracted with the respondents for the transportation, by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of certain gold coin, amounting to fourteen thousand dollars, and of certain silver coin, amounting to eleven thousand dollars, to the libelants belonging; and the said respondents then and there, for a reasonable hire and reward, to be paid by the libelants therefor, contracted with the libelants that they would receive said gold coin and silver coin on board of the said steamboat Lexington, and transport the same therein on the high seas from said New York to said Stonington, and safely deliver the same to the libelants.

"Third. That the libelants, on the said thir- [*351] teenth day of *January, A. D. 1840, at said New York, delivered to the said respondents on board of the said steamboat Lexington, then lying at said New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of said steamboat the said gold coin and silver coin, for the purpose of transporting the same by water on the high seas from said New York to said Stonington, and to deliver the same to the libelants as aforesaid.

"Fourth. That the steamboat Lexington sailed from said port of New York, with the said gold coin and silver coin on board, on said thirteenth day of January, A. D. 1840, and bound to the said port of Stonington; yet the respondents, their officers, servants, and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging, and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents, so carelessly, improperly, and negligently managed and conducted the said steamboat Lexington during her said voyage, that, by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments, and of such careless, improper, and negligent conduct, the said steamboat, together with the said gold coin and silver coin to the libelants belonging, were destroyed by fire on the high seas, and wholly lost.

"Fifth. That by reason of the destruction of the said steamboat Lexington, and of the said gold coin and silver coin, the libelants have sustained damage to the amount of twenty-five thousand dollars.

"Sixth. That the said New Jersey Steam Navigation Company are possessed of certain personal property within the said Rhode Island district, and within the ebb and flow of the sea, and within the maritime and admiralty jurisdiction of this court, to wit, of the steamboat called the Massachusetts, her tackle, apparel, furniture, and appurtenances, and of other personal property.

"Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this court; in verification whereof, if denied, the libelants crave leave to refer to the depositions and other proof to be by them exhibited in the cause. Wherefore, the libelants pray that process, in due form of law, according to the course of admiralty and of this court in causes of admiralty and maritime jurisdiction may issue against the respondents, and against the said steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, *or any other property [*352 to the respondents belonging within the said Rhode Island district; and that the said property, or any part thereof, may be attached and held to enforce the appearance of the respondents in this court to answer the matters so articulately propounded, and to answer the damages which may be awarded to the libelants for the causes aforesaid; and that this court would be pleased to pronounce for the damages aforesaid, and to decree such damages to the libelants as shall to law and justice appertain.

On the same day, a monition and attachment were issued, directing the steamboat Massachusetts, her tackle, apparel, furniture, and appurtenances, or any other property to the respondents belonging, within the Rhode Island district, to be attached. All of which was done.

In May, 1842, the respondents filed their answer, which is too long to be inserted. The substance of it was—

1st. They admitted the ownership of the Lexington, and her being used for the transportation of passengers, goods, wares, and merchandise between New York and Stonington.

2d. They denied any contract whatever with the libelants.

3d. They denied that the libelants ever shipped, or that the respondents received from the libelants, any gold and silver coin whatever.

4th. They asserted that whatever goods were received on board the Lexington were received under the advertisements and notices mentioned in a previous part of this statement.

5th. That the usage and custom of the company was to be held responsible for ordinary care and diligence only; and that this usage, being well known to the libelants, constituted a part of the contract of shipment.

6th. That the bill of lading, heretofore mentioned, was a copy of all the bills of lading given by the company, which was well known to the libelants.

7th. That the notice above mentioned was posted up on board the steamboat, and on the wharf, and in the office of the company, of which facts the libelants were informed.

8th. That the Lexington was accidentally destroyed by fire.

9th. They denied that the cotton was improperly stowed; that the engine, machinery, etc., were imperfect and insufficient; that the officers carelessly, improperly, or negligently managed the boat; or that by reason of these things the boat was lost. The contrary of all these things was averred; and they further averred, that they had complied with the requisitions of the Act of Congress passed on the 7th of July, 1838.

353*] *In verification of this last averment, they filed the inspection certificate, dated on September 23d, 1839.

On the 18th of October, 1842, the District Court pronounced a pro forma decree, dismissing the libel with costs, from which an appeal was taken to the Circuit Court.

Under the authority of the Circuit Court, commissions to take testimony were issued, under which a vast mass of evidence was taken on both sides.

The libelants offered evidence to prove the following positions. That the furnaces were unsafe and insufficient; that there was no proper casing to the steam chimney, nor any safe lining of the deck where the chimney passed through; that dry pine wood was habitually kept in a very exposed situation; that, especially, there was a very improper stowage or disposition of the cargo on board, considering what that cargo was; that the boat had no tiller chain or rope, such as the act of Congress, as well as common prudence, required; that there were on board no fire buckets, properly prepared and fitted with heaving lines; that the fire engine was in one part of the boat, while the hose belonging to it was kept or left in another, and where it was inaccessible when the fire broke out; and that in other respects the respondents were guilty of negligence the more culpable, as the same boat had actually taken fire in her last preceding voyage, and no measure of caution had been taken to prevent a recurrence of the accident.

The respondents, on the contrary, offered evidence to rebut that adduced in support of the above, and particularly that the boat, hull, engine, boiler, and general equipment were good; that the most experienced men had been employed, without regard to expense, in putting her into complete order; that she had a captain, pilot, and crew equal to all ordinary occasions, and that respondents were not liable if they did not prove fit for emergencies which might appall the stoutest; that the boat was well found in tool chests; that there were on board a suction hose, fire engine, and hose, as required by the act of Congress, that they were stowed in a proper place; that sufficient reasons were shown why they were not available at the fire; that there were three dozen and a half of fire buckets on board; that the steering apparatus was good; that the loss of the boat did not result from her not having "iron rods and chains" instead of "wheel or tiller ropes"; that the parting of the wheel ropes, if occasioned by the fire, did not contribute at all to her loss.

At November Term, 1843, the cause came on to be heard before the Circuit Court, when the court pronounced the following decree:

"This cause came on to be heard upon the libel, the answer *of the respondents, [*354 and testimony in the case. The respondents submitted to a decree.

"Whereupon it is ordered, adjudged and decreed, that the said libelants have and recover of the said respondents the sum of twenty-two thousand two hundred and twenty-four dollars, and costs of suit, and that execution issue therefor according to the course of the court."

An appeal from this decree brought the cast up to this court.

It was argued by Mr. Ames and Mr. Whipple for the plaintiffs in error, and Mr. R. W. Greene and Mr. Webster for the defendants. The arguments extended over a wide field, and it is impossible to give them in extenso. All that can be done will be to place before the reader the leading views of the respective counsel, and the reasons in support of them.

The brief filed by Mr. Ames and Mr. Whipple appears to contain these views and authorities. It was as follows:

The libel, after stating that the respondents, as common carriers of merchandise from the city of New York to Stonington, in the State of Connecticut, were owners of the steamboat Lexington, used by them for carrying on their said business, states, in articles second and third.

"Second. That the complainants, on the high seas, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, on the 13th day of January, A. D. 1840 contracted with the respondents for the transportation by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of certain gold coin amounting to fourteen thousand dollars, and of certain silver coin amounting to eleven thousand dollars, to the libelants belonging; and the said respondents, then and there, for a reasonable hire and reward, to be paid by the libelants therefor, contracted with the libelants that they would receive said gold and silver coin on board of the said steamboat Lexington, and transport the same therein, on the high seas, from said New York to said Stonington, and safely deliver the same to the libelants.

"Third. That the libelants, on the said 13th day of January, A. D. 1840, at said New York, delivered to the said respondents, on board of the said steamboat Lexington, then lying at said New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of said steamboat, the said gold coin and silver coin, for the purpose of transporting the same by water, on *the high seas, from said New York to [*355 said Stonington, and to deliver the same to the libelants, as aforesaid."

The libel then proceeds to state the loss of the Lexington, whilst on her voyage from New York to Stonington, on the 13th of January, 1840, and of the gold and silver coin on board, by fire, and attributes the loss to the improper stowage of the gold and silver coin, the imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments of the boat, and her careless, improper, and neg-

ligent management and conduct by the officers, servants, and agents of the respondents; and by reason thereof claims damages to the amount of twenty-five thousand dollars.

The proceeding is in personam, the process being a warrant of attachment and monition, both the attachment and monition being special.

The appellants contend that the decree of the Circuit Court for the Rhode Island district should be reversed, and the libel dismissed, on the following grounds:

First. That the contract set forth in the libel, and claimed to be proved, and for breach of which damages are sought therein—to wit, a contract to carry the gold and silver coin of the libelants, in the steamboat of the respondents, from the city of New York to Stonington, in the State of Connecticut—is not a contract within the admiralty and maritime jurisdiction of the courts of the United States; and hence that this court, sitting as a court of admiralty, has no jurisdiction of this cause.

Second. That, in fact, the libelants did not deliver to the respondents, and the respondents did not receive from the libelants, the said gold and silver coin to carry, but that the contract of the libelants was wholly with one William F. Harnden, a carrier and forwarder on his own account and risk, and as such contracted with and paid by the libelants; and hence, that if the libelants have any cause of action for the loss of their said coin, it is against Harnden, and not against the respondents, there being no privity of contract between the libelants and respondents.

Third. That if, in their own name, which we deny, the libelants could pursue the respondents, it could only be by virtue of and under the contract of Harnden and the respondents, for the transportation on board of the boats of the respondents of Harnden's express crate; and that, by virtue of this contract, Harnden was the insurer of his own crate, whilst on board the respondents' boats, using said boats as his own.

Fourth. That although, under these cir-356*] cumstances, we cannot *be liable for any degree of negligence, or for want of sufficiency in our boat and equipments, to the libelants, with whom we did not contract, and for whom we did not carry, we deny, as a matter of fact, the charge made against us in the libel in this respect, and contend that our boat was staunch and strong, and well equipped, and that her loss by fire was not occasioned by any deficiency in her equipments, or any unskillfulness or negligence in her conduct.

First point. We say that this court, as a court of admiralty, has no jurisdiction of the contract set forth in the libel—a carrying contract, stated and claimed to have been made in the city and within the body of the County of New York, and to be performed by the respondents by a trip of their boat, in which she passed around the head of New York harbor, up the East River, through a portion of Long Island Sound, to Stonington, infra fauces terræ—land locked the whole way.

It is well settled that this court will judicially notice geographical facts relating to causes before them. In United States v. La Vengeance, 3 Dallas, 297, this court took judicial notice of the position of Sandy Hook. See, too, The Apollon, 9 Wheat. 374. In Steamboat Jefferson, 10 Wheat. 428, and in Peyroux v. Howard, 7 Peters, 342, this court took judicial notice of the fact that the tide ebbed and flowed at New Orleans.

The general question of the jurisdiction of the courts of the United States as courts of admiralty, and especially in relation to contracts has been much discussed; and we refer the court, for the general learning and argument upon this subject, to the late Judge Winchester's opinion in The Sandwich, 1 Peters's Adm. Dec. 233, note; Hall's Adm. Prac. Introduction; and to the opinions of the late Mr. Justice Story in De Lovio v. Bolt, 2 Gall. 398, etc., and The Schooner Volunteer, 1 Sumner, 550, in which a very enlarged admiralty jurisdiction is contended for; and to the very able and critical opinions of Mr. Justice Johnson, late of this court, in Ramsay v. Allegre, 12 Wheat. 611; and of Mr. Justice Baldwin, late of this court, in Bains v. The Schooner James and Catharine, 1 Baldwin, 544; and to 1 Kent's Com. 367–377, 5th ed., where a very restricted jurisdiction over contracts is held to have been given to the courts of the United States by the provisions of the Constitution.

Upon this subject, and in relation to the case at bar, we submit to the court the following points and considerations:

The Constitution of the United States provides (article 3, sec. 2), that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made *under their authority; [*357 to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign state, citizens, or subjects."

By this clause, the judicial power of the United States is to extend to "all cases of admiralty and maritime jurisdiction;" and whether, considering the letter of the clause, or the nature of the cases embraced in it, the jurisdiction of the courts of the United States is held to be exclusive. The Sandwich, 1 Peters's Adm. Dec. 233, note, Judge Winchester; Martin v. Hunter's Lessee, 1 Wheat. 333; Bains v. Schooner James and Catharine, 1 Baldwin, 544; 1 Kent's Com. 377, 5th ed.

If this jurisdiction be not imperatively exclusive, by force of the Constitution, it may, at least, become exclusive at the option of Congress; and hence the question of its extent becomes greatly interesting, both as to the jurisdiction of the States and of the common law; or, in other words, to the right of trial by jury.

The jurisdiction is given over "all cases," without reference to the citizenship of the parties, which indicates the extent; and it is not given over "all admiralty and maritime cases," but over "all cases of admiralty and maritime jurisdiction," which indicates the limit of the jurisdiction.

The word "jurisdiction" is necessarily used

in direct reference to some court, and the reading of the clause, therefore, is, "all cases of which admiralty and maritime courts have been accustomed to exercise jurisdiction;" the words "admiralty" and "maritime" being synonymous—the one describing the jurisdiction by the name of the court, the other by the nature of the causes tried in it.

The jurisdiction of courts is necessarily a matter of artificial law, dependent upon convenience, circumstances, policy; and is usually parcelled out by positive regulations.

With regard to the Continental maritime courts, and the courts of admiralty in England, this has been especially the case.

Though founded on the customs and usages of the Mediterranean Sea, collected in the Consulat, these customs and usages were adopted and modified to suit the different countries of Europe, by positive regulation, and courts established with jurisdiction and rules of decision marked out by the code of each State or commercial city. Us et Coustumes de la Mer, published at Bordeaux, 1681; Sea Laws, 251-256, 376, 377.

358*] *Though some matters are within the jurisdiction of all maritime courts, yet it is obvious that on a great variety of subjects the codes differ; and that there is no universal maritime law fixing with precision the jurisdiction of courts of admiralty or maritime courts.

To what source, then, are we to go to ascertain what cases are committed to the courts of the United States by the terms "cases of admiralty and maritime jurisdiction," used in the Constitution?

We submit, first, that we are not to go to the codes or laws of France, Spain, Holland, the Hanse Towns, etc.—to countries of the civil law—to ascertain the meaning of these terms, thus adopting a varying standard of jurisdiction; but, as in other cases, to the law of the parent country, England—the country from whence this was settled, and from whence we derive, in general, all our laws and institutions.

Second. That except as a matter of curious speculation, it is of no importance—to the question before us it is of no importance—to ascertain what was anciently or originally the jurisdiction of the English admiralty; but that the question is, as a matter of fact, what was it, at earliest, at the settlement of the country, or, latest, at the period of the American Revolution; and from the course and practice of courts of admiralty in this country, what was understood to be the extent of admiralty jurisdiction at the time of the adoption of the Constitution of the United States, when the words referred to were used in that instrument.

Third. That, to the question before the court, it is of no importance whether, in the struggle between the courts of common law and admiralty, the former, carrying out acts of Parliament, or, by their own inherent power of prohibition to inferior tribunals, transgressing their rightful jurisdiction, restricted the jurisdiction of the English admiralty within narrower limits that it anciently or originally claimed and exercised; so that, as a matter of fact, it was restricted in its jurisdiction within those limits at the periods above referred to.

Fourth. That it is of no importance to consider the question, whether the terms of the statutes of Richard II. render them applicable, as statutes, to this country; inasmuch as they, with the decisions under them, formed a part of the law of England, fixed the relative jurisdiction of the courts of admiralty and common law, and had fixed it centuries before the settlement of this country.

We might with much more reason contend, that the royal order of King Edward I. and his lords, and of King Edward III., and of his solemn convocation of judges, which were intended *to restrain the courts of com- [*359 mon law, or the inferior manorial jurisdictions, were of no binding force upon this country, as invasions of the ancient law of England, than can be contended on the other side, that solemn acts of Parliament, passed so many years ago, are to be disregarded, as showing the ancient state of the English law.

Fifth. That at the settlement of this country, and at the Revolution, it is perfectly notorious that the courts of admiralty in England not only did not exercise, but did not claim to exercise, jurisdiction over such contracts as the one set forth in the libel.

We do not refer to the claims of civilians in their treaties, in which they claimed everything in general terms. Sea Laws, 208, extracts from Godolphin's View of the Admiral's Jurisdiction.

From such contracts as that set forth in the libel, the courts of admiralty were expressly excluded by the terms of the acts of Richard II., confirmed and explained by the acts of Henry IV. and Elizabeth. See Acts; Sea Laws, 229, 234, 235, and in 6 Vin. Abr. 520, 521.

These acts were plainly and pointedly intended to restrain the jurisdiction of admiralty on waters within the body of a county, and especially within all ports and havens. See Brownlow, part 2, p. 16; Sea Laws, 333; see cases collected in 2 Gall. 429, 447, and 6 Vin. Abr. 523-527.

Dr. Browne admits, what same other civilians deny, that ports, creeks, and havens are within the restraining acts of Richard II. and Henry IV., and that the admiralty jurisdiction was excluded from these places by those acts. 2 Browne, Civ. and Adm. Law, 92; 3 Dunlap, 33; see, too, opinion of Sir Chris. Robinson, in The Public Opinion, 2 Haggard, 398.

Indeed, the whole criticism by Judge Story, in De Lovio v. Boit, of the decisions under the statutes of Richard, is intended to show rather that they were decided wrongly, than that they did not decide that the admiralty had no jurisdiction over contracts made in ports and havens.

The undoubted doctrine of the common law courts, since these statutes at least, has ever been that the jurisdiction of admiralty over contracts is confined to contracts made upon the high sea, to be executed upon the high sea, of matters in their own nature maritime. 2 Gall. 437.

One great point of dispute between the common lawyers and the civilians, in the construction of the statutes of Richard II., was the meaning of the words "things done upon the sea," in stat. 13 Richard II., and "things done and arising within the bodies of counties," in stat. 15 Richard II.

360*] *The civilians, and with them agrees Judge Story, contended that the words "things done upon the sea" meant "things done touching the sea;" i. e., maritime affairs and transactions.

They liken these words to the words of the French ordinance of 1400, which gives the admiralty of France "connoissance et jurisdiction de tous les faits de la mer," etc., and to the words of the French ordinance quoted by Selden, "pour raison ou occasion de fait de la mar;" that is, Selden says, "ab aliquam causam a re maritima ortam;" and because "tous les faits de la mer" means maritime transaction, in the French ordinance, the argument is, that the words "choses faits sur la mer" mean the same thing in the English statute. 2 Gall. 439.

Unlike the French admiralty jurisdiction, the English admiralty jurisdiction, over contracts at least, originally depended upon the place where made or transacted; and even, it would seem, upon the occupation of the parties to them. See Order of King Edward I.: 2 Gall. 402, n. 16; Black Book of Admiralty, quoted by Judge Story, 2 Gall. 405.

Sixth. That, as a matter of fact, the courts of admiralty in this country, previous to the adoption of the Constitution of the United States, so far as their decisions have been considered of value enough to be published, never did exercise jurisdiction over contracts of the character of that set forth in the libel, but held themselves confined to the limits of the jurisdiction of the English courts of admiralty. Clinton v. Brig Hannah, Bee's Adm. R. 419, decided by Judge Hopkinson in 1781; Shrewsbury v. Sloop Two Friends, Bee's Adm. R. 435, decided by Judge Bee in 1786. See, also, The Brig Eagle, Bee, 78, and Pritchard v. The Lady Horatia, Bee, 168, the former decided in 1796, and the latter in 1800, after the adoption of the Constitution; in the latter of which, the ground of the jurisdiction of the court in the case before it is noticed, and the English cases relied on and reviewed.

Seventh. The terms of the commissions of courts of vice-admiralty in this country, in former times, and of the judges of admiralty in England, afford no index to the true limits of their jurisdiction. They were mere matters of form, and Lord Stowell, speaking of his own commission as judge of the Hight Court of Admiralty, says: "It is universally known, that a great part of the powers given by that commission are totally inoperative." The Apollo, 1 Haggard's Adm. R. 312, 313; see, too, Schooner Volunteer, 1 Sumner, 564, 565.

Eighth. No case has yet been decided by the Supreme Court of the United States, affirming the admiralty jurisdiction of the court over a contract of this character.

361*] *The decisions of the Supreme Court upon the subject of their admiralty jurisdiction may be arranged in four classes—

1. Cases of material men, proceeding in rem for repairs done or materials furnished.

The General Smith, 4 Wheat. 438, was the case of a material man proceeding in rem in the domestic port of the ship. The libel was dismissed upon the ground, that upon a ship, in a domestic port, the maritime law gave no lien for materials found, etc., the credit being personal; and hence, that the proceeding in rem could not be maintained. See the obiter dictum of Mr. Justice Story in this case, in substance, that, if the libel had been in personam, it would have been sustained; commented on by Mr. Justice Johnson in Ramsay v. Allegre, 12 Wheat. 611.

The case of Peyroux v. Howard, 7 Peters, 324, was a libel in rem against a domestic vessel in the port of New Orleans, brought by a material man, to enforce a lien given by the local law of Louisiana in such cases.

These decisions conform to the decisions of Clinton v. Brig Hannah, Shrewsbury v. Sloop Two Friends, and Pritchard v. The Lady Horatia, before cited from Bee, which suppose that the remedy in admiralty depends upon the fact of a lien.

The third resolution of the agreement of February 4th, 1632, between the judges of the King's Court of Westminster and the judge of the Court of Admiralty and the attorney-general, concerning the jurisdiction of the English admiralty, was in these words:

"If suit be in the Court of Admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as, for his interest, makes himself a party, no prohibition is to be granted, though they be done within the realm." Dunlap's Adm. Prac. 14; Hall's Adm. Prac. 24, 25, Introduction.

In the time of Charles I., it seems that the English admiralty had jurisdiction to enforce a lien in favor of material men, by a proceeding in rem. 6 Vin. Abr. 527.

2. Cases of possessory, and, perhaps, petitory suits concerning vessels.

The case of The Steamboat Orleans v. Phœbus, 11 Peters, 175, 184, was a libel in rem, in the nature of a possessory suit, brought by one part owner of a vessel against the others, praying that the vessel might be sold, and he paid his advances and freight in account and with other part owners, and his proportion of the proceeds of the sale. The court below, strangely enough, decreed an account and sale. It being shown that the boat was employed in plying between New Orleans and Maysville, *on the Ohio River—i. e., her substantial [*362 employment being in the waters without the ebb and flow of the tide, though she touched waters where the tide ebbed and owed at one terminus of her trips, New Orleans—the libel was dismissed by this court for want of jurisdiction.

Undoubtedly, had her substantial employment been on waters where the tide ebbed and flowed, the court would have entertained the suit so far as to decree a stipulation in favor of the part owner for his security, though the account and sale were out of the course of admiralty.

Possessory suits, in relation to vessels, have always been entertained by the English courts of admiralty without prohibition.

"Until some time after the Restoration," says Lord Stowel, "the courts of admiralty exercised jurisdiction over petitory suits, when it was found by other courts that it belonged exclusively to them; since which it has been very cautious not to interfere at all in

questions of this sort." The Aurora, 3 Rob. 133, 136.

Pursuing the same subject in the case of The Warrior, 2 Dodson, 288, he re-affirms the above in regard to petitory suits, and adds: "The jurisdiction over causes of possession was still retained; and although the higher tribunals of the country denied the right of this court to interfere in mere questions of disputed titles, no insinuation was ever given by them that the court must abandon its jurisdiction over causes of possession." See, too, 2 Browne's Civ. and Adm. Law, 113, 114, 397; Dunlap's Adm. Prac. 24, 29, 30.

3. Cases of mariners' wages.

The steamboat Jefferson, 10 Wheat. 429, was a libel in rem for wages earned on board a steamboat plying between Shippingport, in Kentucky, and places up the Missouri River, which was dismissed by this court for want of jurisdiction over the contract, as one not relating to service performed on waters in which the tide ebbed and flowed.

If the service had been substantially performed on tide waters, the admiralty would have had jurisdiction; such contracts being within the acknowledged jurisdiction of the English admiralty. 2 Browne's Civ. and Adm. Law, 36, 37; Dunlap, 26, 27.

4. Cases of salvage.

Hobart et al. v. Drogan et al., 10 Peters, 108, 119, 120, 121, was a case of salvage.

Salvage has always been deemed within the jurisdiction of the English admiralty. See the case of The Joseph Harvey, 1 Rob. 306, in which Sir William Scott says: "It is allowed [*363] *that the court may, in case of pilotage, as well as salvage, direct a proper remuneration to be made."

Andrews v. Wall, 3 How. 568, was also a case of salvage, the proceeds being in possession of the court, and ordered to be distributed according to an agreement of consortship between the salvors. As his Honor Judge Story observed, in delivering the opinion of the court, it has always been held in the English admiralty, as incidental to the jurisdiction of the court over the subject of salvage, that the court has power to entertain supplementary suits in relation to the proceeds in their possession, and to order them to be paid over to the parties interested according to their right.

Ninth. We know of no case, out of the first circuit, in which the jurisdiction of the court in admiralty over such a contract as this has been affirmed.

The Sloop Mary, 1 Paine, 671, was a libel to enforce a bottomry bond, executed by the owner and master in the West Indies, to enable him to purchase a cargo. One question was, whether the case was within the admiralty jurisdiction of the court, the bond being made by the owner as owner of the vessel, since as master he could not have made such a bond for the mere purchase of cargo, but only for necessary supplies and repairs. The court sustained their jurisdiction, upon the ground that this was a maritime contract, the vessel being hypothecated for the payment of the sum loaned, and the payment being contingent upon the safe arrival of the vessel.

In Wilmer v. Smilax, 2 Peters's Adm. Dec. 495, the District Court of Maryland sustained 474

jurisdiction of a libel on a bottomry deed executed by the owner in a home port. This is going farther than this court has intimated it felt authorized to go. 4 Cranch, 328.

That the English admiralty has always had undisputed jurisdiction over bottomry bonds, and of all contingent hypothecations of cargo and freight, is well settled; the jurisdiction depending, not upon the consideration of the contract, but upon whether the payment be contingent upon the arrival of the vessel. The Barbara, 4 Rob. 1; The Zodiac, 1 Haggard, 325; The Atlas, 2 Haggard, 48; The Murphy, 2 Browne's Civil and Adm. Law, 530; Dunlap's Adm. Prac. 27, 28.

Second point. That, in fact, the libelants did not deliver to the respondents, and the respondents did not receive from the libelants, the said gold and silver coin to carry, but that the contract of the libelants was wholly with one Wm. F. Harnden, a carrier and forwarder on his own account and risk, and as such contracted with and paid by the libelants; and hence, that if the libelants have any cause of action for the *loss of said coin, it is [*364 against Harnden, and not against the respondents, there being no privity of contract between the libelants and respondents.

Harnden was the collector of drafts, etc., for the Merchants' Bank, in the city of New York, and carrier of the specie in question.

His business was that of a carrier and forwarder of specie, small packages, etc., collector of drafts, purchaser of goods, etc., carried on in offices kept by him in New York and Boston, and how he did his business as a carrier is proved by Harnden, 118, 121; Lockwood, 102, 105.

His mode of carrying between New York and Stonington is shown by his agreements with the respondents, owners of boats plying between those places.

The agreement of August, 1839, provides, "that the said William F. Harnden, for and in consideration of the sum of $250 per month, to be paid monthly to the said New Jersey Steam Navigation Company, is to have the privilege of transporting in the steamers of said company, between New York and Providence, via Newport and Stonington, not to exceed once in each day, from New York and Providence, and as less frequently as the boats may run between and from said places, one wooden crate, of the dimensions of five feet by five feet in width and height, and six feet in length (contents unknown), until the 31st December, A. D. 1839, and from this date.

"The following conditions are stipulated and agreed to, as part of this contract, to wit: The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, on the boats of said company.

"Further, that the said Harnden is to attach to his advertisements, to be inserted in the public prints, as a common carrier, exclusively

Howard

responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:

"'Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached [*365] to, the proprietors of the steamboats in which his crate may be, and is transported, in respect to it, or its contents, at any time.'" Schedule I, printed rec. 128. Harnden applies for renewal of contract, by letter of date Boston, December 7, 1839, schedule I, printed rec. 129; Handy replies, by letter, of date New York, December 9, 1839, schedule K, printed rec. 130; Harnden's letter, of date Boston, December 16, 1839, schedule L, printed rec. 130; Handy's letter, of date New York, December 31, 1839, schedule M, printed rec. 130, 131. To this Harnden makes no reply, waiting until he came to New York, Harnden's deposition, printed rec. 121, answer to third cross-interrogatory. He was kept back by bad weather, Lockwood's deposition, printed rec. 104, answer to twenty-second interrogatory; but under same contract, with same advertisements, continues to transport his crate in the boats of the New Jersey Steam Navigation Company, as before; and on coming to New York, on the 24th of February, 1840, formally renews the contract as proposed by Handy in his letter of December 31, 1839. During the interval between the date of this letter and the 24th of February, 1840, the Lexington was lost. See Harnden's deposition, 120; Brigham's, 28, answers to first, second, third, and fourth cross-interrogatories; Ib. 141; Lockwood's, 104, twenty-third interrogatory; schedule N, printed rec. 131, 132. Harnden had acted as carrier for the bank before this transaction. Harnden's deposition, 120, answers to thirteenth, seventeenth, and eighteenth interrogatories, and to tenth cross-interrogatory.

He was not our agent, but did business for himself. They employed him, and not us, and were bound to know in what character he acted; the presumption being, that he who is employed is alone responsible for his acts and contracts.

The burden is upon the libelants to show that Harnden's acts and contracts bind us, he doing business as a carrier, on his own account, in fact and appearance.

We are not bound, therefore, to bring home to the libelants knowledge of the terms of his contract with us; and his notices of these terms are not our notices, but his own; stipulated for, it is true, in our contract with him, ex abundanti cautela, but our exemption from responsibility coming from our relation to Harnden and our contract with him, and not from the fact that his notices were brought home to his employers.

But the Merchants' Bank actually knew that Harnden did business for himself, and was alone to be responsible. He distributed ten thousand notices to that effect, and especially sent them to the Boston banks. Harnden's deposition, 119, answers to fourth, fifth, sixth, seventh, eighth, and ninth interrogatories, *page 121, answer 121; answer to tenth [*366 cross-interrogatory.

He advertised to that effect in the Boston newspapers, some of which this bank took. Curtis's deposition, 153; Champney's, 153; Nichols's 154; advertisement, 155; Conant's, 153–155.

Harnden was not the agent of the Merchants' Bank to ship their coin with us. He was their agent to collect their drafts in New York, but their carrier to transport the proceeds to them at Boston. He used our boats under general express arrangements, for the carrying on of his own business, made between him and ourselves, by which both are bound, and which necessarily excluded all tacit agreements between us and his customers.

We carried Harnden's crate for him—not its contents for his employers. We are, therefore, no carriers for the Merchants' Bank; there is no contract—no privity of contract—between them and us.

Hence, we cannot be liable to the Merchants' Bank; but, if at all, only to Harnden, on our contract with him. Reynolds v. Toppan, 15 Mass. Rep. 370; King v. Lenox, 19 Johns. 235, 236; Walter v. Brewer, 11 Mass. Rep. 99; Ward v. Green, 6 Cowen, 173; Allen v. Sewall, 2 Wendell, 327; S. C. in error, 6 Ib. 335; Halsey v. Brown, 3 Day, 346; Portugal coin case, Abbott on Ship. 119; Cas. temp. Hardw. 85, 194; Butler v. Basing, 2 Carr. & Payne, 613; Citizens' Bank v. Nantucket Steamboat, Company, 2 Story, 32–34, 46.

Again, in case of valuables, as jewels and precious stones, gold and silver coin, carried either by land or sea, it not being the custom of the carrier to carry such things without a special acceptance, he shall not be liable for their loss, unless he accepts them and is paid for them. Kenrig v. Eggleston, Aleyn, 93; commented on by Lord Mansfield, in Gibbon v. Paynton, 4 Burr. 2301; Cases of baggage decided by Lord Holt, and collected in 1 Vin. Abr. 220; and see 1 Wheat. Selwyn, 301, No. 1, and cases cited; Orange County Bank v. Brown et al., 9 Wend. 85; Pardee v. Drew, 25 Ib. 459; Citizens' Bank v. Nantucket Steamboat Company, 2 Story, 32–34, 46; Statutes 11 Geo. IV., and 1 Wm. IV., ch. 38, 68, found in 2 Kent's Com. 609, note c; 2 Stephen's N. P., art. Carrier, in relation to land carriers; statutes 7 Geo. II. ch. 15; 26 Geo. III. ch. 86; 53 Geo. III. ch. 159, found in 2 Kent's Com. 606; Abbott on Shipping, part 3, ch. 4, secs. 8, 9, and in chap. 5, on Limitation of Responsibility of Ship owners; see Hinton v. Dibbin, 2 Ad. & Ell. N. S. 646, reviewing obiter dicta in Boys v. Pink, 8 Carr. & Payne, 361, and in Owen v. Burnett, 2 Cromp *& Mees. [*367 353; S. C. 4 Tyrwhitt, 133, in construction of statutes 11 Geo. IV. and 1 Wm. IV. ch. 68.

We neither received, were paid for, nor carried, with our knowledge, the gold and silver coin of the Merchants' Bank.

The warranty of sufficiency of boat, equipments, etc., is implied in the contract of carriage in favor of him whose goods are contracted to be carried. It follows, that, if we did not contract to carry for the Merchants' Bank, we did not warrant the sufficiency of our means of carriage to them.

Third point. That if in their own name,

which we deny, the libelants could pursue the respondents, it could only be by virtue of and under the contract of Harnden and the respondents for the transportation on board of the boats of the respondents of Handen's express crate; and that, by virtue of this contract, Harnden was the insurer of his own crate whilst on board the respondents' boats, using said boats as his own.

The contract between Harnden, by its terms, throws the whole risk of the carriage of his crate and contents exclusively on him—in any event, at any time. No policy forbids such a contract.

In England it is well settled that a carrier may limit his responsibility by a special acceptance. Kenrig v. Eggleston, Aleyn, 93; Rolles, Ch. J., Southcote's case, 4 Coke, Rep. 84; Coke, Ch. J., Slue v. Morse, 1 Vent. 190, 288; Hale, Ch. J. Lyon v. Mells, 1 Smith, 484; S. C. 5 East, 428; Abbott on Ship. part 3 ch. 4, sec. 8, p. 296, ed. 1822.

See old and new form of bill of lading. Abbott on Ship. part 3, ch. 2, sec. 3, p. 216, ed. 1829; 1 Bell's Com. 454, 471, 4th ed.; Gibbon v. Paynton, 4 Burr. 2301; see Yates, J. Peake's N. P. Cases, 150; 2 Taunt. 271; 1 Bell's Com. 380, 384, 4th ed. book 1, part 1, ch. 4, sec. 3, American Bills of Lading; see Gordon v. Buchanan, 5 Yerger, 71; Johnson v. Friar, 4 Ib. 48; Atwood v. Reliance Transp. Co. 9 Watts. 487; Relf v. Rapp, 3 Serg. & Watts, 35.

It is well settled in England, that a common carrier may limit his responsibility by notices brought home to the knowledge of his customers. Nicholson v. Willan, 5 East, 513; Gibbon v. Paynton, 4 Burr. 2301; Yates, J. and Aston, J. Evans v. Soule, 2 M. & S. 1; Lathham v. Ratley, 2 B. & C. 20; Harry v. Packwood, 2 Taunt. 264; Leeson v. Holt, 1 Starkie, 186; Mawing v. Todd, Ib. 72; Lowe v. Booth, 13 Price, 329; Riley v. Horne, 5 Bingh. 217; Brooke v. Pickwick, 4 Bingh. 218.

The same doctrine prevails in America. Gordon v. Little, 8 Serg. & Rawle, 533; Atwood v. Reliance Transp. Co. 9 Watts, 87; Orange County Bank v. Brown, 9 Wend. 115, Nelson, J.; Phillips v. Earle, 8 Pick. 182; Bean v. Green, 3 Fairf. 422.

368*] *As to the extent of a carrier's liability under such notices. Smith v. Horne, 8 Taunt. 144; Lowe v. Booth, 13 Price, 329; Brooke v. Pickwick, 4 Bingh. 218; Owen v. Burnett, 2 Cromp. & Mees. 360; Wyld v. Pickford, 8 Mees. & Wels. 443.

By special contract a carrier may dispense with all responsibility; and, in this respect, a special agreement differs from notice. 1 Bell's Com. 380–384, 4th ed. book 1, part 1, ch. 4, sec. 2.

The cases of Cole v. Goodwin, 19 Wend. 280, Nowlen v. Hollister, Ib. 246, 247, Clark v. Faxton, 21 Ib. 153, and Gould v. Hill, 2 Hill, 623, are cases of lost baggage of passengers or goods carried by land. See Schieffelin v. Harvey, 6 Johns, 180; McArthur v. Sears, 21 Wend. 194, which show that, as common carriers by water, under a contract for the carriage of goods, and especially valuables, deliberately made, we should be entitled to the benefit of the terms of our special agreement with Harnden, under which the libelants must claim, if at all. See 2 Kent's Com. 601, 608.

But we were not common carriers of this crate and its contents. A common carrier as to some things is not necessarily a common carrier as to others. Citizens' Bank v. Nantucket Steamboat Co. 2 Story, 32–34, 46, etc.

The agreement between us, as the owners of steamboats, and Harnden, a carrier, was a permanent arrangement, by virtue of which he was to have the privilege of sending his crate by our boats, and to carry on his business in our boats.

This he could not exact of us as a common carrier for him, and we did not perform as a common carrier. Story on Bailments, 512, sec. 508; Ibid. 483, sec. 476; Jencks v. Coleman, 2 Sumner, 224, 225; Story on Bailments, 581–583, sec. 591, a, 583, n. 1; 1 Vin. Abr. 220, and cases cited.

In New York it is perfectly well settled that any other bailees, except common carriers, may make what contracts, and provide for what limitations of responsibility, they will, and the courts will fairly carry out the contract. Alexander v. Greene, 3 Hill, 1; 2 Kent's Com. 608, note a.

In New York a bailee, under such a contract as that between Harnden and ourselves, is liable only for fraud. Ibid.

It is like a case of charter-party, in which the charter-party settles the responsibilities of the parties to it. Abbott on Ship. part 3, ch. 1, Contract of Affreightment.

Fourth point. That, although under these circumstances we cannot be liable for any degree of negligence, or for want of sufficiency in our boat and equipments, to the libelants, with whom we did not contract, and for whom we did not carry, nor to Harnden for any misconduct short of fraud or wilful *in- [*369 jury, yet we deny, as a matter of fact, the charge made against us in this respect, and contend that our boat was staunch and strong, and well equipped, and that her loss by fire was not occasioned by any deficiency in her equipments, or any unskillfulness or negligence in her conduct.

Admitting that we could be liable to them on this ground, the burden, as in case of every other breach of contract, is upon him who alleges and claims for a breach—the libelants here. They must prove—

1st. The insufficiency, etc.

2d. That their loss was caused by that insufficiency, and not merely its abstract existence. 1 Bell's Com. 460, 4th ed. book 3, part 1, ch. 5, sec. 2, paragraph 499, L. B. 3; Pothier, Chartre Partie, Vol. I. p. 319; Havelock v. Geddes, 10 East, 555; Sharp v. Grey, 9 Bingh. 459; Alderson, J. Bremmer v. Williams, 1 Carr. & Payne, 414; Best, J. Jones v. Boyce, 1 Starkie, 495; Bell v. Reed, 4 Binney, 127; Hart v. Allen, 2 Whart. 120; Reed v. Dick, 8 Watts, 479; Amies v. Stevens, 1 Stra. 128.

The question has been, whether a carrier is ever liable for a secret defect. Pothier, Chartre Partie. Vol. I. p. 319; Sharp v. Grey, 9 Bingh. 459; Alderson, J. Christie v. Griggs, 2 Camp. 81; Bremmer v. Williams, 1 Carr. & Payne, 414; Story on Bailments, secs. 509, 562, 571, a, 592, and authorities cited.

However this may be, as a general question, we contend that, under a contract by which all risk was excluded from us, we are not to be

liable for secret defects in our boats, machinery, etc.

Our boat, hull, engine, boiler, and general equipment were good, by the proof. [Here the counsel entered into a minute examination of the testimony.]

The Act of 1838 is a penal act, imposing new duties upon carriers, and does not apply to a boat engaged in the waters in which the Lexington was employed, when lost, but only to boats voyaging "at sea," or in the specified larger lakes. See 8th and 9th sections of the Act of 1838.

Compare the 8th and 9th sections of the act with the 3d, 4th, 5th, and 6th sections, and it will be seen that the word "sea," in the act, does not mean "bay, river, or other navigable waters of the United States," but "altum mare," "high or open sea," in the common sense of the term.

But, finally, the loss of the Lexington did not result from her not having "iron rods and chains," instead of "wheel or tiller ropes," required by the statute.

The boat, when found to be on fire, should have been stopped; and this seems to have 370*] been the captain's attempt, at one *time. The parting of the wheel ropes, if occasioned by the fire, did not contribute at all to her loss.

The want of the steering apparatus required by the statute, not being the cause of her loss, is no ground for damages, within the authorities above cited.

Mr. R. W. Greene, for the defendants in error, argued the question of jurisdiction first and then the following points:

1. That the respondents were common carriers.

2. That common carriers are liable for all losses, except those which arise from the act of God, the public enemies, or the fault of the owner of the goods.

3. That common carriers cannot limit their liabilities by notice.

4. That even a special agreement to exempt a common carrier from the legal liabilities of his employment would be void. One cannot be a common carrier, receiving the compensation of common carriers, and yet be exempted or excused from the proper responsibilities of his employment.

5. That if there be any doubt of the correctness of the foregoing propositions, according to the law of England or other countries, there is none according to the law of New York, where the shipment in this case was made.

6. But if the libelants be wrong on the general point (viz., that common carriers cannot, in New York at least, limit their responsibility at all by notice), still the effect of notice, if any effect whatever be given to it, can only be to relieve the carrier from liability for extraordinary losses or occurrences. He is still liable for losses within his own warranty, express or implied, or occasioned by his own negligence or misconduct.

The libelants contend, therefore,

7. That there is no sufficient proof of notice in this case; and,

8. That if notice be proved, it does not relieve the respondents from their implied warranty with regard to the vessel, her seaworthiness, her equipment, the competency of her crew and commander, the mode of stowing cargo, and the navigation and general management of her as a carrying vessel.

And the libelants will maintain, as a rule of evidence fit to govern this case, that if a vessel be lost in fair weather, without the presence of any external cause, or occurence adequate to the production of the loss, the legal presumption is that she was either unseaworthy or was improperly navigated, conducted, or managed; and to discharge the respondents, this presumption must be met, answered, and overthrown, by clear and satisfactory proof.

*The libelants contend that there is [*371 in the case no such clear and satisfactory proof as is sufficient to overcome the legal presumption; and they insist, further, that there is proof that, in point of fact, the respondents' warranty was not complied with in various respects, and among others in these, viz.: that the furnaces were unsafe and insufficient; that there was no proper casing to the steam chimney, nor any safe lining of the deck where the chimney passed through; that dry pine wood was habitually kept in a very exposed situation; that, especially, there was a very improper stowage or disposition of the cargo on board, considering what that cargo was; that the boat had no tiller chain or rope, such as the act of Congress as well as common prudence required; that there were on board no fire-buckets, properly prepared and fitted with heaving lines; that the fire engine was in one part of the boat, while the hose belonging to it was kept or left in another, and where it was inaccessible when the fire broke out; and that in other respects the respondents were guilty of negligence, the more culpable, as the same boat had actually taken fire in her last preceding voyage, and no measure of caution had been taken to prevent a recurrence of the accident.

1st point. As to the question of jurisdiction.

The counsel upon the other side have argued this question as if it were the decision of the court which vested the jurisdiction in it, immediately under the Constitution, without the intervention of an act of Congress, and that if the court were to decide with us, the jurisdiction must remain in its full extent until an alteration of the Constitution. But the Constitution vests in Congress the power to distribute this jurisdiction amongst the courts of the United States, as the public good may require. The courts only take what Congress confers. Congress may confer a jurisdiction as large as the grant contained in the Constitution, as they have done in the Judiciary Act of 1789; or they may abridge and restrict the jurisdiction within such limits as they think proper. They may enact the statutes of Richard, with my Lord Coke's construction. They may even take away the jurisdiction over seamen's wages and bottomry bonds. Congress can also regulate the forms of process and the modes of proceeding in the courts of admiralty, and can provide for the trial by jury of all issues.

Upon such a construction of the grant, the people retain the whole subject under their own control, to be regulated as experience and the progress of events may render expedient. If they find it too large under the Judiciary

Act of 1789, they can limit it; if they prefer that the remedy should be confined to cases in rem, they can so restrict it; if they wish a process in personam as well as in rem, they can leave the law as it is.

372*] *Whereas, by the construction contended for by our adversaries, the court are urged to disable Congress, and the people through Congress, from conferring such jurisdiction as their interests may require. The statutes of Richard, with my Lord Coke's construction of them, become a part of the Constitution of the United States, and impose upon the people and Congress a perpetual disability to enlarge the jurisdiction, however much their interests may require it, without an alteration of the Constitution. The members of the convention were statesmen, civilians, and common lawyers; they were engaged in framing an instrument of government, which they hoped, and which we hope, will endure for ages. The great objects of the confederacy were commerce and union. Is it not absurd to suppose that men, engaged in such a work, would have incorporated into the compact of government such distinctions as to remedies in rem and in personam as are contended for by the counsel for the respondents? Would they not have conferred the larger power upon Congress, and thus left the subject to be regulated as experience should show was most expedient?

It is said, however, in answer to this, that, if the court should now decide that it does not possess the jurisdiction, Congress can hereafter enlarge the jurisdiction. But the present grant is co-extensive with the grant of power to Congress itself in the Constitution. The words used are the same in both instruments. If, then, Congress have already exhausted their power by vesting the courts with the whole of it, how can any fund remain in reserve upon which Congress can draw for a fresh supply?

But it is contended, by the counsel upon the other side, that the English system of admiralty, as it existed in 1787, became bodily transferred, just as it then stood, into the Constitution of the United States. Without inquiring, for the present, into the absurd, contradictory, and inconsistent principles upon which the common lawyers of England had placed the system, let us examine how far it would be suitable and appropriate to the United States —how far it would be adapted to our condition, and adequate to carry out one of the great objects for which the people adopted the Constitution. This object was to promote commerce. The preamble indicates this. The United States was a maritime nation, with an immense extent of sea coast, indented with bays, rivers, and harbors, the navigation of which was dangerous. A few considerations will serve to show that the limited construction contended for by the other side would eminently fail in promoting this essential object of the union.

373*] *As to pilotage.

The English Admiralty had no jurisdiction over pilotage, except upon the high seas, where it was not needed.

[Mr. Greene here illustrated the necessity of the supervision of the federal government over the subject of pilotage, because of its importance, its peculiar applicability to admiralty jurisdiction, the meritorious character of the services rendered, etc., etc.; also over the subject of material men, inasmuch as the States were foreign to each other as to jurisdiction; also over the subject of salvage, inasmuch as the English admiralty had jurisdiction over salvage only where the property of the ship wrecked was not cast ashore, see 5 Howard, 452; also over the subject of collisions in bays, harbors, and navigable rivers, which are purely a maritime subject, and more apt to occur than collisions on the high seas.]

The subject of affreightment is not within the admiralty jurisdiction of England, although the subject of seamen's wages is so. But freight is the mother of wages. The whole subject of affreightment is purely maritime, and within the jurisdiction of all the continential courts, and of Scotland, to this day. I Summer, 555, 558, 559.

What are the history and principles of English admiralty jurisdiction, as settled by the common law courts? The principle is, that if a contract be made upon land, to be performed upon the sea, or made upon the sea, to be performed upon land, the courts of admiralty have no jurisdiction. But they can only interfere where contracts are made upon the sea, to be performed upon the sea—such as a note of hand, given at sea, to be paid at sea, or an agreement to convey real estate, to be executed upon the voyage. Lord Kenyon admitted this to be absurd. In 3 T. R. 267, he says: "If the admiralty have jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the sea, in order to execute the instrument, borders upon absurdity." The common law; as to all other than maritime contracts, is, that the law of the place of performance is to govern; but this rule is set aside as to admiralty. The general rule which governs all courts, as to their jurisdiction, is the subject matter. This is the rule in chancery, in the ecclesiastical courts, and the common law courts, upon every branch of jurisdiction except the admiralty; and in that case alone the inquiry is, not whether the contract be of a maritime nature, but whether it was made within the body of a county. The statutes of Richard are relied upon for this rule, and these statutes are declared by Lord Coke to be in affirmance of the common law. From whatever source this rule of jurisdiction was derived—whether from the statutes *of Richard or from [*374 the common law—if it be an arbitrary rule, and not founded in any just principle, it is unreasonable to suppose that the people of the United States meant to make it a part of their federal compact. But neither the common law nor the statutes of Richard are justly chargeable with this absurd rule of jurisdiction. It rests entirely upon the authority of Lord Coke, who was a great common lawyer, but no civilian.

[Mr. Greene then cited the ancient commissions in admiralty, the ordinance of Edward I., confirmed by ordinance of Edward III., the statutes of Richard II. and Henry IV., to show that the object of all of them was to place the admiralty jurisdiction in the same position where Edward III. had placed it, which did not justify the rule in question.]

The history of Lord Coke's controversy with Lord Chancellor Ellesmere shows the extent to which he desired to push the exclusive jurisdiction of the courts of common law. 3 Bl. Com. 44. Lord Coke's enmity to the admiralty has been a subject of comment by the common law judges in later times, particularly by Mr. Justice Buller; but they were bound by the authority of his decisions, however much they may have condemned the principle on which they were founded. And now, at this late day, this court are called upon to incorporate these decisions into the American Constitution, and thus deprive the American people of the power, through their representatives in Congress, so to regulate this jurisdiction as their interests may require.

The preservation of the trial by jury is said to be the great object for which these decisions were made. It was alleged that the admiralty had no trial by jury, that the judge was the immediate representative of the crown, and that the subject had no participation in the proceedings of this court. This was very plausible in England, but it has no application to this country; and even in England itself the reason is not sound. If the trial by jury be of such importance as to exclude the admiralty jurisdiction from certain classes of cases of a maritime character, why is the jurisdiction of the Lord Chancellor allowed in that country? His jurisdiction extends over the whole kingdom, and controls and annuls the judgments of the common law courts. He is the immediate adviser of the king, and keeper of his conscience. He is a member of the Privy Council, a politician, appointed and removed as his party succeeds or falls. There is no jury trial in his court, except at his discretion; and he never orders an issue to be tried before a jury, except when the evidence is so doubtful that he can come to no satisfactory conclusion, and he then 375*] *puts upon a jury the responsibility of guessing. The United States courts are invested by the Constitution with this power, and they exercise it, sitting as circuit courts in the different States.

How have the common law courts of England extended their own jurisdiction, whilst so scrupulous respecting that of others? The venue was originally local in cases of contracts and personal torts, as well as in real actions. The jury must come from the vicinage; and therefore, where the transaction occurred at sea, no jury could try the case. But a videlicet gave to these courts jurisdiction over the ocean, and the defendant was not allowed to deny the fiction. This was, in fact, an encroachment upon the admiralty. The Court of King's Bench had originally no jurisdiction over contracts, but was confined to cases of trespass. But a fiction which was not permitted to be denied gave jurisdiction over matters of contract, and a similar fiction enlarged the jurisdiction of the Court of Exchequer also.

Two arguments are urged against the jurisdiction over the present case:

1st. It takes away the trial by jury.

2d. It encroaches upon the jurisdiction of the State tribunals.

1st. It takes away the trial by jury.

Nothing can be clearer than that our ancestors attached a high value to the right of trial by jury. But there is a wide difference between an English admiralty judge and one appointed under the Constitution of the United States. The reasons for entertaining a jealousy against the former do not apply to the latter. In the United States, admiralty judges, as well as common law judges, are appointed by and responsible to the people, in some form or other. There is, therefore, no political reason for restraining the jurisdiction of a court of admiralty. If our American ancestors were jealous of the jurisdiction of the vice-admiralty courts of the colonies, the reason for that jealousy ceased when we became an independent people. A vice-admiralty judge of the colonies was the representative of the crown; the people of the colonies had no voice nor participation in his proceedings. It was a foreign tribunal, enforcing, amongst other things, the obnoxious laws of trade. But when the people of the United States came to frame a government for themselves, and to establish a judiciary which should be ultimately responsible to them, nothing can more clearly show how well the Convention and Congress understood their change of position, than the insertion into the Judiciary Act of 1789 of the clause which makes seizures upon tide water *for [*376 breaches of the revenue laws, cognizable in the courts of the United States, as courts of admiralty. No trial by jury was provided. This branch of the vice-admiralty jurisdiction was most bitterly complained of by the colonies; and yet the first Congress which sat under the Constitution invested the courts of the United States with the same power. It was composed of many of the same men who, in the Convention, had framed the Constitution, and who had also been members of the Congress whose measures led to the Revolution. The jurisdiction thus given, for penalties and forfeitures upon tide water, is in direct contradiction to the English system. But it was known to the members of the Convention that a jury trial could be prescribed by an act of Congress in the courts of admiralty. It was so in the colonial vice-admiralty of Virginia.

It may be mentioned, also, that chancery jurisdiction was given to the courts of the United States by the Constitution. There is here no trial by jury, and yet it controls and annuls the judgments of common law courts. Chancery courts existed in most of the colonies —in New York, Virginia, etc.—and their existence was never complained of, because they were established by the colonies themselves.

2d. It encroaches upon the jurisdiction of the State tribunals.

This argument begs the question. It assumes that such jurisdiction would be an encroachment. We deny it. The words of the grant in the Constitution are, "to all cases of admiralty and maritime jurisdiction." They are words of the most comprehensive import; and from the language used, as well as from the reasonableness of the thing, we say that the people must be presumed to have intended a jurisdiction which was needful and proper to carry out, or to aid in carrying out, the great commercial purposes of the Constitution. In adopting the Constitution, the people intended to confer upon the federal government all the powers needful to accomplish the purposes for

which it was formed. State courts are governed by the common law, and not the law maritime. The decisions of one State, moreover, are not binding on another, and thus there would be no uniformity. Whilst the regulation of the commerce of the country was in the hands of the federal government, if its courts had no jurisdiction over commercial questions which might arise out of that commerce, there would be one law in New York, another in Massachusetts, and a third in some other State.

[Mr. Greene continued much further his illustrations of this matter. But for them, or for his arguments upon the other points of the case, there is not room.]

377*] *Mr. Webster, upon the same side with Mr. Greene, laid down the following propositions, which he illustrated at considerable length:

This court has decided—

First. That the admiralty jurisdiction of this government is not limited to the admiralty jurisdiction as it existed in England in 1789. The English rules, therefore, are not to be regarded. Waring v. Clarke, 5 Howard, 441.

Second. That a suit in admiralty lies for a tort committed on the high seas, or elsewhere within the ebb and flow of the tide. Waring v. Clarke, 5 Howard, 441.

Third. That in cases of tort, the proceeding may as well be in personam as in rem. Mauro v. The Almeida, 10 Wheaton, 473.

Fourth. That in case of contract where there is a lien, the admiralty jurisdiction arises, though the contract may be made on land. Peyroux v. Howard, 7 Peters, 324; The General Smith, 4 Wheaton, 438.

Fifth. That the true question in cases of contract is this, to wit, whether the service agreed to be performed, and performed, be in its nature a maritime service. This excludes policies of insurance, but includes affreightment and all contracts to carry over and upon tide waters. 7 Peters, 324; Lord Mansfield and other English judges; Hall's Admiralty, 1.

Sixth. In cases of contract, the proceeding may be in personam, as well as in rem. There would be a great inconsistency if this were not so. In cases where nothing more is sought than damages for the non-fulfillment of a contract, there are two objects, and two only, in proceeding by way of seizure of the rem. One to compel an appearance in the litigation, the other to obtain security. Both these are identical with the proceeding by way of attaching the defendant's goods, as in the case in 10 Wheaton. But it is important to remember, that, in cases of the seizure of the rem, the judgment or satisfaction is not limited to the proceeds of the sale thereof. If a balance remain unsatisfied, execution process goes against the defendant in personam, if he has appeared and contested the suit. In this case, therefore, the plaintiff proceeds in personam with as much regularity as belongs to any proceeding in rem. Besides, as the res went to the bottom, how could there be any proceeding in rem. If there were another case exactly like this, except that in such case a spar, or a sail, or the caboose house, having been found floating, should have been seized, would this court have taken jurisdiction in one case and not in the other? 10 Wheaton, ubi supra.

*Seventh. The court having decided [*378 that the constitutional grant of admiralty and maritime jurisdiction to the government of the United States is not to be limited by the rules which restrained the English admiralty in 1789, it follows of course that the jurisdiction of the courts of the United States should naturally be co-extensive with the granted power, unless Congress has otherwise declared; and as the Judiciary Act of 1789, section ninth, expressly vests in the district courts of the United States original cognizance of all civil causes of admiralty and maritime jurisdiction, then whatever this court adjudges to be a case of admiralty and maritime jurisdiction belongs originally to the District Court, and invests that court necessarily with the power of all process and proceedings fit and proper for the exercise of its jurisdiction, subject to regulation by Congress.

Eighth. It is not, probably, doubted that the grant of admiralty and maritime jurisdiction to the government of the United States is exclusive, or that no State now retains any such power; and so absolutely indispensable has such a jurisdiction been found to be on the interior lakes and rivers, that Congress has been obliged to provide, and has provided, for its exercise on those waters. See Act of 1845.

The only objection to this necessary law seems to be, that Congress, in passing it, was shivering and trembling under the apprehension of what might be the ultimate consequence of the decision of this court in the case of The Thomas Jefferson. It pitched the power upon a wrong location.

Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, and does extend, to all navigable waters, fresh or salt.

The Reporter understands that Mr. Chief Justice Taney, Mr. Justice McLean, and Mr. Justice Wayne, concurred in the following opinion.

Mr. Justice Nelson:

This is an appeal from the Circuit Court of the United States, held in and for the District of Rhode Island, in a suit originally commenced in the District Court in admiralty, and in which the Merchants' Bank of Boston were the libelants, and the New Jersey Steam Navigation Company the respondents.

The suit was instituted upon a contract of affreightment, for the purpose of recovering a large amount of specie lost in the Lexington, one of the steamers of the respondents running *between New York and Providence, [*379 which took fire and was consumed, on the night of the 13th of January, 1840, on Long Island Sound, about four miles off Huntington light-house, and between forty and fifty miles from the former city.

The District Court dismissed the libel pro forma, and entered a decree accordingly. An appeal was taken to the Circuit Court, where this decree of dismissal was reversed, and a decree entered for the libelants for the sum of $22,224, with costs of suit.

The case is now before this court for review.

William F. Harnden, a resident of Boston, in the business of carrying for

hire small packages of goods, specie, and bundles of all kinds, daily, for any persons choosing to employ him, to and from the cities of Boston and New York, using the public conveyances between these cities as the mode of transportation. For this purpose, he had entered into an agreement with the respondents on the 5th of August, 1839, by which, in consideration of $250 per month, to be paid monthly, they agreed to allow him the privilege of transporting in their steamers between New York and Providence a wooden crate of the dimensions of five feet by five feet in width and heighth, and six feet in length (contents unknown), until the 31st of December following, subject to these conditions:

1. The crate with its contents to be at all times exclusively at the risk of the said Harnden, and the respondents not in any event to be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, etc., to be conveyed or transported by him in said crate, or otherwise in the boats of said company.

2. That he should annex to his advertisements published in the public prints the following notice, and which was, also, to be annexed to his receipts of goods or bills of lading:

"Take notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

This arrangement expired on the 31st of December, 1839, but was on that day renewed for another year, and was in existence at the time of the loss in question.

A few days previous to the loss of the Lexington, the libelants employed Harnden in Boston to collect from the banks in the city of New York checks and drafts to the amount of about $46,000, which paper was received by him and forwarded to his agent in that city, with directions to collect and send home the same in the usual way. Eighteen thousand dollars of this [*380 sum *was put in the crate on board of that vessel on the 13th of January, for the purpose of being conveyed to the libelants, and was on board at the time she was lost, on the evening of that day.

Upon this statement of the case, three objections have been taken by the respondents to the right of the libelants to recover:

1. That the suit is not maintainable in their names. That, if accountable at all for the loss, they are accountable to Harnden, with whom the contract for carrying the specie was made.

2. That if the suit can be maintained in the name of the libelants, they must succeed, if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and,

3. That the District Court had no jurisdiction, the contract of affreightment not being the subject of admiralty cognizance.

We shall examine these several objections in their order.

1. As to the right of the libelants to maintain their suit.

They had employed Harnden to collect checks and drafts on the banks in the city of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with the respondents for its conveyance, except what was derived from the possession in the execution of his agency. The general property remained in the libelants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them.

This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of this description of goods, the result would not be changed, so far as relates to the right of property.

The carrier has a lien on the goods for his freight, if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. Story on Bailments, sec. 93, g.

The carrier, says Buller, J., is considered in law the agent or servant of the owner, and the possession of the agent is the possession of the owner. 4 T. R. 400.

Under these circumstances, the contract between Harnden and the respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libelants; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names.

It would be otherwise, in a court of law, if the contract was under seal. Story on Agency, sec. 160.

It rested in parol, in this case, at the time of the loss.

*In Sims v. Bond, 5 Barn. & Adol. [*381 393, the court observed that it was a well established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.

The same doctrine is affirmed by Baron Parke, in delivering the judgment of the court in Higgins v. Senior, 8 Mees. & Wels. 834, 844, in the Court of Exchequer. In that case it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing by the statute of frauds.

The rule is, also, equally well established in this country, as may be seen by a reference to the cases of Beebee v. Robert, 12 Wend. 413, Taintor v. Prendergast, 3 Hill, 72, and Sanderson v. Lamberton, 6 Binney, 129.

The last case is like the one before us. It was an action by the owners directly upon the sub-contract made by the first with the second carrier for the conveyance of goods, in whose hands they were lost.

The cases are numerous in which the general owner has sustained an action of tort against the wrong-doer for injuries to the property while in the hands of the bailee. The above cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest,

with a view to avoid circuity of action; saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent.

We think, therefore, that the action was properly brought in the name of the libelants.

II. The next question is as to the duties and liabilities of the respondents, as carriers, upon their contract with Harnden. As the libelants claim through it, they must affirm its provisions, so far as they may be consistent with law.

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident—in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

The question is, to what extent has this agreement qualified the common law liability? 382*] *We lay out of the case the notices published by the respondents, seeking to limit their responsibility, because,

1. The carrier cannot in this way exonerate himself from duties which the law has annexed to his employment; and,

2. The special agreement with Harnden is quite as comprehensive in restricting their obligation as any of the published notices.

A question has been made, whether it is competent for the carrier to restrict his obligation even by a special agreement. It was very fully considered in the case of Gould et al. v. Hill et al., 2 Hill, 623, and the conclusion arrived at that he could not. See also, Hollister v. Nowlen, 19 Wend. 240, and Cole v. Goodwin, Ib. 272, 282.

As the extraordinary duties annexed to his employment concern only, in the particular instance, the parties to the transaction, involving simply rights of property—the safe custody and delivery of the goods—we are unable to perceive any well founded objection to the restriction, or any stronger reasons forbidding it than exist in the case of any other insurer of goods, to which his obligation is analogous; and which depends altogether upon the contract between the parties.

The owner, by entering into the contract, virtually agrees, that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment; but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence.

The right thus to restrict the obligation is admitted in a large class of cases founded on bills of lading and charter-parties, where the exception to the common law liability (other than that of inevitable accident) has been, from time to time, enlarged, and the risk diminished, by the express stipulation of the parties. The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted.

But admitting the right thus to restrict his *obligation, it by no means* follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of *refusal. [*383 And we agree with the court in the case of Hollister v. Nowlen, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage.

The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands.

This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailm. sec. 570); nor was it allowed to exempt him from accountability for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. 13 Wend. 611, 627, 628.

Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation.

This rule, we think, should govern the construction of the agreement in question.

If it is competent at all for the carrier to stipulate for the *gross negligence of [*384 himself, and his servants or agents, in the trans-

portation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties.

The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libelants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case with a view to the question.

There were on board the vessel one hundred and fifty bales of cotton, part of which was stowed away on and along side of the boiler deck, and around the steam chimney, extending to within a foot or a foot and a half of the casing of the same, which was made of pine, and was itself but a few inches from the chimney. The cotton around the chimney extended from the boiler to within a foot of the upper deck.

The fire broke out in the cotton next the steam chimney, between the two decks, at about half past seven o'clock in the evening, and was discovered before it had made much progress. If the vessel had been stopped, a few buckets of water, in all probability, would have extinguished it. No effort seems to have been made to stop her, but, instead thereof, the wheel was put hard a-port, for the purpose of heading her to the land. In this act, one of the wheel ropes parted, being either burnt or broken, in consequence of which the hands had no longer any control of the boat.

Some of them then resorted to the fire engine, but it was found to be stowed away in one place in the vessel, and the hose belonging to it, and without which it was useless, in another, and which was inaccessible in consequence of the fire.

They then sought the fire buckets. Two or three only, in all, could be found, and but one of them properly prepared and fitted with heaving lines; and, in the emergency, the specie boxes were emptied, and used to carry water.

The act of Congress (5 Statutes at Large, 306, sec. 9) made it the duty, at the time, of these respondents to provide, as a part of the necessary furniture of the vessel, a suction hose and fire engine, and hose suitable to be worked in case of fire, and to carry the same on every trip, in good order; and further provided, that iron rods or chains should be employed and used in the navigation of steamboats, instead of wheel or tiller ropes.

This latter provision was wholly disregarded on board the vessel during the trip in question; and the former also, as we have seen, for all practical or useful purposes.

385*] *We think there was great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton; especially, regarding its exposure to fire from the condition of the covering of the boiler deck, and the casing of the steam chimney. The former had been on fire on the previous trip, and a box of goods partly consumed. Also, for the want of proper furniture and equipments of the vessel, as required by the act of Congress, as well as by the most prudential considerations.

It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested.

We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.

III. The remaining question is as to the jurisdiction of the court.

By the second section of the third article of the Constitution, it is declared that "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction."

The ground of objection to the jurisdiction, in this case, rests upon the assumption, that this provision had reference to the jurisdiction of the High Court of Admiralty in England, as restrained by the statutes of 13 and 15 Richard II., or as exercised in the colonies by the courts of vice-admiralty, which, as their decisions were subject to the appellate power of the High Court at home, with few exceptions, and those by act of Parliament, were confined within the same limits.

This is the foundation of the argument in support of the restricted jurisdiction, and which, it is claimed, excludes the contract in question.

Under the statutes of Richard, as expounded by the common law courts, in cases of prohibition against the admiralty, its jurisdiction over contracts was confined to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas.

If made on land, or within the body of an English county, though to be executed, or the service to be performed, upon the sea, or if made upon the sea, but to be executed upon the land, in either case it was held by the common law courts that the admiralty had no jurisdiction. In the first, because the place where the contract was made, and in the second, where it was to be performed, was within the body of the *county, and, of course, within the [*386 cognizance of the common law courts, which excluded the admiralty.

It is not to be denied, therefore, if the grant of power in the Constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it, that the present suit cannot be maintained, as the District Court of Rhode Island had no jurisdiction.

But in answer to this view, and to the ground on which it rests, we have been referred to the practical construction that has been given to the Constitution by Congress in the Judiciary Act of 1789, which established the courts of admiralty, and assigned to them their jurisdiction; and also to the adjudications of this, and of the circuit and district courts, in admiralty cases, which not only reject the very limited jurisdiction in England, but assert and uphold a jurisdiction much more comprehensive, both in respect to contracts and torts, and which has been exercised ever since the establishment of these courts. And it is insisted, that, whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England,

or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed.

We are inclined to concur in this view, and shall proceed to state some of the grounds in support of it.

By the ninth section of the Judiciary Act of 1789, which established the admiralty courts, it is declared that the district courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

The High Court of Admiralty in England never had original jurisdiction of causes arising under the revenue laws, or laws concerning the navigation and trade of the kingdom. They belong, exclusively, to the jurisdiction of the Court of Exchequer, in which the proceedings are conducted as at common law.

That court exercises an appellate power over the decisions of the vice-admiralty courts in revenue cases in the colonies; even that power was doubted, till affirmed by the Court of Delegates, on an appeal from a decision of the 387*] Vice-Admiralty *Court in South Carolina, in 1754. Since then, it has been exercised; but this is the extent of its power over revenue cases, or cases arising under the navigation laws.

Thus it will be seen that a very wide departure from the English limit of admiralty jurisdiction took place within two years after the adoption of the Constitution; and that, too, by the Congress called upon to expound the grant with a view to the establishment of the proper tribunals to carry it into execution.

The constitutionality of this act of Congress, and, of course, the true construction of the grant in the Constitution, became a subject of discussion before this court, at a very early day, on several occasions, and received its particular consideration.

The first case that involved the question was the case of The Vegeance, in 1796, nine years after the adoption of the Constitution. 3 Dallas, 297.

The vessel was seized by the marshal in the port of New York, as forfeited under an act of Congress, prohibiting the exportation of arms, and libeled and condemned in the District Court. On appeal, the Circuit Court reversed the decree and dismissed the proceedings; upon which an appeal was taken to this court.

On the argument, the Attorney-General took two grounds for reversing the decree. The second was, that, even if the proceeding could be considered a civil suit, it was not a suit of admiralty and maritime jurisdiction; and therefore the Circuit Court should have remanded it to the District Court, to be tried before a jury. He referred to the ninth section of the Judiciary Act, which declared, that "the trials of *issues of fact in the district* courts, in all causes *except civil causes of* admiralty and maritime jurisdiction, shall be by jury," and insisted, that a libel for a violation of the navigation laws was not a civil suit of admiralty jurisdiction; that the principles regulating the admiralty jurisdiction in this country must be such as were consistent with the common law of England at the period of the Revolution; that there admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county, that the act of exporting arms must have commenced on land, and if done part on land and part on the sea, the authorities held that the admiralty had no jurisdiction.

The court took time to consider the question, and on a subsequent day gave judgment, holding that the suit was a civil cause of admiralty and maritime jurisdiction, and therefore rightfully tried by the District Court without a jury; that the case was one coming within the general admiralty powers of the courts; and, for a like reason, it was held that the appeal to the Circuit Court was regular, and properly disposed of.

*It will be observed that the seizure, [*388 in this case, was in the port of New York, and within the body of the county, which extends to Sandy Hook.

The next case that came before the court was the case of The Schooner Sally, in 1805, which arose in the Maryland district, and involved the same question as in the case of The Vengeance, and was decided in the same way.

But the most important one, as it respects the question before us, was the case of The Schooner Betsey, in 1808, 4 Cranch, 443. This vessel was seized for a violation of the Non-Intercourse Act between the United States and St. Domingo, in the port of Alexandria, in this District. She was condemned in the District Court; but on appeal of the Circuit Court reversed the decree, from which an appeal was taken to this court.

Mr. Lee, who had argued the case of The Vengeance appeared for the claimant, and requested permission to argue the point again more at large, namely, whether the case was one of admiralty and maritime jurisdiction; and in this argument will be found the ground and substance of all the arguments which have been since urged in favor of the limited construction of the admiralty power under the Constitution.

He referred to the terms of the grant in the Constitution, and denied that Congress could make cases of admiralty jurisdiction; nor could it confer on the federal courts jurisdiction of a case which was not of admiralty and maritime cognizance at the time of the adoption of the Constitution. That the seizure of a vessel within the body of a county, for a breach of a municipal law of trade, was not of admiralty cognizance; that it was never so considered in England; that all seizures in that country for a violation of the revenue and navigation acts were tried by a jury, in the Court of Exchequer, according to the course of the common law; that the High Court of admiralty in England exercised no jurisdiction in revenue cases, and insisted that if the ninth section of the Judiciary Act was to be construed as including revenue cases and seizures under the navigation acts as civil causes of admiralty and maritime jurisdiction, the act was repugnant to the Constitution, and void.

The court rejected the argument, and held that the case was not distinguishable from that of The Vengeance, and which they had already determined belonged properly to the jurisdiction of the admiralty. They observed, that it was the place of seizure, and not the place of committing the offense, that determined the jurisdiction, and regarded it as clear that Congress meant to discriminate between seizures on 389*] waters navigable *from the sea, and seizures on land or on waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction.

Similar objections were taken to the jurisdiction of the court in the cases of The Samuel and The Octavia, 1 Wheat. 9 and 20, and received a similar answer from the court.

We have been more particular in referring to these cases, and to the arguments of counsel, because they show—

1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the Revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after full consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the Constitution; and,

2. They affirm the practical construction given to the Constitution by Congress in the Act of 1789, which, we have seen, assigns to the district courts, in terms, a vast field of admiralty jurisdiction unknown to that court in England.

The jurisdiction in all these cases is maintained on the broad ground, that the subject matter was of admiralty cognizance, as the causes of action arose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide; expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and therefore out of the limits of the admiralty.

In answer to an argument that was pressed, that the offense must have been committed upon land, such as in case of an exportation of prohibited goods, the court say that it is the place of seizure, and not the place of committing the offense, that decides the jurisdiction—a seizure upon the high seas or within tide waters, although the tide waters may be within the body of a county.

All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction within the words of the Constitution, and as such, were properly assigned to the District Court, in the Act of 1789, as part of its admiralty jurisdiction.

They were so regarded, as well in respect to the subject matter as in respect to the place where the causes of action had arisen.

The clause in the Act of 1789, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," was referred to on the argument in support of the restricted jurisdiction. And it was insisted that the remedy is thus saved to both parties, plaintiff and defendant, and is, in 390*] *effect, an exception from the admiralty power conferred upon the district courts of all causes in which a remedy might be had at common law.

The language is certainly peculiar, and unfortunate, if this was the object of the clause; and besides the construction would exclude from the District Court cases which the sternest opponent of the admiralty will admit properly belonged to it.

The common law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or contract (with the exception of proceedings in rem) which, upon the construction contended for, would be transferred from the admiralty to the exclusive cognizance of these courts.

The meaning of the clause we think apparent.

By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress intended by the ninth section to invest the district courts with this power, as courts of original jurisdiction.

The term "exclusive original cognizance" is used for this purpose, and is intended to be exclusive of the State, as well as of the other federal courts.

The saving clause was inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the district courts might be deemed to have taken away the concurrent remedy which had before existed.

This leaves the concurrent power where it stood at common law.

The clause has no application to seizures arising under the revenue laws, or laws of navigation, as these belong exclusively to the district courts. Slocum v. Mayberry, 2 Wheat. 1; Gelston v. Hoyt, 3 Ib. 246.

If the thing seized is acquitted, then the owner may prosecute the wrong-doer for the taking and detention, either in admiralty or at common law. The remedy is concurrent. Ibid.

2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship carpenters and material men, for repairs and necessaries, made and furnished to ships, whether foreign or in the port of a State to which they do not belong, or in the home port, if the municipal laws of the State give a lien for the work and materials. 1 Peter's Adm. R. 227, 233, note; Bee's Adm. R. 106; 4 Wash. C. C. R. 453; 1 Payne, 620; Gilpin, D. C. R. 203, 473; 1 Wheat. 96; 4 Ib. 438; 9 Ib. 409; 10 Ib. 528; 7 Peters, 324; 11 Ib. 175.

The principle stated in the case of The General Smith, 4 Wheat. 438, and which has been repeated in all the subsequent *cases, [*391 is, that where repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in admiralty to enforce his right.

But as to repairs or necessaries in the port or State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless recognized by that law. But if the local law gives the lien, it may be enforced in admiralty.

The jurisdiction in these cases, as will be seen from the authorities referred to, appears

to have been exercised by the district courts from the time of their earliest organization, and which was affirmed by this court the first time the question came before it.

The District Court of South Carolina, in 1796, in the case of North and Vesey v. The Brig Eagle (Bee's R. 79) maintained a libel for supplies furnished a foreign vessel, and considered the question as a very clear one at that day. See, also, Pritchard v. The Lady Horatia, p. 169, decided in 1800.

Judge Winchester, district judge of the Maryland district, maintained the jurisdiction, in a most able opinion, at a very early day. 1 Peters's Adm. R. 233, note.

The same opinion was also entertained by Judge Peters, of the Pennsylvania district. 1 Peters, 227.

Since then, the jurisdiction appears to have been undisputed.

We refer to these opinions, not so much for the authority they afford, though entitled to the highest respect as such, but as evidence of the line of jurisdiction exercised, at that early day, by learned admiralty lawyers, in direct contradiction to the theory that the constitutional limit is to be determined by the jurisdiction in England. They are the opinions of men of the Revolution, engaged in administering admiralty law as understood in the country soon after the adoption of the Constitution, fresh from the discussions which every provision and grant of power in that instrument had undergone. The opinions may be well referred to as affording the highest evidence of the law on this subject in their day.

3. Another class of cases in which jurisdiction is entertained by the courts in this country on contracts, but which is denied in England, are suits for pilotage. 10 Peters, 108. It is denied in England on the ground of locality, the contract having been made within the body of a county.

We shall pursue the examination no farther. The authorities, we think, are decisive against expounding the constitutional grant according to the jurisdiction of the English admiralty, and in favor of a line of jurisdiction which fully embraces the contract in question.

392*] *Before jurisdiction can be withheld in the case, the court must not only retrace its steps, and take back several of its decided cases, but must also disapprove of the ground which has heretofore been taken, and maintained in every case, as the proper test of admiralty jurisdiction.

Some question was made on the argument founded on the circumstance that this was a suit in personam.

The answer is, if the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person, as well as over the ship; it must, in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance.

On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of *the court of admiralty* in England, but into the *nature and subject matter* of the contract—whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether, the service was to be substantially performed upon the sea, or tidewaters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract is to be performed beyond tidewaters, or if the contract relates exclusively to the interior navigation and trade of a State, jurisdiction is disclaimed. 10 Wheat. 428; 7 Peters, 324; 11 lb. 175; 12 lb. 72; 5 Howard, 463.

The exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power.

It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide waters with foreign countries, and among the several States.

Contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts.

Upon the whole, without pursuing the examination farther, we are satisfied that the decision of the Circuit Court below was correct, and its decree should be affirmed.

Mr. Justice Catron: [*393

1. In my judgment, the New Jersey Steam Navigation Company were entitled to all the benefits of Harnden's contract with them, in regard to the property of others with which he (Harnden) was intrusted, for the purpose of transporting it in his crate. And though the company can rely on all the defenses which they could have relied upon if Harnden had sued them, still I think the libelants can maintain this suit.

Had a trover and conversion been made of the money sued for, or an open trespass been committed on it by throwing it overboard, by the servants or agents of the company, then either Harnden, the bailee of the bank, might have sued the company, or the bank might have sued. As to the right to sue, in the case put, by the bank, there can be no doubt; as such acts were never contemplated by the contract, nor covered by it.

The Navigation Company were responsible to Harnden (and to those who employed him), notwithstanding the contract, for acts of gross negligence in transporting the property destroyed; as, for instance, if the servants of the company, in navigating the vessel, omitted to observe even slight diligence, and failed in the lowest degree of prudence, to guard against fire, then they must be deemed in a court of justice to have been guilty of gross negligence; by which expression I mean, that they acted reckless of consequences, as respected the safety

of the vessel and the lives and property on board and in their charge, that such conduct was contrary to common honesty, and that the master and owners were liable for loss by reason of such recklessness, as they would have been in case of an affirmative and meditated fraud that had occasioned the same loss, and that this burning was a tort.

Whether it is evidence of fraud in fact, as Sir William Jones intimates, or whether it is not, as other writers on bailments declare, is not worthy of discussion. The question is this: Is the measure or liability the same where a ship is burned because the master and crew did not observe the lowest degree of prudence to prevent it, and in a case where she is willfully burned? This is the question for our consideration. In the civil law, I apprehend no distinction in the cases put exists; nor do I believe any exists at common law. But by the laws of the United States, such gross and reckless negligence as that proved in the case before us was a fraud and a tort on the shippers, and the fire that occurred, and consequent loss of life, a crime on the part of the master.

By the twelfth section of the Act of 1838; chap. 191, every person employed on any steam-394*] boat or vessel, by whose negligence *to his respective duty the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and subject to conviction and imprisonment at hard labor for a time not exceeding ten years. 5 Statutes at Large, 306. Here the Legislature have put gross negligence in the category of crimes of a high grade, and of frauds of course; nor can this court assume a less stringent principle, in a case of loss of property, than Congress has recognized as the true one, if life be destroyed by such negligence. From the facts before us, I feel warranted in saying, that, had the captain survived the destruction of the ship and the loss of many lives by the disaster, he would have been clearly guilty according to the twelfth section.

One single circumstance is decisive of the culpable negligence. By section ninth of the above act, it is made "the duty of the master and owner of every steam vessel employed on the sea, to provide, as a part of the necessary furniture, a suction hose and fire engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order." This vessel had something of the kind; but it was in no order for use, and a mere delusion, and a sheer fraud on the law and public. Had there been such an engine and hose, the fire could have been extinguished in all probability, as I apprehend.

2. There was only a single rigged bucket on board, and nothing else to reach the water with, and the money of libelants was thrown from the boxes, and they used to lift water.

3. The flue from the furnace ran through three decks, and was red hot through the three decks, and the cotton was stowed within eighteen inches on all sides of this red hot flue, and the bales pressed in, three tiers deep, from the boiler deck to the next deck so that it would have been with much difficulty that the cotton could have been removed should a fire occur; there the fire did occur, and the cotton was not removed—wherefore the vessel was burnt. And from the mode of stowage a fire could hardly be avoided, and was to be expected and guarded against.

Then as to the jurisdiction. The fire occurred on the high sea. It was a tort there. The case depends not on any contract, but on mere tort standing beyond the contract. The locality of the tort is the locus of jurisdiction. Locality is the strict limit. 2 Bro. Adm. Law, 110; 3 Bl. Com. 106; the conflict between the Luda and De Soto, in Louisiana, 1847, 5 Howard. But especially 2 Bro. Adm. Law, 144, which lays down the true doctrine as follows:

"We have now done with the effect of the master's contracts *or violence, as to [*395 his owners, and proceed to consider how he and they are affected by his negligence. And, first, as soon as merchandises and other commodities be put on board a ship, whether she be riding in a port or haven, or upon the high sea, the master is chargeable therewith; and if the same be lost or purloined, or sustain any damage, hurt, or loss, whether in the haven or port before, or upon the seas after, she is upon her voyage, whether it be by mariners or by any other through their permission, the owner of the goods has his election to charge either master or owners, or both, at his pleasure—though he can have but one satisfaction—in a court of common law, if the fault be committed infra corpus comitatus; in the admiralty, if super altum mare; and if it be on a place where there is divisum imperium, then in one or the other, according to the flux or reflux of the sea."

I think the libel in this case covers my view of it. It sets out the facts of how the money was shipped in general terms, but avers it was lost by fire, and by reason of an insufficient furnace, insufficient machinery, furniture rigging, and equipments, and the careless, negligent, and improper management of said steamboat Lexington by the servants and agents of the Navigation Company.

If this technical objection had been addressed to the court below, it could have been easily remedied, and cannot be favorably heard here, now, no doubt, made for the first time.

I therefore think there was jurisdiction in the Circuit Court to try the libel; and, second, that the decree was proper, and ought to be affirmed, without alteration.

Mr. Justice Daniel:

The inquiries presented for consideration in this cause resolve themselves into two obvious or natural divisions; the one involving the rights of the parties as growing out of their alleged undertakings; the other the right of the libelant to prosecute his claim in the mode adopted in the court below, and the power of the court to adjudicate it in that or in any other mode whatever. This latter inquiry, embracing as it does the nature and extent of the admiralty powers of the government of the United States, and by consequence the construction of that article of the Constitution by which alone those powers have been invested, challenges the most solemn, deliberate, and careful investigation. I approach that investigation with the diffidence which its wide-spread interest and importance, and a deep conviction of my own deficiencies, cannot but awaken.

The foundation, nay, the whole extent and

396*] fabric, of the *admiralty power of the government are to be found in that portion of the second section of the third article of the Constitution which declares that the judicial power shall extend (amongst other subjects of cognizance there enumerated) "to all cases of admiralty and maritime jurisdiction."

The distribution of this admiralty power so created by the Constitution, with reference to the tribuanls by which, and the modes in which, it shall be executed, is contained in the Act to establish the judicial courts of the United States in 1789, section ninth, which constitutes the district courts of the United States courts of exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of certain seizures under the laws of imposts, concluding or qualifying this investment of power with these plain and significant terms: "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

Looking now to the provisions of the third article of the Constitution, and to those of the ninth section of the Judiciary Act, we recur to the inquiry, What is this civil and maritime jurisdiction derived form the Constitution, and vested by the Judiciary Act in the district courts—what the standard by which its scope and power, its "space and verge," are to be measured—what the rules to be observed in the mode of its execution? Although the Constitution and Act of Congress do not precisely define or enumerate the former, nor prescribe in forms and precedents the latter, yet it will hardly be pretended, that either the substance or the forms of admiralty jurisdiction were designed by the founders of our jurisprudence to be left without limit, to be dependent on surmise merely, or controlled by fashion or caprice. They were both ordained in reference to some known standard in the knowledge and contemplation of the statesman and legislator, and the ascertainment of that standard by history, by legislative and judicial records, must furnish the just response to the inquiry here propounded.

In tracing the origin, existence, and progress of the colonial institutions, or in seeking illustrations or analogies requisite for the comprehension of those institutions down to the period of separation from the mother country, it is to the laws and policy of the latter that we must chiefly look as guides to anything like accurate results in our investigations. For the necessity here intimated, various and obvious causes will at once be perceived. As instances of these may be exemplified—1st, similarity of education and opinion, strengthened by intercourse and habit; 2d, national pride, and the partiality which naturally creates in the offspring admiration and imitation of the parent; 3d, identity of civil and political rights in the 397*] *people of both regions; 4th, and chiefly, perhaps the jealousy of the mother country with regard to her national unity, power, and greatness—a principle which has ever prompted her to bind in the closest practicable system of efficient uniformity and conformity the various members of her extended empire. These causes have had their full effect in regulating the rights of person and of property amongst British subjects everywhere within the dominions of England. There is not, and never has been, a question connected with either, in which we do not find every Englishman appealing to the common law, or to the charters and statutes of England, as defining the nature and as furnishing the best protection of his rights. He uniformly clings to these as constituting at once his birthright, his pride, and his security. Vide 1 Bl. Com. 127, 128. Would it not be most strange, then, with this strong tenacity of adherence to their peculiar national polity and institutions, that we should suppose the government or the people of England disposed to yield their cherished laws and customs in matters which peculiarly affect them in a national point of view, to wit, the administration of their maritime and commercial rights and interests? It would seem to me equally reasonable to expect that the admiralty courts of England, or any part of the dominions of England, in order to define or settle their jurisdiction, would as soon be permitted to adopt, as the source and foundation and measure of their power, the ordinances, if such there be, of China or Thibet, as those of France, Genoa, or Venice, or of any other portion of the continent of Europe, whether established by the several local governments on the continent or based upon the authority of the civil law. With respect to the realm of England, the origin and powers of the Court of Admiralty are placed upon a footing which leaves them no longer subjects of speculation or uncertainty. Sir William Blackstone, in his Commentaries (Vol. III., chap. 5, p. 69), informs us—upon the authority of Sir Henry Spelman (Glossary, 13), and of Lambard (Archeion, 41)—that the Court of Admiralty was first erected by King Edward III. Sir Matthew Hale, in his History of the Common Law, (Vol. I., p. 51, London edition of 1794, by Runnington), speaking of the Court of Admiralty, says "This court is not bottomed or founded upon the authority of the civil law, but hath both its powers and jurisdiction by the law and custom of the realm in such matters as are proper for its cognizance." And in a note (m) by the editor to the page just cited, it is said, "The original jurisdiction of the admiralty is either by the connivance or permission of the common court laws. The statutes are only in affirmance of the common law, and to *prevent the [*398 great power which the admiralty had gotten in consequence of the Laws of Oleron. That, generally speaking, the courts of admiralty have no jurisdiction in matters of contracts done or made on land; and the true reason for their jurisdiction in matters done at sea is, because no jury can come from thence; for if the matter arise in any place from which the pais can come, the common law will not suffer the subject to be drawn ad aliud examen." And for this doctrine are cited 12 Reports, 129; Roll Abr. 531; Owen, 122; Brownlow, 37a; Roll Rep. 413; 1 Wilson, 101; Hobart, 12; and Fortescue, De Laudibus, 103, edit. 177[illegible]. Again, Lord Hale (Vol. I., pp. 49–51), speaking of the jurisdiction of the admiralty, lays down the following limits to its power: "The jurisdiction of the Admiralty Court, as to the matter of it, is confined by the laws of the realm to things done upon the high sea only: as depredations and piracies upon the high sea,

offenses of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties or contracts made even upon the high sea—touching things that are not in their own nature maritime, as a bond or contract for the payment of money; so, also, of damages in navigable rivers, within the bodies of counties, things done upon the shore at low water, wreck of the sea, etc.; these things belong not to the admiral's jurisdiction. And thus the common law and the statutes of 13 Richard II., chap. 15, and of 15 Richard II., chap. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea."

In this cursory view of Lord Hale of the admiralty jurisdiction, there is one feature which cannot escape the most superficial observation; and that is, the extraordinary care of this learned judge to avoid every implication from uncertainty or obscurity of terms, which might be wrested as a pretext for the assumption of power not clear, well founded, and legitimate. In the extract above given, it will be seen that the sea, as the theater of the admiralty power, is mentioned in eight different instances, in every one of which it is accompanied with the adjunct high. Altum mare is given as the only legitimate province of the admiral's authority; and then, as if to exclude the possibility of improper implication, are placed in immediate and striking contrast the transactions and the situations as to which, by the common law and the statutes of England, the interference of the admiralty was utterly inhibited. "But," he 399*] *proceeds to say, "touching contracts or things made within the bodies of the English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties or contracts made even upon the high sea—touching things that are not in their own nature maritime, as a bond or contract for the payment of money; so, also, of damages in navigable rivers, within the bodies of English counties, things done upon the shore at low water, wreck of the sea, etc.; these things belong not to the admiral's jurisdiction."

Sir William Blackstone, treating of the cognizance of private wrongs (Book 3, chap. 7, p. 106), speaks of injuries cognizable by the maritime or admiralty courts. "These courts," says this writer, "have jurisdiction and power to try and determine all maritime causes, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea." He then cites the statutes of 13 and 15 Rich. II., Co. Litt. 260, Hob. 79, and 5 Reports, 106, for the positions thus asserted. I shall, in the progress of this opinion, have occasion further to remark upon this language, "courts maritime or admiralty courts," here used by this learned commentator, when I come to speak of an interpretation placed upon the second section of the third article of the Constitution, as implying an enlargement of the powers conferred, from a connection of the terms "admiralty" and "maritime" in the section just mentioned. What I would principally advert to here is the description of the causes denominated "maritime," and as falling solely and peculiarly within the admiralty jurisdiction, and to the reason why they are thus denominated "maritime," and as such assigned to the admiralty. They are, says this learned commentator, "maritime, or such injuries as, although they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must, therefore, be causes arising wholly upon the sea, and not within the precincts of any county." Here, then, is the explicit declaration, that it is the theatre, the place of their origin and performance, exclusively, not their relation to maritime subjects, which determines their forum; for they are causes, says he, which in their nature may be of common law cognizance. In this connection it seems not out of place to advert to the discrimination made by the same author between the pretensions to power advanced by *certain tribunals which subsisted and [*400 grew up rather by toleration than as forming any fundamental and regular portions of the British constitution. Thus, in Book 3, chap. 7, pp. 86, 87, speaking of the ecclesiastical, military and maritime courts, and the courts of common law, he says: "And with regard to the three first, I must beg leave, not so much to consider what hath at any time been claimed or pretended to belong to their jurisdiction by the officers and judges of those respective courts, but what the common law allows and permits to be so. For these eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England, not by any right of their own, but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden to be discussed or drawn in question before them. It matters not what the Pandects of Justinian or the Decretals of Gregory have ordained; they are of no more intrinsic authority than the laws of Solon or Lycurgus; curious, perhaps, for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws, which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance which other nations have referred entirely to the temporal courts, as concerning wills and successions to intestates' chattels; and perhaps we may, in our turn, prohibit them from interfering in some controversies which, on the Continent, may be looked upon as merely spiritual. In short, the common law

of England is the one uniform rule to determine the jurisdiction of our courts; and if any tribunals whatsoever attempt to exceed the limits so prescribed to them, the king's courts of common law may and do prohibit them, and in some cases punish their judges." So far, then, as the opinions of Hale and Blackstone are entitled to respect—so far as the writings and decisions of the venerable expounders of the British constitution to which they refer may be regarded as authority— the origin and powers of the admiralty in England, the subjects permittted to its peculiar cognizance, the control exerted to restrict it to that peculiar cognizance by the common law tribunals, would seem not to be matters of uncertainty. Sir William Blackstone, too, is a writer of modern date, and, as such, his opinions may claim exemption from the influence of conflict of 401*] *bigotry or prejudice, which the advocates of the admiralty seem disposed to attribute to the opinions or the times of Spelman, of Fortescue, and Coke.

Passing from the testimony of the writers already mentioned, let us call in a witness as to the admiralty powers and jurisdiction, as existing in England for a century past, at least, whom no one will suspect of disaffection to that jurisdiction. I allude to Mr. Arthur Browne, Professor of Civil Law in the University of Dublin, in whose learned book scarcely any assertion of power ever made by the admiralty courts, however reprobated and denied by the common law tribunals, is not commended, if not justified, and scarcely one retrenchment or denial of power to the former is not as zealously disapproved. Let us hear what this witness is compelled, through multo cum gemitu, to admit, with respect to the jurisdiction of the instance court in cases civil and maritime—cases identical in their character with that now under consideration. After dilating upon the resolutions of 1632, and upon what by him are designated as the irresistible arguments of Sir Leoline Jenkins in favor of the powers of his own court, Professor Browne is driven to the following concessions. Of the common law courts he says (Vol. II., p. 74): "Adhering on their part to the strict letter of the rule, that the business of the admiralty was only with contracts made upon the sea, they here took locality as the only boundary, though in the instances before mentioned, of contracts made on sea, they refused this limit; and having insisted, as indeed Judge Blackstone has even of late done, that contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on land, were not cognizable by the admiralty, they left to it the idle power of trying contracts made upon the sea to be also executed upon the sea, of which one instance might not happen in ten years." Again (p. 85), speaking of what he characterizes as "the torrent of prohibitions which poured forth from the common law courts," he tells us, that "little was left for the authority of the admiral to operate upon, in the subject of contracts, amidst those curbs so eagerly and rapidly thrown upon him in the last century, save express hypothecations of ship or goods made at sea or in foreign ports, *and suits for seamen's wages.*" At the close *of this chapter* on the jurisdiction of the instance courts, Mr. Browne presents his readers with the general conclusion to which his investigations on this head had conducted him, in the following words: "The result of our inquiries in the present chapter, as to the extent of the jurisdiction of the Instance Court of Admiralty which is at present seemingly allowed by the common law courts, is, that it is confined in matters of *contract to suits for [*402 seamen's wages (on all hands admitted to be an exception to the rule restricting the admiralty to the sea), or to those on hypothecations. In matters of tort, to actions for assault, collision, and spoil and in quasi contracts, to actions by part owners for security, and actions of salvage; but if a party," says he, "institute a suit in that court on a charter-party, for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to retain it." In this concluding passage from Mr. Browne's chapter on the jurisdiction of the instance courts, there are two circumstances which impress themselves upon our attention, as seemingly, indeed palpably, irreconcilable with the law or with each other. The first is the concession (a concession said to be made upon a general survey of the subject) as to the limit imposed by the common law tribunals upon the admiralty; the second, the opinion, in the very face of this concession, that the admiralty, if it should not be actually prohibited, if it could only escape the vigilance of the common law courts, might proceed, might make an incursion within this established, this prohibited, nay, conceded boundary. Opinions like these evince an adherence to the admiralty apparently extreme, and almost contumacious; and it may be owing to this division, that decisions have been pressed into its support, which, to my apprehension, do not come directly up to the point they are called to fortify, or, if they did, are too few in number and too feeble to remove the firmly planted landmarks of the law. Thus the case of Menetone v. Gibbons, 3 T. R. 267, is cited as authority that the admiralty has cognizance over contracts, though executed on land and under seal. This case, it is true, is somewhat anomalous in its features, but yet it is thought that no fair exposition of it can warrant the conclusions attempted to be deduced from it. Notwithstanding some expressions which may have fallen from some of the judges arguendo, it is certainly true that every justice who decided that case put his opinion essentially upon these foundations: that the case was one of a hypothecation of the ship, in the course of a foreign voyage, by the master, who had a right to hypothecate; that the contract provided for or gave no remedy except in rem, whereas the common law courts proceed against the parties only; that if the court should decide against the admiralty jurisdiction (and this, too, after a sentence of condemnation and sale of the ship), being unable to give any redress under the contract by proceeding in rem, the party making the advances would be irreparably injured. This case should be expounded, too, in connection with that of Ladbroke v. Crickett, decided by the same judges twelve months *previously (2 T. R. 649), in which a [*403 natural distinction is taken between the extent

of the right to prohibit the jurisdiction of the admiralty before sentence, and the right to impeach its proceedings after they are consummated and carried into execution without interference. In the latter case, Buller, whose remarks have been quoted from Menetone v. Gibbons, says (p. 654): "There is a great difference between applications to this court for prohibitions to the admiralty pending the suit and after sentence: in the first case, this court will examine the whole case, and see the grounds of the proceedings in the admiralty: but the rule is quite the reverse after sentence is passed: in such a case, they will not look out of the proceedings; for the party who applies for a prohibition after sentence must show a nullity of jurisdiction on the face of the proceedings; therefore the plaintiff in this case could not go into evidence at the trial to impeach the decree of the Court of Admiralty. The case states, in general terms, that that court did pronounce a decree for the sale of the ship in question, and that a warrant issued out of that court for seizing and selling the ship. So that we must take it that they had jurisdiction, for nothing appears on the face of the decree to show that they had not." Showing, conclusively, that this case determined nothing as to the original legitimate powers either of the common law or admiralty tribunals, but positively refusing to institute a comparison between them. The next case adduced by Mr. Browne, and the last which I shall notice, is that of Smart v. Wolff, 3 T. R. 323. The first remark which is pertinent to this case is, that it was a case of prize, one of a class universally admitted to belong peculiarly and exclusively to a court of admiralty; and the question propounded in it, and the only question, was as to the proceeding practiced by the court for carrying into effect this, its undoubted jurisdiction. There the goods had been, by an interlocutory order, delivered to the captors, upon a stipulation to respond for freight, if allowed on the final decree; and the amount of freight ultimately allowed being greater than that covered by the stipulation, the court, by a proceeding substantially in rem, ordered the captors to bring in so much of the cargo as would be equal to the excess of the allowances beyond the amount of the stipulation. A rule for a prohibition obtained from the King's Bench was, upon full argument, discharged, and the grounds of the court's decision are fully disclosed in the opinion of all the judges, in accordance with the reasoning of Mr. Justice Buller, who is here particularly quoted because he has been referred to as favorable to the doctrines of Mr. Browne, and who thus expresses himself: "Every case that I know on this subject is a 404*] *clear authority to show that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction. After the cases of Lindo v. Rodney, Le Caux v. Eden, and Livingston v. McKenzie, it would only be a waste of time to enter into reasons to show that this court has no jurisdiction over those subjects. Still less reason is there for saying, that the admiralty shall be prevented from proceeding after it has made an interlocutory decree; because that would be to say, that the admiralty has jurisdiction at the beginning of the suit, and not at the end of it." The case of Smart v. Wolff, then, is assuredly no direct authority, if authority at all, to sustain the theory or the partialities of Professor Browne. Indeed, the utmost that can be drawn from this case in favor of those theories is an expression of belief, by Justice Buller, that my Lord Coke entertained not only a jealousy of, but an enmity against, the admiralty; a belief which, whether well or ill founded, must be equally unimportant—equally impotent to impugn an inveterate, a confirmed, nay, an admitted course and body of jurisprudence. Upon a review of all the authorities to which I have had access, the conclusion of my mind is certain and satisfactory, that, with some temporary deviations or irregularities, such as the resolutions of 1632, the jurisdiction of the Instance Court of the Admiralty, both by the common law and by the statutes of 13 and 15 Richard II., down to the period at which, during the reign of the present queen, that jurisdiction was enlarged, was, in matters of contract (with the known exception of seamen's wages), limited to maritime contracts made and to be executed upon the high sea, and to cases of hypothecation of the ship upon her voyage; and in matters of civil tort, to cases also occurring upon the sea, without the body of the country. But this restriction upon the jurisdiction of the instance courts of England, so uniformly maintained by the common law courts of that country—acknowledged, however condemned, by Mr. Browne, and admitted in argument in this case—it is contended, does not apply to the powers and jurisdiction of the like courts in the United States, and did not apply at the period when the federal Constitution was adopted, but that a jurisdiction more varied and enlarged, as practiced in the British colonies in North America, and under the general confederation at the adoption of the Constitution, was in the contemplation of the framers of this Constitution, and must therefore be referred to as the measure of the powers conferred in the language of the second section of the third article—"all cases of admiralty and maritime jurisdiction." In testing the accuracy of these positions, it would be asking too much of this court to receive as binding authority the decisions of *tribunals [*404 inferior to itself, farther than they rest upon indisputable and clear historical truths in our colonial history; truths, too, which shall sustain a regular and recognized system of jurisdiction. It will not be sufficient to allege some obscure, eccentric, or occasional exertions of power, if they could be adduced, and upon these to attempt to build up an hypothesis or a system—nay, more, to affirm them to be conclusive proofs of a system established, general, well known to and understood by the framers of the Constitution, and therefore entering necessarily into their acceptation of the terms "admiralty and maritime jurisdiction." The danger of yielding to such scanty and inadequate testimony must be obvious to every mind. The still greater danger of theorizing upon words not of precise or definite import, freed from the restraints of settled acceptation, has been exemplified in our own time and country, in an able, learned and ingenious ef-

fort to confer on the admiralty here powers not merely co-extensive with the most ambitious pretensions of the English admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient or modern Europe, and covering, not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description, viz., shipwrights, material men and insurers (vide 2 Gall. 397); and this upon the assumption, that the term "maritime" implied more than the word "admiralty," when unassociated with it, and this was so understood by the framers of the Constitution, who designed it as an enlargement of the admiralty power. Yet if we turn to the language of Mr. Justice Blackstone (Vol. III., p. 106), he tells us that the courts maritime are the admiralty courts, using the terms "maritime" and "admiralty" as convertible; and that the injuries triable in the admiralty (or maritime causes) are such as are of common law cognizance, yet, being committed on the high seas, are therefore to be tried by a peculiar court. Again (p. 68) he says: "The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the seas, or in parts out of the reach of the common law, are only the Court of Admiralty and its courts of appeal." So, likewise, Sir Matthew Hale (p. 50), in characterizing maritime contracts to be those made and to be executed upon the sea, certainly excludes any implication beyond these; and this must be taken as the English interpretation of the term "maritime," by which it is understood as identical with "admiralty."

And here it seems proper to remark, that I cannot subscribe to the opinion, either from the bench or the bar, that the decisions of inferior courts, which it is not merely the right, 406*] but the *duty, of this tribunal to revise, should, by their intrinsic authority as decisions, be recognized as binding on the judgment of this court. They are entitled to that respect to which their accuracy, when examined, may give them just claims; but it is surely a perversion of our judicial system to press them as binding merely because they have been pronounced. If these decisions can be appealed to upon the mere force of their language, I would quote here the words of Judge Washington, in the case of The United States v. Gill, 4 Dall. 398, where he declares, that the words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England, from whose code and practice we derive our systems of jurisprudence, and obtain the best glossary." Nor am I disposed to consider the doctrine of the civil law which has been mentioned, to escape from the silence of our own code or that of England upon the subject.

I do not contest the position, that the established, well defined, regular, and known civil jurisdiction of the admiralty courts of England, or of the vice-admiralty courts of the American colonies, was in the contemplation of the men who achieved our independence, and was adopted by those who framed the Constitution. *I willingly* concede this position. *That which I do resist* is what seems to me an effort to assert, through the colonial vice-admiralty courts, powers which did not regularly inhere in their constitution; powers which, down to the date of the quarrel with the mother country, were never bestowed on them by statutory authority; powers which to their superior—from whom they emanated, and to whom they were inferior and subordinate, the High Court of Admiralty—had long been conclusively denied, as has been already abundantly shown. With respect to the establishment and powers of these courts, we are informed by Browne (2 Civ. and Adm. Law, 490), that "all powers of the vice-admiralty courts within his majesty's dominions are derived from the high admiral, or the commissioners of the admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commission, the lords of the admiralty are authorized to erect vice-admiralty courts in North America, the West Indies, and the settlements of the East India Company;" "and in case any person be aggrieved by sentence or interlocutory decree having the force of a sentence, he may appeal to the High Court of Admiralty." Blackstone, also, says (Vol. III., p. 68): "Appeals from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction." Stokes, in his View of *the Constitu- [*407 tion of the British colonies in North America, speaking of the vice-admiralty courts, says (chap. 13, p. 271): "In the first place, as to the jurisdiction exercised in the courts of vice-admiralty in the colonies, in deciding all maritime causes, or causes arising on the high seas, I have only to observe, that it proceeds in the same manner that the High Court of Admiralty in England does." Again (p. 275) he says: "From the courts of vice-admiralty in the colonies, an appeal lies to the High Court of Admiralty in England." Mr. Browne, in his second volume of Civ. and Adm. Law, p. 491, accounts for the jurisdiction of the vice-admiralty courts in America, in revenue causes, by tracing it to the statute of 12 Charles II., commonly called the Navigation Act, and to statutes 7th and 8th of William III., c. 22, and designates this as totally foreign to the original jurisdiction of the admiralty, and unknown to it. With this view of the origin and powers of the vice-admiralty courts of the colonies, showing them to be mere branches, parts of the admiralty, and emanating from and subordinate to the latter, it would seem difficult to perceive on their part powers more comprehensive than those existing in their creator and superior, vested, too, with authority to supervise and control them. The existence of such powers certainly cannot rest upon correct logical induction, but would appear to be at war equally with common apprehension and practical execution. Power cannot never be delegated which the authority said to delegate itself never possessed, nor can such power be indirectly exercised under a pretext of controlling or supervising those to whom it could not be legitimately delegated. The colonial vice-admiralty courts, as regular parts of the English admiralty, created by its authority, could by their constitution, therefore,

be invested only with the known and restricted jurisdiction of the former. If a more extended jurisdiction ever belonged to, or be claimed for, these colonial tribunals, it must rest on some peculiar and superadded ground, which it is incumbent on the advocates of this jurisdiction clearly to show. Has anything of the kind been adduced in the argument of this cause? Beyond the provisions of the statutes of Charles II. and William III., relative to cases of revenue, has there been shown any enlargement by statute of these vice-admiralty powers, any alteration by judicial decision in England of the constitution and powers of the vice-admiralty courts, as emanating from, and limited by, the jurisdiction of the admiralty in the mother country? Strongly as authority for the affirmative of these inquiries has been challenged, nothing satisfactory to my mind, nothing, indeed, having the appearances of authority, has been adduced; because, I take 408*] it *for granted, from the distinguished ability of the counsel, such authority was not attainable. The learned and elaborate investigations of the counsel for the appellants have brought to light a series of proofs upon the jurisdiction of the vice-admiralty courts, all in strict accordance with the positions laid down in Blackstone, Stokes, and Browne, and exemplifying beyond these the actual and practical extent and modes to which and in which that jurisdiction was permitted and carried into operation in the colonies. These developments are valuable as illustrations of our early history, but they are still more so to the jurist seeking to ascertain the boundaries of right amidst contested limits of power. A recapitulation of them here would require an inconvenient detail. They well deserve, nevertheless, to be preserved and remembered, as showing incontestably, with the exception of revenue cases arising under the statutes of Charles and of William, and designated on all hands as "totally foreign to the original jurisdiction of the admiralty, and unknown to it," that the constitution and functions of the vice-admiralty courts, from the earliest notices of their existence, in the American colonies, were modelled upon and strictly limited to those of the mother country (of which they were branches or portions); that, so far from there having grown up a more enlarged and general jurisdiction in the colonial vice-admiralty courts—a jurisdiction known and acquiesced in—every effort on their part to transcend the boundary prescribed to their superior in the mother country was watched with jealousy by the common law tribunals, and by them uniformly suppressed. Coming down to the periods immediately preceding the Revolutionary conflict, and embraced by the war, and during the existence of the Confederation, the volumes of testimony poured forth in the forms of essays, speeches, and resolutions, prove that the pretensions then advanced by the British government, through the medium of the admiralty jurisdiction, extended that jurisdiction beyond its legitimate province as an emanation from the admiralty at home, so far from being regarded as pertaining to a known and established system, were received as novelties and oppressions—as abhorrent to the genius of the people, to the British constitution itself, and worthy to be repelled even by an appeal to arms. It would seem, then, reconcilable neither with reason nor probability, that the men who made these solemn protests—that a community still warm from the contest induced by them—should, upon their emancipation from evils considered intolerable, immediately, by a species of political suicide, rivet those same evils indissolubly upon themselves. Much more reasonable does it appear to me, that the statesmen who framed our national *charter, when conferring the admiral- [*409 ty and maritime jurisdiction, had in their contemplation that jurisdiction only which was familiar to themselves and their fathers, was venerable from time, and in practice acceptable to all; they could not have intended to sanction that whose very existence they denied. This view of the question is further fortified by the opinion of two able American jurists, both of them contemporaneous with the birth of our government. I allude to the opinion of Chancellor Kent, expressed at page 377 of the first volume of his Commentaries, 5th edit., and to that of Mr. Dane, found in volume sixth of his Abridgement, p. 353. It is in close conformity to, and congenial with, the seventh amendment of the Constitution, and with the saving in the Judiciary Act of the right to a remedy at common law, wherever the common law should be competent to give it. An able illustration of the construction here contended for may also be seen in the elaborate opinion of the late Justice Baldwin in the case of Bains v. The Schooner James and Catharine (Baldwin's Reports, 544), where the learned judge, in support of his conclusions, with great strength of reasoning, and upon authority, expounds the term "suits at common law," in the seventh amendment of the Constitution, and the phrase "the right to a common law remedy where the common law is competent to give it," contained in the saving in the ninth section of the Judiciary Act, showing their just operation in limiting the admiralty within proper bounds. I deem it wholly irregular to attempt to adduce general admiralty powers from the cognizance vested in the courts as to seizures; these are purely cases of revenue, are treated in England as anomalous, and as not investing general admiralty jurisdiction, but as unknown to it; or jurisdiction in cases of contract, as between private persons. This interpretation disposes at once of all the conclusions which it is attempted to draw from the several cases of seizure decided in this court. The obiter dictum in the case of The General Smith ought not to be regarded as authority at all, much leess as laying the foundation of a system. From the best lights I have been able to bring to the inquiry before us, reflected either from the jurisprudence of the mother country, from the history of the colonial government, or the transactions of the general Confederation, I am satisfied that the civil, admiralty, and maritime jurisdiction conferred by the second section of third article of the Constitution was the restricted jurisdiction known to be that of the English admiralty, insisted upon and contended for by the North American colonies, limited in matters of contract (seamen's wages excepted) to things agreed upon and to be performed upon the sea, *and [*410

cases of hypothecation, and in civil torts to injuries occurring on the same theatre, and excluded as to the one and the other from contracts made, or torts committed, within the body of a county.

It has been urged in argument, that the restriction here proposed is altogether unsuited to and unworthy the expanded territory and already great and increasing commerce of our country. To this may be replied the fact, that it was thought sufficiently broad for a nation admitted even at this day to be the most commercial on the globe. In the next place, I am by no means prepared to concede that the interests of commerce, and certainly other great interests in society, are to be benefited by incursions upon the common law jurisprudence of the country. Recurring, as a test, to the institutions and to the condition of various nations, a very different and even opposite conclusion would be impressed by it. But even if it be admitted that a power in the admiralty such as would permit encroachments upon the venerable precincts of the common law would be ever so beneficial, the reality of such advantage, and the right or power to authorize it, are essentially different concerns. An argument in favor of power founded upon calculations of advantage, in a government of strictly delegated powers, is scarcely legitimate when addressed to the Legislature; addressed to the judiciary, it seems to be especially out of place. In my view, it is scarcely reconcilable with government in any form, so far as this term may signify regulated power, and ought to have influence nowhere. If a restricted admiralty jurisdiction, though ever so impotent for good or prolific of inconvenience, has been imposed by the Constitution, either or both those evils must be of far less magnitude than would be attempts to remedy them by means subversive of the Constitution itself, by unwarranted legislative assumption, or by violent judicial constructions. The pressure of any great national necessity for amendments of that instrument will always insure their adoption.

To meet the objection urged in this case to the jurisdiction deduced from the character of the contract sued on, it has been insisted that the foundation of this suit may be treated as a marine tort, which, having been committed on Long Island Sound, and therefore not within the body of any county, is exempt from objection on the score of locality. If the pleadings and proofs in this cause presented a case of simple or substantial tort, occurring without the body of a county, no just objection could be made to the jurisdiction. It is, therefore, proper to inquire whether a case of marine tort, in form or in substance, is presented upon this record. There is a class of cases known to the common law, in which a plaintiff having a 411*] *right of action arising upon contract may waive his remedy directly upon the contract in form, and allege his gravamen as originating in tort, produced by a violation or neglect of duty. The cases in which this alternative is permitted are, in the first place, those in which, independently of the rights of the plaintiff arising from express stipulations *with the defendant*, there are duties or obli*gations incumbent on* the latter resulting from the peculiar position he occupies with respect to the public, giving the right to redress to all who may suffer from the violation or neglect of these public obligations. Such are the instances of attorneys, surgeons, common carriers, and other bailees. The wrong in these instances is rather the infringement of these public and general obligations, than the violation of the private direct agreement between the parties; and agreement, contract, is not the foundation of the demand, nor can it be properly taken as the measure of redress to be adjudged; for I presume it is undeniable, that, if the relations of the parties are the stipulations of their contract exclusively or essentially, their remedies must be upon such stipulations strictly. Secondly, they are cases in which a kind of quasi tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract. The contract, therefore, must be referred to, and substantially shown, to ascertain the rights of the parties, and to measure the character and extent of the redress to either of them. It can in no material feature be departed from. This I take to be the rationale of the practice, and the view here taken appears to be sustained by authority. Thus, in Boorman v. Brown, 3 Adolph. & Ellis, 525, New Series, Tindal, Ch. J., delivering the opinion of all the court, says: "That there is a large class of cases in which the foundation of the action springs out of the privity of contract between the parties, but in which nevertheless, the remedy for the breach or nonperformance is indifferently in assumpsit, or in case upon tort, is not disputed." Again (p. 526), the same judge says: "The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonperformance, is a ground of action upon tort." In the case of Winterbottom v. Wright, 10 Mees. & Wels. 114, Lord Abinger thus states the law: "Where a party becomes responsible to the public by undertaking a qublic duty, he is liable, though the injury may have arisen from the negligence of his servant or agent; so, in cases of public nuisances, whether the act was done by the party or a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. These, however, are cases *where the real ground [*412 of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases, in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract; but there is no instance in which a party who was not a privy to the contract entered into with him can maintain any such action." And Alderson, Baron, in the same case says: "The only safe rule is, to confine the right to recover to those who entered into the contract. If we go one step beyond that, we may go fifty." So, too, in Tollit v. Sherstone, 5 Mees. & Wels. 283, a case in tort, Maule, Baron, says: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract; and

the same principle extends to an action arising out of the contract." In further proof that these actions in form ex delicto, founded on breach of contract, are essentially actions of contract, it is clear that, in such actions, an infant could not be debarred the privilege of his nonage, nor could the operation of the statute of limitations upon the true cause of the action be avoided; both these defenses would apply, according to the real foundation of the action.

With respect to these cases ex delicto quasi ex contractu, as they have been called, it has been ruled, that if the plaintiff states the custom, and also relies on an undertaking general or special, the action is in reality founded on the contract, and will be treated as such. Vide Orange County Bank v. Brown, 3 Wendell, 158.

If the practice of the common law courts above considered be at all applicable to suits in the admiralty, how would it operate upon the case before us? Is this case, as presented on the face of the libel, or upon the proofs adduced in its support, either formally or substantially a case founded solely on public duty, or upon contract between the parties? It would seem to be difficult, in any form of words, to state a contract more express than is set out in the libel in this cause. It is true that in the first article there is a statement that the respondents were common carriers of merchandise between the city of New York and the town of Stonington in Connecticut, but it is nowhere alleged that the property of the complainants was delivered to the respondents as common carriers, or was received by them in that character, or under any custom or obligation binding them as carriers. So far from this, it is averred in the second article of the libel, that the complainants contracted on a particular day, and at a particular place, and 413*] *that at that very place, and on that very day, the respondents contracted with the libelants, for a certain reward and hire to be paid, to transport the said merchandise, etc.—mutual and express stipulations set forth. Is this the statement of a general custom, a responsibility accruing from implied public duties, or is this not rather the exclusion of everything of the kind? Again, article third of the libel avers, that on the day and at the place mentioned in the second article, viz., on the 13th day of July, 1840, at the city of New York, the libelants delivered to the respondents their merchandise, and it was received by the latter, to be transported according to the agreement between them. If, then, the power of proceeding in tort for a breach of the contract, known to the common law courts, can be extended to the admiralty, it would still, as in the former tribunals according to the authorities, present every question for decision as a question of contract, between parties (and because they were so) to the contract, by the stipulations according to which alone the rights and wrongs of all must be adjusted. This election of the proceeding in tort arising ex contractu, if permitted to the admiralty, would leave the subject of jurisdiction just where it would stand independently of such election. In the exercise of such election, you are necessarily driven to the contract to ascertain the existence, the nature, and extent of the assumed tort, in other words, the infraction or fulfillment of the contract, and the investigation develops inevitably an agreement, of which, with respect to parties, to locality, or subject matter, or to all these, the admiralty can have no cognizance.

But after all I would inquire for the authority under which the admiralty has been allowed to assume, under an artificial rule of common law pleading, jurisdiction of matters not falling naturally, directly, and appropriately within its cognizance. Indeed, its admirers and advocates, from Sir Leoline Jenkins to Professor Browne, have zealously defended it against every imputation of attempts at assumption, insisting that the subjects claimed for its cognizance and its modes of claiming them, were such only as naturally and appropriately belonged to it. They have as zealously complained of abstractions by the common law courts, by means of uncandid and unreasonable fictions, of matters naturally and familiarly belonging to the admiralty. If a single precedent exists showing that, by the artificial rules of pleading practiced in the common law courts, partaking in some degree of fiction, the admiralty has ever obtained jurisdiction over matters which otherwise would not have fallen with its cognizance, that precedent is unknown to me; and it is equally certain that I am unwilling to *create one. And [*414 it is remarkable, that, in direct opposition to this effort to give jurisdiction to the admiralty by borrowing a license from the common law courts, we have the explicit declaration of Professor Browne himself, amidst all his partiality, that in matters of tort the jurisdiction of the admiralty is limited to "actions for assault, collision, and spoil"—instances of pure tort, excluding every idea of fiction, and equally excluding one single attribute of contract. Vide Vol. II., chap. 4, p. 122.

I am extremely diffident as to the wisdom and safety of enlarging a jurisdiction (and especially by the force of implication), which from the earliest traces of its existence (whatever has been said in this case about the power of reform in this respect) has always been exercised by rules and principles less congenial with our institutions than are the principles and proceedings of the common law; which, by the mere force of implication in the terms "admiralty and maritime," overrides the seventh amendment of the Constitution, and the important saving in the ninth section of the Judiciary Act; which by a like implication frees itself altogether from all restriction imposed, both by the second section of the third article of the Constitution, and by the eleventh section of the Judiciary Act, with respect to controversies between citizens of the same State. A jurisdiction substituting, too, for the invaluable safe-guard to truth secured by confronting the witness with court and jury, a machinery by which the aspect and the force of testimony are graduated rather by the address and skill of the agents employed to fabricate it, than by its own intrinsic worth, and transferring the trial of facts resting upon credibility to a tribunal often remote and inconvenient, and constrained to decide on statements that may be merely colorable, often entirely untrue.

Again, to decide this case upon the ground of liability of the owners for a tort committed by the master, would present this strange incongruity. Although, by the common law, owners of vessels were responsible for losses occasioned by the misconduct of masters as their agents, to the full amount of such losses, yet as long since as the statute of 7 George II., passed in 1734, nearly forty years before our independence, this responsibility was expressly limited in extent to the value of the vessel and the freight. The laws of Oleron and Wisby, we are told by Lord Tenterden (vide Treatise on Shipping, p. 395), contain no provision on this subject, though this writer informs us, upon the authority of Vinnius, that such a provision was contained in the laws of Holland, and that by the laws of Rotterdam, as early as 1721, the owners were exempted from liability for the acts of the master done with-
415*] out their *order farther than their part of the ship amounted to. By the French Ordonnance of the Marine, Book 2, tit. 8, art. 2, the rule is thus given: "Les proprietaires des navires seront responsable des faits du maître; mais ils en demeureront déchargés en abandonnant leur batiment et le fret." So, too, Boulay-Paty, in his work entitled Cours de Droit Commeercial Maritime, Vol. I, pp.270 et seq., after interpreting the word fait or act of the master as inclusive of delicta quasi delicta, acts of negligence or imprudence, as well as his contracts or engagements, upon a comparison of the opinions of various authors—Valin, Emerigon, Pothier, etc.—comes to the following conclusions: "Maintenant, disons donc que le capitaine, soit par emprunt, soit par vente de marchandises soit par délit ou quasi-délit, n'a que le pouvoir d'engager le navire et le fret, sans qu'il lui soit possible de compromettre la fortune de terre de ses armateurs. Ceux-ci se dégagent de toutes les obligations contractées par le maître, en cours de voyage, par l'abandon du navire et du fret." This same writer (pages 275 and 276) lays down the following doctrines, which he quotes from Grotius, from Emerigon, from Pothier, and from the Consulat de le Mer: "L'obligation où les propriétaires sont de garantir les faits de leur capitaine, est plus réelle que personnelle. . . . Pendant le cours du voyage, le capitaine pourra prendre deniers sur le corps, mettre des apparaux en gage, ou vendre des marchandises de son chargement. Voilà tout. Son pouvoir légal ne s'étend pas au-delà des limites du navire dont il est maître, c'est-à-dire administrateur; il ne peut engager la fortune de terre de ses armateurs qu'autant que ceux-ci y ont consenti d'une manière spéciale. . . . De sorte que si le navire périt, ou qu'ils abdiquent leur intérêt, ils ne sont garans de rien. . . . En effet, le Consulat de la Mer, cap. 33, après avoir dit que l'intérêt que les armateurs out sur le corps, est engagé au paiement des dettes contractées par le capitaine, en cours de voyage, ajoute que la personne ni les autres biens des coproprietaires ne sont obligés, à moins qu'ils ne lui eussent donné à ce sujét, un pouvoir suffisant.

"Au ch. 236 il est dit que si le navire périt, c'est assez que cette perte soit pour le compte *des quirataires.*"

From this view of the law as existing in England and on the European continent, it is manifest, that, in the former country, the responsibility of the owners, prior to the statute of 7 Geo. II., was a common law liability, and was acknowledged and allowed to the full extent that the demand could be proven, embracing both the persons and all the property of the owners; that since the statute of Geo. II., this liability is limited to the value of the ship and freight, but still to be enforced *in [*416 the courts of common law or equity; that, by the maritime law of the Continent, the liability of the owners was always limited to the ship and freight, and that, from this restricted liability, the owners were entirely released by an abandonment of ship and freight, or by a total loss of the former at sea, whether the claim was made on account of the contract, or tort, or a delictum of the master. But, in this case, the court have sanctioned a liability resting upon common law principles, irrespective of any limit imposed either by statute or by the rules of the maritime law, and this by means, too, of artificial or fictitious constructions, practiced upon only in the courts of common law, relative to the forms of actions prosecuted in those courts; and, for the accomplishment of this object, have permitted the adoption of modes and proceedings peculiarly and solely appertaining to the maritime law—a system of jurisprudence essentially dissimilar, a system which recognizes no such claim as the present, but under whose authority the owners would be wholly absolved by the total loss of the vessel, and under which they would be permitted to stipulate for their own exemption from liability on account of the barratry or dishonesty of their agents. Vide Abbott on Shipping, p. 294. The incongruity here pointed out might have been avoided, by confining the parties to their proper forum.

My conclusions, then, upon the question of jurisdiction, are these: that the case presented by the libel is palpably a proceeding in personam upon an express contract, entered into between the parties in the city of New York; that it is therefore a case properly cognizable at a common law court, for any breach of that contract which may have been committed, and consequently is not a case over which the admiralty court can, under the Constitution and laws of the United States, have jurisdiction, either in personam or in rem.

Having felt myself bound to treat at some extent what seemed to me the decisive, and what may, too, be called the public or constitutional question involved in this cause—the question of jurisdiction—as to what may be the merits of this controversy, the obligations sustained by the parties to each other, and the extent to which these have been fulfilled or violated, I shall content myself with simply giving the conclusions to which my mind has been conducted, without pretending to reason them out fully upon the facts or the law of the case, because those conclusions would not be the grounds of a formal dissent, though di[illegible] affirmed by a majority of my brethren.

Whilst I am impressed with the strong ne[illegible] cessity that exists *for guarding against [*417 fraud or neglect in those who, by holding themselves forth as fitted to take charge of the lives, the health, or the property of the community, thereby invite the public trust and reliance, I am not prepared to say that there can

be no limit or qualification to the responsibility of those who embark in these or similar undertakings—limits which may be implied from the inherent nature of those undertakings themselves, or which may result from express stipulation. It seems to me undeniable, that a carrier may select the particular line or description of business in which he engages, and that, so long as he with good faith adheres to that description, he cannot be responsible for anything beyond or inconsistent with it. The rule which makes him an insurer against everything but the act of God or the public enemy makes him an insurer as to performances only which are consistent with his undertaking as carrier. A common carrier of travelers is bound to the preservation of the accustomed baggage of the traveler, because of the known custom that travelers carry with them articles for their comfort and accommodation, and the price for which the transportation is undertaken is graduated on that presumption; but the carrier would not therefore be responsible for other articles, of extraordinary value, secretly transported upon his vehicle, because by this secrecy he is defrauded of a compensation commensurate with the value of the subject transported, and with the increased hazards to which it is attempted to commit him without his knowledge or assent. But to render him liable, he must have received the article for transportation, and it must be a subject falling fairly within the scope of his engagement. Within this range he is an insurer, with the exceptions above stated. But a carrier may, in a given case, be exempted from liability for loss, without fraud, by express agreement with the person for whom he undertakes; for I cannot well imagine a principle creating a disability in a particular class of persons to enter into a contract fraught with no criminal or immoral element—a disability, indeed, extending injuriously to others, who might find it materially beneficial to make a contract with them. A carrier may also be exempted from liability by the conduct of the owner of property, in keeping the exclusive possession and control of it, and thereby withholding it from the care and management of the carrier. Upon applying the principles here succinctly stated to the evidence in this cause, it is not made out in proof, to my mind, that the respondents ever received, as carriers, from the libelants, or indeed in any other capacity, property of any species or description, or ever knew that property of the libelants was, directly or indirectly, within the possession of the respondents, or on 418*] *board their vessel. It is not in proof that Harnden, in his contract with the respondents, acted as the agent of the libelants or for their benefit, or that, at the time of the agreement or of the shipment made by Harnden, the libelants and respondents were known to each other by transactions as shipper and carrier. It is established by proof, that Harnden contracted, in his own name and behalf alone, with the respondents for a separate compartment on board their vessel, to be, with its contents (the latter unknown to the respondents), at all times under his exclusive control; that the property alleged to have been lost was, if in this separate compartment, *placed there without certain knowledge of its* character or value on the part of the respondents, was under the exclusive direction of Harnden, who accompanied it, and who, up to the time of the conflagration of the vessel, held the property under lock and key, and could alone, without violence and a breach of the engagement, have had access to it. Were this controversy directed between Harnden and the respondents, from the peculiar nature of the contract between these parties, and from the possession of the subject reserved to and exercised by the former, any liability of the respondents, even then, might be a matter of doubt; but there should, I think, be no difficulty in concluding that no kind of liability could attach to the respondents in favor of persons for whom they had undertaken no duty, and who, in reference to the transaction in question, were strangers, entirely unknown to them. Upon the merits of this case, as well as upon the question of jurisdiction, I think the decree of the Circuit Court ought to be reversed, and the libel dismissed.

Mr. Justice Woodbury:

On most of the facts involved in this libel, little controversy exists. It is certain that the respondents took the property of the plaintiffs on board their steamboat, the Lexington, to carry it, on her last calamitous voyage, the 13th of January, 1840, from New York to Stonington. It is equally certain that it was lost on that voyage, in Long Island Sound, at a place where the tide ebbed and flowed strongly, and several miles from shore, and probably without the limits of any State or county. It is certain, likewise, that the property was lost in consequence of a fire, which broke out in the boat in the night, and consumed it, with most of the other property on board. The value of it is also sufficiently certain, and that it was put on board, not by an officer of the bank, but by Harnden, a forwarding agent for the community generally, and under a special contract between Harnden and the respondents, that the *latter were not to run any risk, nor be [*419 responsible for any losses of property thus shipped by him.

But some other facts are not so certain. One of that character is, whether the fire occurred by accident, without any neglect whatever by the respondents and their agents, or in consequence of some gross neglect by one or both. It would not be very material to decide this last fact, controverted as it is and in some degree doubtful, if I felt satisfied that the plaintiffs could recover anywhere, and more especially in admiralty, on the contract made by Harnden with the respondents, for the breach of the contract to carry and deliver this property.

The first objection to such a recovery on the contract anywhere is, that it was made with Harnden, and not with the bank. Butler v. Basing, 2 Carr. & Payne, 613; 15 Mass. 370; 2 Story, 32. Next, that he was acting for himself, in this contract, on his own duties, liabilities, and undertakings, and not for them; and that the bank, so far as regards any contract, looked to him and his engagement with them, and not to the respondents or their engagement with him. 6 Bingh. 131. Next, that the articles, while on board the boat, were to be in the care and control of Harnden, and not

of the master or owners; and hence no liability exists on the contract even to him, much less the bank. Story on Bailments, p. 547, sec. 582. And this same conclusion is also urged, because Harnden, by his contract, made an express stipulation, that the property carried should be at his risk, as well as in his care. See 5 East, 428; 1 Ventris, 190, 288. It is contended, further, that, if the bank can sue on Harnden's contract made with the respondents, it must be on the principle of his acting in it as their agent, and not for himself alone; and if so, and they, by suing on it, adopt its provisions, they must be bound by the stipulation in it made by him, not to hold the respondents liable for any risk or loss.

It is, however, doubted, whether, with such a stipulation, the respondents are not, by public policy, to be still liable on a contract like this, in order to insure greater vigilance over all things intrusted to their care (Gould v. Hill, 2 Hill, 623), and on the ground that the parties could not mean by the contract that the carriers were to be exonerated for actual misbehavior, but only for accidents otherwise chargeable on them as quasi insurers. Atwood v. Reliance Insurance Company, 9 Watts, 87; 2 Story, 32, 33.

It is insisted, next, that, as the unusual nature of the property carried, in this case, was not made known to the carriers, nor a proportionate price paid for its transportation, the 420*] owner *cannot recover beyond the usual value of common merchandise of such a bulk. Citizens' Bank v. Steamboat Nantucket, 2 Story, 32; 25 Wend. 459; Gibbon v. Paynton, 4 Burr. 2301.

But, giving no decisive opinion on the validity of any of these objections, as not necessary in the view hereafter taken, yet they are enumerated to show some of the difficulties in sustaining a recovery on this contract, notwithstanding their existence.

Another important objection remains to be considered. It is, that no jurisdiction exists over this contract in a court of admiralty where these proceedings originated. The contract was made on land, and of course within the body of the County of New York. It was also not a contract for a freight of goods abroad, or to a foreign country, the breach of which has been here sometimes prosecuted in courts of admiralty. Drinkwater et al. v. The Spartan, Ware D. C. 149, by a proceeding in rem, 155; De Lovio v. Boit, 2 Gall. 398; The Volunteer, 1 Sumner, 551; Logs of Mahogany, 2 Sumner, 589; 6 Dane's Abr. 2, 1, Charter-parties. See a case contra, in the records of Rhode Island, A. D. 1742.

But the law of England is understood to be, even in foreign charter-parties, against sustaining such suits, ex contractu, in admiralty. 3 D. & E. 323; 2 Lord Raym. 984; 1 Hagg. Ad. 226, and cases cited in 12 Wheaton, 622, 623.

By agreement of the judges in A. D. 1632, admiralty was not to try such cases, if the charter-party was contested. Dunlap's Adm. 14; 4 Instit. 135; Hobart, 268.

It seems, however, to be doubted by Browne (2 Browne's Civ. and Adm. Law, 122, 525), *whether the libelant* may not proceed in admiralty, *if he goes to* recover freight only, and not a penalty. It is also believed, that, in this country, contracts to carry freight between different States, or within the same State, if it be on tide water, or at least on the high seas, have sometimes been made the subject matter of libels in admiralty. Dunlap's Adm. 487; 1 Sumner, 551; 3 Am. Jur. 26; 6 Am. Jur. 4; King et al. v. Shepherd, 3 Story, 349, in point; Gilp. D. C. 514; Conkling, Pra. 150; De Lovio v. Boit, 2 Gall. 448. I am inclined to the opinion, too, that, at the time the Constitution of the United States was adopted, and the words "cases of admiralty and maritime" were introduced into it, and jurisdiction over them was subsequently given in civil proceedings, in the Act of 1789, to the district courts, the law in England had in some degree become changed in its general principles in respect to jurisdiction in admiralty over contracts. Their courts had become inclined to hold that the place of performance of a contract, if maritime in its subject, rather *than the place of its [*421 execution, was the true test as to its construction and the right under it. This conformed, also, to the analogy as to contracts at common law. See cases in Towne v. Smith, 1 Wood. & M. 135.

It is not unusual for the place to which the parties look for fulfilling their duties to be not only different from the place of making the contract, but for the parties to regard other laws and other courts, applying to the place of performance, as controlling and as having jurisdiction over it. Bank of the United States v. Donnally, 8 Peters, 361; Wilcox v. Hunt, 13 Peters, 378; Bell et al. v. Bruen, 1 Howard, 169.

Hence, for a century before 1789, Lord Kenyon says, admiralty courts had sustained jurisdiction on bottomry bonds, though executed upon the land; because, "if the admiralty has jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the sea to execute the instrument borders on absurdity." See Menetone v. Gibbons, 3 D. & E. 267–269; 2 Lord Raym. 982; 2 H. Bl. 164; 4 Cranch, 328; Paine's C. C. 671. On this principle, the admiralty has gradually been assuming jurisdiction over claims for pilotage on the sea, both the place of performance and the subject matter being there usually maritime. 10 Wheat. 428; 7 Peters, 324; 10 Peters, 108; 11 Peters, 175; 1 Mason, C. C. 508. Because, on the general principle just referred to, as to the object of the contract, if "it concerned the navigation of the sea," and hence was in its nature and character a maritime contract, it was deemed within admiralty jurisdiction, though made on land. Zane v. The Brig President, 4 Wash. C. C. 454; 4 Mason, C. C. 380 The Jerusalem, 2 Gall. 191, 465, 448; The Sloop Mary, Paine, C. C. 671; Gilp. D. C. 184, 47 429; 2 Sumner, 1.

This is the principle, at the bottom, for covering seamen's wages in admiralty. Howe v. Nappier, 4 Burr. 1944.

Not that the consideration merely was maritime, but that the contract must be to do something maritime as to place or subject. Plummer v. Webb, 4 Mason, C. C. 380; Bernal v. The Janus et al. 1 Baldw. C. C. 549, 552; "A New Brig," Gilp. D. C. 306. But we have already seen there are several direct precedents

in England against sustaining these proceedings in admiralty on the contract, such as a charter-party or bill of lading, and strong doubts from some high authorities against it in this country. Chancellor Kent seems to think a proceeding in admiralty, on a charter-party like this, cannot be sustained, except by what he calls "the unsettled doctrine laid down in De Lovio v. Boit." 3 Kent's Com. 162; see likewise Jus-
422*] tice *Johnson's opinion to the like effect in Ramsey v. Allegre, 12 Wheat. 622.

Looking, then, to the law as held in England in 1789, and not considering it to be entirely clear in favor of sustaining a suit in admiralty on a charter-party like this, and that it is very doubtful whether any more settled or enlarged rule on this subject then prevailed in admiralty here, or has since been deliberately and generally adopted here, in respect to charter parties or bills of lading, I do not feel satisfied in overruling the objection to our jurisdiction which has been made on this ground.

The further arguments and researches since Waring v. Clarke, 5 How. tend also, in my view, to repel still more strongly any idea that admiralty jurisdiction had become extended here, at the Revolution, in cases either of contracts or torts, more broadly than in England.

But it is not necessary now to go into the new illustrations of this cited in the elaborate remarks of the counsel for the respondents, or discovered by myself, in addition to those quoted in the opinion of the minority in Waring et al. v. Clarke, and in The United States v. The New Bedford Bridge, 1 Wood. & M. Among mine is the declaration by Lord Mansfield himself, December 20th, 1775, that the colonies wished "that the admiralty courts should never be made to extend there," instead of wishing their powers enlarged (6 American Archives, 234; Annual Register for 1776, pp. 99, 100); and there is likewise the protest of the friends of America, the same year, in the House of Lords, that the increase of admiralty power by some special acts of Parliament was a measure favored at home rather than here, and was not acceptable here, but denounced by them as an inroad on the highly prized trial by jury. 6 American Archives, 226. Among those cited is the conclusive evidence, that in some of the colonies here before the Revolution, the restraining statutes of Richard II., as to the admiralty, were eo nomino and expressly adopted, instead of not being in force here. See in South Carolina, 2 Statutes at Large, 446, in 1712, and in Massachusetts, Dana's Defense of New England Charters, 49-54; in Virginia, "the English Statutes," passed before James I., 9 Henings Statutes, 131, 203; Commonwealth v. Gaines, 2 Virg. Cases, 179, 185; in Maryland, 1 Maryland Statutes, Kilty's Report, 223; and in Rhode Island, her records of a case in 1763, at Providence.

But I pass by all these, and much more, because, notwithstanding the course of practice here the last half century in some districts, and the inattention and indifference exhibited in many others as to the true line of discrimi-
423*] nation between the jurisdiction *belonging to the common law courts and that in admiralty, enough appears to induce me, as at present advised, not to rest jurisdiction in admiralty over a transaction like this on contract alone. I shall not do it, the more especially when a ground less doubtful in my apprehension exists and can be relied on for recovering all the loss, if the damage was caused by a tort.

I have turned my attention to ascertain whether the facts in this case exhibit any wrong committed by the respondents, of such a character as a tort, and in such a locality as may render our jurisdiction in admiralty clear over it, looking to the principles of admiralty law in England, and also in this country, so far as can now be discovered to have existed at the time of our Revolution.

First, as to this, it is argued, that, in point of fact, gross negligence existed in the transportation of this property. If so, this conduct by the respondents or their agents may be sufficient to justify a proceeding ex delicto for the nonfeasance or misfeasance constituting that neglect, and causing the loss of this property, entirely independent of the contract or its form, or the risks under it, or the want of notice of the great value of the property. Particularly might this be sufficient, if the injury was caused in a place, and under circumstances, to give a court of admiralty undoubted jurisdiction over it as a marine tort.

The question of fact, then, as to neglect here, and the extent of it, may properly be investigated next, as in one view on the subject it may become highly important and decisive of the right to recover, and as it is our duty to settle facts in an admiralty proceeding, when they are material to the merits.

As before intimated, it is here virtually conceded, that the property of the plaintiffs, while in charge of the respondents as common carriers on the sea, was entirely lost, by the burning of the boat in which it was transported.

The first inference from these naked facts would be, that the fire was produced by some cause for which the owners were responsible, being generally negligence, and that prima facie they were chargeable. 6 Martin, 681; Story on Bailments, secs. 533, 538.

Indeed, the common carrier who receives property to transport, and does not deliver it, is always held prima facie liable. Abbott on Ship. ch. 3, sec. 3; 1 Ventris, 190; 6 Johns. 169; 8 Johns. 213; 19 Wendell, 245; Story on Bailments, sec. 533; 3 Kent's Com. 207, 216; 3 Story, 349, 356; 5 Bingh. 217, 220; 4 Bingh. 218.

If they would have this inference or presumption changed, so as to exonerate themselves, it must be done by themselves, *and not [*424 the plaintiffs, and by proof removing strong doubts; or, in other words, turning the scales of evidence in their favor in this attempt. This idea is fortified by the express provision establishing a presumption, by the act of Congress, in case of damages by explosions of steam. 5 Stat. at Large, p. 305, sec. 13.

Independent of this presumption, when we proceed to examine the evidence on both sides as to the contested points of fact connected with the loss, it is found to be decidedly against the conduct of the respondents and their agents; and, so far from weakening the presumption against them from the actual loss, it tends with much strength to confirm it. There had to be sure, been recent repairs, and certifi-

cates not long before obtained of the good condition of the boat. But on the proof, she does not seem to have been in a proper state to guard against accidents by fire when this loss occurred. Her machinery was designed at first to burn wood, and had not long before been changed to consume anthracite coal, which created a higher heat. And yet there was a neglect fully to secure the wooden portions of the boat, near and exposed to this higher heat, from the natural and dangerous consequences of it. So was there an omission to use fire brick and new sheet iron for guards, nigh the furnace. On one or two occasions, shortly before this accident, the pipe had become reddened by the intense heat so as to attract particular attention; and shortly before, the boat actually caught fire, it is probable, from some of those causes, and yet no new precautions had been adopted.

In the next place, the act of Congress, 5 Stat. at Large, pp. 304, 305, requires the owners of steamboats "to provide as a part of the necessary furniture, a suction hose and fire engine and hose suitable to be worked in said boat, in case of fire, and carry the same upon each and every voyage in good order." Sec. 9. And it imposes also a penalty of $500 for not complying with any condition imposed by the act. Sec. 2.

The spirit of this requisition is as much violated by not having the hose and engine so situated as to be used promptly and efficiently, as by not having them at all, or not having them "in good order."

The hose and engine were not kept together, and hence could not be used on that fatal night. One was stowed away in one part of the boat, and the other elsewhere, so as not to be in a situation to be brought promptly into beneficial use.

Again, it was an imperative provision in the act of Congress before referred to (sec. 9)—and the neglect of it was punished by a fine of $300, on the owner as well as master—"that iron rods or chains shall be employed and used in the navigating of all steamboats, instead of 425*] wheel or tiller ropes." *Yet this was not complied with, and renders their conduct in this respect, not only negligent, but illegal.

Though, in fact, this accident may not have proved more fatal than otherwise from this neglect, the non-compliance with the provision was culpable, and throws the burden of proof on the owners to show it did not contribute to the loss. Waring et al. v. Clarke, 5 Howard, 463. It is true that Congress, some years after, March 30, 1845, dispensed with a part of this provision, (5 Stat. at Large, 626), under certain other guards. Yet in this case even those other guards were wholly omitted.

Nor does there appear to have been any drilling of the crew previously, how to use the engine in an emergency, or any discipline adopted, to operate as a watch to prevent fires from occurring, or, after breaking out, to extinguish them quickly. Indeed, the captain, on this occasion, checked the efforts of some to throw the ignited cotton overboard, so as to stop the flames from spreading, by peremptorily forbidding it to be done.

The respondents, to be sure, prove that *several buckets were on board.* But the buckets, except in a single instance, were not rigged with heaving lines, so as to be able to draw up water, and help to check promptly any fire which might break out. And in consequence of their fewness or bad location, some of the very boxes containing the specie of the plaintiffs were broken open and emptied, in order to hold water. Lastly, when discovered, the officers and crew do not appear generally to have made either prompt or active exertions to extinguish the fire, or to turn the vessel nearer shore, where this property, and the passengers, would be much more likely to be preserved, eventually, than by remaining out in the deep parts of the Sound.

The extent and nature of the liability thus caused are well settled at law. The property of the plaintiffs was destroyed by fire, through great neglect by the defendants and their agents. Common carriers are liable for losses by fire, though guilty of no neglect, unless it happen by lightning. 1 D. & E. 27; 4 D. & E. 581; 3 Kent's Com. 217; 5 D. & E. 389; Gilmore v. Carman, Smedes & Marsh. 269; King et al. v. Shepherd, 3 Story's Rep. 360; 2 Browne, Civ. and Adm. Law, 144; 2 Wend. 327; 21 Wend. 190. These respondents were common carriers, in the strictest and most proper sense of the law. King et al. v. Shepherd, 3 Story's Rep. 349; see other cases, post.

They would, therefore, be liable in the present case without such neglect, if this view of it applied to a recovery on the ground of a tort as well as of a contract. But as it may not, *the next inquiry is if the facts dis- [*426 close a breach of duty, a culpable neglect, either by the officers or owners of the vessel, amounting to a tort, and for which the defendants are responsible.

It is well settled that a captain is bound to exercise a careful supervision over fires and lights in his vessel, ordinarily. Malynes, 155; The Patapsco Ins. Co. v. Coulter, 3 Peters, 237, 228, 229; Busk v. The Royal Ex. Ass. Co. 2 Barn. & Ald. 82.

He is required in all things to employ due diligence and skill (9 Wend. 1; Rice's R. 162), to act "with most exact diligence" (3 Esp. 127) or with the utmost care (Story on Bailm, sec. 327.) But how much more so in a steamboat, with fires so increased in number and strength, and especially when freighted with very combustible materials, like this, chiefly with cotton!

His failure to exert himself properly, to extinguish any fire amounts to barratry, 3 Peters, 228, 234; Waters v. Merch. Louisville Ins. Co. 11 Peters, 213; 10 Peters, 507. And if the property be insured against barratry, the owners may then recover.

To be sure, in one case the owners of a steamboat were exonerated from paying for a loss by fire. But it was only under the special provision of the local laws, rendering them exempt, if the fire occurred "by accidental or uncontrollable events." See Civil Code of Louisiana, 63d article; Hunt v. Morris, 6 Martin, 681.

So the written contract for freight, as well as that for insurance, sometimes does not cover fire, but specially exempts a loss by it. Kent's Com. 201-207.

In such case there may be no liability for it

on the insurance, and doubtfully on the charter or bill of lading, unless it was caused by gross neglect crassa negligentia. But in case of such neglect, liability exists even there. 3 Kent's Com. 217; 3 Peters, 238; 1 Taunton, 227. In this view the owners seem liable for all damages which they or their servants could have prevented by care. 8 Serg. & Rawle, 533. As an illustration of what are meant by such damages, they are those which happen, if on land, from unskillful drivers, "from vicious and unmanageable horses, or when occasioned by overloading the coaches, as these would imply negligence or want of care." Beckman v. Shouse, 5 Rawle, 183.

From the above circumstance, the conclusion is almost irresistible, that what constitutes a gross neglect by the respondents and their agents, as to the condition of the boat and its equipments, existed here, and by the deficien- [*427
cies and imperfection *of them contributed much to the loss of this property; and beside this, that want of diligence and skill on board, after the fire broke out, as well as want of watchfulness and care to prevent its happening or making much progress, was manifest.

If any collateral circumstance can warrant the exaction of greater vigilance than usual, on occasions like these, or render neglects more culpable, it was, that the lives of so many passengers were here exposed by them, and became their victims. This last consideration is imperative, in cases of vessels devoted both to freight and passengers, to hold the owners and their servants responsible for the exercise of every kind of diligence, watchfulness, and skill which the principles of law may warrant. Beside the great amount of property on board on this occasion, they had in charge from one to two hundred passengers, including helpless children and females, confiding for safety entirely to their care and fidelity. All of these, except two or three, were launched into eternity, during that frightful night, by deaths the most painful and heartrending. Had proper attention been devoted to the guards against fire, such as prudence and duty demanded, or due vigilance and energy been exercised to extinguish it early, not only would large amounts of property probably have been saved, but the tragic sufferings and loss of so many human beings averted.

In view of all this, to relax the legal obligations and duties of those who are amply paid for them, or to encourage careless breaches of trusts the most sacred, or to favor technical niceties likely to exonerate the authors of such a calamity, would be of most evil example over our whole seaboard, and hundreds of navigable rivers and vast lakes, where the safety of such immense property and life depends chiefly on the due attention of the owners and agents of steamboats, and is, unfortunately, so often sacrificed by the want of it. To relax, also, when Congress has made such neglect, when followed by death, a crime, and punishable at least as manslaughter, would be unfaithfulness to the whole spirit of their legislation, and to the loudest demands of public policy.

Their enactment on this subject is in these words (see statute before cited, sec. 12): "That every captain," etc., "by whose misconduct, negligence, *or inattention to his or their* re-

spective duties, the life or lives of any person on board said vessel may be destroyed, shall be deemed guilty of manslaughter," etc.

Showing, then, as the facts seem to do here, wrongs and gross neglects by both the owners and officers of the boat, the next step in our inquiries is, whether any principles or precedents exist against their being prosecuted in admiralty as a *tort, and by a proceed- [*428
ing which sounds ex delicto, and entirely independent of any contract.

The recovery, in cases like this, on the tort, counting on the duty of the carrier and its breach by the negligent loss of the property, is common, both in this country and abroad, in the courts of common law.

Whether it be redressed there in trespass or case, when suing ex delicto, is immaterial, if, when case is brought, the facts, as here, show neglect or consequential damage, rather than those which are direct and with force. And if case lies at common law on such a state of facts, there seems to be no reason why a libel in admiralty may not lie for the wrong, whenever, as here, it was committed on the sea, and clearly within admiralty jurisdiction over torts. For the admiralty is governed by like principles and facts, as to what constitutes a tort, as prevail in an action at law for damages, and its ingredients are the same, whether happening on land or water. But case will lie at law, on facts like those here, for reasons obvious and important in the present inquiry. Indeed, on such facts the ancient action was generally in case, and counted on the duty of the carrier to transport safely the property received, and charged him with tortious negligence in not doing it. 1 Price, 27; 2 Kent's Com. 599; 3 Wend. 158. In such proceedings at common law, the difference was in some respects, when ex delicto, more favorable to the owners, as then some neglect, or violence, or fraud, or guilt of some kind, must be shown, amounting to a breach of public duty by the carrier or his servants. Hinter v. Dibdin et al. 2 Adol. & Ell. N. S. 646; 2 New R. 454; 2 Chit. R. 4. While in the action of assumpsit, more modern, but by no means exclusive, the promise or contract alone need be shown, and a breach of that, though without any direct proof of neglect, as carriers are by their duties, in law, insurers against all losses except by the king's enemies and the act of God. 3 Brod. & Bingh. 62, 63; 19 Wend. 239; Forward v. Pittard, 1 D. & E. 27; 1 Esp. Cas. 36; 2 Chit. R. 1; Ashmole v. Wainwright, 2 Adol. & Ell. N. S. 663.

So it is well settled that these rules of law, and all others as to common carriers by land, apply to those by water, and to those boats carrying freight, as this one did. 10 Johns. 1; 1 Wils. 281; 3 Esp. Cas. 127; 2 Wend. 327; 3 Story, 349.

What, then, in principle, operates against a recovery?

Some would seem to argue, that a proceeding ex delicto must be trespass, and that case is not one. But when it proceeds, as here, for consequential damages, and those caused by gross neglect, and not a mere breach of contract, it sounds ex delicto as much as trespass itself. 1 Chit. Pl. 142; 3 East, 593, 2 Saund. 47, b.

*The misconduct complained of here [*429

amounted to a tort, as much as if it had been committed with force. A tort means only a wrong, independent of or as contradistinguished from a mere breach of a contract. The evidence here, in my apprehension, shows both misfeasance and nonfeasance, and a consequential loss from them, which it is customary to consider as tortious. It was here, to be sure, not a trespass vi et armis, and perhaps not a conversion of the property so as to justify trover, though all the grounds for the last exist in substance, as the plaintiffs have lost their property by means of the conduct of the defendants, into whose possession it came, and who have not restored it on demand, nor shown any good justification for not doing it.

It is altogether a mistake, as some seem to argue, that force and a direct injury are necessary to sustain proceedings in tort, either at law or in admiralty, for damages by common carriers. So little does the law regard, in some cases, the distinction between nonfeasance and misfeasance, in creating a tort and giving any peculiar form of action for it, that in some instances a nonfeasance is considered as becoming misfeasance; such as a master of a vessel leaving his register behind, or his compass, or anchor. 3 Peters, 235. And "torts of the nature," as in the present case, may be committed either by "nonfeasance, misfeasance, or malfeasance," and often without force. 4 D. & E. 484; 1 Chit. Pl. 151; Bouvier's Dict. Tort. And even where mala fides is necessary to sustain the proceeding, gross negligence is evidence of it. 4 Adol. & Ell. 876; 1 Howard, 71; 2 Spence's Eq. Jur. 425; Jones on Bailments, 8; Story on Bailments, secs. 19, 20. The action in such case is described as "upon tort," and arises ex delicto. 2 Kent's Com. 599. In most instances of gross negligence, misfeasance is involved (2 Cromp. & M. 360); as a delivery to a wrong person, or carrying to a wrong place, or carrying in a wrong mode, or leaving a carriage unwatched or unguarded. 2 Cromp. & M. 360; 8 Taunt. 144. Where case was brought for damage by overloading and sinking a boat, it was called an action "for a tort," and sustained, though the injury was wholly consequential. 1 Wils. 281.

Again, it has been argued, that if direct force be not a necessary ingredient to recover in this form of action, it must in some degree rest on the contract which existed here with Harnden, and be restrained by its limitations. But the books are full of actions on the case where contracts existed, which were brought and which count entirely independent of any contract, they being founded on some public duty neglected, to the injury of another, or on some 430*] private wrong *or misfeasance, without reference to any promise or agreement broken. 12 East, 89; 4 Howard, 146; Chit. Pl. 156; Forward v. Pittard, 1 D. & E. 27; 2 N. Hamp. 291; 2 Kent's Com. 599; 3 East, 62; 6 Barn. & Cress. 268; 5 Burr. 2825; 6 Moore, 141; 9 Price, 408; 5 Barn. & Cress. secs. 504–508. Some of the cases cited of this character are precisely like this, being for losses by non-delivery of property by common carriers, and sued for as torts thus committed. 5 D. & E. 389. They *go without* and beyond the contract entirely.

Nor is intent to do damage a necessary ingredient *to sustain either case* or trespass. 2 New R. 448. Though the wrong done is not committed by force or design, it is still treated as ex delicto and a tort, if it was done either by a clear neglect of duty, by an omission to provide safe and well furnished carriages or vessels, by carelessness in guarding against fires and other accidents, by omitting preparations and precautions enjoined expressly by law or by damages consequent on the negligent upsetting of carriages, or unsafe and unskillful navigation of vessels. See cases of negligent defects in carriages and vessels themselves, 2 Kent's Com. 597, 607; 6 Jurist, 4; The Rebecca, Ware, D. C. 188; 10 East, 555; 5 East, 428. Or in machinery, Camden and Amboy Railroad v. Burke, 13 Wend. 611, 627; 5 East, 428; 9 Bingh. 457. Even if the defect be latent, 3 Kent's Com. 205. See those of careless attention, The Rebecca, Ware, D. C. 188. See those of nonconformity to legal requisitions, as hose and engine here not in good order, Waring et al. v. Clarke, 5 Howard. See those consequent on negligent driving, 4 Barn. & Cress. 223; Bretherton v. Wood, 3 Brod. & Bingh. 54. If damage or loss happen by neglect or wrong of a servant of a common carrier, the principal is still liable. 13 Wend. 621; Story on Partnership, sec. 489; Dean et al. v. John Angus, Bee's Adm. 369, 239; Story on Bailments, sec. 464; 2 Browne, Civ. and Adm. Law, 136. This is necessary to prevent fraud; if such neglect be not evidence of fraud or misfeasance. The owner should be liable for employing those negligent. Story on Agency, sec. 318, and note.

There is another important consideration connected with this view of the subject and relieving it entirely from several objections which exist to a proceeding founded wholly on a contract rather than a tort. It is this: Where the injury is caused by a tort or fraud, no question arises as to any special agreement or notice, as with Harnden here, not to assume any risk. In short, the agreement of that kind here, does not exonerate, if "malfeasance, misfeasance, or gross negligence" happens by owners or their servants. 13 Wend. 611; 19 Wend. 234, 251, 261; 5 Rawle, 179, 189; 2 Crompt. & M. 353; *2 Kent's Com. sec. 40; Brooke v. Pick- [*431 wick, 4 Bingh. 218; 3 Brod. Bingh. 183. Because the wrong is then a distinct cause of action from the breach of the contract, and the exception in it as to the risk was intended to reach any loss not happening through tortious wrong. "Even with notice, stage proprietors and carriers of goods would be liable for an injury or loss arising from the insufficiency of coaches, harness, or tackling, from the drunkenness, ignorance, or carelessness of drivers, from vicious and unmanageable horses, or when occasioned by overloading the coaches, as these would imply negligence or want of care." 3 Rawle, 184. It is further settled, in this class of cases, that the principle of not being liable for jewels, money, and other articles of great value, unless notice was given of it and larger freight paid in consequence of it, does not apply. 4 Bingh. 218; 5 Bingh. 223; 2 Crompt. & M. 353. Because here the liability is not that of an insurer against many accidents and many injuries by third persons of the property carried, and which it may be right to limit to such values as were known and acted upon in agreeing to carry. But it is for the wrong of the

carrier himself, or his agents; their own misfeasance or nonfeasance, and hence gross neglect, renders them responsible for the whole consequential damages, however valuable the property thus injured or lost. 2 Barn. & Ald. 356; 8 Taunt. 144; 4 Binn. 31; 2 Adol. & Ell. N. S. 659; 5 Barn. & Ald. 341, 350; 16 East, 244, 245.

Some think the neglect in such case, so as to be liable for valuables, must amount to misfeasance. 2 Adol. & Ell. 659; 2 Myl. & Craig, 358. It must be "misfeasance or gross negligence." 2 Kent's Com. 607, note; 13 Price, 329; 12 B. Moore, 447; 5 Bingh. 223–225; 8 Mees. & Wels. 443. By a recent statute in England, under William IV., though the carrier has been exonerated from the liability and care of valuables, without notice, yet he cannot be if gross neglect happens. 2 Adol. & Ell. 646.

All this being established at law, what is there to prevent this wrong from being deemed a tort, in connection with maritime matters—or, in other words, "a marine tort"—and subject to be prosecuted in admiralty? I am not aware that a marine tort differs from any other tort in its nature or incidents, except that it must be committed, as this was, on the high seas. See cases cited in Waring et al. v. Clarke, 5 Howard. There it was held sufficient to constitute a marine tort and one actionable in admiralty, if the wrong was committed only on tide water.

We have already suggested, also, as to the gist of the wrong, that gross neglect, the elements and definition of it, are the same on the water as on land, and consequential or direct 432*] damages *by a wrong are regarded in the same light on both. The actions of case, as well as trespass, at common law, in illustration of this, are numerous, as to torts on the water. See ante.

Force, too, is no more necessary to constitute this kind of tort at sea than on land, or in admiralty than in a common law court. 3 Story, 349. That is the gist of this branch of the case. It is true, that most of the libels in admiralty for torts are for such as were caused by force, like assaults and batteries (4 Rob. Adm. 75); or for collision between ships on the sea, to the injury of person or property (2 Browne's Civ. and Adm. Law, 110; Dunlap's Adm. 31; Moore, 89); or for wrongful captures (10 Wheat. 486; Bee's Adm. 369; 1 Gall. 315; 3 Cranch, 408); or for carrying off a person in invitum (Dunlap's Adm. 53); or for any "violent dispossession of property on the ocean." 1 Wheat. 257; L'Invincible, 1 Wheat. 238. And though, where trespass is brought at common law, or a tort is sued for in admiralty as "a marine trespass," there must usually have been force and an immediate injury (1 Chit. Pl. 128; 11 Mass. 137; 17 East, 246; 1 Pick. 66; 8 Wend. 274; 3 Mass. 293; 11 Wheat. 36, argu.; 4 Rob. Adm. 75), yet it need not be implied or proved in trespass on the case at law, or in a libel in admiralty for consequential damages to property. Such a libel lies as well for a tort to property as to the person, on the sea (2 Browne's Civ. and Adm. Law, 109, 202; Doug. 594, 613, note; 4 Rob. Adm. 73–76; Martin v. Ballard et al. Bee's Adm. 50, 239); and for consequential injury by a tort there, as well as *direct injury. Sloop v. Cardolero*, Bee's Adm. 51, 60; 3 Mason, 242; 4 Mason, 385–388; 2 Browne's Adm. 108; 2 Story, 188; 2 Sir Leoline Jenkins, 777. It was even doubted once, whether, for such torts at sea, any remedy existed elsewhere than in admiralty. 2 Browne's Civ. and Adm. Law, 112. Indeed, 1 Browne's Civ. and Adm. Law, 397, shows that, beside rights arising from contract, there were "obligations or rights arising to the injured party from the torts or wrongs done by another." And these were divided into those arising ex delicto and those quasi ex delicto; and the former included "damage" to property, as in this case. It meant injury to property by destroying, spoiling, or deteriorating it, and implied "faultiness or injustice," (401), but not necessarily force. Either trespass or case sometimes lies for a marine tort, even in the collision of vessels, where at times the only force is that of winds and tides, and the efforts of the master were to avoid, rather than commit, an injury. 1 Chit. Pl. 145; 2 Story, 188; 11 Price, 608; 3 Carr. & Payne, 554. Damages by insufficient equipments, ropes, etc., must be paid by the owners of the vessel to the merchant, *even by the Laws of Oleron, art. 10. [*433 Sea Laws, 136; Laws of Wisby, art. 49. And nothing is more consequential, or less with force, than that kind of injury.

Finally, the principles applicable to the definition of the wrong or tort being here in favor of a recovery in admiralty, and there being no precedents in opposition, but some in support of it, the inference is strong, that this destruction of the property of the plaintiffs may well be regarded and prosecuted in admiralty as a marine tort.

Though I admit there are no more cases in point abroad, in 1789, for sustaining a suit for a consequential injury by a carrier as a tort, than on the contract, in admiralty, yet the principles are most strongly in faver of relying on the tort, without any opposing decision, as there is to a libel on the contract. Besides this, other difficulties are avoided, and more ample justice attained, by the libel here for the tort, than by one for the contract.

A moment to another objection—that the libel in this case does not contain allegations in proper form to recover damages in admiralty, as if for a maritime tort.

This libel is in several separate articles, rather than in a single count. In none of them is any contract specifically set out, though in one of them something is inferred to as "contracted." The libel avers that the respondents were common carriers; that a public duty thus devolved on them; that they received the property on board to transport it, and so negligently conducted, it was lost. The breach is described throughout, not of what had been "contracted" or promised, but as a wrong done, or tort, and specifies several misdoings. It is in these words:

"Yet the respondents, their officers, servants, and agents, so carelessly and improperly stowed the said gold coin and silver coin, and the engine, furnace, machinery, furniture, rigging, and equipments of the said steamboat were so imperfect and insufficient, and the said respondents, their officers, servants, and agents, so carelessly, improperly, and negligently managed and conducted the said steamboat Lexing-

ton, during her said voyage, that by reason of such improper stowage, imperfect and insufficient engine, furnace, machinery, furniture, rigging, and equipments, and of such careless, improper, and negligent conduct, the said steamboat, together with the gold coin and silver coin to the libelants belonging, were destroyed by fire on the high seas, and wholly lost."

Where contract and tort, in the forms of declaration at common law in actions of the case, are with difficulty discriminated, the general test adopted is, if specific breaches are as-
434*] signed, *sounding ex delicto, it is case on the tort. Jeremy on Carriers, 117. Here this is done.

The same technical minuteness is not necessary in a libel as in a declaration at common law. 5 Rob. Adm. 322; Dunlap, Adm. 438, 439; Ware, D. C. 51. Only the essential facts need be alleged, without regard to particular forms, either in contract or tort. Hall's Prac. 207, 138; Dunlap, Adm. 427.

And in the same libel between the same parties, unlike the rule at common law, it is held by some that both contract and tort may be joined, though it is proper to state them in separate articles in the libel, like separate counts. Semble in 2 Story's R. 349; Dunlap, Adm. 89. And in some cases it is clearly better not to unite them. Ware, D. C. 427. Here if the libel is considered as but separate paragraphs of one article, it is a good one in tort. Dunlap, Adm. 114, 115; 4 Mason, C. C. 541. And if as separate article, one of them is valid in tort.

The forms of libels for maritime torts include those which caused only consequential damages, as well as those which caused direct damages. Dunlap, Adm. 49; 3 Story's R. 349, one count seems to be for the wrong.

There are cases of this kind merely for improper usage to passengers, by bad words, and neglect; but no force existed, or was alleged. 3 Mason, C. C. 242.

Others are libels for seducing or carrying away a minor son of the plaintiff to his damage, like the actions on the case at common law. Plummer v. Webb, 4 Mason, C. C. 380. Yet they are called, as they are in law, "tortious abductions."

So a libel lies for loss of goods "carelessly and improperly stowed." Ware, D. C. 189.

But, if the libel here was less formal in tort, the liberality practiced in admiralty pleadings, regarding the substance chiefly, as in the civil law, would allow here any necessary amendments. Dunlap, Adm. 283; 4 Mason, C. C. 543; 3 Wash. C. C. 484. Or would allow them in the court below, by reversing the judgment, and sending the case back with directions to permit them there. 4 Wheat. 64, 63; 4 Howard, 154; 1 Wheat. 264, 13; 9 Peters, 483.

The amount of damages which can be awarded in admiralty, in a case like this, has been agitated by some of the court, but was not argued at the bar. It is not without difficulty, but can in a minute or two be set right. By the ancient practice in admiralty, in case of contracts of freight made by the master, it is true that the owners were liable, whether ex contractu or ex delicto, and whether in personam or in rem, for only the value of the vessel or the capital used in that business. *Dunlap, Adm. 31. And if the vessel [*435 was lost, the remedy against the owners was entirely lost in admiralty. Ware, D. C. 188. Yet, it is a conclusive answer, that here, as well as abroad, the rule of the civil and common law is to give the whole loss. 2 Kent's Com. 606; 3 Kent's Com. 217. And that this rule of full damage in a libel in admiralty has been adopted here after much consideration. Livingston, Justice, in Paine, C. C. 118, says, that "it had long been regarded as a general principle of maritime law" to make the owners liable for a tort by the master, and that now the whole injury was the measure of damage, without reference to the value of the vessel and freight. See, also, Del Col v. Arnold, 3 Dall. 333; The Apollon, 9 Wheat. 376; 3 Story's R. 347; 2 Story's R. 187.

This is modified by some State laws, under certain circumstances. See The Rebecca and Phebe, Ware, D. C. 269. And in England, by 53 Geo. III. ch. 99.

But even there the owner is still liable beyond the value of the vessel and freight, if the damage or neglect was "committed or occasioned" with "the fault or privity of such owner." See Statues at Large of that year; The Rebecca and Phebe, Ware, D. C. 269; see for this and other statutes, 2 Bro. Civ. and Adm. Law, 45, excusing owners if the pilot alone is in fault; see 6 Geo. IV. ch. 125, sec. 55; 1 Wm. Rob. 46; 1 Dod. Adm. 467. So the whole injury must be paid now on the contract, and the owners cannot escape by abandoning the vessel which did the wrong. 2 Bro. Civ. and Adm. Law, 206, note.

On principle, also, this is the right rule in admiralty, clearly, where the owners themselves at home, and not the master abroad, made the contract, or where they were guilty of any neglect in properly furnishing the vessel, and not he. The Rebecca and Phebe, Ware, D. C. 269, 203–206.

The principle of his binding them only to the extent of the property confided to him to act with, or administer on, does not apply to that state of facts (Abbott on Shipp. 93), but only to his doings abroad.

The contracts made abroad are usually in his name, as well as by him, and not by the owners, and he only to sue or be sued. Abbott on Shipp. pt. 2, ch. 2, sec. 5.

In Waring et al. v. Clarke, which was a tort by the master at home, in a collision of two boats, the whole amount of the injury was awarded. See, also, 1 Howard, 23; 3 Kent's Com. 238. So principle, no less than precedent, requires it now, in admiralty as well as common law, when the master is usually not a part owner, but a mere agent of the owners, and doing damage, as here, by unskillfulness or neglect, and not by *willful miscon- [*436 duct. Ware, D. C. 208; 1 East, 106. For this, surely, those should suffer who selected him respondent superiori. 1 East, 106; Abbott on Ship. pt. 2, ch. 2, sec. 9; 2 Kent's Com. 218.

It is a mistake, likewise, to suppose, as some have, that the rule of damage is thus higher in admiralty than at common law, or when counting on the tort rather than contract. The only difference is, that in admiralty, if counting on the contract, doubts exist whether a recovery

can be had on the precedents, while, if counting on the tort, no doubt exists, the place of the tort being clearly on the sea, and within admiralty jurisdiction. Nor do I see any sound reason for not sustaining this case in admiralty, when jurisdiction exists there over the subject, because this proceeding is in personam and not in rem. 6 Am. Jur. 4; 2 Bro. Civ. and Adm. Law, 396; 2 Gall. 461, 462; Hard. 173.

The jurisdiction is one thing, the form of proceeding another; and it is only when the vessel itself is pledged, and no personal liability created, so as to lay a foundation for an action at law, that the form of proceeding seems to help to give jurisdiction in admiralty, where alone the libel in rem in such case can be followed. 3 D. & E. 269.

But even then, I apprehend, the subject matter must be proper for admiralty, or it could not be prosecuted there in rem, because, if the subject matter is a carriage or horse, rather than a ship or its voyage, or something maritime, admiralty would get no jurisdiction by the thing itself being pledged, or to be proceeded against. The Fair American, 1 Peters, Adm. 87; Duponceau on Jurisdiction, 22, 23.

Indeed, the rule in England to this day seems to be adverse to proceeding in admiralty at all, even in rem, to recover freight. Abbott on Shipp. 170. King et al. v. Shepherd et al. 3 Story, 319 was a libel, in personam, against a common carrier by water, and held that the liability was the same as on land, and an act of God to excuse must be immediate, and that the burden of the excuse rests on the respondents and they are not discharged by a wreck, but must attend to the property till safe or restored.

So it has been adjudged by this court to be proper to prosecute in admiralty for marine torts, in personam as well as in rem. Manro v. Almerda, 10 Wheat. 473; The Apollon, 9 Wheat. 362; Bee, Adm. 141; The Cassius, 2 Story, R. 81; 14 Peters, 99. See, also, the rules of this court (1845), for admiralty practice, the 14th, 16th, and 17th (3 Howard, 7, Preface), and which expressly allow in libels for freight proceedings in rem or in personam, and in some trespasses to property either mode. 437*] *I concur, therefore, in the judgment of the court, affirming the decree for full damages, but on the ground of a recovery for the wrong committed as a marine tort, rather than on any breach of contract which can be prosecuted by these plaintiffs, and in admiralty.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Rhode Island; and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages at the *rate of six per centum per annum.*

12 L. ed.

PETER HOGG and Cornelius H. Delamater, Plaintiffs in Error,
v.
JOHN B. EMERSON.

Under Patent Act where court below allows writ of error, amount in dispute being below $2,000, it must bring up whole case—schedule annexed to letters patent, used to explain or add to title of invention—when different patentable subjects may be united in one patent—rules for construing specifications and descriptions.

When a case is sent to this court under the discretion conferred upon the court below by the seventeenth section of the Act of July 4, 1836 (Patent Law), 5 Stat. at Large, 124, the whole case comes up, and not a few points only.

The specification constitutes a part of a patent, and they must be construed together.

Emerson's patent for "certain improvements in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land," decided not to cover more ground than one patent ought to cover, and to be sufficiently clear and certain.

A patentee, whose patent right has been violated, may recover damages for such infringement for the time which intervened between the destruction of the patent office by fire, in 1836, and the restoration of the records under the Act of March 3, 1837.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York. It was a suit for the violation of a patent right, and the writ of error was allowed under the seventeenth section of the Act of 1836.

On the 8th of March, 1834, John B. Emerson, the defendant in error, obtained the following letters patent (which were recorded anew on the 5th of March, 1841), viz.:

The United States of America, to all to whom the letters patent shall come:

Whereas John B. Emerson, a citizen of the United States, hath alleged that he has invented a new and useful improvement in the steam engine, which improvement he states has not been known or used before his application; hath made *oath that he doth verily [*438 believe that he is the true inventor or discoverer of the said improvement; hath paid into the Treasury of the United States the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the Secretary of State; signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose. These are therefore to grant, according to law, to the said John B. Emerson, his heirs, administrators, or assigns, for the term of fourteen years from the eighth day of March, one thousand eight hundred and thirty four, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents.

NOTE.—As to jurisdiction of U. S. Supreme Court defendant on amount—interest cannot be added to give jurisdiction—how value of thing demanded shown—what cases reviewable without regard to sum in controversy, see note to 7 L. ed. U. S. 592.

Damages for infringement of patent; treble damages, see note to 13 L. ed. U. S. 824.

As to measure of damages generally, see note to 51 L.R.A. 803.

In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, this eighth day of March, in the year of our Lord one thousand
[L. S.] eight hundred and thirty-four, and of the independence of the United States of America, the fifty-eighth.

Andrew Jackson.

By the President:

Louis McLane, Secretary of State.

City of Washington, to wit:

I do hereby certify that the following letters patent were delivered to me on the eighth day of March, in the year of our Lord one thousand eight hundred and thirty-four, to be examined; that I have examined the same, and find them conformable to law; and I do hereby return the same to the Secretary of State, within fifteen days from the date aforesaid, to wit, on this eighth day of March, in the year aforesaid.

B. F. Butler,

Attorney-General of the United States.

The schedule referred to in these letters patent, and making part of the same, containing a description in the words of the said John Brown Emerson himself, of his improvement in the steam engine:

To all whom it may concern:

Be it known, that I, John Brown Emerson, of the city of New York, have invented certain improvements in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, and that the following is a full and exact description thereof:

439*] *One object of my improvement is to substitute for the crank motion a mode of converting the reciprocating motion of a piston into a continued rotary motion, by a new combination of machinery for that purpose.

This mode is applicable to an engine either with one or with two cylinders, and is carried into effect as follows: Alongside of the cylinder I place a shaft, the lower end of which may revolve in a step on the platform or foundation upon which the cylinder stands; in which case it must be somewhat longer than twice the lenght of the cylinder, as it must extend above it to a height somewhat greater than the length of the stroke of the piston. Sometimes, however, this shaft may have its lower gudgeon only a small distance below the upper end of the cylinders, whence it must extend above it as before. Its upper gudgeon must of course be sustained by a suitable frame. This shaft is to stand parallel to the piston rod, from which it is to receive its revolving motion. Upon the upper end of the shaft, above the top of the cylinder, there is to be placed a solid cylinder of wood, or of any other convenient substance, of such diameter as shall cause its periphery to come nearly into contact with the piston rod for its whole length, when the piston is raised. The solid cylinder above described to be made to revolve in the following manner: I make a groove in it, which commences near its lower end, and, passing spirally, extends half way round it by the time it *reaches nearly to* the upper end, or to a distance *vertically equal to* the stroke of the engine; *from that point* it passes down around the opposite half, and returns into itself at the point of beginning. Upon the upper end of the piston, against its side, I place a friction roller, which is to work in the groove in the solid cylinder; the piston rod rising between parallel guide pieces, by which it is kept in its proper place, and its tendency to turn round by the action of the roller in the groove is checked. When the piston is down, this friction roller will stand in the V formed by the junction of the grooves on the opposite sides, and as it is raised, it will in its passage to the upper junction give half a revolution to the solid cylinder, and in descending will complete the revolution by the action of the friction roller on the other portion of the groove.

When two cylinders are used, they are to be placed parellel to each other, and at such a distance apart that the pistons of each may, in like manner, act upon the solid cylinder; the piston of one being up when the other is down. The boiler, the steam pipe, the valves for the admission and discharge of steam, and other appendages, may be similar to some of those already in use. From the revolving shaft, already described, *a rotary motion may [*440 be communicated to paddle wheels, steam carriages, or other objects. As it is my intention, in general, to place my cylinders and revolving shaft vertically, I communicate motion to the horizontal shaft of a paddle wheel by means of bevel geared wheels near the lower end, or at any convenient part of the shaft; and by similar gearing, carriages may be propelled upon rail or ordinary roads.

When used for steamboats, I employ an improved spiral paddle wheel, differing essentially from those which have heretofore been essayed. This spiral I make by taking a piece of metal of such length as I intend the spiral propeller to be, and of a suitable width, say, for example, eighteen inches; this I bend along the center so as to form two sides, say of nine inches in width, standing at right angles, or nearly so, to each other, and give to it, longitudinally, the spiral curvature which I wish. Of these pieces I prepare two or three, or more, and fix them on to the outer end of the paddle shaft, by means of arms of a suitable length, say of two feet, more or less, in such a position that the trough form given to them longitudinally shall be effective in acting upon the water. It must be entirely under water, and operate in the direction of the boat's way; instead of metal, the spiral propeller may be formed of wood, and worked into the proper form—the shape, and not the material thereof, being the only point of importance.

Where a capstan is required, as on board of a steamboat, I allow the upper end of the vertical shaft before described to pass through the deck of the vessel, and attach the capstan thereto, so that it may be made to revolve by the action of the shaft, using such ray wheels and falls to connect the shaft and the capstan as will allow of their being conveniently engaged and disengaged.

What I claim as my invention, and for which I ask a patent, is the substituting for the crank in the reciprocating engine a grooved cylinder, operating in the manner hereinbefore described, by means of its connection with the piston rod, together with all

the variations of which this principle is susceptible; as, for example, a bar of metal may be bent in the form of a groove, and attached to the revolving shaft, and friction wheels on the piston rod may embrace this on each side, producing an effect similar to that produced by the groove. I also claim the spiral propelling wheel, contracted and operating in the manner in which I have set forth; and likewise the application of the revolving vertical shaft to the turning of a capstan on the deck of a vessel. Not intending, in either of these parts, to confine myself to precise forms or dimensions, but to vary them in such manner as experience 441*] or convenience may *dictate, whilst the principal of action remains unchanged, and similar results are produced by similar means.

John Brown Emerson.

At April Term, 1844, Emerson brought an action of trespass on the case in the Circuit Court of the United States for the Southern District of New York, against Hogg and Delamater, for an infringement of his patent right. As one of the points decided by the court was whether or not the allegations of the declaration corresponded with the evidence of the patent, it is thought proper to insert the declaration. It was as follows, viz.:

"John B. Emerson, a citizen of the State of New York, by Peter Clark, his attorney, complains of Peter Hogg and Cornelius Delamater, citizens of the same State, defendants, in custody, etc., of a plea of trespass on the case.

"For that, whereas the said plaintiff was the original inventor of a certain new and useful improvement, in the letters patent hereinafter mentioned and described, the same being a certain improvement in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, which was not known or used before his said invention, and which was not, at the time of his application for a patent, as hereinafter mentioned, in public use with his consent or allowance. And the said plaintiff being so as aforesaid the inventor thereof, and being also a citizen of the United States, on the eighth day of March, one thousand eight hundred and thirty-four, upon due application therefor, did obtain certain letters patent therefor, in due form of law, under the seal of the United States, signed by Andrew Jackson, then President, and countersigned by Louis McLean, then Secretary of State, bearing date the day and year aforesaid, whereby there was secured to him, the said plaintiff, his heirs, executors, administrators, or assigns, for the term of fourteen years from and after the date of the said patent, the exclusive right and liberty of making, using, and vending to others to be used, the said improvement, as by the said letters patent in court to be produced will fully appear. And the said plaintiff further says, that the said defendants, well knowing the said several premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, and vending of the said invention or improvement, after the making and issuing of the said letters patent, and within the term of fourteen years in said letters patent mentioned, to wit, on the *first day [*442 of January, eighteen hundred and forty, and on divers other days and times between that time and the commencement of this suit, at the city of New York, and within the southern district of New York, wrongfully and unjustly, without the leave or license, and against the will, of the plaintiff, made and sold divers, to wit., ten machines for propelling boats, in imitation of the said invention and improvement, or a part of the said invention or improvement, to the benefit, use, and enjoyment whereof the said plaintiff was and is entitled as aforesaid, in violation and infringement of the said letters patent, and of the exclusive right and privilege to which the plaintiff was and is entitled as aforesaid, and contrary to the form of the statutes of the United States in such case made and provided.

"And the said plaintiff further says, that the said defendant, well knowing the said several premises, but further contriving and intending as aforesaid, after the obtaining of the said letters patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit., on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, within the southern district of New York aforesaid, wrongfully and unjustly, without the leave or license, and against the will, of the plaintiff, did make and sell divers, to wit., ten improved machines for propelling boats or vessels upon the water, constructed in a similar form and acting upon the same principle as the said machine or improvement, to the benefit, use, and enjoyment whereof the said plaintiff was and is entitled by his said letters patent, as aforesaid, in violation and infringement of the exclusive right so secured to the said plaintiff by the said letters patent as aforesaid, and contrary to the form of the statute in such case made and provided.

"And the said plaintiff further says, that the said defendant, well knowing the said several premises, but contriving and intending as aforesaid, after the obtaining of the said letters patent by the said plaintiff as aforesaid, and within the said term of fourteen years, to wit., on the said first day of January, eighteen hundred and forty, and at divers other times between that day and the commencement of this suit, in the southern district of New York aforesaid, wrongfully and unjustly, and without the consent or allowance, and against the will, of the plaintiff, did imitate in part and make a certain addition to the said invention or improvement, to the benefit, use and enjoyment whereof the plaintiff was and is entitled as aforesaid, in breach of the said letters patent, and in violation and infringement of the exclusive right and privilege so secured to the *said plaintiff as aforesaid and contrary [*443 to the form of the statute in such case made and provided.

"By means of the committing of which said several grievances by the said defendants as aforesaid, the said plaintiff is greatly injured, and has lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and improvement in the said letters patent described and set forth, and in respect whereof

he was and is entitled to such privilege as aforesaid, and was and is otherwise damnified to the damage of the said plaintiff of ten thousand dollars, and therefore," etc.

To this declaration, the defendants pleaded the general issue, and filed a copy of the special matters of defense to the action.

In May, 1847, the cause came on for trial. The patent was given in evidence, when the counsel for the defendants prayed the court to instruct the jury that the patent, thus produced in evidence by the said plaintiff, was void, for the reasons following:

1. That the claim of the plaintiff, as set forth in his specification annexed to his letters patent, embraces the entire spiral paddle wheel; the claim is, therefore, too broad upon the face of it, and the letters patent are void upon this ground, and the defendants are entitled to a verdict.

2. That the patent is void upon its face, for this, that, purporting to be a patent for an improvement, and specifying that the invention is of "an improved spiral paddle wheel, differing essentially from any which have heretofore been essayed," without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from the previously essayed spiral paddle wheels, it is wanting in an essential prerequisite to the validity of letters patent for an improvement.

3. That the patent is void upon its face, for this, that it embraces several distinct and separate inventions, as improvements in several distinct and independent machines susceptible of independent operation, not necessarily connected with each other in producing the result arrived at in the invention, and the subject matter of separate and independent inventions.

4. It appears in evidence, that the drawing and model of the paddle wheel of plaintiff, filed and deposited originally in the patent office, had been lost by the destruction of that office in December, 1836, and that in restoring the record of the patent, under the Act of March, 1837, the plaintiff sent from New Orleans to the office a new drawing, to be filed on the 5th of May, 1841, together with a court copy of the letters patent which were deposited in the 444*] office. The drawing was not *sworn to by the plaintiff, but remained in the office till January, 1844, when it was delivered to an agent of the plaintiff and sent to New Orleans, and sworn to by him, and filed in the department on the 12th of February, 1844. On an examination subsequently by the plaintiff, it was discovered that this drawing was imperfectly made, and thereupon a second drawing was procured by him, which he claimed and offered to prove to be an accurate one, and was sworn to, and filed on the 27th of March, 1844, an authenticated copy of which was offered in evidence on the trial by the plaintiff; which was objected to by the counsel for the defendants, but the objection was overruled and the evidence admitted, to which an exception was taken.

5. That if from the evidence the jury are satisfied that no propelling wheels were made by the defendants between the 27th of March, 1844, the date of the alleged completion of the record of the plaintiff's patent, under the Act of March 3d, 1837, and the commencement of this suit in April following, that, upon this ground, the defendants are entitled to a verdict.

The court charged, in respect to the instructions prayed for, that "the claim of the plaintiff was for an improvement on the spiral paddle wheel or propeller; that by a new arrangement of the parts of the wheel, he had been enabled to effect a new and improved application and use of the same in the propulsion of vessels; that the ground upon which the claim is grounded was this: it is the getting rid of nearly all the resisting surface of the wheels of Stevens, Smith and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft. It is claimed that a great portion of the old blade not only did not aid in the propulsion, but actually impaired its efficiency, and also that the improved wheel is made stronger. It was made a question on the former trial, whether the plaintiff did not claim, or intend to claim, the entire wheel. But we understand it to be for an improvement upon the spiral paddle wheel, claimed to be new and useful in the arrangement of its parts, and more effective, by fixing the spiral paddles upon the extremity of arms, at a distance from the shaft."

The court further instructed the jury, that "the description of the invention was sufficient, and that the objection, that the parts embraced several distinct discoveries, was untenable."

The court further charged, "that the damages were not necessarily confined to the making of the wheels between March, 1844, when the drawings were restored to the patent office, and the bringing of the suit. Such a limitation assumes *that there can be no infringe- [*445
ment of the patent after the destruction of the records, in 1836, until they are restored to the patent office, and that, during the intermediate time, the rights of patentees would be violated with impunity." We do not assent to this view.

In the first place, the act of Congress providing for the restoration was not passed till 3d March, 1837; and, in the second place, in addition to this, a considerable time must necessarily elapse before the act would be generally known, and then a still further period, before copies of the drawings and models could be procured. Patentees are not responsible for fire, nor did it work a forfeiture of their rights.

The ground for the restriction claimed is, that the community have no means of ascertaining, but by a resort to the records of the patent office, whether the construction of a particular machine or instrument would be a violation of the rights of others, and the infringement might be innocently committed.

But if the embarrassment happened without the fault of the patentee, he is not responsible for it; nor is the reason applicable to the case of a patent that has been published, and the invention known to the public. The specification in this case had been published. It is true, if it did not sufficiently describe the improvement without the aid of the drawing, this fact would not help the plaintiff. If there had been unreasonable delay and neglect in restoring the records, and in the mean time a defendant had

innocently made the patented article, a fair ground would be laid for a mitigation of the rule of damages, if not for the withholding them altogether; and the court left the question of fact as to reasonable diligence of the patentee or not in this respect, and also all questions of fact involved in the points of the case for the defendants to the jury.

The counsel for the defendants excepted to each and every part of the charge of the court, so far as said charge did not adopt the prayer on the part of the defendants.

The verdict of the jury was, that the said Peter Hogg and Cornelius Delamater, the defendants, are guilty of the premises within laid to their charge, in manner and form as the said John B. Emerson hath within complained against them, and they assess the damages of the said plaintiff, on occasion thereof, over and above his costs and charges by him about this suit in this behalf expended, at one thousand five hundred dollars, and for those costs and charges at six cents.

The judgment of the court was, that the said John B. Emerson do recover against the said Peter Hogg and Cornelius Delamater his damages, costs, and charges in form aforesaid 446*] *by the jurors aforesaid assessed, and also three hundred and twenty-four dollars and fifteen cents, for his said costs and charges by the said court now here adjudged of increase to the said John B. Emerson, and with his assent; which said damages, costs, and charges, in the whole, amount to one thousand eight hundred and twenty-four dollars and fifteen cents.

The cause was argued in this court, in printed arguments, by Mr. Upton and Mr. John O. Sargent for the plaintiffs in error, and Mr. Morton and Mr. Cutting for the defendant in error. The arguments were too voluminous to be reported in extenso, and it is not possible, therefore, to give more than extracts from each.

The counsel for the plaintiffs in error assigned as errors the following points:

I. The defendant in error has no patent for an improved spiral paddle wheel.

II. If the defendant's patent is for the combination of instruments described in the specification, there is no pretense that the combination has been infringed; if for several separate improved machines, it cannot be supported in law.

III. Defendant's patent is void for too broad a claim, and for not distinguishing his alleged improvement from other inventions, nor particularly specifying, as the statute requires, the particular improvement which he claims as his own invention or discovery. The case exhibits an improvement as the invention, and the claim is for the whole machine.

IV. The drawing filed March 27th, 1844, was not legal evidence of defendant's patented invention, because there was a drawing filed by the patentee on the 12th of February previous, which was, by the second section of the Act of 1837, with his letters patent, the only legal evidence of his invention, as patented, that could be offered in any judicial court of the United States.

V.—1. The patentee, after an alleged correction of the record of his letters patent, by filing the second drawing, could not, in law, avail himself of that alleged correction to cover by it alleged causes of action previously accruing; and in the absence of proof of any subsequent infringements, the plaintiffs here were entitled to a verdict below.

2. Nor was he entitled to recover damages for any alleged infringement prior to the alleged completion of his record by the filing of the corrected drawing of 27th March, 1844.

VI. What was reasonable time in this case for the restoration of defendant's patent to the office, if not expressly fixed *by statute [*447 (Act of 1837, sec. 2), was exclusively a question of law.

Mr. Upton, for plaintiffs in error:

I. This action was brought to recover damages from the defendants below, for their asserted infringement of an alleged patent of the plaintiff for "an improved spiral paddle wheel"; and the first question to which the attention of the court is requested is one which is presented upon the face of the letters patent, which constitute the basis of the action, and which are incorporated into the bill of exceptions; it is this: Has the defendant in error any such patent?

If it be manifest to this court, upon an inspection of the record and an examination of the letters patent, that he has no grant, as patentee, of "an improved spiral paddle wheel," then it is submitted, that there is no escape from the necessity of reversing the judgment which has been rendered, awarding him damages for the invasion of such a grant. This necessity is in no manner affected, though it appear that the objection was not taken in the court below, either at the trial or upon a motion in arrest of judgment. It is sufficient if the defect be manifest upon the record; for it would be monstrous to contend that this court is powerless in any case, to reverse the judgment, when it appears upon the record before them that the very foundation of the judgment is so incurably and fatally defective as to have been completely beyond the remedy of the party, though the objection were taken at the earliest possible stage of the proceedings. Authority can scarcely be necessary to sustain this position. But this court has decided, in the case of Slacum v. Pomery, 6 Cranch, 221, that it not too late to allege as error in the Supreme Court a defect which ought to have prevented the rendition of the judgment in the court below. "Had this error," say the court, " been moved in arrest of judgment, it is presumable the judgment would have been arrested"; and "there can be no doubt, that anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error." So, also, Garland v. Davis, 4 Howard, 131.

By the bill of exceptions it appears, that, upon the introduction in evidence of the letters patent by the plaintiff, "the counsel for the defendants did insist before the said Circuit Court, on behalf of said defendants, that the said letters patent so produced and given in evidence on the part of the said plaintiff, as aforesaid, were wholly insufficient as the basis of the aforesaid action and claim upon the said defendants." Now, by reference to the letters patent (page 7 of the record), the *court [*448 will perceive that the grant to the patentee,

upon the face of the letters, is for "an improvement in the steam engine," and for that alone; that it was for that alone that he solicited a patent by petition; that it was of that improvement only that he made oath that he was the original and first inventor. Such is the grant, and so it is recorded; and the public would seek in vain upon the records of the patent office for a patent to the plaintiff below for "an improved spiral paddle wheel."

It will not be contended that the letters, standing alone, confer any title to such an invention. But it may be said, that, inasmuch as the patentee has described a paddle wheel, and also an improved method of causing a capstan to revolve upon the deck of a vessel, as well as his improvement in the steam engine, and claimed these, as well as his steam engine, in his schedule annexed to the letters patent, the grant must be construed to cover the paddle wheel and the capstan, as well as the steam engine, though it be in express terms for the steam engine only, though it was for that alone that he solicited a patent, and it was that alone that he made oath he had invented. Were this doctrine maintainable, it is obvious that it would be wholly subversive of the policy of the law, which looks as well to the protection of the public as it does to the encouragement of inventors. That the schedule annexed to letters patent forms a part of the patent, and that they are to be construed together, is undoubtedly well established. This is the English doctrine, as well as that of our own courts; and, by a careful investigation of the authorities, it will be perceived that Mr. Phillips, in his elementary work (pp. 224 et seq.), is mistaken in supposing that there is any conflict between them.

By these authorities it is decided that the title of the invention, as contained in the patent, may be explained by its description in the specification, whenever such title is general, ambiguous, or uncertain; and the patent will be sustained in all cases, unless the patent indicate one invention, and the specification describe another and different invention. American authorities—Phillips on Patents, 224, and cases cited; Sullivan v. Redfield, Paine, C. C. R. 442; Shaw v. Cooper, 7 Peters, 292, 315; Evans v. Chambers, 2 Wash. C. C. R. 125; Barrett v. Hall, 1 Mason, 476; Whittemore v. Cutter, 1 Gall. 437; Evans v. Eaton, Peters, C. C. R. 341. English authorities—Godson on Patents, 108, 113, and cases; Neilson v. Harford, Webster, 312, and arg.; Rex v. Wheeler, 2 Barn. & Ald. 350; S. C. 3 Merivale, 629; Glegg's Patent, Webster, 117; Russell v. Cowley, Webster, 470; Household v. Neilson, Webster, 679.

When Mr. Phillips says (Phillips on Patents, 225), that any defect in the title may be rem- [*449] edied by the specification, what he means is apparent by reference to the cases which he cites. The description comes in aid of a defective title, but never can create a new title, by adding to the grant. There must be such a conformity between the title and the specification as that the former shall give some idea of the latter. It is the description of the thing patented "which is made part of these presents," not a description of something else, of which the title of the grant gives no idea.

Thus reads the patent itself. After reciting that John Brown Emerson had by petition solicited a patent for an improvement in the steam engine, had made oath that he was the first and original inventor of said improvement, and paid the fee of thirty dollars into the treasury it grants to him the exclusive right, etc., in the said improvement, "a description whereof is given in the words of the said John Brown Emerson himself, in the schedule hereunto annexed, and is made a part of these presents." Then follows the caption of the schedule, thus: "The schedule referred to in these letters patent, and making part of the same, containing a description in the words of the said John Brown Emerson himself of his improvement in the steam engine."

No reported authority can be found in the remotest degree sustaining the proposition, that a description and claim of anything contained in a specification are covered by the grant, though the grant make no reference to it, and the title is so entirely distinct from it as to suggest no idea of the thing described. Were this proposition tenable, then were we to strike out from this patentee's specification every word descriptive of his improvement in the steam engine, leaving nothing but the comparatively few words descriptive of the spiral paddle wheel and the improved capstan, the grant for the improvement in the steam engine must be construed as a grant for an improved spiral paddle wheel and an improved capstan. Now, would it not be monstrous to contend that an instrument of so solemn a character as a government grant of letters patent is to be added to and enlarged by construction?

The doctrine as settled, upon every principle of construction, is the true doctrine—that the description of the thing patented, contained in the schedule annexed to the patent, constitutes a part of the patent, and may be and should be resorted to, in construing the patent, to control the generality of the title and to explain or elucidate ambiguities or uncertainties; but that a description of a thing not indicated by the patent, not even remotely suggested by the grant or the title, can never be construed with the patent for the purpose of adding to or enlarging the terms of the grant.

That this doctrine may be made [*450 more obvious and conclusive—if it be possible or desirable—the court is referred to the provisions of the statute under which the letters patent in this case issued.

The inventor is required to present his petition soliciting the patent, and to take oath that he is the inventor. The statute further requires that the letters patent shall recite the allegations and suggestions of the petition, and give a short description of the invention. This requisition was obviously for the twofold purpose, 1st, that it might appear that the proper preliminary steps had been taken by the applicant, of which the recital in the letters was proof; and, 2d, that it might, on their face, be seen what was the nature and character of the grant. Act of 1793, secs. 1, 3. Now, did this patentee present his petition, soliciting a patent for an improved spiral paddle wheel, and make oath that he was the inventor of that improvement? If it be answered that he did, then the positive requisition of the statute is

not complied with, for the patent recites the allegations and suggestions, of no such petition, and gives a short description of no such invention; and for this reason the patent would be absolutely void.

This is well established in the following cases; Evans v. Eaton, Peters, C. C. R. 340; Kneiss v. Schuylkill Bank, 4 Wash. C. C. R. 9; Cutting et al. v. Myers, 4 Wash. C. C. R. 220; Evans v. Chambers, 2 Wash. C. C. R. 125.

If the letters patent do recite the allegations and suggestions of the petition, then the patentee did not solicit a patent for "an improved spiral wheel" or an "improved capstan"; he did not make oath that he had invented these improvements, and hence the letters contain no description whatever of these improvements, and confer no grant of an exclusive right in them upon the patentee.

[The counsel then quoted largely from the opinion of Judge Washington in Evans v. Eaton, Peters, C. C. R. 40.]

II. At the trial, the defendants' counsel requested the court to instruct the jury, "that patent of the plaintiff was void upon its face, for this, that it embraces several distinct and separate inventions, as improvements in several distinct and separate machines susceptible of independent operation, and not necessarily connected with each other in producing the result aimed at in the invention, and the subject matter of separate and distinct patents." The court charged the jury, that "the objection that the patent embraced several distinct discoveries is untenable." In this it is respectfully submitted that the court below erred.

The counsel here cited and commented on 451*] Phillips on *Patents. "It is well settled, that two or more distinct machines, capable of independent operations, cannot be united in one patent." 3 Wheat. 454; 1 Mason, 457; 2 Mason. 112; 1 Story, 290.

III. At the trial of this case, the counsel for the defendants requested the court to instruct the jury, "that the claim of the plaintiff, as set forth in his specification annexed to his letters patent, embraces the entire spiral paddle wheel; the claim is, therefore, too broad upon the face of it, and the letters patent are void upon this ground." Upon this point the court charged the jury as follows: "It was made a question on the former trial, whether the plaintiff did not claim the entire wheel; but we understand it to be for an improvement upon the spiral paddle wheel, claimed to be new and useful in the arrangement of its parts, and more effective, by fixing the spiral paddles upon the extremity of arms, at a distance from the shaft."

IV. At the trial, the counsel for the defendants also requested the court to instruct the jury, "that the patent is void upon its face for this, that, purporting to be a patent for an improvement, and specifying that the invention is of an improved spiral paddle wheel, 'differing essentially from any that have heretofore been essayed,' without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from the previously essayed spiral paddle wheels, it is wanting in an essential prerequisite to the validity of letters patent for an improvement." Upon this point the court charged the jury as follows: That "the claim of the plaintiff was for an improvement on the spiral paddle wheel or propeller—that by a new arrangement of the parts of the wheel, he has been enabled to effect a new and improved application and use of the same in the propulsion of vessels. That the ground upon which the claim is founded is this: it is the getting rid of nearly all the resisting service of the wheels of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft. It is claimed that a great portion of the old blade not only did not aid in the propulsion but actually impaired its efficiency, and also that the improved wheel is much stronger." And the court further charged the jury, that "the description of the invention was sufficient."

Upon these two points, it is submitted that the court below erred. They are so connected, by reason of the peculiar circumstances of the case, that they will be presented and considered together, though they are distinct grounds of objection to the patent.

*[The counsel then contended that [*452 the specification ought to be construed by itself, and be so clear as to be understood without resorting to evidence or any other source of information, and cited: English authorities —McFarlane v. Price, 1 Starkie, 199; In re Nickels, Hindmarch on Patents, 186; Hill v. Thompson, 3 Merivale, 622; S. C. 8 Taunton, 325. American authorities—Dixon v. Moyer, 4 Wash. C. C. R. 69; Evans v. Hettick, 3 Wash. C. C. R. 425; Lowell v. Lewis, 1 Mason, C. C. R. 189; Ames v. Howard, 1 Sumner, 482.]

This leads to the principle in the law of patents involved in the fourth point. It is the positive requisition of the statute, and has been repeatedly considered and passed upon by the federal judicial tribunals.

Before an inventor shall receive a patent, he is required, "in case of any machine, fully to explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions, and shall particularly specify and point out the particular improvement or combination which he claims as his own invention or discovery. The requisition of the English law is similar in this respect.

Now, before proceeding to consider whether the patentee, in this case, has complied with this positive and salutary requisition of the law the attention of the court is requested to the reported cases in which the requisition has received judicial construction.

By a careful examination of these authorities, it will be found established, that, where a patent is taken out for an improvement, the specification must describe what the improvement is, and the patent be limited to such improvement; if the patent includes the whole machinery, it includes more than the patentee invented, and is therefore void; that if the patent be for an improvement in an existing machine, the patentee must, in his specification, distinguish the new from the old, and confine his patent to such parts only as are new, and if both be mixed up together, and a patent is taken for the whole, it is void; that, however the authorities may apparently vary in pointing out the particular manner in which the patentee must specify his improvement, and

distinguish what he claims as new and his invention from what was old and before known, yet that they are in perfect harmony in deciding that he must do this in some manner, and upon the face of the specification. American authorities—Evans v. Eaton, 3 Wheat. 454; Woodcock v. Parker, 1 Gall. 438; Whittemore v. Cutter, 1 Gall. 478; Odiorne v. Winkley, 2 Gall. 51; Lowell v. Lewis, 1 Mason, 182; 453*] *Barrett v. Hall, 1 Mason, 447; Sullivan v. Redfield, Paine, C. C. R. 441; Evans v. Eaton, 7 Wheat. 408; Dixon v. Moyer, 4 Wash. C. C. R. 69; Isaacs v. Cooper, 4 Wash. C. C. R. 261; Cross v. Huntley, 13 Wend. 385; Head v. Stevens, 19 Wend. 411; Ames v. Howard, 1 Sumner, 482; Kneiss v. Schuylkill Bank, 4 Wash. C. C. R. 9; Morris v. Jenkins et al., 3 McLean, 250; Peterson v. Woodler, 3 McLean, 248. English cases—McFarlane v. Price, 1 Starkie, 199; Williams v. Brodie, Davies, Pat. Cases, 96, 97; Manton v. Manton, Davies, Pat. Cases, 349; Hill v. Thompson, 8 Taunton, 325; Minter v. Wells, 1 Webster, 130; Rex v. Nickels, Hindmarch on Patents, 186.

Now, apply the rule of law, as prescribed by the statute and construed by these authorities, to the patent in this case. Admit that rule, as most liberally stated, in any reported decision, and the counsel respectfully asks, in what manner, upon the face of the patentee's specification, has he distinguished that which he claims as new, and his invention, from what was old and before known, or pointed out in what his improvement consists? It is most confidently answered, that he has done this in no manner whatever, neither expressly nor by implication, nor by any reference, and it is not in the wit of man to determine, upon the face of the specification, what the improvement is which the patentee claims or intended to claim. The court below, in their construction of the claim, in charging the jury, say, that the improvement consists "in a new arrangement of the parts." Does this appear, either in terms, or even impliedly, upon the face of the description? So far from this, the last words of the patentee, in his description, are, that the "shape" of the thing is the "only point of importance." The court further say, that this new arrangement of the parts consist in "getting rid of nearly all the resisting surface of the wheel of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft."

Where, upon the face of the description, is there any mention made of Stevens', Smith's, or of any previously invented wheel, save in the general declaration by the patentee, that his improved wheel "differs essentially from any which have been heretofore essayed"—a declaration which the court, in the case of Barrett v. Hall, above cited, declare to be "no specification at all"? And where, upon the face of the specification, is there the most remote allusion to the "getting rid of resisting surface"?

V. At the trial of the case, "it appeared in 454*] evidence that the *drawing and model of the paddle wheel of the plaintiff, filed and deposited originally in the patent office, had *been lost by* the destruction of that office in *December, 1836, and* that, in restoring the rec*ord of the patent*, under the Act of March, 1837, the plaintiff sent from New Orleans to the office a new drawing, to be filed on the 5th of May, 1841, together with a court copy of the letters patent, which were deposited in the office. The drawing was not sworn to by the plaintiff, but remained in the office till January, 1844, when it was delivered to an agent of the plaintiff, and sent to New Orleans, and sworn to by him, and filed in the department on the 12th day of February, 1844. On an examination, subsequently, by the plaintiff, it was discovered that this drawing was imperfectly made, and thereupon a second drawing was procured by him, which he claimed and offered to prove to be an accurate one, and was sworn to and filed on the 27th day of March, 1844, an authenticated copy of which was offered in evidence on the trial by the plaintiff, which was objected to by the counsel for the defendants; but the objection was overruled, and the evidence admitted, to which an exception was taken."

It is contended that the Circuit Court erred in admitting in evidence the second drawing of March 27th, 1844, and in support of this position, the following considerations are respectfully submitted:

[The counsel then urged—

That the patentee had exhausted his privilege, when he swore to the first drawing.

That, if allowed to file more than one, he might continue to file them down to the day of trial.

That the first drawing became, by the statute, prima facie evidence of the invention, and there could not be two such.

That if this patentee had procured a re-issue of his patent, under the third section of the Act of 1837, he would not have been entitled to the privilege which he now claims, and it is unreasonable to suppose that Congress intended to give greater privileges under one section than another.]

VI. At the trial of this case, the counsel for the defendants requested the court to instruct the jury as follows: "That if, from the evidence, the jury are satisfied that no propelling wheels were made by the defendants between the 27th of March, 1844—the date of the alleged completion of the record of the plaintiff's patent, under the Act of March 3d, 1837—and the commencement of this suit in April following, that, upon this ground, the defendants are entitled to a verdict."

The court refused to grant this prayer, and left it, as a question of fact, for the jury to say whether there had or had *not been un- [*455 reasonable delay on the part of the patentee in restoring the record. Now, was this a question of fact? It is submitted that it was not, but that, under the circumstances, it was purely a question of law, to be passed upon by the court.

The record shows, that, from the burning of the patent office, in December, 1836, up to the month of May, 1841, no step whatever was taken by the patentee to restore the record of his patent, and that he then delayed to complete the record until the month of February, 1844. Of course, there could have been no dispute as to the fact in connection with the question of reasonable or unreasonable diligence. Now, the authorities are clear in establishing this

doctrine, that, when there is no dispute as to the facts, the questions of reasonable or unreasonable time, or delay, or diligence, are questions of law for the court, and not of fact for the jury. The following cases are referred to: Ellis v. Paige, 1 Pick. 43; S. C. 2 Ib. 71, 77, note; Gilbert v. Moody, 17 Wend. 354; Reynolds v. Ocean Ins. Co. 22 Pick. 191; Livingston & Gilchrist v. Maryland Ins. Co. 7 Cr. 506.

And now as to the charge of the court, that "the damages were not necessarily confined to the making of the wheels between March, 1844, when the drawings were restored to the patent office, and the bringing of this suit." Is not this error? Why was the drawing of March 27th, 1844, filed in the patent office? For the reason only, as avowed, that the drawing of February preceding was incorrect and defective. For the reason only that the public had no notice, or, what is still worse, that the public had an imperfect and deceptive information, by the first drawing of the particulars of the patentee's invention. Would it not be monstrous to allow a patentee to recover damages for an alleged infringement made at a time when, by his solemn oath, he declares that the defendant was not notified of the character of his invention?—nay, more, when he swears, that, at the time of the alleged infringement, the only recorded notice of his invention, sworn to by himself, was imperfect, incorrect, and insufficient.

But by an examination of the grounds upon which the court rest their decision upon this question, it will be seen in what manner the error has arisen. The court say, the limitation contended for by the defendants "assumes that there can be no infringement of the patent after the destruction of the records, in 1836, until they are restored to the patent office, and that, during the intermediate time, the rights of the patentees would be violated with impunity." With the greatest deference, it will appear, upon a consideration of the statute provisions, that the doctrine contended for involves no such assumption.

456*] *The second section of the Act of 1837 provides for the very difficulty which is urged by the court as the sole objection to the limitation contended for. Foreseeing that some time must necessarily elapse before patentees could be informed of their rights and duties, and prepare copies of their patents and drawings and models, Congress has provided, in this section, that, from the 15th of December, 1836, when the patent office was burned, to the 1st day of June, 1837, and not after, patentees and others may give in evidence their patents in any court, notwithstanding that they have not been re-recorded, and no verified drawing of the invention has been filed in the patent-office.

Is there not great danger, in the disposition to give the most liberal and enlarged interpretation to statute provisions for the protection and encouragement of inventors, that the rights of the public may be too much disregarded?

By the burning of the patent office, something more was involved than the loss of the evidences of the rights of patentees. The public were thereby deprived of the only notice which the law recognizes of what they could and what they could not do, without being subjected to prosecutions for invasions of patent rights. For the public, in the language of Judge Washington, in a case before cited, "can depend upon no other information, to enable them to avoid the consequences of litigation, than what the records may afford. No description of the discovery, secured by a patent, will fulfill the demands of justice and of the law, but such as is of record in the patent office, and of which all the world may have the benefit."

Now, Congress, in legislating to repair the loss of the patent office, and to provide against its natural consequences, had in view the protection of the public, as well as patentees; and while, on the one hand, it was justly considered that patentees ought not to suffer by reason of a loss arising from no fault of theirs, on the other, it was as justly considered that the public ought not to suffer by reason of a too long delay on the part of patentees to furnish to the public anew the recorded descriptions of their inventions. Thus the second section of the Act of 1837, saving the rights of patentees, enables them to recover damages for infringements after the burning of the patent office, and down to the month of June, 1837, notwithstanding the non-existence of any public record of their inventions; but, saving the rights of the public, the statute gives no further time.

Is not this clear? And being so, is it not manifest that the court below erred in the instructions given to the jury upon this point?

*The drawing of a patentee, annexed [*457 to his patent, or referred to in his specification, constitutes a part of the patent, and oftentimes, as in this case, is the most material portion of the description—without which the invention would be virtually undescribed. Now, when a patentee alters or amends his patent, whether in the written description or the delineated description, there is nothing better established than that he cannot recover damages for an alleged infringement committed prior to such amendment. The authorities to this point are conclusive, and in perfect uniformity; some of them, and those the most recent, going so far as to maintain that it makes no difference though the amendment be of a mere clerical error. In re Nickels, Turner & Phillips, 44; S. C. 1 Webster, 649; Hindmarch on Pat. Eng. ed. 216, et seq.; Wyeth v. Stone, 1 Story, 290; Woodworth v. Hall, 1 Wood & M. 248, 389.

It is submitted, that a denial of the doctrine here urged on behalf of the plaintiffs in error would be equivalent to an abrogation of the provisions of the thirteenth section of the Patent Act of 1837, which declares that a patent can only be amended by a surrender and reissue, and that the amended patent can only operate upon causes of action accruing subsequently to the amendment.

Construe the first section of the Act of 1837 as the court below has construed it, and what is the consequence? A patentee, whose grant is dated on or before the 14th of December, 1836, may maintain actions for infringement of his rights from then to the present time, without any public record of his patent whatsoever being in existence during the entire period, provided he produces at the trial an authenticated copy of his patent and drawings from the patent office, recorded there, perhaps

but the day before! From this consequence, it is submitted, there could be no escape, and small, indeed, would be the hope of escape for the innocent invader of the unrecorded right, with the question of reasonable diligence in the restoration of the record left to the decision of a jury.

Mr. Morton and Mr. Cutting, for the defendant in error:

I. The first point raised by the plaintiffs in error does not properly arise. The jury rendered a verdict for $1,500 damages. The amount in controversy being less than $2,000, the defendants below had no right to remove the cause to this court. They moved the Circuit Court for a new trial upon a case made, which motion was denied, and judgment was docketed upon the verdict. The defendants below then applied to the Circuit Court for the allowance of a writ of error, under the 17th section of the Act of Congress, approved July 458*] 4, 1836, *which authorizes writs of error in patent cases to the Supreme Court of the United States, in the same manner and under the same circumstances, as was then provided by law in other judgments and decrees of circuit courts, "and in all other cases in which the court should deem it reasonable to allow the same."

Having no right to a writ of error, therefore, unless the judges of the Circuit Court "should deem it reasonable to allow the same," application for the writ was made to the discretion of the court; and the application was granted so far as to allow the defendant to raise, for the consideration of the Supreme Court, five points specified by the court below, and which constitute the 2d, 3d, 4th, 5th, and 6th points now presented by the plaintiffs in error.† The defendants availed themselves of the permission to issue a writ of error, restricted as above stated, and now, after the writ has been allowed, they seek to argue a question not embraced in those specified by the court.

It is respectfully submitted that this course ought not to be encouraged, and that the grounds discussed in the first point taken by the plaintiffs in error need not be considered by the counsel for the patentee. It may be briefly remarked, however, that the point referred to was not raised at the trial, and does not appear upon the face of the record, or even upon the bill of exceptions. It was insisted below, that the patent was void for the reasons specified in the bill of exceptions. The court will search in vain for the question attempted to be discussed by the counsel for the plaintiffs in error in his first point.

Even if it were raised by the bill of exceptions, and were a point that could be argued here, it would be untenable. The argument appears to be, that the patentee has no patent for "an improved paddle wheel," because the title of the grant is for an improvement in the steam engine, and the counsel for the plaintiffs in error argues as if the letters and the schedule were not part of the same instrument. By taking the whole patent together, that is, the letters and the specification, there can be "no difficulty in ascertaining the ex- [*459 tent of the patent. It grants to the patentee the right of "making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said patentee himself in the schedule hereto annexed, and is made a part of these presents."

Thus the schedule is made a part of the patent, as much as if it were recited in the letters themselves. The grant is for the improvement described in the schedule, and by referring to the schedule, the improved paddle wheel is distinctly embraced as a part of the claim.

In the construction of patents, the schedule annexed must be always kept in view, and resorted to in order to ascertain what is the invention claimed and patented. If the claim or specification be more extensive than the actual invention, the patent may be void in part or in whole for that reason; but there can be no doubt that, prima facie, the patentee has a grant for all that he claims in the schedule annexed to his patent. The description in the letters of the thing invented is always very brief, because it points to and incorporates the patentee's specification and description annexed, and which usually sets forth minutely the whole claim.

The argument on the other side, as to the effect of a variation between the title of the patent and the thing patented and described in the schedule, assumes that a good and perfect specification and description of the invention claimed by the patentee may be utterly defeated by a defect in the title, so that a specification and claim free from all ambiguity will be rendered utterly worthless by a defect in what the counsel terms "the title" of the patent. A rule of construction so harsh and unreasonable would be most destructive in its consequences. If applied to the interpretation of statutes, it would nullify many of them that are free from doubt; not many of the acts of Congress would stand, if defective titles were declared to be fatal to the laws themselves.

The Patent Act of 1793, section first, provides that the Secretary of State may cause letters patent to be granted, "giving a short description of said invention or discovery." When the patentee presents his specification, it is referred to in, and made a part of the patent, and it is from the patent, with schedules and drawings taken together, that it is to be determined what thing is intended to be patented. Pitt v. Whitman, 2 Story, 621. Any defect in the title is remedied by a proper description in the schedule. Barrett v. Hall, 1 Mason, 477; Whittemore v. Cutter, 1 Gall. 437; Phill. Pat. 224, 225.

*In England, the rule appears to be [*460

†Writ of error allowed in respect to the question—

1. Whether the patent is void as embracing two or more distinct and independent inventions or improvements.

2. Whether the claim is for entire paddle wheel, *or only* for an improvement.

3. Whether the new is sufficiently distinguished *from the old.*

4. Whether the corrected drawing was properly allowed and filed.

5. Whether the rule of damages was correct, on condition that case be submitted on written argument to Supreme Court at ensuing term, before 1st of February, and judgment to be secured by filing the usual bond.

A copy of Judge Nelson's indorsement on petition for writ of error. Alex'r. Gardiner, Clerk.

different. There the patent is distinct from the specification, and controls it in construction, so that the patentee cannot cover anything by the specification which is not embraced in the patent. Campion v. Benyon, 3 Brod. & Bingh. 5; The King v. Wheeler, 2 Barn. & Ald. 345.

II. But the plaintiffs insist that the patent "is void, for the reason that it embraces several distinct and separate inventions, as improvements in several distinct and independent machines susceptible of independent operation, not necessarily connected with each other in producing the result arrived at in the invention, and the subject matter of separate and independent inventions.

It is clear from the specification that the patentee claims to have discovered an improvement in the steam engine and with it, in the mode of propelling vessels. He substitutes for the crank motion a mode of converting the reciprocating motion of a piston into a continued rotary motion, by a new combination of machinery for that purpose. From the revolving shaft described by him, a rotary motion may be communicated to paddle wheel or other objects. When used for steamboats, the patentee employs the improved paddle wheel described by him, which is necessary to be worked in connection with the other machinery. When a capstan is required, as on board of a steamboat, he describes the mode of connecting the shaft of the engine with the capstan, so that it may be made to revolve by the action of the shaft; and he claims as his invention the substituting for the crank, in the reciprocating engine, a grooved cylinder, operating as described; the paddle wheel constructed and operating as set forth, and the application of the revolving vertical shaft to the turning of a capstan.

Now, it is manifest that the invention is a mechanical unity. The improved engine and paddle wheel are intended to act together, and if a capstan be used, the improved engine is made to connect with and turn the capstan, as it does the paddle wheels. Although the engine may be applied to the old fashioned wheel and though it may or may not be attached to the capstan, yet it is manifest that the improved engine connected with the paddle wheel, or with a capstan, may be used in connection to produce or aid the result designed by the patentee, viz., the propulsion or navigation of a vessel.

[The remainder of the argument upon this head is omitted.]

III. The defendants prayed the court to instruct the jury, "that the claim of the plaintiff, as set forth in his specification annexed to his letters patent, embraced the entire spiral paddle wheel; that the claim was, therefore, too broad upon the face of it, and the letters patent were void upon that ground.

461*] *The court charged the jury that "it was made a question on the former trial, whether the plaintiff did not claim or intend to claim the entire wheel; but we understood it to be for an improvement upon the spiral paddle wheel."

The counsel for the plaintiffs in error supposes that the court below arrived at this conclusion, not from the face of the patent, but from matters dehors the specification. This assertion is unfounded. The view of the court below is the result of a just construction of the patent itself.

It is difficult to perceive by what course of argument the patent can be shown to be too broad upon its face. By the expression "too broad," I presume, is intended that the patentee claims more than he has invented. This is usually a question of fact, dependent upon the proofs at the trial. The face of this patent certainly does not disclose the fact that the patentee has a grant for anything of which he does not claim to have been the inventor. The counsel for the plaintiffs has not discussed this point, except so far as his observations under his fourth point may be applicable to it; and it is therefore not deemed necessary here to enlarge further upon this branch of the case, except to observe that the patentee does not claim to be the inventor of "paddle wheels," nor of "wheels acting on the spiral or screw principle;" on the contrary, he refers to wheels previously "essayed," upon which wheels the patentee claims to have improved. What he does claim, then, is an improved spiral propelling wheel, constructed and operating under water in the manner described, which improvement, as described in the schedule, is new, and is the invention of the patentee.

IV. It is insisted, that the court below ought to have charged the jury as prayed for: namely, "that the patent is void upon its face for this, that, purporting to be a patent, for an improvement, and specifying that the invention is of an improved spiral paddle wheel, differing from any which have heretofore been essayed, without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from previously essayed spiral paddle wheels, it is wanting in an essential prerequisite to the validity of letters patent for an improvement."

The court refused so to charge, and held that the description of the invention was in this respect sufficient.

The point now raised is one purely technical, because it must be assumed after verdict, and upon the bill of exceptions, that the patentee was the real inventor of what he claims; that de facto he has not claimed as new that which had been known before; that the improvement is useful, and that the specification is so full and clear, and free from ambiguity, that *any mechanic skilled in the art of [*462 making propellers could, by following it, construct the thing patented.

But however meritorious the invention may be, yet it is contended that the patent ought to be adjudged void, because it does not point out the difference between the improved propeller and all other propelling wheels previously essayed.

The object of pointing out the old from the new is, that the public may be informed what the party claims as his invention, and may ascertain if he claims anything in common use.

The law does not require that he should describe the various paddle wheels then known, or point out the differences between them and his improvement; such a rule, even if practicable, would be too onerous to be endured.

Take, for example, a patent for an improvement upon all stoves previously essayed; it would be unreasonable to prescribe that the specification should describe all the stoves in use, or that had ever been essayed, and that it should point out the difference between them and the particular improvement; such requirement would be impracticable. When Emerson applied for his patent, in 1834, there were a very great number of paddle wheels and propellers known, or which had been essayed, many of which had been patented in this country and in England. Now, it was not necessary for him to have described all these various wheels and propellers. It is enough if he has specified his own improvement; and if he has done so in an intelligible form, his patent is good on its face, although, when tested by evidence dehors the patent, it might appear that he has claimed what was old, and thus his patent might be defeated.

In Evans v. Eaton, 7 Wheat. 435, the rule is thus expressed: "We do not say that the party is bound to describe the old machine, but we are of opinion that he ought to describe what his own improvement is, and to limit the patent to such improvement. The law is sufficiently complied with by distinguishing in full, clear, and exact terms the nature and extent of his improvement only."

Most of the authorities cited by the counsel for the plaintiffs in error, under his fourth point, are referred to by Phillips, in his work on Patents, and the rule that he deduces from them is thus stated, at page 269:

"In specifying an improvement in a machine, it is often necessary to describe the whole machine as it operates with the improvement, in order to make the description intelligible, and enable an artist to construct the machine, as the inventor is bound to do in his description, and which if he fails to do, he falls into the fault of obscurity; on the other 463*] hand, if the whole *machine, as well the old as the new part, be thus described, it is requisite to distinguish what part the patentee claims, since, if this does not satisfactorily appear, the patent will, as we have seen, be void for ambiguity; or if the obvious construction is, that he claims the whole machine in its improved state, the patent will be void by reason of the patentee's claiming too much. The mode of expression generally used in the books, in relation to this subject is, that the specification must distinguish the old from the new. The only object of this distinction is, however, to specify what the patentee claims, and the mere discrimination of the new from the old would not necessarily show this, for perhaps he does not claim all that is new. When the cases say, therefore, that the specification must distinguish the new from the old, we must understand the meaning to be, that it must show distinctly what the patentee claims, the only object of this distinction being for this purpose. This doctrine is illustrated by some of the cases already stated, and it runs through them all wherein this question arises."

Most of the patents describe the improved machine only, as will be seen by referring to the specifications in the patent office, and to *the reports* of patent cases.

It has been, of late years, the practice of the courts of this country to give effect to patents, if possible, rather than to destroy them; and to this end, mere technical objections are no longer encouraged. The rigorous rules of the English courts, and of some of our earlier cases, by which meritorious patents were frequently overturned, have given place to more liberal and enlightened principles.

[The remainder of the argument upon this head is omitted.]

V. The authenticated copy of the corrected drawing, filed in the patent office on the 27th of March, 1844, was correctly admitted.

The original drawing, filed with the patent in 1844, had been destroyed by fire; the patentee could not of course produce the original, and he therefore resorted to the next best evidence that the nature of the case permitted; this consisted of a copy which the plaintiff below offered to prove to be an accurate copy of the original; and this copy so offered was duly authenticated in the manner provided by the first and second sections of the Act of March 3, 1837.

Upon the strictest principles of the law of evidence, the plaintiff below was entitled to prove what the original drawing really was. The original being lost, the next best evidence of it was an exact copy, proved to be accurate.

This proof would have been admissible and proper, irrespective *of the Act of 1837, [*464 and whether the copy so offered was a record of the patent office or not. Suppose the Act of 1837 had never been passed, and the plaintiff had proved the destruction of the original drawing, he might have produced upon the trial a copy of it; and after proof that it was a true copy, he would have entitled himself to read it in evidence.

But there can be no reasonable doubt that the corrected drawing, filed on the 27th of March, 1844, was properly received by the patent office, and that an authenticated copy thereof was admissible as evidence under the provisions of the Act of 1837.

That act was remedial in its character; its object was to restore the records, and to repair the loss occasioned by the fire. To that end, it was of the highest public importance that the specifications and drawings should be correctly and accurately restored. To have received imperfect or inaccurate copies would have increased, and not have remedied, the mischief, and to assert that the patent office had exhausted its power to restore models and drawings by the reception of what were not copies or true representations of the originals would be to give a construction to the statute that would defeat its object.

The first section declares, "that it shall be the duty of the commissioner to cause the copies offered by the patentee, or any authenticated copy of the original record, specification, or drawing, which he may obtain, to be transcribed," etc. It is not only within the powers of the department to receive corrected drawings or models, in place of those that prove to be inaccurate or imperfect, but it is the duty of the commissioner to obtain exact substitutes for the originals, if possible; and if those already filed are shown to be erroneous, imperfect, or untrue delineations of the originals, it is the duty of the commissioner to replace them

with corrected copies. In this way only can the objects of the act be accomplished. To deny this power would be to perpetuate errors.

VI. The court below properly refused to charge the jury that the defendants were not entitled to a verdict, if they were satisfied that no propelling wheels were made between the 27th of March, 1844, and the commencement of the suit.

The defendants excepted to the charge so far only as it did not adopt the prayer insisted on by them.

The prayer upon this point insists that the defendants were entitled to a verdict, if no wheels were made by them after the 27th of March, 1844, no matter how often they had infringed the plaintiff's patent prior to that date. It assumes that all persons may, with impunity, infringe upon all or any patents intermediate between the destruction by fire of the rec- [*465 ords of the patent *office, and the complete restoration of them under the act of 1837. If the principle contended for be sound, then the patentee has no remedy for willful and deliberate violations of his patent committed intermediate the destruction of the records of the patent office and the complete restoration of them, no matter how public and notorious the patent may have become, and no matter how extensively the patent may have been published and circulated in works of art or otherwise.

This principle cannot be sound; and the defendants' prayer and exception raise no other question. The prayer assumes the broad ground that there is no liability for infringements committed prior to the restoration, not only of the patent itself, but of the drawings, and that the patentee is not entitled even to nominal damages.

The patent, in the present case, had been restored and recorded anew long before the 27th of March, 1844, namely, in the year 1841; the recorded copy of the specification and claim was correct, and disclosed the patentee's right; and yet the court was asked in effect to charge the jury, that infringements might be perpetrated with impunity at any time after the fire, and at any time after the recording anew of the letters and schedule, until the 27th of March, 1844.

The letters patent were published in the Franklin Journal in 1834, were filed anew in 1841, and of themselves were sufficient to protect the patentee, even if the restoration of the drawing had been imperfect.

The views of the learned judge in his charge need no illustration; he charged the jury as favorably for the defendants as they had a right to request.

The complaint of the counsel for the plaintiffs in error, that the court left the question of unreasonable delay, on the part of the patentee, in taking measures to restore his records to the jury, is not properly urged, upon the present writ of error, because—

1. It is not one of the five points that the court below allowed to be raised.

2. That part of the charge was not excepted to at the trial, and, on the contrary, the exception was limited to the point taken in the defendant's prayers.

3. Even if this point were properly before the court, it is clear that the question whether the patentee had been guilty of unreasonable delay and neglect in restoring the records was a question of fact upon the evidence then before the court.

It was a question of fact, submitted to the jury for the benefit of the defendants below; for if there had been such neglect or delay, the court instructed the jury, that, if the defendants *had innocently made the patented [*466 article, it would be a fair ground for a mitigation of the rule of damages, if not for the withholding them altogether.

The charge was as favorable to the defendants as the law and the evidence would permit.

Mr. John O. Sargeant, for the plaintiffs in error, in reply and conclusion:

It is objected to the first point raised by the counsel for the plaintiffs in error, that it is not properly presented to the court, though it is admitted to arise upon the record. The argument is, that the court below intended to restrict the plaintiffs to the consideration of certain specified questions. True it is, that the court struck out from the bill of exception several points on which the plaintiffs relied; but the object of the court in so doing is misapprehended. It was the purpose of the court merely to disembarrass and relieve the record of objections which they considered ill-taken, and the discussion of which they deemed unnecessary. That besides this limitation, of which the plaintiffs have not complained, it was the intention of the court to cut them off from their right of dealing with this record according to law, is not to be presumed or implied. No doubt whatever is entertained by the counsel for the plaintiffs that the objection is well raised on the record, and that it is fatal to the defendant's claim.

I. The point made is, that the defendant in error has no patent for an improved spiral paddle wheel.

The learned counsel for the defendant is mistaken in supposing that the argument of plaintiff's counsel proceeds upon the idea that the letters patent and the specification are not parts of the same instrument. The specification forms a part of the patent, and they are to be construed together, but construed with reference to the fundamental principle of interpretation, Quoties in verbis nulla ambiguitas, ibi nulla expositio contra verba fienda est--or, as it is sometimes laid down in the books, "No construction shall be made contrary to the very express words of a grant."

In construing this instrument, we must look to the situation of the parties, and the mode in which it was prepared. The formal letters patent speak the language of both parties. In the instrument of grant, there is nothing equivocal or ambiguous. It is not capable of being misunderstood. No ingenuity can extort a double meaning from it. Mr. Emerson made oath that he was the inventor of an improvement in the steam engine; solicited a patent for said improvement; received a patent reciting the exclusive privileges vested in him in said *improvement, and making the de- [*467 scription of said improvement contained in the schedule annexed a part of his patent. All this must be taken as absolute truth. The patentee claiming under this instrument is bound by its recitals, and estopped from denying anything that it alleges. The letters patent, in fact, are the joint production of the

grantor and grantee. The Secretary of State adopted the description of his improvement which the grantee furnished in his petition. The entitling of the schedule is debatable ground. This may have been the work of the grantee alone, or of a clerk in the department. In either event, it indicates the intention of the parties, and, as if to exclude the possibility of the grantee's taking an exclusive privilege to any other thing than that contemplated and expressed in the patent, the heading or title of the schedule recites, in effect, that said schedule is made a part of the patent, so far as it contains a description of the improvement in the steam engine, and no farther.

The language of the parties indicates plainly enough what was intended to be granted, and what was actually granted. Then comes the descriptive part of the schedule, or the specification, in the words of the grantee alone. This contains a particular description of the improvement in the steam engine secured by the patent. It then describes an application of this improved engine to turn the capstan on the deck of a vessel; and an improved spiral paddle wheel, alleged to differ materially from those previously essayed. Now, the ground taken by the counsel who opened this case is simply this, that Mr. Emerson cannot, by the introduction of new matters in his specification, make his patent operate as a grant for the improvement mentioned in his petition, oath, and letters; and also as a patent for other things not mentioned in such petition, oath, and letters. It is respectfully submitted, that such is clearly the law.

It is presumed that there is no difficulty in the court's taking judicial notice of anything involved in the construction of a patent, which a judge at nisi prius would know without the aid of a jury. If this view is correct, the court will know that an improved steam engine is not an improved paddle wheel, and was not at the time this patent was issued. This being so, the improved spiral paddle wheel is not only not in terms included in this patent, but is by legal implication as absolutely excluded from the patent as if it were excluded in express terms. In the fair, natural, obvious interpretation of this grant, collecting its meaning from the terms used in it, understood in their plain, ordinary, and popular sense, the improved steam engine is the subject, and the sole subject, of 468*] Mr. Emerson's *patent. Apply these principles, which, in the language of a learned and eminent judge, furnish a "rule of construction which applies to all instruments," and they establish beyond a question that Mr. Emerson has no grant for an exclusive privilege in a spiral paddle wheel.

And, first, because the force of the schedule is thus restrained in express terms by the patent, and these terms are the language of both parties. Again, because the language of the schedule is throughout the language of the grantee alone, and binds the grantor only so far as it has been expressly, or by necessary implication adopted by him. Now, the duty of the Secretary of State, under the Act of 1793, was purely ministerial. He took no such judicial cognizance of specifications as is now rigidly exercised by the commissioner of patents. The grantee might have included many distinct machines in his schedule, and the Secretary of State was not called upon to notice the fact, did not notice it, and could not have prevented it. The patent was within his control, and the schedule so far as it was made a part of the patent, but not otherwise. He could so far restrict it as to limit its effect to the description of the thing patented, and to that extent he did in fact, in express terms, limit it. Beyond this he had no jurisdiction. The same is true of the Attorney-General. It was his duty merely to see that the patent purported to embrace but one improvement, and that the specification was signed by the patentee, and attested by two witnesses. His duty was then discharged, and he certified to the patent's being conformable to law. Now, is it not against reason, and therefore against law, to say that such a schedule, made by the grantee alone, and not examined by the grantor, is in any other respect, and to any greater extent, operative in conferring exclusive privileges, than it is made so by the mutual assent of the parties, expressed in their common and joint language in the patent itself? Can such recklessness and improvidence in the issue of its grants as a different construction would establish be attributed to any government? If the schedule had contained the specification of a spiral paddle wheel alone, would it have been patented under the terms of this grant? Would the patentee in that case have complied with that provision of the statute of 1793 which required him to "recite" his invention in his petition? Would his oath to the invention of an improved steam engine then have covered the invention of a spiral paddle wheel? And if not in that case, why in this? Does the mere fact of describing the improved steam engine in the schedule incorporate in this patent an improved paddle wheel, which would not have been incorporated if the improved steam engine had been omitted altogether? If such is the construc- [*469 tion to be put upon these instruments, the secretary might as well have issued his letters patent in blank, and suffered individuals to fill them up at their pleasure. The petition, the oath, the description, the grant, the signing by the secretary and President, the reference to the Attorney-General, were all superfluous. But, say the counsel for the defendant in error, the schedule is a part of the patent, and if the schedule contains a description and claim of a machine, that machine becomes the subject of the exclusive privileges granted by the patent, just as much as if the inventor had petitioned for, sworn to, paid for, and received a patent for the same. This understanding of the matter would have been a very convenient one for a patentee under the law of 1793, because it would have enabled him to include in his letters the inventions of others, without incurring the penalties of perjury; and as many of them as he pleased at the expense of a single fee. With all deference, but with all confidence, it is repeated, that the schedule is so far a part of the patent as it contains a description of the thing patented, and no farther. It is the description of the improvement patented contained in the schedule, which is the specification that forms a part of the patent. It is in this view that the language of the court is to be applied, when they say that the specification is

a part of the patent, and that the whole is to be taken together, and construed as one instrument. As a general thing, under the law of 1793, the schedule contained only such a specification; in contemplation of law it never can contain any other; if it contains anything more, the excess is surplusage. If it does not vacate the patent, it is at least inoperative—it cannot enlarge the grant.

On the English cases there would be no doubt on this point. For the non-conformity between the title in the patent and the description in the specification, the patent would be declared void on two grounds: 1st. For the false suggestion in the petition. 2d. For the claim in the specification of an improvement not within the true meaning and extent of the grant.

Either of these objections would render a patent in England absolutely void. 1st. Because the crown has been deceived. 2d. Because the inaccurate title is calculated to deceive the public.

These consequences flow, not from any special provision in the English patents or statutes, but from principles of the common law applicable to all public grants. These principles apply with equal force to public grants of the United States, unless there is some provision in our patents as issued, or in our stat- [*470 utes *on this subject, rendering them inapplicable. It is submitted, with all deference, that no such provision can be found, and that the reasons for sustaining them in their full effect are stronger under the system established by our act of 1793, than under the English system.

[The remainder of the argument upon this head is omitted.]

II. It is again objected by the counsel for the defendant in error, that there is nothing in the exception to the ruling of the court in regard to the insertion of several claims for distinct and separate machines in the specification.

The case of the defendant is obviously very much distressed by this point, and his counsel protest strongly that the inventions described exhibit a "mechanical unity," being all a means of propelling vessels. To maintain this proposition they resort to a very extraordinary mechanical discussion, to show that, by means of the capstan, without regard to the motive power of the engine, they could propel a vessel. If this be so, and the counsel should present their argument to the commissioner of patents in the shape of a specification, they might readily obtain a patent for it if a new and useful invention. They think, if a vessel with Mr. Emerson's machinery on board should be becalmed, without fuel, that, by applying "the motive power" by manning the capstan, motion would thereby be communicated to the propeller. The answer to this is, that no such application is contemplated by the patentee; and to arrive at it the learned counsel is compelled to sever and destroy his mechanical unity, by leaving the steam engine useless for the want of fuel.

The question is now, for the first time, distinctly presented to this tribunal, and the doctrine on this subject is to be settled by the judgment of the court in this case. It is a question of no inconsiderable public importance, and it is desirable that it should be adjudicated on plain and substantial grounds. All inventions are supposed to conduce more or less to one common object, to wit, the benefit of the public. This common purpose is probably too remote to sustain the introduction of all manner of inventions into the same patent; but, for all practical purposes, it is precisely as approximate and tenable as the common purpose claimed for the patentee in this case.

It is most humbly submitted, that the doctrine of this court, as suggested in Evans v. Eaton, is the true doctrine on this subject. "On the general patent law a doubt might well arise whether improvements on different machines could regularly be comprehended in the same patent, so as to give a right to the exclusive use of the several machines separately, as well as a right to the exclusive use of those machines in combination." *This lan- [*471 guage obviously contemplates a case in which the machines patented might be used in combination; and the whole force of Mr. Justice Marshall's very sound and pregnant suggestion is destroyed the moment the converse of the proposition is established, namely, that when machines are capable of being used in combination, then any number of them may be united in the same patent. The language of the court in the case cited applies only to the case where the machines in question are capable of acting together; withdraw such cases from the operation of the principle propounded by the court, and there is an end of it. And yet this doctrine, as laid down by the court in that case, is daily acted upon by the patent office, under the Act of 1836; and if it is materially shaken or qualified, the revenues of the department will be very seriously diminished.

The suggestion in Evans v. Eaton, on this point, was much considered in Barrett v. Hall, and it may be said that no cases on record present more masterly expositions of the principles of patent law which they discuss. Wyeth v. Stone stands on the extreme verge of sound principle; but there the two instruments were in fact but part of one and the same machine. The instruments contemplated in that case formed a compound machine for cutting ice. They were, in fact, but parts of one and the same instrument. Two things cannot be readily imagined more absolutely distinct and separate instruments, than a steam engine and a paddle wheel. A steam engine is employed to give motion to every manner of machinery. A paddle wheel may be turned by horse power, or man power, or windmill power, as well as by a steam engine. Here the engine is the motive power; the wheel is the thing moved. The engine might be well employed to move anything else; the wheel might well be put in action by any other motive power. They are as distinct and separate as cause and effect, and cannot be united in one patent, except upon principles that would entirely nullify the rule of law laid down in Evans v. Eaton and Barrett v. Hall, and admit of the introduction in the same patent of entirely distinct and separate machines.

It is suggested, that a different doctrine from that contended for by the plaintiffs prevails in England. We have cited no English authorities on this point. It arises on our own statutes, and is so rested by Mr. Justice Marshall,

There is no hardship in the rule contended for. In no other way can the subject matter of an invention be distinctly brought out, so as to warn the public against undesigned infringements. If several machines can be mixed up in one specification, and several improvements on each, and then patented in the name of 472*] *one of those machines, it is respectfully, but earnestly, insisted, that the patent office cannot fail to become the source of more oppression and outrage than will be long tolerated by a people who are masters of their own institutions. Under such an understanding of the law, letters patent will be regarded by the public as mere charters of iniquity, and the whole system must be swept away. It must be as impracticable to sustain such an institution in the United States is it would be to establish the Inquisition here, or vest in the government those odious prerogatives the abuse of which lead to the English statute of monopolies.

It is most humbly submitted, then, that, on the authorities and on the reason of the case, there was error in the charge of his honor, the circuit judge, that "the objection that the patent embraces several distinct discoveries is untenable."

III. Counsel for the defendant in error cannot perceive by what course of argument this "patent" can be shown to be too broad upon its face. We are embarrassed somewhat in reasoning upon this case, because it is an anomaly. This is the first attempt on record to sustain a grant of an exclusive privilege by virtue of letters patent which contain no allusion whatever to the alleged subject matter of the privilege which is set up under them. We repeat, and to this point pray the special attention of the court, that, among the many hundred patent cases that have been adjudicated in this country and in England, not one such case is reported. In discussing analogies, therefore, we must waive for the time the great difference between this and all other cases, arising from the fact that the patent before us contains no grant of an exclusive privilege in a spiral paddle wheel.

Plaintiffs' counsel do not allege, therefore, that this patent is too broad upon its face. It is as broad upon its face as the law will allow. It is broad enough to cover an improved steam engine, and no more broad. It is made void by attempting to include more in the specification than is included in the grant, and more in the claim than is shown to be of the patentee's invention. The objection of plaintiffs' counsel is, that the claim is broader than the invention.

The claim is for the entire spiral paddle wheel, constructed and operating as set forth; and more than that, it is for such a machine "not confined to precise forms or dimensions, but varied as experience or convenience may dictate, whilst the principle of action remains unchanged, and similar results are produced by similar means."

Here is a claim for the entire wheel, to be varied as the inventor may see fit to vary it, 473*] and for every other wheel operating *on the same principle, and producing similar results by similar means. It is a claim, as broad and distinct as language can make it, for the *spiral propelling wheel*, and every part of it, and for liberty to vary it in form as the inventor pleases, as long as a similar result—to wit, the propulsion of vessels—is produced by similar means—to wit, by a spiral wheel. The result contemplated is propulsion; the means or instrument is a spiral wheel, of such form as experience or convenience may induce the inventor to make, without changing the principle of action. Such is the claim; and if the claim is a valid one, no man can effect the propulsion of a vessel on the principle of action contemplated by a spiral wheel, without invading Mr. Emerson's claim.

But, while such is the claim with which Mr. Emerson arms himself, and goes out among men, as Lord Kenyon expressed himself in a similar case, "hanging terrors over the unlearned," when we come to examine the specification of his wheel, we find an implied acknowledgment that it is only an improvement, and merely an implied acknowledgment. He speaks of an "improved spiral paddle wheel," leaving the unavoidable inference, that he has improved the ordinary paddle wheel by making it spiral, and that the spiral feature—or, as he subsequently describes it, his spiral trough—is the only material part of his improvement.

Here is the old defect, that has been decided over and over again to be fatal—the invention of an improvement, and the claim of the whole machine. No ingenuity can withdraw this case from that large class of cases in which the rule we contend for has been laid down with a distinctness that cannot be mistaken, and applied with a wise, uniform, and unrelenting firmness. The courts say, that no man shall give that false color to his claim which may enable him to "hang terrors over the unlearned." The case before the court is Jessop's case, where the patent was for the whole watch, and the invention of a particular movement. It is the case presented in Williams v. Brodie, where the invention was an improvement on a stove, and the patent for the whole stove. It runs on all fours with Cross v. Huntley, where the invention was of an improvement in the washing machine, and the claim was for the whole machine; where the court did not hesitate, in an action where the patent came up collaterally, to declare it void. It is Bovile v. Moore, where the patent for an improvement on a lace machine was held void, because the claim was for the whole machine, though a considerable part of it had been long in use.

There is no matter of fact to be found, in order to bring out this defect, that the law may be applied to it. *It lies on the face of [*474 the specification. Jessop, Williams, Cross, and Bovile showed that they had invented improvements, and claimed the entire machines. Emerson suggests that he has invented an improvement, and claims the entire machine. Where is the difference? What subtlety can distinguish between these cases? And why should we seek to establish thin, fine, and subtle distinctions, in a case where the policy of the law is so plain, obvious, and honest, and where the great end to be attained is to prevent patentees from "hanging terrors over the unlearned?"

These cases, it may be said, are not binding authorities upon this court. They are not so

cited. No weight is claimed for them beyond that which they derive from their intrinsic good sense and sound reason. Their authority, as well considered decisions, has never been judicially disturbed or questioned. But there is a case of controlling authority—that of Evans v. Eaton—sustaining the doctrine for which we contend to its full extent. To this case I shall have occasion again to refer, in considering the fourth head of the argument of the learned counsel for the defendant, to which I now pass.

IV. The fourth point discussed by the learned counsel for the defendant touches the second prayer made to the court below.

Plaintiffs contend that Mr. Emerson's specification does not define with precision the nature and extent of the alleged improvement in the spiral paddle wheel, but describes the whole machine, and claims the whole as improved, without distinguishing the new from the old. A patent with such a specification cannot be supported. This doctrine rests so firmly on the authoritative decision of this court, that it may well be left to authority. We shall, therefore, merely allude to the obvious reason for it which is to limit the exclusive privilege to the actual improvement, and disarm the patentee of the power of "hanging terrors over the unlearned," and practicing upon the fear and credulity of the public, by "pretending that his invention is more than what it really is, or different from its ostensible objects." If a patentee can mix up a single undefined improvement in details of the construction and operation of an old machine, and then claim the whole machine constructed and operating in the manner set forth, then a patent, instead of being merely the reward of meritorious invention, is a device to encourage litigation, extortion, and fraud. Such a patent shifts its grounds at every trial, changes its color according to the aspect in which it is presented or met, and adapts itself with a fatal elasticity to the length and breadth of the evidence which happens to be applied to it.

475*] *[The remainder of the argument upon this head is omitted.]

V. Now, with regard to the drawings. It appears from the record (p. 10), that two drawings were filed by Mr. Emerson in the patent office, under the Act of 1837; one as early as 1841, which was refiled, with the plaintiff's oath to its correctness, on the 12th of February, 1844, and the other, with the same oath, on the 27th of March, 1844. The second drawing was the one produced and relied on by the plaintiff below as constituting, with the letters patent, that certified copy of the renewed record in the patent office which the second section of the act last cited makes the only proof of the alleged patent admissible in any judicial court of the United States.

The learned counsel for the defendant in error suggest, that, after the original drawing was destroyed by fire, the next best evidence of it was an accurate copy of it, offered to be proved such. It is submitted, with great deference, that a drawing of Mr. Emerson's paddle wheel, filed in March to lay the foundation of a suit in April, was not the next best evidence of the alleged original, for the reason that there was another drawing, previously filed and sworn to, which was something more than next best evidence of the lost original, being made by statute absolutely the only evidence of it that could be received in any judicial court of the United States. It might, indeed, be well contended, that the first filed drawing did not at all partake of the character of secondary evidence. It became, by force of the statute, to all legal intent, the original drawing. It filled the place of the original drawing on the record, being verified by the same oath, vesting the same rights, construed in the same way as part of the specification, and conclusive proof of all that it purported to prove, until it should be rebutted. The letters patent and first drawing filed by Mr. Emerson, under the first section of the Act of 1837, became, by virtue of the second section, as far as the patentee was concerned, primary evidence. It was open to observation and impeachment to all the rest of the world; but by operation of the statute, in connection with well established principles of law, it was at all events conclusive upon the patentee. The drawing, therefore, filed on the 27th of March, 1844, was not in law the "next best" evidence of Mr. Emerson's original drawing, because there was a prior drawing filed on the 12th of February, which the statute had expressly declared to be the legal original, at least for all purposes of litigation.

[The remainder of the argument upon this head is omitted.]

VI. On the question of damages, counsel for the defendant insist that there was no error in the charge of the learned judge, that "the damages were not necessarily confined to the *making of the wheels between March, [*476 1844, when the drawings were restored to the patent office, and the bringing of the suit." Such a limitation was prayed below, and, as it was supposed, on well established principles of law and equity. It is again pressed, with all deference, but with perfect conviction, that the refusal of the prayer was error, for which the judgment under consideration ought to be reversed.

The Patent Act contemplates, that everything to be done by an inventor, with respect to his specification and drawings, is to be done before the patent issues. There is no such thing as correcting the record of a specification or drawing by mere substitution of some other specification or drawing. After the patent issues, the patentee cannot, by merely depositing a new drawing, on any plea whatever, make it a part of his patent, or any evidence whatever of his invention, as originally patented, so as to cover cases of alleged infringement prior to such change in the record. There can be only one motive of desiring to add a new drawing, and that is, to remedy a defect or insufficiency in the original drawing or specification, or to correct the same. The object of such a change can never be merely to present a more tasteful drawing, or a drawing more agreeable to the eye, or more in conformity to pictorial rules. Other arts than the fine arts induce such an application. The offer to file a new drawing is an admission on the part of the patentee, that his new drawing covers something in which the original drawing is defective or insufficient. And, under these circumstances, what does the

statute say? That the patentee must surrender his patent, and that a new patent may issue in conformity with his corrected specification, and thereafter operate, for the residue of the original term, on the trial of all actions thereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing out of the original patent. And in this case, the commissioner is not bound to grant such re-issue, nor can he grant it except in cases where the error has arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. Similar proceedings may be had in regard to the addition of an improvement. (Act of 1836, sec. 13.)

[The remainder of the argument upon this head is omitted.]

It is respectfully submitted, then—

1. Because the defendant in error has no grant of exclusive privilege in the machine, which is the subject matter of the present controversy.

2. Because he could not in law receive a grant for it, as one of several distinct machines in the same patent.

477*] *3. Because, as the author of an improvement, he could not take out a valid patent for the whole machine.

4. Because he has not in his specification distinguished between the old and new parts of his alleged improved machine, but has claimed the whole machine as improved.

5. Because he did not produce in evidence the record of his patent which the law had made such, but another record; and,

6. Because he has recovered damages for causes of action accruing previously to the alleged correction of his record, and prior to the alleged renewal of it under the Act of 1837.

For all these reasons, and for others raised upon the exceptions and record in this cause, presented, perhaps, too much at length, but not more at length, in the view of counsel, than their public importance may justify—that the judgment of the Circuit Court in this case ought to be reversed.

Mr. Justice **Woodbury** delivered the opinion of the court:

This is a writ of error brought under some peculiarities which are first to be noticed.

It comes here by virtue of the 17th section of the general patent law of July 4th, 1836. 5 Statutes at Large, 124.

That section grants a writ of error from decisions in actions on patents, as in ordinary cases, and then adds the privilege of it "in all other cases in which the court shall deem it reasonable to allow the same." This was doubtless intended to reach suits where the amount in dispute was less than $2,000, on account of the importance of the points sometimes raised, and the convenience of having the decisions on patents uniform, by being finally settled, when doubtful, by one tribunal, such as the Supreme Court.

The judges below, in this case, deemed it reasonable, that only a certain portion of the questions raised at the trial, concerning the *validity of the* patent, should come here, and *the record was made* up accordingly.

But the appellants contend for their right to bring here all the questions which arose in the case, and this is a preliminary point to be settled before going into the merits. The present is believed to be the first writ of the kind, which has given occasion for settling the construction of any part of the above provision; and therefore, without the aid of precedent, after due consideration of the words and design of the statute, we have come to the conclusion that the position of the plaintiffs in error, in this respect, is the correct one, and that when a court below deem it "reasonable" to allow a writ of error at all, under the discretion vested in them by this special provision, it must be on the whole case.

*The word "reasonable" applies to the [*478 "cases," rather than to any discrimination between the different points in the cases.

It may be very proper for the court below to examine those points separately and with care, and if most of them present questions of common law only, and not of the construction of the patent acts, and others present questions under those acts which seem very clearly settled or trifling in their character, not to grant the writ of error at all. It might, then, well be regarded as not "reasonable" for such questions, in a controversy too small in amount to make the writ a matter of right to persons, if standing on an equal footing with other suitors. But we think, from the particular words used rather than otherwise, that the act intended, if the court allowed the writ as "reasonable" at all, it must be for the whole case, or, in other words, must bring up the whole for consideration.

We shall, therefore, proceed to examine all the questions made at the trial, which it is supposed are relied on, and are now before us on the original writ and a certiorari issued since.

Looking to the declaration, the action is for a violation of a patent for an "improvement in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land."

The evidence offered at the trial was a patent for "a new and useful improvement in the steam engine," "a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents."

In the schedule annexed is described fully what he says he invented, viz., "certain improvements in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land."

The first question arising on this statement is, whether the evidence proves such a patent as is set out in the writ to have been violated by the respondents.

If the patent is to be ascertained from the letters alone, or rather from what is sometimes called their title or heading, without reference to the schedule annexed, the evidence is undoubtedly defective, as the writ speaks of a patent for an "improvement in the steam engine and in the mode of propelling" vessels, etc., therewith, while the letters themselves, in their title or heading, speak only of a patent for "a new and useful improvement in the steam engine." But the schedule annexed and referred to for further description, after "im-

provement in the steam engine," adds, "and in the mode of propelling therewith" vessels, etc.

It can hardly be doubted, therefore, that the 479*] improvement *referred to in the writ and in the letters patent, with the schedule or specification annexed, was in truth one and the same.

Coupling the two last together, they constitute the very thing described in the writ. But whether they can properly be so united here, and the effect of it to remove the difficulty, have been questioned, and must therefore be further examined. We are apt to be misled, in this country, by the laws and forms bearing on this point in England being so different in some respects from what exist here.

There the patent is first issued, and contains no reference to the specification, except a stipulation that one shall, in the required time, be filed, giving a more minute description of the matter patented. Webster on Pat. 5, 88; Godson on Pat. 6, App. It need not be filed under two to four months, in the discretion of the proper officer. Godson on Pat. 176.

Under these circumstances, it will be seen that the patent, going out alone there, must in its title or heading be fuller than here, where it goes out with the minute specification. But even there it may afterwards be aided, and its matter be made more clear, by what the specification contains. They are, says Godson on Pat. 108, "connected together," and "one may be looked at to understand the other." See, also, 2 H. Bl. 478; 1 Webst. Pat. R. 117; 8 D. & E. 95.

There, however, it will not answer to allow the specification, filed separately and long after, to be resorted to for supplying any entire omission in the patent; else something may be thus inserted afterwards which had never been previously examined by the proper officers, and which, if it had been submitted to them in the patent and examined, might have prevented the allowance of it, and which the world is not aware of, seeing only the letters patent without the specification, and without any reference whatever to its contents. 3 Brod. & Bingh. 5.

The whole facts and law, however, are different here. This patent issued March 8th, 1834, and is therefore to be tested by the act of Congress then in force, which passed February 21st, 1793. 1 Statutes at Large, 318.

In the third section of that act it is expressly provided, "that every inventor, before he can receive a patent," "shall deliver a written description of his invention," etc.; thus giving priority very properly to the specification rather than the patent.

This change from the English practice existed in the first patent law, passed April 10th, 1790 (1 Statutes at Large, 109), and is retained in the last Act of Congress on this subject, passed July 4th, 1836 (5 Statutes at Large, 119).

It was widely introduced, in order that the officers of the government might at the outset 480*] have before them full means to *examine and understand the claim to an invention better, and decide more judiciously whether to grant a patent or not, and might be able to give to the world fuller, more accurate, and early descriptions of it than would be possible under the laws and practice in England.

In this country, then, the specification being required to be prepared and filed before the patent issues, it can well be referred to therein in extenso, as containing the whole subject matter of the claim or petition for a patent, and then not only be recorded for information, as the laws both in England and here require, but beyond what is practicable there, be united and go out with the letters patent themselves, so as to be sure that these last thus contain the substance of what is designed to be regarded as a portion of the petition, and thus exhibit with accuracy all the claim by the inventor.

But before inquiring more particularly into the effect of this change, it may be useful to see if it is a compliance with the laws in respect to a petition which existed when this patent issued, but were altered in terms shortly after.

A petition always was, and still is, required to be presented by an inventor when he asks for a patent, and one is recited in this patent to have been presented here. It was also highly important in England, that the contents of the petition as to the description of the invention should be full, in order to include the material parts of them in the patent, no specification being so soon filed there as here to obtain such description from, or to be treated as a portion of the petition, and the whole of it sent out with the patent, and thus complying with the spirit of the law, and giving fuller and more accurate information as to the invention than any abstract of it could.

In this view, and under such laws and practice here, it will be seen that the contents of the petition, as well as the petition itself, became a very unimportant form, except as construed to adopt the specification, and the contents of the latter to be considered substantially as the contents of the former.

Accordingly, it is not a little curious, that, though the Act of 1793, which is to govern this case, required, like that of 1790, a petition to be presented, and the patent when issued, as in the English form, to recite the "allegations and suggestions of the petition" (1 Statutes at Large, p. 321, sec. 1, and p. 110, sec. 3), yet, on careful inquiry at the proper office, so far as its records are restored, it appears that, after the first act of 1790 passed, the petitions standing alone seldom contained anything as to the patent beyond a mere title; sometimes fuller, and again very imperfect and general, with no other allegations or suggestions, or descriptions whatever, except those in the *schedule [*481 or specification. The only exception found is the case of Evans v. Chambers, 2 Wash. C. C. 125, in a petition filed December 18th, 1790.

Though the records of the patent office before 1836 were consumed in that year, many have been restored, and one as far back as August 10th, 1791, where the petition standing alone speaks of having invented only "an easy method of propelling boats and other vessels through the water by the power of horses and cattle." All the rest is left to the schedule. Other petitions, standing alone, are still more meagre; one, for instance, in 1804, asks a patent only of a "new and useful improvement, being a composition or tablets to write or draw

on;" another, only "a new and useful improvement in the foot stove;" and another, only "a new and useful improvement for shoemaking;" and so through the great mass of them for nearly half a century. But the specification being filed at the same time, and often on the same paper, it seems to have been regarded, whether specially named in the petition or not, as a part of it, and as giving the particulars desired in it; and hence, to avoid mistakes as to the extent of the inventor's claim, and to comply with the law, by inserting in the patent at least the substance of the petition, the officers inserted, by express reference, the whole descriptive portion of it as contained in the schedule. This may have grown out of the decision of Evans v. Chambers, in order to remedy one difficulty there. Cases have been found as early as 1804, and with great uniformity since, explicitly making the schedule annexed a part of the letters patent. Proofs of this exist, also, in our reports, as early as 1821, in Grant et al. v. Raymond, 6 Peters, 222; and one, 1st Oct. 1825, in Gray et al. v. James et al. Peters, C. C. 394; and 27 Dec. 1828, Wilson v. Rousseau, 4 How. 649.

Indeed it is the only form of a patent here known at the patent office, and the only one given in American treatises on patents. Phillips on Pat. 523. Doubtless this use of the schedule was adopted, because it contained, according to common understanding and practice, matter accompanying the petition as a part of its substance, and all the description of the invention ever desired either in England or here in the petition. Hence it is apparent, if the schedule itself was made a part of the patent, and sent out to the world with it, all, and even more, was contained in it than could be in any abstract or digest of a petition, as in the English form.

We regard this mode and usage on this subject, adopted so early here and practiced so long, as not proper to be overruled now, to the destruction of every patent, probably, from 482*] 1791 to *1836; and this, too, when the spirit of all our system was thus more fully carried out than it could have been in any other way.

As this course, however, sometimes was misunderstood and led to misconstructions, the revising act as to patents, in July 4th, 1836, changed the phraseology of the law in this respect, in order to conform to this long usage and construction under the Act of 1793, and required not in terms any abstract of the petition in the patent, but rather "a short description" or title of the invention or discovery, "correctly indicating its nature and design," and "referring to the specification for the particulars thereof, a copy of which shall be annexed to the patent." And it is that—the specification or schedule—which is fully to specify "what the patentee claims as his invention or discovery." Sec. 5; 5 Statutes at Large, 119.

It was, therefore, from this long construction, in such various ways established or ratified, that, in the present patent, the schedule, or, in other words, the specification, was incorporated expressly and at length into the letters themselves—not by merely annexing them with wafer or tape, as is argued, but describing the invention as an "improvement, a description whereof is given in the words of the said John B. Emerson himself, in the schedule hereto annexed, and is made a part of these presents." Hence, too, wherever this form has been adopted, either before or since the Act of 1836, it is as much to be considered with the letters—literæ patentes—in construing them, as any paper referred to in a deed or other contract. Most descriptions of lands are to be ascertained only by the other deeds and records expressly specified or referred to for guides; and so of schedules of personal property, annexed to bills of sale. Foxcroft v. Mallett, 4 How. 378; 21 Maine, 69; 20 Pick. 122; Phil. on Pat. 228; Earle v. Sawyer, 4 Mason, C. C. 9; Ex parte Fox, 1 Ves. & Beames, 67. The schedule, therefore is in such case to be regarded as a component part of the patent. Peters C. C. 394, and Davis v. Palmer et al. 2 Brockenbrough, 301. The oath of Emerson, too, that he was inventor of the improvement, must thus be considered as extending to all described in the schedule, no less than the title, and this is peculiarly proper, when the specification is his own account of the improvement, and the patent is usually only the account of it by another, an officer of the government. Taking, then, the specification and letters together, as the patent office and the inventor have manifestly in this instance intended that they should be, and they include what has long been deemed a part and the substance of the petition; and the patent described in them is quite broad enough to embrace what is alleged in the writ to have been taken out as a *patent by the plaintiff, [*483 and to have been violated by the defendants. They are almost ipsissimis verbis. And when we are called upon to decide the meaning of the patent included in these letters, it seems our duty not only to look for aid to the specification as a specification, which is customary (1 Gall. 437; 2 Story's R. 621; 1 Mason, C. C. 477), but as a schedule, made here an integral portion of the letters themselves, and going out with them to the world, at first, as a part and parcel of them, and for this purpose united together forever as identical.

It will thus be seen, that the effect of these changes in our patent laws and the long usage and construction under them is entirely to remove the objection that the patent in this case was not as broad as the claim in the writ, and did not comply substantially with the requirements connected with the petition.

From want of full attention to the differences between the English laws and ours, on patents, the views thrown out in some of the early cases in this country do not entirely accord with those now offered. Paine, C. C. 441; Pennock et al. v. Dialogue, 2 Pet. 1. Some other diversity exists at times, in consequence of the Act of 1793, and the usages under it in the patent office, not being in all respects as the Act of 1836. But it is not important, in this case, to go farther into these considerations.

The next objection is, that this description in the letters thus considered covers more than one patent, and is therefore void.

There seems to have been no good reason at first, unless it be a fiscal one on the part of the government when issuing patents, why more than one in favor of the same inventor should not be embraced in one instrument, like more

than one tract of land in one deed, or patent for land. Phillips on Pat. 217.

Each could be set out in separate articles or paragraphs, as different counts for different matters in libels in admiralty or declarations at common law, and the specifications could be made distinct for each, and equally clear.

But to obtain more revenue, the public officers have generally declined to issue letters for more than one patent described in them. Renouard, 293; Phillips on Pat. 218. The courts have been disposed to acquiesce in the practice, as conducive to clearness and certainty. And if letters issue otherwise inadvertently, to hold them, as a general rule, null. But it is a well established exception, that patents may be united, if two or more, included in one set of letters, relate to a like subject, or are in their nature or operation connected together. Phil. on Pat. 218, 219; Barrett v. Hall, 1 Mason, C. C. 447; Moody v. Fiske, 2 Mason, C. C. 112; Wyeth et al. v. Stone et al. 1 Story, 273.

484*] *Those here are of that character, being all connected with the use of the improvements in the steam engine, as applied to propel carriages or vessels, and may therefore be united in one instrument.

Another objection is, that these letters, even when thus connected with the specification, are not sufficiently clear and certain in their description of the inventions.

This involves a question of law only in part, or so far as regards the construction of the written words used. Reutgen v. Kanowrs et al. 1 Wash. C. C. 168; Davis v. Palmer et al. 2 Brockenbrough, C. C. 303; Wood v. Underhill, 5 How. 1. The degree of clearness and freedom from ambiguity required in such cases is, by the Patent Act itself of 1793, to be sufficient "to distinguish the same from all other things before known, and to enable any person skilled in the art of science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same." 1 Statutes at Large, 321; see, also, on this, Godson on Pat. 153, 154; 2 H. Bl. 489; Wood v. Underhill, 5 How. 1; Davoll et al. v. Brown, 1 Wood. & M. 57; Pet. C. C. 301; Sullivan v. Redfield, Paine, C. C. 441.

There are some further and laudable objects in having exactness to this extent, so as, when the specification is presented, to enable the commissioner of patents to judge correctly whether the matter claimed is new or too broad. 3 Wheat. 454; 3 Brod. & Bingh. 5; 1 Starkie, N. P. 199. So, also, to enable courts, when it is contested afterwards before them, to form a like judgment. 1 Starkie, N. P. 192. And so that the public, while the term continues, may be able to understand what the patent is, and refrain from its use, unless licensed. Webster on Pat. 86; 11 East. 105; 3 Merivale, 161; Evans v. Eaton, 3 Wash. C. C. 453; 4 Wash. C. C. 9; Bovill v. Moore, Davies' Cas. 361; Lowell v. Lewis, 1 Mason, C. C. 182–189.

In the present instance, yielding to the force of such reasons in favor of a due and rational degree of certainty in describing any improvements claimed as new, there still seems to us, though without the aid of experts and machinists, no difficulty in ascertaining, from the language used here, the new improvement intended to be given to the steam engine, by substituting a continued rotary motion for a crank motion, and the new form of the spiral wheel, when the engine is used in vessels, by changing the form of the paddles and placing them near the ends of the arms; and the new connection of the power with the capstan of such vessels, by inserting the upper end of the shaft into the capstan. It is obvious, also, that the inventor *claims as his improvement, [*485 not the whole of the engine, nor the whole of the wheel, but both merely in the new and superior form which he particularly sets out. He, therefore, does not claim too much, which might be bad. Hill v. Thompson et al. 2 J. J. Marsh. 435; 4 Wash. C. C. 68; Godson on Patents, 189; Kay v. Marshall, 1 Mylne & Cr. 373; 1 Story's R. 273; 2 Mason, C. C. 112; 4 Barn. & Ald. 541; Bovill v. Moore, 2 Marsh. Com. P. Rep. 211.

The novelty in each he describes clearly, as he should; and it is not necessary he should go further. 1 Story's R. 280; Webster on Pat. 86, note; MacFarlane v. Price, 1 Starkie, 199; and King v. Cutler, Ib. 354; 3 Carr. & Payne, 611; 2 Mason, C. C. 112; Kingsby & Pirsson on Pat. 61; Godson on Pat. 154; Isaacs v. Cooper et al. 4 Wash. C. C. 259.

He need not describe particularly, and disclaim all the old parts. 7 Wheat. 435; Phil. on Pat. 270, and cases cited.

And the more especially is that unnecessary, when such disclaimer is manifestly, in substance, the result of his claiming as new only the portions which he does describe specially. All which is required on principle in order to be exact, and not ambiguous, thus becomes so.

It is to be recollected, likewise, that the models and drawings were a part of this case below, and are proper to be resorted to for clearer information. Earle v. Sawyer, 4 Mason, C. C. 9. With them and such explanatory testimony as experts and machinists could furnish, the court below were in a condition to understand better all the details, and to decide more correctly on the clearness of the description; but from all we have seen on the record alone, we do not hesitate to concur in the views on this point as expressed in that court.

In conclusion, on the other objections to the proof, as to the drawings and to the charge below in relation to the effect of them and to the destruction of them by fire, we likewise approve the directions given to the jury.

The destruction by fire was no fault of the inventor; and his rights had all become previously perfected. This is too plain to need further illustration. We cannot consent to be over astute in sustaining objections to patents. 4 East, 135; Crosley v. Beverly, 3 Carr. & Payne, 513, 514. The true rule of construction in respect to patents and specifications and the doings generally of inventors, is to apply to them plain and ordinary principles, as we have endeavored to on this occasion, and not, in this most metaphysical branch of modern law, to yield to subtleties and technicalities, unsuited to the subject and not in keeping with the liberal spirit of the age, and likely to prove ruinous to a class of the community so inconsiderate *and unskilled in business as men [*486 of genius and inventors usually are.

Indeed, the English letters patent themselves

now, however different may have been once their form or the practice under them, declare that "they are to be construed" "in the most favorable and beneficial sense, for the best advantage" of the patentee. Godson on Pat. 24, App. 7; Kingsby & Pirsson on Patents, 35; see, also, on this rule, Grant v. Raymond, 6 Peters 218; Ames v. Howard, 1 Sumner, 482–485; Wyeth v. Stone, 1 Story's R. 273, 287; Blanchard v. Sprague, 2 Story's R. 164; 2 Brockenbrough, C. C. 303; 2 Barn. & Ald. 345, in the King v. Wheeler; 5 Howard, 708, in Wilson v. Rousseau et al.; 1 Crompt. Mees. & Bros. 864, 876, in Russell v. Cowly.

The judgment below is affirmed.

Note.—After the delivery of this opinion, the counsel for the plaintiffs in error suggested that other questions were made below, which they desired to be considered, and therefore moved for another certiorari to bring them up. This was allowed, and judgment suspended till the next term.

WILLIAM HOUSTON et al. and Francis Fisk et al., Plaintiffs in Error,
v.
THE CITY BANK OF NEW ORLEANS.

Power of district court under Bankrupt Act—may order sale under mortgage, of bankrupt's property, and may marshal proceeds according to priorities.

The District Court of the United States, sitting in bankruptcy, had power to decree a sale of the mortgaged property of a bankrupt; and if there are more mortgages than one, and the proceeds of sale are insufficient to discharge the eldest mortgage, the purchaser will hold the property free and clear of all incumbrances arising from the junior mortgage.

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Louisiana.

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

It was argued by Mr. Johnson and Mr. Clay for the plaintiffs in error, and Mr. Sergeant for the defendants in error.

Mr. Johnson stated the case on behalf of the plaintiffs in error, who were purchasers of certain property which was exposed to public sale by order of the District Court of the United States. The question was, whether a mortgage upon the property, held by the City Bank, was an existing lien at the time of filing the bill, or whether the lien had been destroyed by the proceedings in bankruptcy.

487*] *He then proceeded to lay down four propositions:

1. That the District Court had jurisdiction to decree a sale, with or without the assent of the mortgagee, and the purchaser gets an absolute title against all persons claiming by or through the bankrupt.

2. If wrong in this proposition, and the District Court had no authority to sell without the assent of the mortgagee, then it had power to sell with that assent; and as the property did not sell for enough to pay the first mortgagee, who assented to the sale, the title to the purchaser becomes absolute.

3. If wrong in this, then that the conduct of the City Bank, the junior mortgagee, furnishes presumptive evidence of its assent also to the sale.

4. That the cancellation of the mortgage of the bank under a mandamus, as between the mortgagee and those claiming under him, vested an absolute title in the purchaser.

[As the decision of the court turned entirely upon the first point, the argument of Mr. Johnson, and also those of the other counsel, upon the other points, are omitted.]

I. The District Court had power to decree a sale, with or without the assent of the mortgagee. This involves two branches:

1st. Had Congress the constitutional power to pass such an act?

2d. Did they, by the act, vest the power in the District Court?

1st. The power of Congress was denied during the passage of the act, but this court have affirmed it by decreeing under it. It is only necessary to refer to the language of the Constitution, and it will be seen that the terms of the grant are of the broadest character. The power is to pass all laws; the only restriction is that they shall be uniform. But as the court has already decided the constitutionality of the law, by acting under it, the inquiry need not be pursued.

2d. Did Congress, by the act, vest the power in question in the District Court?

We have seen, that the power of Congress over the subject of bankruptcy is total and absolute, with the single limitation that the laws must be uniform; and an examination of the law will show that Congress intended to exercise the whole of its power. This is a cardinal principle in the interpretation of the statute. If the legislative power was intended to be exhausted, we can judge how much was given to the courts. We say, that jurisdiction over the whole subject of bankruptcy was conferred.

The title of the act is co-extensive with the power of Congress. *It is "to establish [*488 an uniform system," etc. The first section is so too. The second avoids certain deeds, etc., and the proviso says that liens or mortgages, etc., shall not be impaired. The only effect of this is to preserve the rights themselves; but it gives no direction how the rights are to be enforced. It means that the courts of the United States are to protect them, as well as the State courts; and the uniform rule by which this is to be done can only be found in the former, acting as they do from one common source of construction and authority, namely, this court. The exception itself in favor of these rights shows that Congress intended to occupy the whole ground. Everything which is not excepted passes under the act. The rights themselves, therefore, being the only matters which are excepted, the mode of enforcing those rights by an application to the State courts is not saved. Not being excepted, it is gone. If Congress had intended that the State courts should retain their jurisdiction over mortgages, and have the power of foreclosing them, the

NOTE.—As to jurisdiction of District Court—see note to 1 L. ed. U. S. 489.

law would have said so. The argument upon the other side must be, that all these incumbrances were excluded from the operation of the law entirely. But the bankrupt is obliged to make a return of all his property of every kind, under the penalty of losing the benefit of the law. He must include his mortgaged property, and the whole must be adjudicated by one head. Other sections, in addition to the proviso, show a design of giving the control of the whole subject to the District Court. All property of the bankrupt, all his rights in every species of estate, real, personal, and mixed, all his debts, are portions of the matter which is thrown into this court. Debts are provable and proved there. If such a surrender be not made, the bankrupt is not to have the benefit of the act. This shows that all the debts are to be paid out of the property. The fifth, seventh, ninth, tenth, and fifteenth sections all tend to show the control of the District Court over the entire subject; the sixth and eighth, more especially. Let us revert to the question before the court, and see what it is. Had the District Court authority to decree a sale of mortgaged property, so as to give the purchaser a good title? This is the question. The language of the Constitution is very different as to the two subjects of naturalization and bankruptcy. Over the first the power of Congress is only to establish a uniform rule, leaving it to the State, as well as federal courts, to enforce the rule. The jurisdiction of State courts is not taken away. But over the subject of bankruptcy the power is to establish uniform laws. They must be the same everywhere. It would be strange if the United States courts were not vested with power to decide all ques-
489*] tions *which may occur under these laws. The object was uniformity. In fact, this was the condition upon which the power was held by the federal government. The act of Congress says that the District Court shall have jurisdiction over all matters arising under the act, all "cases and controversies," all "acts, matters, and things," etc., until a final distribution. Is this a power merely to sell an estate subject to liens? If a clear title could not be obtained, the property would be sacrificed. The fact that claims may exist upon the property, and the legality of those claims, are wholly different things. A bankrupt may make fraudulent mortgages, or give illegal claims to his wife. Who is to decide the question of their legality, unless it be the District Court? Until the question is settled, the property would not sell. So much for the sixth section. But the eighth removes all doubt, for it allows the Circuit Court to entertain a bill in equity in all cases arising under laws, treaties, etc. The third section vests the rights of a bankrupt in the assignee. Could he not have filed a bill in the Circuit Court to have the mortgaged property sold? The mortgagee also might file a bill. If the assignee were to assert, and prove, that the mortgage was void, either in his bill or answer, would not the court set it aside? But the jurisdiction of the Circuit Court is concurrent with the District Court, not superior to it. The District Court has, therefore, the same power.

The decisions of this court in 3 Howard, 203 and 426, settle the question. But the opinion is said to be obiter. It is strange that the highest court in the land, vested with power to decide constitutional questions, should listen for many hours to arguments, write out its opinion, and that such opinion should be disregarded as obiter. It was wise to settle the law then. As soon as the Act of 1841 passed, numerous cases occurred under it. Doubts grew up. Judges decided differently. Property to the amount of thousands of dollars was distributed under the law. It was the duty of this court, as guardians of the commonwealth, to settle all these difficulties, and guard against conflicts between the authorities of the States and United States. But the doctrines asserted in Ex-parte Christy, 3 Howard, 203, have ceased to be obiter. Even if we admit that the precise point now before us was not before the court in that case, yet it came up afterwards, in 3 Howard, 426. At page 434, the court say that they concur in the principles and reasonings of Ex-parte Christy. The dismission of the bill depended upon the case coming within the preceding case of Ex-parte Christy, and the decision was made upon this ground. This was not, therefore, an obiter opinion. At page 440, Mr. *Justice Catron never doubted the power [*490 of the District Court over mortgaged property, provided the jurisdiction of a State court had not first attached. As this did not occur in the present case, it appears to be free from all objection.

Mr. Sergeant, for defendants in error:

This case is brought to this court under the twenty-fifth section of the Judiciary Act, and the only point open is the one which arises under that section. It has been said by the counsel on the other side, that the whole case is before this court, and the authority of Osborne v. Bank of United States cited in support of the position. But that case was not brought here under the twenty-fifth section. This court cannot decide that the court below was right on the constitutional point, and then proceed to reverse the decision for other reasons. Only one of the points stated by the opposite counsel is before the court now. The other three are not. All questions relating to the respective rights of different mortgagees is a Louisiana question, to be decided by the State courts. Whether or not the bank assented to the sale is not a point which this court is at liberty to examine under the record, nor whether the proceedings in the State courts, in order to obtain the cancellation of the mortgages, were regular or not. These are questions for the courts of the State exclusively. The only question now before us is the right of the District Court, under the act of Congress, to force to a conclusion all matters between a mortgagor and mortgagee. How has the exercise of this power worked in the present case? The bankrupt was worth $350,000, and borrowed $200,000 on mortgage. The property, under the forced sale, sold for $120,000 only, not one third of what the assignee had valued it at. [Mr. Sergeant here recited the facts in the case.]

The question before us may be divided into two branches:

1st. Had the District Court jurisdiction over mortgages?

2d. Had it jurisdiction in this case, and in the mode pursued?

1st. Before the case of Ex-parte Christy, different constructions had been given to the act of Congress, and we are still in the midst of the conflict. Where was the necessity of deciding in advance? The act of Congress could as well be carried out in one way as in the other. If the settlement of questions relating to mortgages had been left to State courts, it would not have protracted the settlement of a bankrupt's estate. The necessity of the case does not demand that this power should be vested in the district courts. The existence of [*491] *different opinions shows a doubt of the existence of such a power; and a decision in favor of this ultra power will make a law odious which was not so before. It makes the law interfere with State jurisdiction. If this mortgage had been left to the ordinary course of proceeding in Louisiana, the case would have been settled long ago. But instead of that, we are here now, disputing about an act of Congress. What is it? The proviso in the second section controls and limits the whole act. It declares that nothing shall annul, destroy, or impair the rights of married women, or liens or mortgages. Without this proviso, the law could not have been passed. It was put in because the States required it to be so. The reservation is, that liens shall not be impaired. Suppose a lien existed upon property, and the person who held the lien was put into possession, and an order of the District Court forces him to sell it when he does not wish to do so. Is not his lien impaired? The creditor is in possession of property, under a contract that he shall keep it until the debtor pays him what is due, and the court sends an officer to take it away. Has he not a less right than the contract gives him? So, also, the construction contended for on the other side requires the District Court to settle the rights of married women. What right has this court to meddle with the subject, whilst a woman is yet under coverture? Who is to represent her? The proviso saves equally rights under contracts and rights under the law. Your aid is not asked to protect them. All liens are preserved which are valid by the laws of the respective States. Who is to judge of their validity? The State courts, or the judges of this court in their circuits? Whichever tribunal decides, it must look only to State laws. Where, then, is the evil of allowing State courts to interpret State laws?

It is not correct to say, as the opposite counsel has done, that where Congress has plenary power, and passes an act, therefore the act must be construed to the full extent of the power which Congress possessed. This has not been the doctrine of Congress nor of the people. Half a century ago, this court decided that they would take jurisdiction only so far as Congress had delegated it. The Judiciary Act of 1789 limits the power of this court, which has never gone beyond it. Doubtful words must not be construed to enlarge jurisdiction until the people alter the Constitution of the United States. If there be a doubt, the test must then be applied, whether a necessary implication exists, or whether the laws of the United States can be enforced without the jurisdiction claimed. This is the rule in all cases of limited jurisdiction. Apply it to this case. Has Congress said clearly that this power is given to the District *Court? [*492 On the contrary, some of the judges of this court have denied the power, which shows that it is not clearly granted.

The second, third, and eleventh sections all have the same object in view, namely, the preservation of rights which exist under State laws; and the only inquiry is into the validity of these rights under those laws. The United States are jealous of their Constitution, and have courts of their own to protect it. Is it unreasonable to concede the same feeling to the States, and to allow their own courts to decide upon rights flowing from State laws? Nobody doubts the correctness of the course pursued by the United States. Why not grant the same to the States?

The third section gives to the assignee all the rights of the bankrupt. Take the case of property pledged for a debt due by a bankrupt, and in possession of the mortgagee. The bankrupt himself has no right to take it out of his possession, except by redeeming it. How, then, can the assignee do it, and exercise greater power than the bankrupt himself? All that the assignee can legally do is to redeem. But the claim here is, that the assignee can bring the unwilling creditor into the District Court, and compel him to sell the property. If there is a loss, on whom will it fall? The creditor must be the only sufferer. So it would be, if family rights were involved. The assignee would look only to the interest of the creditors of the bankrupt, and the rights of the family be wholly disregarded.

2d. Had the District Court jurisdiction in this case, and in the mode pursued?

[Mr. Sergeant here objected, that the requisitions of the act had not been complied with, as to the petition, notice, etc.]

In England, the courts order trustees to invest trust funds in mortgages, and so they do in the United States. Such an investment is generally recognized as a safe place for money. What is a mortgage? It is an estate in land vested in the mortgagee. It may be called a security for a debt, but it is created by a conveyance of the estate. It is true that it is an estate on condition subsequent, but if the debt is not paid, the estate vests in the mortgagee. The relief sought here is to have the property sold. I ask that the contract may be carried out. The nature of a mortgage is explained in 1 Howard, 318, and 9 Wheaton, 489. It is there asserted, that the mortgagor has no right, at law or equity, but to redeem the property by paying the debt. Whilst the mortgagee has two remedies—namely, by ejectment and bill—the mortgagor has no right except to redeem. Congress knew this, and vested his right in the *assignee. In Pennsylvania there is no [*493 foreclosure of a mortgage. The courts of law furnish the remedy. Our mortgagee can never be obliged to sell. Will you overturn our law of mortgage by ambiguous words? I adhere to the contract in this case. They go out of it. It is at the option of the mortgagee whether to sell or not; but they compel him to sell. The property was worth $350,000. Suppose they had waited for a favorable time to sell, instead

of putting it up at auction. What good has accrued to anyone from so putting it up? None. But the opposite counsel say that this course is recommended by its simplicity. What has this simplicity produced? A long contest in Louisiana, and now here, at a grievous expense. Congress never intended this. Nor did they intend to place the courts of the United States in a position antagonistical to the State courts, and thereby compel the latter to surrender the whole control of the subject. And for what purpose? To promote speedy settlements? The cases under the bankrupt law of 1800 are not yet all disposed of. Now and then we find one walking the earth, like an unquiet ghost.

Mr. Clay, for the plaintiffs in error, in reply and conclusion:

Thomas Banks, a citizen of New Orleans, being the owner of a block of buildings in that city, a remarkable edifice, called Banks' Arcade, executed three several mortgages upon it, the first to the New Orleans Canal and Banking Company, the second to the Carrolton Railroad Company, and the third, and last in point of time, to the City Bank of New Orleans, the defendant in this writ of error. These mortgages were executed to secure payment of large sums of money which Banks owed to the respective mortgagees, as stated in the mortgages. On the 30th of July, 1842, Banks filed his petition, in the District Court of the United States, holden in New Orleans, to be declared a bankrupt, under the act of the Congress of the United States to establish a uniform system of bankruptcy. His petition was accompanied by a schedule, exhibiting the names of all his creditors, and a list of all his property; and among his creditors so enumerated is the defendant, for a loan on mortgage and on pledge of stock; and among the property described in the schedule, and surrendered to his creditors, is Banks's Arcade. On the 5th of September, 1842, after due publication and notice served on the creditors resident in the city of New Orleans (the defendant being one of them), according to the requisition of the Bankrupt Act, a decree of bankruptcy was pronounced by the District Court, and F. B. Conrad was appointed assignee of the bankrupt's estate, who qualified, and entered on the duties of his office according to law.

494*] *On the 10th of October, 1842, the assignee presented a petition to the District Court, stating that a great portion of the bankrupt's property consisted of large masses, such as the City Hotel, Banks' Arcade, etc., which would sell to greater advantage if subdivided; that the leases granted by the bankrupt were about expiring; and that the interest of the estate would be promoted by leasing out the property for one year, as purchasers would prefer buying with tenants in occupation of the property. A day was fixed, by order of the court, for the hearing of the petition, which was advertised in the newspapers; and on the hearing, the prayer of the petition was granted, and the assignee took possession of Banks' Arcade and the other property of the bankrupt.

Subsequently, the assignee applied to the District Court for an order of sale of the property, exhibited plans for subdivision; and proposed terms of sale. The court fixed a day for the hearing of the petition, ordered it to be published in the newspapers, and personal notice of it to be served on the mortgagees. On the 6th of January, 1843, the court, after reciting that notices had been published according to the rules of court, and that personal notice had been served on the mortgage creditors, naming them (and the defendant among them), pronounced a judgment, that the sale of the property take place in the manner and on the terms proposed by the assignee, on the 15th of February, 1843; and that the mortgages be cancelled, so as to give purchasers unencumbered titles, reserving, however, to the mortgagees, respectively, their rights upon the proceeds of sale.

The sale accordingly was effected, by the marshal of the United States, on the day appointed, when the plaintiffs, being the highest bidders, became respectively the purchasers of the several parcels adjudged to them by that officer. The sale was one of the most notorious and attractive that ever took place in the city of New Orleans, from the conspicuous position, great value, and well known character of Banks' Arcade, etc. It was duly advertised in the newspapers of the city, placarded, and otherwise made public, and brought together a vast multitude. It was conducted with irreproachable fairness, which is not contested at all in the present suit. By the subdivision of the great block of buildings, into smaller parcels, they were placed within the reach of a greater number of persons, and consequently excited more competition among persons disposed to purchase. By the large and liberal credits given to purchasers (which there was no obligation to have done), the property was also placed in the power of more capitalists and purchasers. From these two causes, it is beyond a *doubt that the property sold for much [*495 more than it would have commanded if it had been put up in block and sold for cash.

From the public advertisement and the great notoriety of this sale of Banks's Arcade, in the absence of all proof it would not have been doubted, but it is positively proven in the cause, that the defendant had full notice of the sale. Yet neither the defendant, nor any one of that vast multitude present at the sale, interposed, in any manner whatever, to forbid it, or uttered one word of warning or advice to persons bidding, to prevent their purchasing. And the plaintiffs, so far from supposing that they would be involved in a tedious and expensive lawsuit about the property they were purchasing, had every reason to conclude that they would acquire a clear, unencumbered, and indisputable title to it.

Still, before they actually paid the consideration money, and received titles for the property purchased, they required of the assignee the production of the certificate of the register of mortgages, that there existed no mortgage or other incumbrance on the property, which certificate is held by the law and practice of Louisiana to be a perfect security to purchasers against pre-existing liens. The District Court, it has been seen, had ordered the mortgages (including the defendant's) to be cancelled, prior to the sale, so that purchasers might obtain unencumbered titles; and what the law,

through the tribunals of justice, commands to be done, ought to be considered and taken as done. But to remove all scruples and quiet all apprehensions, on the 24th of February, 1843, the court passed an order, at the instance of the assignee, stating that, in pursuance of its order, a sale had taken place, for which sale the New Orleans Banking and Canal Company, which held the first and oldest mortgage on Banks's Arcade, had given to the assignee its written consent that its mortgage should be raised, in order that the assignee might pass clear titles to the purchasers; and ordering that the recorder of mortgages should erase from his records the mortgages of the defendant and others.

On the 6th of March, 1843, the assignee presented his petition to the Parish Court for the parish of New Orleans, reciting the proceedings in the District Court, and the refusal of the recorder of mortgages to comply with the order to erase the mortgages; and concluding by praying the court for a mandamus to compel the register to cancel the mortgages in conformity with the order of the District Court. The case was elaborately argued for three days, in the Parish Court, which finally ordered the mandamus to be granted. The recorder ap-
496*] pealed *from this decision to the Supreme Court of Louisiana; and that court affirmed it. See 5 Robinson's Reports of cases in the Supreme Court of Louisiana, 49. Thereupon the recorder erased the mortgages, gave a certificate that no incumbrances existed on the property, and the assignee passed a clear title to the plaintiffs, and received the price from them at which the property had been stricken off, in money and notes, according to the terms of sale.

On the 23d of June, 1843, the New Orleans Canal and Banking Company presented a petition to the District Court, stating the sale of Banks' Arcade, and praying that, as the first mortgagee, the assignee be ordered to pay over to the petitioner the cash proceeds and the notes of the purchasers. The court ordered public notice to be given of this petition, which having been accordingly given, on the 6th of July, 1843, the day fixed for its being heard, the court gave judgment that the assignee pay over to the Canal Bank, holding the oldest mortgage, the proceeds of the sale of Banks' Arcade. The aggregate amount fell far short of what was due to the bank.

On the 5th of January, 1844, the assignee having filed his account of his administration of the bankrupt's estate, so far as he had been able to make progress in it, his account was referred by the court to commissioners, for examination and report. The commissioners proceeded to the adjustment of the assignee's accounts, awarded or adjudged the proceeds of the sale of Banks' Arcade to the New Orleans Canal and Banking Company, as the first mortgage creditor on the property, and reported to the court.

Upon receiving their report, the hearing on it was fixed for the 18th of April, 1844, and notice was ordered to be given through the public papers, and personally, to the resident creditors of the bankrupt, to show cause why the report should not be homologated by the court. Among the creditors personally notified was the City Bank of New Orleans, the present defendant. On the day fixed, the report of the commissioners was homologated by the court.

Throughout the whole proceedings of the District Court, in the case of Thomas Banks' bankruptcy, that court appears to have acted with the greatest caution, and with the most conscientious regard to the rights of mortgagees and all creditors. In the commencement of Banks' action or suit against his creditors, to obtain his discharge, under the Bankrupt Act of Congress, they were notified by publication in the newspapers, and personally, as required by the act. On the occasion of every important step taken during the progress of the case, the creditors were fully notified, either personally or by publication *in the newspapers, [*497 or in both forms, of what was proposed to be done. Thus, when the assignee proposed to have the property subdivided, and, as the leases upon it were about expiring, asked for authority to grant new leases, the court fixed a time for hearing his motion, and ordered public notice thereof to be given in the newspapers. So, when the assignee applied for an order of sale, accompanying his petition with a schedule of the property to be sold, and stating the proposed terms of sale, the court fixed a time for hearing the motion, and ordered that public notice thereof be given in the newspapers, and personally served on the mortgage creditors. So, also, when the New Orleans Canal and Banking Company, after the sale of Banks' Arcade, petitioned the court, as the oldest mortgagee, to have the proceeds of the sale applied towards payment of its mortgage, a day was fixed for the trial of this petition and the court ordered public notice to be given in the newspapers. And again, after the report was made of the commissioners appointed to settle the assignee's account of the administration of the bankrupt's estate, by which report the proceeds of Banks' Arcade were awarded to the first mortgagee, as they had been previously by the judgment of the court, notice was given to all creditors, through the public papers, and served personally on the defendant, to appear and show cause why the report should not be homologated by the court.

But if the District Court were signally assiduous and untiring in inviting by repeated notifications, all persons, and the City Bank especially, to come forward and assert their rights, and oppose whatever might unjustly tend to their prejudice, that corporation appears to have firmly resolved to disregard all its friendly summonses. It maintained throughout an obstinate, if not sullen silence. It determined upon a deliberate, if not masterly, inactivity. It never once, on any occasion, appeared in the District Court sitting in the bankruptcy of Thomas Banks. It did not object to, or contest, the sale of the Arcade, when about to be ordered. It did not forbid the sale, when about to be made. It did not oppose the appropriation of the proceeds of sale towards the payment of the first and prior mortgage. When the report of the commissioners, appointed to settle the accounts of the assignee, was about to be homologated by the court, the defendant did not oppose the slightest obstacle, although that report expressly assigned the proceeds of the Arcade away from his mortgage

towards the satisfaction of the eldest mortgage. He made no opposition, which is known, to the erasure of his mortgage, either before the Parish Court of New Orleans, or before the Supreme Court of Louisiana. If the defendant 498*] entertained any antipathy to *the federal tribunal, the State courts remained open to him; but neither there did he make his appearance, whilst any of the transactions which he now seeks to annul and set aside were in progress. He did not before any State court institute an hypothecary action, or apply for any order of seizure and sale to subject the Arcade to the payment of his mortgage. He applied for no injunction to restrain the proceedings before the District Court, nor to prevent the Parish Court from erasing his mortgage. The defendant was as silent as the grave until after the whole proceedings about the Arcade were closed in the Bankrupt Court, until after the plaintiffs had bought the property, without warning, paid the purchase money, received a clear title, and taken a peaceable and quiet, and, as they had every right to suppose, an undisturbable possession, of what they had fairly bought and honestly paid for.

In this stage of the business, when all seemed perfectly settled, and when, according to the ordinary course of human affairs, and the wants of quiet and repose in society, there should be a termination of all controversy, the City Bank of New Orleans for the first time puts itself in motion, and, seeking to disregard, disturb, and set aside all that had been previously done in respect to the Arcade, commences in the Commercial Court of New Orleans its hypothecary action against the plaintiffs in this writ of error, as third parties in possession of the mortgaged property. It does not make defendants to the suit, either the New Orleans Canal and Banking Company, or the Carrollton Railroad Company, both of which, as has been before stated, held mortgages prior in time and dignity to that of the City Bank of New Orleans. It charges no irregularity, imputes no fraud, and does not impeach the fairness of the sale. It is founded exclusively upon the notion that the highest judicial tribunals of the State and Union had perseveringly and deliberately misinterpreted the Bankrupt Act; and that, although that act is now dead, and years have elapsed and millions of property have changed hands under faith of the interpretation given to it, it is not now too late to go back and correct the error into which those tribunals have fallen. The court dismissed the action of the City Bank, and it appealed to the Supreme Court of Louisiana. That court, reversing the decision of the inferior tribunal, gave judgment for the City Bank, to reverse which this writ of error is now prosecuted.

I. The first ground on which the plaintiffs rely is. that the first mortgagee, being an acknowledged party to the cause, gave his previous consent and authority to the sale, and, after it was made, petitioned the court to receive the 499*] proceeds, and *actually did receive them, towards the satisfaction of his mortgage, and so ratified and confirmed the previous sale.

[As the decision of the court did not turn upon this point, the argument is omitted.]

II. But it is contended that, without any assent of the first mortgagee to the proceedings of the court in bankruptcy, and even in opposition to the protest of that and every other incumbrancer, that court, under the act of Congress, had full and complete jurisdiction over the mortgaged property, had ample power to order its sale, and that the sale, in virtue of its authority, is valid, and binding upon all parties whatever.

Nothing, it would seem, on principle, would be more proper and fitting, than that the assignee of the bankrupt should be invested with all the property, however encumbered, rights, and interests of the bankrupt; that he should have power to sell and dispose of it to the best advantage, making clear titles to the purchasers; and that he should be obliged, at the same time, to show proper regard and pay due respect to all liens and incumbrances existing on the property. In no other way can a unity in the administration of the bankrupt's estate be secured. In no other way can a speedy and definitive settlement of it be effected. If a part of his estate, the unencumbered part only, be subject to the authority of the assignee, and the residue of it, the encumbered part, be beyond his control, and liable to a different and conflicting administration, delay and confusion are inevitable.

What was so manifest and reasonable in itself was not likely to be overlooked by the wisdom of Congress. Accordingly, in the Bankrupt Act the assignee is invested with the fullest right and power over the whole estate, rights and interests of the bankrupt, of whatever kind or nature, to the same extent in which the bankrupt himself held them. (Third section of the act.) And Congress, looking to the interest of all parties to have a speedy settlement of the bankrupt's estate, has provided (in the tenth section of the act), that it shall, if practicable, be accomplished within two years after the decree in bankruptcy.

By the second section of the act, it is provided, that nothing in the act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of the act.

Under this proviso the defendant contends, that as mortgagee, he is exempted from the operation of the Bankrupt *Act; that it [*500 does not touch or affect him; that the property which is mortgaged to him is beyond the reach or control of the Bankrupt Court, and that he may proceed when he pleases to enforce his mortgage rights, without regard to the interests of the other creditors of the bankrupt, and without respect to the requirement of the Bankrupt Act to insure a speedy settlement and close of the proceedings in each case in bankruptcy, within two years, if practicable, after the decree delaring the bankruptcy.

These are high pretensions, and ought to be fully and justly weighed. Undoubtedly, the rights of all mortgagees, in a due execution of the Bankrupt Act, art to be fully respected and enforced, and are not to be annulled, destroyed, or impaired. But, whilst the most liberal and full effect ought to be given to the part of the act which declares that they shall not be im-

paired, annulled, or destroyed, full operation should also be allowed to all other parts of the act.

If the act can receive a construction by which the mortgage creditor can be made safe in the receipt of the debt which the mortgage was intended to secure, and other creditors can be allowed to receive what remains of the mortgaged property, after that object is accomplished, that construction would be recommended by justice and equity.

The plaintiffs contend, that the mortgaged property should be fairly administered by the assignee, along with the other property of the bankrupt; that it should be fairly sold, in a manner likely to make it the most productive; and that out of the proceeds the mortgages should be first satisfied, and the residue, if any, be applied to the payment of the general creditors. And this, they contend, is necessary to comply with the provisions of the Bankrupt Act. Far from annulling, destroying, or impairing the lien, they contend that this course gives to it full and complete effect, securing the identical object for which the mortgage or lien was created.

But the defendant, in effect, contends that the whole property of the bankrupt, as was manifestly intended by the Bankrupt Act, is not vested in the assignee; that a part of that property, which happens to be mortgaged, is without the power or control of his assignee; that it can only be acted upon and disposed of when the mortgagee pleases; and, consequently, whatever may be its value or amount, whether it exceeds or not the debt which it was intended to secure, it must remain exempt from the power or management of the assignee.

This is not believed to be according to the design of the Bankrupt Act. That was to subject the whole property of the bankrupt to the payment of all his debts, according to their 501*] *priority and privileges. And this design can be best effectuated by subjecting the property to a single and undivided mangement, under the superintendence of the assignee, acting in obedience to one judicial tribunal.

If the contrary be supposed—if the mere fact of the existence of a mortgage withdraws the mortgaged property from the control of an assignee—what might be the consequence? The mortgage may be illegal and invalid, or may be upon property amounting to a value greatly exceeding the debt intended to be secured by it. Is the property mortgaged under such circumstances to remain beyond the reach of the assignee? Does not every view which can be taken of the subject lead to the conclusion that the entire property of a bankrupt, encumbered and unencumbered, should be under the control of the assignee, so as to be administered by him, with due respect to liens or not, as they may happen to exist?

It is further urged by the defendant, that, whilst his mortgage is to remain sacred and beyond the reach of the assignee, the equity of redemption may be sold; in other words, that the mortgage property must be sold, subject to the incumbrance. If the existence of a mortgage protects the property against the operation of the Bankrupt Act, all "lawful rights of *married women or minors*, or any liens or other securities on property, real or personal," are equally entitled to the protection claimed under the proviso of the second section of the Bankrupt Act. How would it be possible to make any rational sale of the estate of the bankrupt, subject to these unascertained incumbrances? Neither the seller could possibly know the actual value of what he was selling, nor the purchaser what he was buying. Both would be acting perfectly in the dark. Between the two modes of selling the encumbered property —that of selling it although shrouded over with unknown liens, or liens of unascertained amount or validity, subject to the whole of them, or that of fairly selling it upon ample notice, liberated from all incumbrances, good and bad, and applying the proceeds first to the satisfaction of all "lawful rights of married women or minors or any liens, mortgages, or other securities," and the surplus, if any, to other creditors—there cannot for a moment be a doubt which is fraught with the most equity, justice, and propriety. The error of the argument of the defendant, in opposition to the latter mode of sale, consists in considering it as annulling, destroying, or impairing the lien. So far from its having that effect, the precise object for which it was created is accomplished by applying the proceeds of the mortgaged property to the satisfaction of the lien. It no more annuls, destroys, or impairs the lien, than would be done by a *judicial sale [*502 of the property under a judgment or the decree of a State tribunal. A mortgage cannot be justly or truly said to be impaired or annulled when it has been fully satisfied or satisfied to the extent of all the proceeds of the property mortgaged.

If it had been the intention of Congress to do anything more, in regard to mortgages and other liens, than to preserve them unimpaired—if it had been intended to exclude them altogether from the operation of the Bankrupt Act—different language from that which was actually used would have been employed. Thus in the third, the next section of the act to that which has been under consideration, the language of the proviso is, "that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture," etc. clearly manifesting, that, with that exception, it was the purpose of Congress to vest in the assignee the whole estate of the bankrupt, of every name and nature, encumbered or unencumbered, to be administered by him with due regard to the rights and privileges of all persons.

But it is useless to prolong the argument in support of the interpretation of the bankrupt law now contended for. Any necessity for it is wholly superseded by authoritative decisions of the highest tribunals, federal and State. The jurisdiction of the United States District Court, sitting in bankruptcy, over the property mortgaged by the bankrupt, is supported and maintained by this court in the case Ex-parte The City Bank of New Orleans (the same bank which is defendant in this case) against Christy, Assignee, 3 Howard's Reports, 292. Nothing can be more full, clear, and satisfactory than the reasoning employed by this court in that case, and the conclusion at which it ar-

rives. It was objected against it, in the court below, that the decision was extrajudicial; that it was not necessary to determine the point as to the jurisdiction over mortgages; and that the cause went off by a refusal to grant the prohibition moved for. It is true, that, if the Supreme Court had chosen to shrink from any expression upon that point of its opinion, and to stand non-committal, it might have limited itself to a simple denial of the prohibition. But it is respectfully conceived, that such a course of darkness would not have well corresponded with the duty and dignity of that high tribunal. The point fairly arose in the cause, was elaborately discussed in the argument, and was deliberately considered by the court. It arose under a new law, just going into full operation throughout the whole extent of the United States, and subject to exposition by a great variety of tribunals, federal and State. Conflicting, or apparently conflicting, decisions 503*] were made, or in danger of *being made, by inferior courts. All eyes were anxiously turned to this court for light. The very party now objecting to the authority of the precedent brought the point before the court, and fully, ably, and confidently argued it. Under all these circumstances, and considering the great necessity for uniformity of practice and decision under this new law, could this court have justly and honorably avoided settling definitively the controverted point? The court thought it could not. The decision of such a question, which was attended with so much solemnity and consideration, cannot be regarded as obiter dicta, or loose expressions of judges, which accidentally fall from them, without deliberation, during the progress of a trial.

But, to put the matter forever at rest, this court subsequently re-affirmed all the doctrines and principles laid down previously in the preceding case, in Norton's Assignee v. Boyd et al. 3 Howard, 434.

I will not go into an examination of the decisions of particular judges of the federal courts, acting on the circuits or in the districts; for if they conflict with those already referred to, they must yield to the paramount authority of this court.

If this decision of the question, by the highest tribunal in the land, stood upon its own exalted authority and dignity alone, it ought to command the respect and obedience of all other tribunals, State and federal, within the United States. For if the Supreme Court of the United States cannot finally and definitively settle a controverted interpretation of a law of the United States, our admirable but complicated system of free government would be thrown, as to the administration of justice, into utter and hopeless disorder and confusion. But it does not rest upon the sole authority of this court. The Supreme Court of Louisiana, by repeated decisions, fully and deliberately considered, had decided the same question in the same way. Conrad, Assignee, etc. v. Prieur, Recorder, etc. 5 Robinson, 49; Clarke, Assignee, v. Rosenda et al. 5 Robinson, 27; Benjamin, Assignee, v. Prieur, 5 Robinson, 59; Lewis v. Fisk et al., 6 Robinson, 159.

12 L. ed.

It will be perceived, on an examination of these cases, that they cover the whole ground of the question of the jurisdiction of the Bankrupt Court; and that it was thoroughly considered and most ably argued. The Supreme Court of Louisiana declares, that, however the question may be settled in other States, the maintenance of the jurisdiction of the Bankrupt Court is essential to the purposes of justice in Louisiana; and that, if it be not maintained, "it would be destructive of most of the liens and securities intended to be protected by the last proviso of the second section of the act of Congress," owing "to the peculiar na- [*504 ture of the liens and mortgages as constituted by the laws of Louisiana.

Thus doubly fortified by the solemn and deliberate decisions of the highest judicial tribunal in the United States, and the highest judicial tribunal of the State of Louisiana, the plaintiffs had some right to suppose that they could not be disturbed in the possession of property fairly purchased, and held by them under the sanction of these high authorities.

[Mr. Clay then replied to Mr. Sergeant's argument respecting the irregularity of the proceedings.]

III. That the cancelment and erasure of the defendant's mortgage create an absolute bar to any relief to which he now seeks to subject the mortgage in the hands of third parties to his demand.

IV. That the defendant, by his culpable silence and non-intervention, during the whole proceedings, from beginning to end, and terminating in the consummation of the sale of the mortgaged property by the passing of titles, has deprived himself of all right to the aid and assistance of a court of justice to enforce his present claim.

[As the decision of the court did not turn upon either of these points, the argument is omitted.]

Mr. Chief Justice Taney delivered the opinion of the court:

This case is brought here by a writ of error directed to the Supreme Court of the State of Louisiana, under the twenty-fifth section of the Act of 1789. The record is voluminous, and necessarily so from the nature of the controversy in the State courts. But the following summary statement contains all the facts material to the question now before this court upon the writ of error:

In 1842, Thomas Banks, a citizen of New Orleans, was declared a bankrupt under the act of Congress to establish an uniform system of bankruptcy, and F. B. Conrad appointed his assignee. At the time of his bankruptcy he was the owner of certain real property in New Orleans, called Banks' Arcade, upon which he had executed three several mortgages, all of them outstanding and unsatisfied at the time he became a bankrupt. The first was to the New Orleans Canal and Banking Company; the second to the Carrollton Railroad Company; and the third to the City Bank of New Orleans.

533

Upon the application of the assignee, the District Court of the United States ordered those mortgaged premises to be sold, and directed that the mortgages should be cancelled, and the property sold free from incumbrance, rendering to the parties interested their respective priorities in the proceeds. It 505*] *was accordingly sold, and purchased by the appellants; and they having complied with the terms of sale, conveyances have been made to them by the assignee, and possession delivered.

Before the money was paid by the purchasers, there were some proceedings in the State courts in order to obtain the actual cancellation of these mortgages in the office in which they were recorded. But these proceedings are not material to the question before this court, and it is unnecessary to state them.

After the sale was made and reported by the assignee, the New Orleans Canal and Banking Company, which held the elder mortgage, filed a petition in the District Court, praying that the proceeds of the sale might be paid over to that bank; the whole amount for which the property was sold being insufficient to satisfy the debt due on that mortgage. The said bank had, it appears, before this application was made, consented to the sale by the assignee, and agreed that the mortgages in its favor should be cancelled for the purpose of giving titles to the purchasers, reserving its rights to be paid first out of the proceeds.

But neither the Carrollton Railroad Company nor the City Bank of New Orleans appeared in the District Court in any of the proceedings hereinbefore mentioned, although regularly notified. Nor did either of them exhibit or prove any claim against the bankrupt's estate, nor assent or object to the sale, or to any of the proceedings therein.

Subsequently, however, and after the proceedings upon this subject in the District Court had been completed, and the purchasers had complied with the terms of sale, and received their titles from the assignee, and been placed in possession of the premises, the City Bank of New Orleans, which held the third mortgage, instituted a suit in the Commercial Court of the State, for the purpose of charging the property in the hands of the purchasers with the money due on its mortgage. The purchasers resisted the claim, upon the ground that they were entitled to hold the property free and discharged from this encumbrance, under the sale made to them by the assignee, as hereinbefore stated. And the Commercial Court having decided in favor of the validity of this defense, the bank appealed to the Supreme Court of the State, where the question was raised and argued, whether, under the act of Congress establishing a uniform system of bankruptcy, the purchasers were entitled to hold the premises free and discharged from the mortgage to the City Bank.

Upon this question the Supreme Court re- 506*] versed the judgment *of the Commercial Court, and adjudged that the property should be seized by the sheriff, and sold to satisfy the demand of the bank. And it is this judgment of the Supreme Court of Louisiana that is now before this court for revision.

The record manifestly presents a case within the twenty-fifth section of the Act of Congress of 1789, and the jurisdiction of this court has not been disputed. The authority of the District Court of the United States to order the sale of the property free from and discharged of the incumbrances, as mentioned in the proceedings, was drawn in question, and the decision of the Supreme Court of the State was against the validity of the authority thus exercised by the District Court. And this is the only question upon which this court is authorized to pass judgment; for the same section of the Act of 1789, which gives jurisdiction in the cases therein enumerated, forbids it to be exercised over any other question which may have arisen in the case, or been decided by the State court.

The question, then, to be decided by this court is simply this: Are the purchasers under the sale made by the assignee of Thomas Banks, as hereinbefore stated, under the authority of the District Court, entitled to hold the property free and discharged from the mortgage and incumbrance of the City Bank?

With every respect for the learned State court which has decided against the right of the purchasers, we cannot persuade ourselves that it can be either necessary or proper, at this day, for this court, in deciding a case like this, to enter into an argument upon the construction of the bankrupt law, in order to vindicate its judgment. The power of the District Court over mortgages, in cases of bankruptcy, was fully argued and considered in the two cases reported in 3 Howard, 292 and 426, as appears by the opinions delivered by the court, and the opinions of the justices who dissented. But whatever difference of opinion existed as to some of the propositions maintained in these cases by the majority of the court, there has been no division of opinion upon a question like the one presented in this record. And the court are unanimously of opinion that the sale made by the assignee of the property in question is valid, and that the purchasers are entitled to hold it free and discharged from the mortgage to the City Bank, and from all other incumbrances mentioned in the proceedings.

The judgment of the Supreme Court of Louisiana must therefore be reversed.

Order.

This cause came on to be heard on the transcript of the *record from the Supreme [*507 Court of the State of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, to be proceeded with in conformity to the opinion of this court, and as to law and justice shall appertain.

THE WEST RIVER BRIDGE COMPANY, Plaintiffs in Error,

v.

JOSEPH DIX and The Towns of Brattleboro' and Dummerston, in the County of Windham, Defendants in Error.

THE WEST RIVER BRIDGE COMPANY, Plaintiffs in Error,

v.

THE TOWNS OF BRATTLEBORO' AND DUMMERSTON, in the County of Windham, and Joseph Dix, Asa Boyden, and Phineas Underwood, Defendants in Error.

Bridge erected and owned by private corporation may be taken for public highway, under general act, compensation being made, same as to natural persons.

A bridge, held by an incorporated company, under a charter from a State, may be condemned and taken as part of a public road, under the laws of that State.

This charter was a contract between the State and the company, but, like all private rights, it is subject to the right of eminent domain in the State.

The Constitution of the United States cannot be so construed as to take away this right from the States.

Nor does the exercise of the right of eminent domain interfere with the inviolability of contracts. All property is held by tenure from the State, and all contracts are made subject to the right of eminent domain. The contract is therefore not violated by the exercise of the right.

The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement.

Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property.

THESE cases were brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Judicature of the State of Vermont.

In 1795, the Legislature of Vermont passed an act, entitled, "An Act granting to John W. Blake, Calvin Knowlton, and their associates, the privilege of building a toll bridge over West River, in Brattleboro'."

The first section enacted that Blake, Knowlton, and their associates, should be and continue a body politic and corporate, by the name of the West River Bridge Company, for one hundred years; and that they should have the exclusive privilege of erecting and continuing a bridge over West River, within four miles from the place where said stream united with Connecticut River.

508*] *The second section fixed the rate of tolls.

The third section enacted, that, at the expiration of forty years from the 1st of December, 1796, the Judges of the Supreme Court should appoint commissioners to examine the books and accounts of the company; and if it should appear that the net proceeds should have averaged a larger sum than twelve per cent. per annum, the judges should lessen the tolls, provided they did not reduce them so low as to prevent the proprietors from receiving twelve per cent.

The remaining sections provided for the government of the company, for their keeping the bridge in good repair, etc., etc.

During the years 1795, 1796, and 1797, the company built the bridge.

In 1799, Josiah Arms conveyed to the company a small piece of land, about two acres, lying on the south bank of the West River.

In 1803, the Legislature passed a supplement to the charter, which altered the rate of tolls, but left the remaining parts of it unaltered.

In November, 1839, the Legislature passed an act entitled, "An Act relating to highways," in and whereby it was enacted and provided, that "whenever there shall be occasion for any new highway in any town or towns in this State, the supreme and county courts shall have the same power to take any real estate, easement, or franchise of any turnpike, or other corporation, when, in their judgment, the public good requires a public highway, which such courts now have, by the laws of this State, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons, whose estate, easement, franchise, or rights shall be taken, as are now granted and provided in other cases; provided, that no such real estate, easement, or franchise shall be taken in the manner and for the purposes aforesaid, unless the whole of such real estate, easement, or franchise belonging to said corporation shall be taken, and compensation made therefor."

On the 25th of August, 1842, Joseph Dix, and fifty-four other persons presented the following petition to the County Court for the County of Windham:

"That the public highway or stage road, leading from the stage house of Henry Smith, in Brattleboro', through the northerly part of said town, and through the town of Dummerston, to the south line of Putney, in said county, has for a long time been a subject of great complaint, both on account of the steep and dangerous hills, and the great difficulty of keeping the same in repair, as now traveled. That various and repeated *attempts [*509 have been made to improve the same, with little success. Your petitioners further represent, that, from actual survey and admeasurement, they are confident a highway may be laid between said termini, and made at a moderate expense, which will avoid most of the hills and be perfectly satisfactory to the public. Your petitioners are aware that some alterations have recently been made on said route by a committee of this court, upon the petition of Paul Chase and others, and that indictments are now pending against said towns for not making the same; but your petitioners believe that said committee, in ordering said alterations, are influenced by the solicitations of interested individuals, rather than

NOTE.—As to what laws are void as impairing the obligation of contracts—see notes to 3 L. ed. U. S. 162; 4 L. ed. U. S. 529.

Eminent domain; what may be taken—see note to 33 L. ed. U. S. 740; 40 L. ed. U. S. 188.

12 L. ed.

the public good, and that if said alterations are worked, they would form but little improvements, and that the public will never be satisfied until said highway is laid on the best possible route; and further, that it will cost as much to make said alterations (which we consider to be useless), as it will to make a good traveling road on the route contemplated by the petition.

"And your petitioners further represent, that the toll bridge across West River, on said route in Brattleboro', owned by the West River Bridge Corporation, is, and for a long time has been, a sore grievance, both to the traveler and the inhabitants of the towns in the vicinity, who have occasion to pass and repass, travel and labor, on said highway; and however the Legislature in the infancy of the State may have exercised sound discretion in granting said toll bridge, yet, in the present improved and thriving condition of the inhabitants, your petitioners are unable to discover any good reason why said grievance should longer be endured, or why the wealthy town of Brattleboro' should not, as well as other towns much less able, sustain a free bridge across West River. Your petitioners therefore pray the court, by an able, judicious, and disinterested committee, to cause said route to be surveyed, and such alterations and improvements to be made in the old road, or a new one to be laid, as the public good may require; and also to take the real estate, easement, or franchise of the 'West River Bridge Company,' a corporation owning the aforesaid toll bridge, for the purpose of making a free road and bridge across said river, agreeable to the statute in such case made and provided; and as in duty bound will ever pray."

In conformity with the above prayer, the court appointed three persons to examine the premises and make report.

In May, 1843, the commissioners reported that they had examined the premises, and were unanimously of opinion that a new road ought to be laid out over a considerable portion of the distance between the termini mentioned in 510*] the petition, *which road, they said, they had caused to be surveyed and laid out. The report then proceeded as follows:

"The said commissioners also examined the toll bridge across West River in Brattleboro', and have taken into consideration the propriety of laying a free road across said bridge, at the expense of said town of Brattleboro', as contemplated by said petition; and in this the said commissioners were unanimously of the opinion that public good required that the real estate, easement, or franchise of the West River Bridge Corporation should be taken, and compensation made therefor, that said toll bridge might thereafter become a free bridge. The said commissioners have therefore assessed to the said West River Bridge Corporation the sum of four thousand dollars, to be paid to the said West River Bridge Corporation out of the treasury of said town of Brattleboro', in full compensation for all real estate, easement or franchise belonging to said corporation, which real estate, easement, or franchise is situate in *said town* of Brattleboro', near the mouth of *West River, and is supposed* to be more *particularly described in a* deed from Josiah Ames to the West River Bridge Company, dated on the first day of April, in the year seventeen hundred and ninety-nine, and recorded in Brattleboro' records of deeds, liber D, page 203, containing two acres of land, be the same more or less, with a covered bridge, gate, toll house, barn, and other buildings thereon.

"Thomas F. Hammond,
"Julius Converse,
"Isaac N. Cushman,
"Commissioners."

To this report, the West River Bridge Company, the town of Brattleboro', the town of Dummerston, and the persons who were entitled to damages for the loss of land, etc. all filed objections.

The town of Brattleboro' filed five objections, the last of which was as follows:

"5. Because it does not appear from said report, and is not true in fact, that there was, or that said commissioners considered that there was, any occasion for any new highway on said route within a great distance, to wit, within two miles of said bridge."

The town of Dummerston filed ten objections, the first four of which are as follows:

"1. Because said commissioners proceeded in said report to discontinue the Indited Road, so called; a road of which the petition of Joseph Dix and others did not ask the discontinuance; *a road which said town was [*511 then liable to make, and has since raised money to make.

"2. Because the acceptance of said report would render the maintenance of two roads necessary through a large part of the town, while the natural difficulties are so great, that, with only one, the burdens of said town, when compared with its means, are unusually onerous.

"3. That said surveyed route, or Nurse Swamp route, so called, is a longer, more wet, and more expensive route, between the termini in question.

"4. That said commissioners were partial, prejudiced, and mistaken; and acted under the influence of misrepresentations made by interested persons."

The persons to whom damages were awarded by the report were fifteen in number. Eleven of these filed six objections, the first of which was as follows:

"1. Because the said commissioners were partial, prejudiced and mistaken, and acted under the misrepresentations made by interested persons."

The West River Bridge Company filed seven objections, the sixth of which stated the charter, their observance of it, and their desire for its continuance.

In November, 1843, the case was tried, and the report of the commissioners was accepted. The two towns were ordered to pay the damages awarded to the persons through whose lands the road was laid out, and "the town of Brattleboro', to pay to the West River Bridge Company the sum of damages, as assessed by said commissioners, by the 31st day of May, 1844; and that said bridge be opened for free public travel by the 1st day of June, 1844."

In February, 1844, a writ of certiorari was sued out from the Supreme Court, whereby the whole proceedings of the County Court were brought up for review. Upon the argument,

the West River Bridge Company, in addition to the exceptions which they had presented to the court below, filed the two following:

"First. That the said statute of this State, having been enacted long after the said grant by the same State of the said franchise of toll to the said West River Bridge Corporation, and long after the said grant was accepted and acted on by the said corporation, is of no validity for the purpose of authorizing the taking of the said franchise against the consent of said corporation, or the laying out of a free public highway over and upon the said bridge, on the ground that the said statute, if it purports to authorize the proceedings aforesaid, is a violation of the contract of this State with the said 512*] corporation, and is *therein repugnant to that clause of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contract.

"Second. That inasmuch as it is apparent upon the said record, and proofs filed in said cause, copies of which are hereunto annexed, that there is no occasion for any new highway within the said town of Brattleboro', near said bridge; and that no new highway is in fact laid out, or adjudged to be laid out, within the distance of two miles from either terminus of said bridge; and that the damages awarded to the said West River Bridge Company are grossly inadequate as a compensation for the value of the corporate franchise, and other property adjudged to be taken; the taking of the said franchise, and laying out of the said free public highway over and upon the said bridge, by the judgment of the said County Court, under such circumstances, a mere evasion, under color of law, of the said provision of the constitution of the United States, and an exercise of authority under this State which is wholly invalid as against the said West River Bridge Company, on the ground of its being repugnant to the constitutional provisions aforesaid."

The Supreme Court passed the following judgment:

"And thereupon, after hearing the respective parties by their counsel, upon their respective allegations, and the said execptions in the said record contained, it is considered, ordered and adjudged by the court here, that the statute aforesaid was and is valid for the purpose of taking the said franchise and laying out the said free public highway over and upon the said bridge; and that the same was and is in no wise repugnant to the Constitution of the United States; and that the said proceedings of the said County Court were a lawful exercise of the authority of the State under the said statute, and neither repugnant to nor an evasion of the provisions of the said Constitution; and that there is no error in the record and proceedings aforesaid; and that the said defendant parties recover their costs."

To review this judgment, a writ of error brought the case up to this court.

It was argued by Mr. Webster and Mr. Collamer on behalf of the plaintiffs in error, and Mr. Phelps for the defendants in error. On both sides argumentive briefs were filed; and although all the counsel added many illustrations and arguments, orally, to their respective briefs, in the progress of discussion, yet the reporter thinks it the safer course to reprint the briefs themselves.

*Mr. Webster and Mr. Collamer, for [*513 the plaintiffs in error:

In the township of Brattleboro', in Vermont, A. D. 1795, there was a public highway along the west bank of the Connecticut River, and passing across West River, a tributary of the Connecticut, which public highway was resurveyed that year, and ever has, and still does, continue unaltered within said town. This resurvey was under an act of 1795. Whitney's affidavit, and copy of survey; Record, pp. 34, 35.

In 1795, by an act of the Legislature of Vermont, the plaintiffs were created a corporation for one hundred years, with the exclusive privilege of erecting and continuing a toll bridge over West River, within four miles of the place where that stream unites with Connecticut River, and the rate of toll was fixed by said act. The act provided that the bridge should be built where the road was to be surveyed, and within two years, and it was so done. Charter, Record, p. 26, sec. 4, and proviso to sec. 6, p. 28.

The act further provided, that at the expiration of forty years the outlay and income of the plaintiffs might be examined by commissioners, appointed by the Supreme Court; and, if the plaintiffs had realized more than twelve per cent. per annum, the court might reduce the tolls so as to yield only that amount. The plaintiffs, within the limited time, erected the bridge, and have ever since sustained it, having several times rebuilt it; and now, at great expense, have erected so large a part of it with stone, that to sustain it is much less expense than formerly, and the franchise and bridge are now of great value, to wit, of the value of ten thousand dollars. Record p. 56.

By the general law of Vermont relating to highways, the County Court, on petition, may appoint commissioners to lay out highways within the county, who survey the way and assess the damage to the landholders, and make report to the court, who thereupon make their orders accordingly; and the same power is given to the Supreme Court, in laying highways into two or more counties. Revised Statutes of Vermont, p. 553.

In November, 1839, the Legislature passed "An Act relating to highways," which provided, "whenever there shall be occasion for any new highway in any town or towns within this State, the supreme and county courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the State, to lay out highways over individual or private property; and the same power is granted, and *the same rules shall be observed, in [*514 making compensation to all such corporations and persons whose estate, easement, franchise, or right shall be taken, as are now granted and provided in other cases; provided that no such real estate, easement, or franchise shall be taken in the manner and for the purpose aforesaid, unless the whole of such real estate, easement, or franchise belonging to said corporation shall be taken, and compensation made therefor."

In 1842, a petition was presented to the County Court of the County of Windham, Vermont, praying for a resurvey and improvements in the highway, beginning in the village of Brattleboro', and leading north across this bridge, and thence north to and through the town of Dummerston; and in relation to this bridge, it is represented in the petition as a great "grievance, and should no longer be endured;" and praying that said road be resurveyed, and the real estate, easement, or franchise of the "West River Bridge Company" should be taken for the purpose of making a free road and bridge across said river. On that petition the court appointed commissioners, who proceeded to examine the road and decide in the premises.

They surveyed and laid out a road in this manner (as appears, Record, p. 17), beginning at Brattleboro' village, about one mile south of this bridge, and following the existing highway to and across the bridge, and thence north of the bridge two miles, without making any alteration whatever. Record, p. 32, and Report, p. 17. They then report changes in the highway, all but fifty rods of which is in Dummerston; and, as to this bridge, the commissioners report as follows:

"The said commissioners also examined the toll bridge across West River, in Brattleboro', and have taken into consideration the propriety of laying a free road across said bridge, at the expense of the town of Brattleboro', as contemplated by said petition; and in this the said commissioners were unanimously of opinion that the public good required that the real estate, easement, or franchise of the West River Bridge Company should be taken, and compensation made therefor, that said toll bridge might be made a free bridge. The commissioners have therefore assessed to the said West River Bridge Corporation the sum of four thousand dollars, to be paid to the said West River Bridge Corporation out of the treasury of said town of Brattleboro', in full compensation for all real estate, easement, or franchise belonging to said corporation, which real estate, easement, or franchise is situate in said town of Brattleboro', near the mouth of West River." Record, pp. 15, 16, and Ames's deed, p. 32.

This report was returned into court, and [*515] though exceptions and objections were thereto made on the part of the present plaintiffs, as well as by said town of Brattleboro', yet the court, on the hearing, decided to accept and approve said report, and established the whole of said road, and ordered that Brattleboro' pay the present plaintiff the said sum of four thousand dollars, and "that said bridge be opened for the free public travel." Record, pp. 25, 26.

This decision and these proceedings were carried before the Supreme Court of the State by certiorari, and by that court affirmed; whereupon the plaintiff brings this writ of error.

By the twenty-fifth section of the Judiciary Act of the United States, it is provided, "That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision of the suit could be had, where *is drawn* in question the validity of a statute of, *or authority exercised* under, any State, on the *ground of their being* repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." The plaintiff insists that this power and authority exercised under the State of Vermont, and the statute of that State, passed in 1839, under which the power was exercised in the manner it was done, are repugnant to the Constitution of the United States.

This court is never called on to decide a State law unconstitutional in the abstract. It must have a case before it, and the question is: Is it constitutional as construed and applied in the case by the State court? If it were not so, the State courts have but to take a State law, good on its face, and construe it to cover cases, however grossly unconstitutional, and there would be no redress, as it might be said, The law is good, but the decision is bad, but that is not within the jurisdiction of this court. The only way is to treat the State statute as the State court has treated and applied it in the case, and then to consider whether, for such a purpose, it is constitutional. Such has been the course in this court. A law may be constitutional for some purposes, and not for others. Golden v. Prince, 3 Wash. C. C. R. 313. The statute of Maryland, levying a tax on any bank put in operation in that State without consent of its Legislature, was not decided as unconstitutional in the abstract. It was undoubtedly good as to private banks, or those of other States; but when it was applied by the State courts to a branch of the United States Bank, then this court decided that, for that purpose, it was bad, being unconstitutional. McCulloch v. Maryland, 4 Wheaton, 235. The statute of New York, granting the exclusive navigation of its waters by steam ves- [*516 sels, was, by this court, holden as unconstitutional, as applied to vessels coming from without the State. Gibbons v. Ogden, 9 Wheaton, 209. Indeed, the words of the United States statute are carefully adapted to such an object. It provides, not merely that this court is to pass on the constitutionality of the State law, but on any authority exercised under any State. If, then, it appears that, in this case, the plaintiff's rights have been invaded by any authority under the State, or by any law of the State repugnant to the Constitution of the United States, the decision of the State court must be reversed.

I. It is insisted by the defendant that this is a pretended exercise of the power of the eminent domain, as an incident of sovereignty—the taking of private property for public use; when, in truth and reality, it is but an action impairing and destroying the force and obligation of a contract, contrary to the provisions of the United States Constitution.

This is attempted to be effected under the disguise of calling this grant and franchise property. It is no such property as falls within, or can be the subject matter of, the eminent domain. The original idea of the eminent domain was the right of sovereignty, or residuum of power over the land which remained in the sovereign or lord paramount after the fee granted to the feudatory, and was therefore confined to the realty. In the progress of art

and commerce, when personal property became worthy of legal consideration, this power of sovereignty was extended over that, and even included debts. But this grant to the plaintiffs can fall within no such category of property. It is a franchise, a pure franchise. It included the grant of no property, real or personal. It lay in grant, and not in livery. It was created by, and had its existence in, the grant in the contract; and it could cease only by impairing and destroying that contract. If a private debt or contract, as a chose in action, could be taken under the power of eminent domain, yet still the debt is kept on foot and in force. But this is an attempt, not to take and keep in force this contract, but actually to extinguish and destroy it. Even if it were true, as has been holden, that property which the corporation create or acquire, and the taking of which would not destroy the grant, might be taken in the proper exercise of this power of eminent domain, yet the grant itself, the franchise, is no property. A franchise is defined to be "a royal privilege or branch of the king's prerogative, subsisting in the hand of a subject."

The State alone possessed the power to erect and sustain toll bridges across large streams in the public highway. This prerogative was duly granted to the plaintiffs as to a certain 517*] *stream; and in the plaintiff's hands, within the limitations of the grant, it could not be overthrown by the exercise of another branch of the sovereignty of only equal and no greater force. It is true, that the shares in a corporation are property, but the franchise is not. It cannot be taken to respond to any liabilities of the corporation, and can only be extinguished by forfeiture. It is entirely unlike a grant of land, to which the State court compare it, in this—this is a grant of royal prerogative, or branch of sovereignty; whereas, when land is granted, all the powers of sovereignty, to enforce the laws, levy taxes, and in all other respects, remain still in the State over the granted territory.

II. All the powers of the States, as sovereign States, must always be subject to the limitation expressed in the United States Constitution, nor can they any more be permitted to overstep such limitations of power by the exercise of one branch of sovereignty than another. What is forbidden to them, and which they cannot do directly, they should not be permitted to do by color, pretense, or oblique indirection. Among other matters limiting and restricting State sovereignty is this: No State shall pass "any law impairing the obligation of contracts." The power of eminent domain, like every other sovereign power in the State, is subject to this limitation and prohibition. Laws creating corporations, with powers for the benefit of the individual corporators, even though for public purposes, like turnpikes, railroads, toll bridges, etc., have always, and by almost every court in the Union, and by this court, been decided to be contracts between the government and the corporators. The plaintiffs' grant and franchise was a contract of the State for one hundred years, and by this Act of 1839, and the proceeding under it, that contract is not only impaired, but utterly destroyed; and this a State can no more do under the power of eminent domain, than under the law making power, or any other power of sovereignty. It is said, the citizen is safe, because, under the exercise of the eminent domain, he is to receive compensation for whatever is taken. That furnishes no security, for the mode and amount of compensation is fixed ex-parte by the government and its agents; and, besides that, the prohibition of the Constitution is general, and contains no exceptions for this exercise of this power of eminent domain as to contracts.

If the provision of the Constitution which forbids the impairing of contracts, does not extend to the contracts of the State governments, and they are left subject to be destroyed by the eminent domain, then there is an end of public faith. It is said, by every writer, and by almost every court which has *passed on [*518 this subject, the eminent domain, that it must rest with "the legislative power to determine when public uses require the assumption of private property," and to regulate the mode of compensation. 2 Kent's Com. 340. If to this it be holden that this extends even to contracts of the government itself, then it follows, that the State of Mississippi, or any other State indebted, has but by law to declare that the public good requires that the State debts, bonds, etc., shall be taken for the public use, and appoint commissioners to fix their present market value to the holders, and, on payment thereof, declare them extinguished. Such is the real character of this transaction.

III. The power or authority exercised under the State in this case was this: under the pretense of laying a new highway, where none was required, and none, in fact, laid, they have taken a franchise, and abolished the tolls of a chartered bridge. By the statute of 1839, under which this proceeding is attempted to be justified, it is provided, "whenever there shall be occasion for any new highway," etc., etc. In this case, it appears that there had been there a highway from 1796, and this bridge was built in that highway, and this public stage road was followed by the commissioners who made this survey for more than a mile south of this bridge, across it, and two miles north of it, without variation; and this was approved by the court; thus conclusively deciding that no new highway was required there. All that was mere pretense and fiction, and shown by the record to be false. Let us now reduce to undisguised English that statute of the State, as it was construed and enforced by the authority exercised under the State in this case. Whenever any toll bridge heretofore granted becomes of any value to the proprietors, and thereby obnoxious to the inhabitants of the vicinity, they may present a petition to their County Court, and therein falsely pretend that a new highway is there needed, and the court shall appoint commissioners of their own selecting, who may pretend to lay out a new highway, but really only follow the old one across the bridge, and appraise the damage to the proprietors of the bridge; and the court may thereupon declare and adjudge, that all tolls at said bridge cease on said sum being paid, though the time of the grant has not expired, and though the sum does not equal half the value of the franchise. This would be, in substance, enacting, that, "hereafter no tolls shall be paid for passing West River Bridge,

the same being hereby abolished, because they are offensive to the vicinity, and the proprietors shall receive such gross sum as persons selected ex-parte by the vicinity or State shall 519*] decide." All this is but destroying *the contract by which the franchise was created, under the color and pretense of exercising the eminent domain. Chancellor Kent, in treating of this power of eminent domain, says: "If they should vacate a grant of property or of a franchise, under a pretext of some public use or service, such cases would be abuses of their discretion, and fraudulent attacks on private rights and the law be clearly unconstitutional and void." 2 Kent's Com. 340.

IV. It has been holden in every State where the point has arisen, and before judges of this court, that every turnpike, railroad, or toll bridge, though made by a corporation, still is a highway, and an erection for public use; and therefore a clause in such grant to take private property, making compensation therefor, without consent of the owner, for such highway, is a legitimate exercise of the power of eminent domain. When, therefore, this power has been exercised, or the delegation of its exercise has been granted to the corporation and been used, and the private property been taken and devoted to the public use, the power has exhausted itself on the subject. All that remains is the contract of the State with the corporation, that is, that the erection shall be sustained by the corporation for public use, and compensation received therefor by the receipt of certain tolls. Now, can the State impair and abolish this contract by again exercising the power of eminent domain on the subject? Can the State say to the corporation, We delegate to you, for good consideration, the power of eminent domain in taking property to make a road or bridge for public use; and when this is done, then say, We will again assume and exercise over you the very same power we delegated and sold to you?

V. It is not necessary now to inquire whether, for the purpose of making some new, extensive, and continuous highway, canal, or railroad, which the public good required, and which required the including within it some short turnpike, railroad, or toll bridge previously granted, such turnpike, or bridge, or railroad might not be legitimately merged in the greater object. Nor is it necessary, in this case, to decide whether this bridge and franchise might not be taken and destroyed to prevent public invasion, or to convert into a fortification, or of any different public use from that to which it is already appropriated. This case is of a very distinct character, and cannot be properly confounded with such cases. This bridge was erected in a highway, constitutes a part of that highway, and is devoted exclusively to public use as a highway; nor can the proprietors deprive anyone of the right of so using it. The attempted proceeding is, not to appropriate it 520*] to any new public *use, but to keep it devoted to precisely the same use, but only to abolish the tolls, which by contract belong to the plaintiff.

It is said by the State court, that this is the same as a grant of land. Let us, then, supposing this to be so, inquire whether a State, having, for good consideration, granted land in fee-simple for the grantee to use, occupy, improve, and to sell to others for the same purpose, can, under the power of eminent domain, in any form, take that land from the owner, and compel him to receive a sum which the State's commissioners shall state, for the purpose of using, by the State, the same for the same purposes it was used before by the owner; and to sell or grant to others, for the same purposes and uses. If this be so, there is no limitation to this power; for, as the Legislature alone have the right to determine when and what private property shall be taken for the public use, if there be superadded, that they also shall determine what is public use, it must follow that what courts have often said, a State could not take one man's property and give it to another, is not true; for they have but to declare that they will take it for the use of the State, and then grant it to others for a greater price or better cultivation; or take the lands of all for an agrarian operation for the public benefit. If these tolls are abolished by this proceeding, what prevents the State from granting the same charter to some political favorite to-morrow?

It should be here observed, that the public can obtain no pecuniary benefit by this or any similar operation, nor be relieved of any burden thereby, except what is derived by fraudulently or coercively imposing on the other party an insufficient compensation, as in this case. What the plaintiff ought justly to receive was the value of the franchise, that is, that sum which the tolls would have yielded him beyond the expense of sustaining the bridge. If the public justly pay the plaintiff that sum, and then support the bridge, their outlay is precisely the same as if they left the plaintiff to sustain the bridge, and paid the tolls. Unjust oppression can be the only object of this proceeding.

This power, the eminent domain, which only within a few years was first recognized and naturalized in this country, is unknown to our Constitution or that of the States. It has been adopted from writers on other and arbitrary governments, and goes on the ground that all the powers heretofore regarded as the incident of sovereignty must be existing in some department of State authority, which is far from true. But being now recognized in court, our only security is to be found in this tribunal, to keep it within some safe and well defined limits, or our State governments will be but unlimited despotisms *over the private citizens. [*521 They will soon resolve themselves into the existing will of existing majority, as to what shall be taken, and what shall be left to any obnoxious natural or artificial person. It is easy to say, that, by a very slight improvement on the proceedings in this case, and in pursuance of the avowed principle, that, as to the exercise of this power of eminent domain, the Legislature, or their agents, are to be the sole judges of what is to be taken, and to what public use it is to be appropriated, the most levelling ultraisms of Antirentism or Agrarianism or Abolitionism may be successfully advanced.

Mr. Phelps, for defendants in error:

In the year 1795, the plaintiffs in error were made a corporation by act of the Legislature of the State of Vermont, and, by said act, had granted to them the exclusive privilege of erect-

ing and maintaining a bridge over West River, within four miles of its mouth, with the right of taking certain tolls for passing the same. This franchise was to continue for the term of one hundred years, and has not yet expired. The company proceeded to erect their bridge, and have maintained it until the institution of the proceeding in question, and have, during all that time, been in the enjoyment of the franchise so granted. In 1842, a proceeding was instituted in the County Court for the County of Windham, within which said bridge was situated, under a general law of the State of Vermont for the laying out and opening highways, by which proceeding the bridge was made a public and free highway, and the right to take tolls extinguished. This was effected by the judicial determination of a court of competent jurisdiction. In conformity with the provisions of the statute, the whole property of the plaintiffs, both realty and franchise, was appraised, and due provision made for compensation to the plaintiffs to the full value of the same.

By a statute of that State, then and still in force (passed November, 1839), the supreme and county courts have the same power to take any real estate, easement, or franchise, of any turnpike or other corporations, when, in their judgment, the public good requires a public highway, which they have by law to lay out highways over individual or private property.

The plaintiffs in error now seek to reverse the proceedings and judgment of the State court, upon the ground that the above mentioned statute, so far as it professes to authorize the extinguishment of their franchise, is unconstitutional and void.

The Constitution of the United States and 522*] that of the State *of Vermont both recognize the right to take private property for public use. The latter declares:

"That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."

This provision, as well as the similar one in the Constitution of the United States, does not confer the power, but merely limits its exercise.

The power itself is an essential and indispensable attribute of sovereignty, which can be neither alienated nor abridged by ordinary legislation.

Without the limitation imposed by the Constitution, it might be exercised without compensation. Gov. etc. of Cast Plate Manf. Co. v. Meredith, 4 T. R. 794; Stark v. McGowen, 1 Nott & McCord, S. C. R. 387.

Full compensation to the plaintiffs having been provided in this case, the proceeding does not conflict with the constitution of Vermont.

Nor with that of the United States, as the provision in that instrument is not restrictive of the States, but of the general government only.

The proceeding, then, being a regular and legitimate exercise of power, warranted by the constitution of the State, the question arises, Does it conflict with that provision in the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts? And this question resolves itself into another, namely, Does this provision of the Constitution override, annul, or abrogate the right of eminent domain, as it would otherwise exist in the sovereignty of the respective States?

For if this power is still supposed to exist, notwithstanding this clause of the Constitution, then its legitimate exercise cannot conflict with that provision.

All real estate is held, or supposed to be held, by grant from the State. If it cannot be taken for public use in a proper case, and in a proper way, under the restriction of the State constitution, then it cannot be taken at all, and the right of eminent domain is gone.

That this right still remains in the several States is not now to be questioned. Rogers v. Bradshaw, 20 Johns. 742; Beekman v. Sar. and Schen. Railroad Co. 3 Paige's C. R. 45; Boston Water Power Co. v. Boston and Worcester Railroad Co. 23 Pick. 360; 15 Vt. 745; Charles River Bridge v. Warren Bridge, 7 Pick. 459; S. C. 11 Peters, 546.

But there is no need of authorities on this point. The entire *practice and uni- [*523 versal opinion of the country, judicial and extrajudicial, from the adoption of the Constitution to this day, have settled the matter.

It is not to be supposed that the purpose of this restriction was to extinguish a power in the several State sovereignties so essential to the exercise of their functions.

If, then, this proceeding is obnoxious to the objection of violating the Constitution, it must be for some other reason than because private property, once granted by the State, has been resumed for public use in the manner pointed out by the constitution and laws of the State.

If this restriction does not forbid the exercise of the power, does it limit and control it?

Unquestionably it does. A grant is a contract, and anything which defeats or impairs rights growing out of it, in a manner inconsistent with the constitution and laws of the State, may be said to impair its obligation. Thus, to take private property for public use without compensation, where the State constitution forbids such taking, is, doubtless, prohibited by that clause of the Constitution of the United States which provides that no law shall be passed impairing the obligation of contracts.

In order, then, to render the exercise of the right of eminent domain justifiable and consistent with the Constitution of the United States, it is admitted there should be, first, compensation to the owner, where the State constitution requires it; and, second, such necessity for the act as a rational exercise of the power, keeping in view its end and purpose, requires.

As to the compensation, it is in this instance fully provided for. So scrupulous is the law of the State on this point, that not only was the whole property of the plaintiffs compensated for at its appraised value, in this instance, but provision is made by the statute (see Statutes of Vermont, p. 133), for a revision of the subject, in certain cases, by the judicial tribunals.

It was objected before the State court, that no notice was given to the plaintiffs by the commissioners, before proceeding to assess damages.

The State court, doubtless, found that notice was given, as the return of the commissioners so states. But if the fact were otherwise, the

omission does not vitiate the proceeding, as the statute just alluded to provides a remedy in such a case.

The value of the plaintiff's property and the amount of compensation having been ascertained by judicial determination, this court will not inquire whether it was in fact reasonable or not. The adjudication of the State court is conclusive, and an error of judgment, in this particular, would not vitiate the proceeding.

524*] *The next inquiry is as to the necessity for the exercise of the power in this instance.

It is admitted that the right to take private property for public use depends upon necessity. Yet that need not be of the most stringent character—an unavoidable, uncontrollable necessity. It is enough if the public interest or convenience require it; in short, if it be a measure of public expediency.

Upon this principle has the power been exercised in a vast majority of cases throughout the country. All modern improvements in the means of communication stand upon this footing. New roads are substituted for old ones for convenience alone. Canals and railroads are not indispensable; the country may subsist, as it has done, without them; yet they are so intimately connected with the great interests of the country, and have such important bearing upon its prosperity and welfare, that the propriety and legality of the exercise of this right of eminent domain for their establishment have never been doubted.

If the power exist in the State governments, the power of judging of the reasonableness of its exercise in a given case, and of the degree of necessity generally which justifies the appropriation of private property to public use, must exist there also.

This power is admitted to appertain to the State Legislatures, and may, without question, be delegated by them to the judicial tribunals, as it is often delegated to private corporations and mere executive officers. When exercised by the latter, it is of course subject to judicial revision and control. Upon this ground stands the proceeding in chancery in the State court, which has been brought hither by writ of error.

This judicial function must be vested somewhere, and from the very nature of it, it having reference to a matter of mere internal and domestic policy, it must be in the State government.

The decision of the State court is therefore, upon this point, conclusive, and the necessity for the exercise of the power in this case is judicially established.

If, then, the power has been exercised agreeably to the provision of the State constitution, and upon sufficient necessity, for proper and rational objects, and in a proper and legal manner, the plaintiffs are driven to the alternative of either admitting the constitutionality and validity of the proceeding, or denying the power altogether. For, if such an exercise of it be forbidden by the prohibition in the Constitution of the United States, all and every exercise of it is equally so.

But that prohibition was not intended to

525*] override or abrogate *the right of eminent domain. The latter remains full, ample, and unimpaired, to be exerted in a sound legislative and judicial discretion, in proper cases and for proper ends.

The proceeding in question does not impair the obligation of the grant to the plaintiffs in 1795.

Every grant of this kind is made subject to the right of eminent domain, and of course upon the implied condition that the property may be resumed for public use whenever the public necessities require it. This is universally admitted in respect to land, and I shall endeavor to show that there is no difference in this respect between land and a franchise like the one in question. The resumption, therefore, whenever the public exigencies require it, is in harmony with the original intent and tenor of the grant.

It is not an attempt to repeal or annul the grant, but the proceeding recognizes its validity and the rights derived from it. It is on this ground that compensation is made.

It is a purchase by the State of the plaintiffs' franchise, and may be illustrated by its analogy to a purchase by a grantor of a title derived originally from his own conveyance.

It is, I am aware, a proceeding in invitum; but, being a purchase, it is no more in derogation of the grant, than the course of a creditor who, by virtue of legal process, seizes property of his debtor held by force of a conveyance from himself, is in derogation of that conveyance.

Whether the right of a State to compel a sale from the plaintiffs to itself is derived from an implied condition in the grant, or from a power inherent in its sovereignty, is unimportant; if legally effected, it is a sale and purchase after all, and is no more inconsistent with the original grant than if made voluntarily by the plaintiffs.

It does not impair the obligation of the contract, because it leaves to the plaintiffs the full benefit of the grant; and if they cannot enjoy that benefit in the precise form originally specified, they take what, in the eye of the law, is the same thing, an equivalent. The franchise is extinguished, but is extinguished by purchase; and if any injustice is done, it must consist rather in the arbitrary and unnecessary exercise of an acknowledged power, than in any denial or impeachment of the validity of the grant, or the rights derived from it. The proceeding, instead of questioning or impairing the obligation of the contract, recognizes and affirms it, and gives a compensation upon the simple and only ground, that the rights and property of the plaintiffs derived from the grant are not to be questioned.

The general power of the State to reclaim, for public use, *lands which have been [*526 granted to individuals, will not be questioned; but the question has been agitated elsewhere, and may be started here, whether a franchise granted to private persons for their private emolument, and yet for a public use, is not beyond the reach of that power. These cases being of a mixed character, combining private right and emolument with public convenience, the question resolves itself into two others, viz.:

1st. Are private rights thus conferred of any superior sanctity? And,

2d. Does the partial, qualified, and limited

appropriation of the property to public use exclude the further exercise of the right of eminent domain?

It is impossible, we think, to make any distinction between franchises thus granted, and titles to land derived from letters patent. The same sovereign power exists. The same great law of public necessity, demanding that private right should yield to public exigency, applies to both.

The distinction attempted to be drawn from the supposition, that the citizens takes his grant of land knowing and expecting that it may be resumed for public use, but receives his grant of a franchise with different expectations, is evidently a distinction without a difference, as it is based upon an assumption in every point of view erroneous.

The exercise of this right of eminent domain over franchises created by special grant is a common occurrence. Bridges are substituted for ferries; turnpikes are superseded by railroads and canals; yet, frequent as this occurrence is, it has rarely been contested.

The power of the Legislature to take franchises, like other property, for public use, has never, to my knowledge, been judicially denied. On the contrary, it has often been judicially asserted. See Armington v. Barnet, 15 Verm. 745.

In Rogers v. Bradshaw, 20 Johns. 742, the canal encroached upon and took a portion of the turnpike, and the latter encroached upon the adjoining land; yet the right of the State was sustained.

In the case of Charles River Bridge v. Warren Bridge, the ferry, which was the property of a private corporation, was superseded by the bridge.

In the case between The Boston Water Power Company and The Worcester Railroad, 53 Pick. 360, the power of the Legislature over franchises is expressly asserted. In that case the franchise was not, indeed, annihilated, but was diminished in value, and impaired. If the Legislature could take a portion of the franchise, they could doubtless take the whole, if the exigency required it.

527*] *Mr. Phelps here adverted to the case of Charles River Bridge v. Warren Bridge, 7 Pickering, to show the opinions entertained on this point at the bar and on the bench. See pp. 394, 399, 452, 453, 500, 513, 522, 523, 528; also, to same case, 11 Peters, pp. 472, 490, 505, 569, 579, 580, 638, 641, 644, 645.

He also cited, Tuckahoe Canal Co. v. The James River Railroad Co. 11 Leigh, 42; Enfield Bridge Co. v. Hartford and New Haven Railroad Co. 17 Conn. 40, 60; same case, pp. 457, 461; 8 N. H. 398.

It is to be borne in mind, that the real estate of the plaintiffs was not derived from the grant of 1795, nor was it acquired by the aid of the power of the State; no authority being conferred by that act to take private property without the owner's assent.

The taking the land, therefore, if it conflict with any grant, conflicts with the original grant from the British crown, made prior to the Revolution. If it come in collision with the grant of the franchise, it is only incidentally and consequentially.

Unless, then, the Legislature, by the grant of the franchise in 1795, parted with the right of eminent domain over the place where the franchise was to be exercised, the taking the land for public use must be conceded to be lawful.

If, then, the land can be taken, could not the same power take the franchise, which is merely incident to it?

If we advert to the Act of 1795, we shall find that the franchise consists in the right to take toll upon a bridge, to be maintained by the plaintiffs, upon their own land, and at their own expense. Now, if the bridge itself passes from them in a legal way, and they cease to maintain it, the right to take toll ceases.

The case, then, is not one in which the grant of the franchise is revoked or annulled by the Legislature in bad faith, but one in which, the public having acquired the rights of the plaintiffs, the further exercise of the franchise is neither reasonable nor just.

It was argued in the court below, that the franchise is not annexed to land, and therefore "could not be taken, but where the right is given to take land."

The franchise, by the grant, might be exercised at any place within four miles of the mouth of the river. The proceeding in question merely prohibits its exercise in this particular place, leaving it to be enjoyed elsewhere, if it be of any value to the plaintiffs. In this view, the case falls precisely within the decision in The Boston Water Power Company v. The Worcester Railroad, 23 Pick. 360.

*The plaintiffs, however, had given a [*528 location to it, and its exercise elsewhere being probably of no value, the case was treated by the State court as a practical extinguishment of it, and compensation made accordingly.

In this view of the matter, the franchise still subsists, impaired only by the establishment of a public highway in this particular place.

Does the partial and qualified appropriation of the plaintiffs' property to public use exclude the exercise of the right of eminent domain by the State?

It is to be observed, that the land of the plaintiffs had never been taken by the sovereign power for public use until the proceeding now in question was instituted. It was voluntarily devoted to that use by the plaintiffs, with a view to the enjoyment of the franchise.

The property is still private, and the public use it only by paying an equivalent, in the form of toll.

Were it otherwise, it would be difficult to make out that a partial exercise of the right of eminent domain exhausts the power, or that, property being devoted to public use, the sovereign power cannot regulate, modify, or control that use. The fact of such devotion comes rather in aid, than otherwise, of the public right.

Whether, therefore, we have regard to the fact that the property is private, or to the qualified public use, there is no impediment to taking it absolutely for a more enlarged and beneficial public use, on the one hand, and modifying or changing the use on the other.

There is no difficulty arising from the fact that the property is already sequestered to public use; but the difficulty has arisen, as the reported cases show, from the employment of private corporations to exercise the power in

question, and to carry out these great measures of internal improvement. The objection was first started, that, in the case of turnpike and railroad corporations, the property of the citizen has been taken, not for public use, but for the private use and benefit of the corporation. The proceeding has, however, been sustained, upon the ground that, although the enterprise has been undertaken with a view to private emolument, yet the ultimate purpose is the public convenience; and if the legislative power can take private property for such purposes, it may be taken through the agency of a corporation, as well as that of a public executive officer. So, where a grant of a franchise comes in collision with a previous grant of a similar kind, it has been objected that it was not competent for the Legislature to take the property of one person for the use and benefit [*529] of another; yet such a proceeding has been sustained, where it is for public use, and the increased benefit to the public requires the sacrifice.

Our case, however, is free from this objection. The property has been taken, not for the benefit of another private corporation, but strictly and solely for public use.

The objection urged in the State court, that no new highway is laid out, is founded upon an erroneous assumption. The public and free highway is, in a legal sense, a different thing from a bridge, or way, which is private property, and which the citizens may use only for a toll to be paid in each instance of using.

The highway was public only in a limited sense. That it was competent for the Legislature or the courts, under the statute, to enlarge the public use, is, I think, clear.

If the objection is, that no new highway was necessary, inasmuch as the public had already a right of passage there, and could use the way as they had previously done, the answer is, that the power of the courts over this matter is not limited to cases of strict, absolute necessity, but they are at liberty to consult the public convenience, and to look to a more beneficial and enlarged public use. They are the constitutional judges on this point, and their decision upon it is conclusive.

The statute of Vermont, under which the court proceeded, does not use the word "necessity." Its language is, "Whenever there shall be occasion for a new highway," etc., and "when in their [the court's] judgment the public good requires a public highway."

There are several points made in the State courts, which are addressed rather to the discretion of those courts, and which have no bearing upon the constitutional question; it is not deemed necessary to notice them here.

Mr. Justice Daniel delivered the opinion of the court:

The West River Bridge Company, Plaintiffs, v. Joseph Dix and the Towns of Brattleboro' and Dummerston, Defendants, upon a writ of error to the Supreme Court of Judicature of the State of Vermont, sitting in certain proceedings as a court of law,

and

The same Plaintiffs v. The Towns of Brattleboro' and Dummerston, and Joseph Dix, Asa Boyden, and Phineas Underwood, upon a writ of error to the Supreme Court of Judicature, and to the Chancellor of the First Circuit of the State of Vermont.

These two causes have been treated in the argument as one—and such they essentially are. Though prosecuted in different forms and in different forums below, they are merely various modes of endeavoring to attain the same end, and a decision in either of the only question they raise for the cognizance of this court disposes equally of that question in the other.

They are brought before us under the twenty-fifth section of the Judiciary Act, in order to test the conformity with the Constitution of the United States of certain statutes of Vermont; laws that have been sustained by the Supreme Court of Vermont, but which it is alleged are repugnant to the tenth section of the first article of the Constitution, prohibiting the passage of State laws impairing the obligation of contracts.

It appears from the records of these causes, that, in the year 1795, the plaintiffs in error were, by act of the Legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and enjoyed the franchise granted to them by law, until the institution of the proceeding now under review.

By the general law of Vermont relating to roads passed 19th November, 1839 (vide Revised Laws of Vermont, p. 553), the county courts are authorized, upon petition, to appoint commissioners to lay out highways within their respective counties, and to assess the damages which may accrue to land holders by the opening of roads, and these courts, upon the reports of the commissioners so appointed, are empowered to establish roads within the bounds of their local jurisdiction. A similar power is vested in the Supreme Court, to lay out and establish highways extending through several counties.

By an act of the Legislature of Vermont, passed November 10, 1839, it is declared that "whenever there shall be occasion for any new highway in any town or towns of this State, the supreme and county courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the State, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons whose estate, easement, franchise, or rights shall be taken, as are now granted and provided in other cases. "Under the authority of [*531 these statutes, and in the modes therein prescribed, a proceeding was instituted in the County Court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plain-

tiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property, and for the consequent extinguishment of their franchise. The judgment of the County Court, having been carried by certiorari before the Supreme Court of the State, was by the latter tribunal affirmed.

Pending the proceedings at law upon the petition of Dix and others, a bill was presented by the plaintiffs in error to the Chancellor of the first judicial circuit of the State of Vermont, praying an injunction to those proceedings so far as they related to the plaintiffs or to the real estate, easement, or franchise belonging to them. This bill, having been demurred to, was dismissed by the Chancellor, whose decree was affirmed on appeal to the Supreme Court, and a writ of error to the last decision brings up the case on the second record.

In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared and implied, formed a contract between the plaintiffs and the State of Vermont, which the latter, under the inhibition in the tenth section of the first article of the Constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the State legislation or to the Constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, 532*] which should be regulated with *reference to the advantage of the whole society. This power, denominated "eminent domain" of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the Supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent *do- [*533 main. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely by the greatest violence of construction be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a ques-

tion of power; and, conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A dis-
534*] tinction *has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth; avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, chap. 3, page 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. Vide Bl. Com. Vol. III. chap. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the State, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power *of a State, in the* exercise of eminent domain, *to extinguish immediately* a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of The Governor and Company of the Cast Plate Manufacturers v. Meredith, 4 Term Reports, 794, and Lord Kenyon, especially in that case founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

The several State decisions cited in the argument, from 3 Paige's Chancery Reports, p. 45; from 23 Pickering, p. 361; from 17 Connecticut Reports, p. 454; from 8 New Hampshire Reports, p. 398; from 10 New Hampshire Reports, p. 371, and 11 New Hampshire Reports, p. 20, are accordant with the decision above mentioned, from 4 Durnford and East, and entirely *supported by it. One [*535 of these State decisions, namely, the case of The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company, 17 Connecticut Reports, places the principle asserted in an attitude so striking, as seems to render that case worthy of a separate notice. The Legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted, in a charter subsequently granted by them to the Hartford and Springfield Railroad Company, a provision in these words, "That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company." This provision, comprehensive as its language may seem to be, was decided by the Supreme Court of the State as not embracing any exemption of the Bridge Company from the legislative power of eminent domain, with respect to its franchise, but to declare this, and this only—that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the State. These decisions sustain clearly the following positions, comprised in this summary given by Chancellor Walworth, 3 Paige's Reports, p. 7, where he says, that, "notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency, of the State is concerned." In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognize the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power—the only question properly presented upon these records—we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise; nor do we inquire into the conformity between

the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the State for the exercise of her legitimate authority, and as being without the province assigned to this court by the Judiciary Act.

536*] *Upon the whole, we consider the authority claimed for the State of Vermont, and the exertion of that authority which has occurred under the provisions of the statutes above mentioned, by the extinguishment of the franchise previously granted the plaintiffs, as set forth upon the records before us, as presenting no instance of the impairing of a contract, within the meaning of the tenth section of the first article of the Constitution, and consequently no case which is proper for the interposition of this court.

The decisions of the Supreme Court of Vermont are therefore affirmed.

Mr. Justice McLean:

As this is a constitutional question of considerable practical importance, I will state succinctly my general views on the subject.

The West River Bridge, under the statutes of Vermont, was appropriated to public purposes. And it is alleged that the charter under which the bridge was built and possessed by such appropriation was impaired. Our inquiry is limited to this point. For whatever injury the proceeding may have done to the interests of the corporation, unless its contract with the State was impaired, we have no jurisdiction of the case.

The power in a State to take private property for public use is undoubted. It is an incident to sovereignty, and its exercise is often essential to advance the public interests. This act is done under the regulations of the State. If those regulations have not been strictly observed, that is not a matter of inquiry for this court. The local tribunals have the exclusive power in such cases.

This act by a State has never been held to impair the obligations of the contract by which the property appropriated was held. The power acts upon the property, and not on the contract. A State cannot annul or modify a grant of land fairly made. But it may take the land for public use. This is done by making compensation for the property taken, as provided by law. But if it be an appropriation of property to public use, it cannot be held to impair the obligations of the contract.

It is insisted that this was a pretended exercise of the power of the eminent domain, with the view of destroying the force and obligation of the plaintiffs' charter.

This whole proceeding was under a standing law of the State, and it was sanctioned, on an appeal, by the Supreme Court of the State. A procedure thus authorized by law, and sanctioned, cannot be lightly regarded. It has all the solemnities of a sovereign act.

537*] *But it is said that the franchise of the plaintiff cannot be denominated property; that "it included the grant of no property, real or personal; that it lay in grant, and not in livery."

If the action of the State had been upon the franchise only, this objection would be unanswerable. The State cannot modify or repeal a charter for a bridge, a turnpike road or a bank, or any other private charter, unless the power to do so has been reserved in the original grant. But no one doubts the power of the State to take a banking house for public use, or any other real or personal property owned by the bank. In this respect, a corporation holds property subject to the eminent domain, the same as citizens. The great object of an act of incorporation is, to enable a body of men to exercise the faculties of an individual. Peculiar privileges are sometimes vested in the body politic, with the view of advancing the convenience and interests of the public.

The franchise no more than a grant for land can be annulled by the State. These muniments of right are alike protected. But the property held under both is held subject to a public necessity, to be determined by the State. In either case, the property being taken renders valueless the evidence of right. But this does not, in the sense of the Constitution, impair the contracts. The bridge and the ground connected with it, together with the right of exacting toll, are the elements which constitute the value of the bridge. The situation and productiveness of the soil constitute the value of land. In both cases, an estimate is made of the value, under prescribed forms, and it is paid when the property is taken for public use. And in these cases the evidences of right are incidents to the property.

No State could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State, and kept up by it, as a toll bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised bona fide by a State, but the property, not its product, must be applied to public use.

It is argued that if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended. If in the course of time the property, by a change of *circumstances, should no longer be [*538 required for public use, it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway should be abandoned, it would revert to the original proprietor and owner of the fee.

It is objected that this bridge, being owned by a corporation and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private.

The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. But it was a toll bridge, and by the act it is made free. The use, therefore, is not the same. The tax assessed on the citizens of the town, to keep up and pay for the bridge, may be impolitic or unjust; but that is not a matter for the consideration of this court.

It is supposed, if this power is sustained by the State of Vermont, it will be in the power of a State to seize the evidences of its indebtment in the hands of its citizens, or within its jurisdiction, have their value assessed, and by paying the amount, extinguish them. Such a case bears no analogy to the one before us. The contract only is acted upon in the case supposed. The obligation to pay the money by the State is materially impaired, which brings the case within the Constitution. But the appropriation of property affects the contract or title by which it is held only incidentally. This, it is said, is an extremely technical distinction, and is not sustainable, as it enables a State to do indirectly what the Constitution prohibits.

However nice the distinction may seem to be, when examined, it will be found substantial. The power of appropriation by a State has never been held by any judicial tribunal as impairing the obligation of a contract in the sense of the Constitution. And this power has been frequently exercised by all the States since the adoption of the Constitution. In the fifth article of the amendments to the Constitution it is declared, "Nor shall private property be taken for public use without just compensation." This refers to the action of the federal government, but a similar provision is contained in all the State constitutions. Now, the Constitution does not prohibit a State from impairing the obligation of a contract unless compensation be made, but the inhibition is absolute. So that if such an act come within the prohibition, the act is unconstitutional. But this power has been exercised by the States since the foundation of the government, and 539*] no *one has supposed that it was prohibited by that clause in the Constitution which inhibits a State "from impairing the obligations of a contract."

The only reasonable result, therefore, to which we can come is, that the power in the State is an independent power, and does not come within the class of cases prohibited by the Constitution.

This view gives effect to the Constitution in imposing a salutary restraint upon legislation affecting contracts, but leaves the States free in their exercise of the eminent domain, which belongs to their sovereignties, is essential for the advancement of internal improvements, and acts only upon property within their respective jurisdictions. The powers do not belong to the same class. That which acts upon contracts and impairs their obligation only is prohibited.

Mr. Justice Woodbury:

In the decisions of this court on constitutional questions it has happened frequently, *that, though its members* were united in the *judgment, great differences* existed among them in the reasons for it, or in the limitations on some of the principles involved. Hence it has been customary in such cases to express their views separately. I conform to that usage in this case the more readily, as it is one of the first impression before this tribunal, very important in its consequences, as a great landmark for the States as well as the general government, and, from shades of difference and even conflicts in opinion, will be open to some misconstruction.

I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a State is derived from, or protected by, its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace. Vattel, B. 1, ch. 20, sec. 244; 2 Kent's Com. 270; 37 Am. Jurist, 121; 1 Bl. Com. 139; 3 Wils. 303; 3 Story on Const. 661; 3 Dallas, 95. Some ground this public right on sovereignty. 2 Kent's Com. 339; Grotius, B. 1, ch. 1, sec. 6. Some, on necessity. 2 Johns. Ch. 162; 11 Wend. 51; 14 Wend. 51; 1 Rice, 383; Vanhorne's Lessee v. Dorrance, 2 Dallas, 310; Dyer v. Tuscaloosa Bridge, 2 Porter, 303; Harding v. Goodlett, 3 Yerger, 53. Some on implied compact. Raleigh & Gaston Railroad Company v. Davis, 2 Dev. & Bat. 456; 2 Bay, 36, in S. Car.; 3 Yerger, 53. Where a charter is granted after laws exist to condemn property when needed for public purposes, others might well rest such a right on the hypothesis that such laws are virtually a part and condition of the grant itself, as much as *if inscribed in it, totidem verbis. Towne[*540 v. Smith, 1 Wood. & M. 134; 2 Howard, 608, 617; 1 Howard, 311; 3 Story on Const. secs. 1377, 1378, quære.

But, however derived, this eminent domain exists in all governments, and is distinguished from the public domain, as that consists of public lands, buildings, etc., owned in trust, exclusively and entirely by the government, 3 Kent's Com. 339; Memphis v. Overton, 3 Yerger, 389, while this consists only in the right to use the property of others, when needed, for certain public purposes. Without now going further into the reasons or extent of it, and under whatever name it is most appropriately described, I concur in the views of the court, that it still remains in each State of the Union in a case like the present, having never been granted to the general government so far as respects the public highways of a State, and that it extends to the taking for public use for a road any property in the State, suitable and necessary for it. Tuckahoe Canal case, 11 Leigh, 75; 11 Peters, 560; 20 Johns. 724; 3 Paige, Ch. 45; 7 Pick. 459. But whether it could be taken without compensation, where no provision exists like that in the fifth amendment of the Constitution of the United States, or that in the Vermont constitution, somewhat similar, is a more difficult question, and one which some have doubted. 4 D. & E. 794; 1 Rice, 383; 3 Leigh, 337. I do not mean to express any opinion on this, as it is not called for by the facts of this case. But compensation from the public in such cases prevails generally in modern times, and certainly seems to equalize better the burden. 2 Dallas, 310; Pisc. Bridge v. Old Bridge, 7 N. Hamp. 63; 4 D. & E.

794; 1 Nott & McCord, 387; Stokes et al. v. Sup. Ass. Co. 3 Leigh, 337; 11 Leigh, 76; Hartford Bridge, 17 Conn. 91; Vattel, B. 1, ch. 20, sec. 244; 3 Paige, Ch. 45; 2 Dev. & Bat. 451; 2 Kent's Com. 339, note; Lex. & Ch. Railroad case, 3 Dana, 289.

Nor shall I stop to discuss whether it is on this principle of the eminent domain alone, that private property has always been taken for highways in England, on making compensation, so as to be a precedent for us. This was done there formerly, not as here, but by a writ ad quod damnum, and it was for ages issued before the grant of any new franchise by the king, whether a road, ferry, or market; and the inquiry related to the damage by it, whether to the public or individuals. Fitz. N. B. 221; 3 Bac. Abr. Highways, A.

Nor were alterations in roads, or even the widening or discontinuing of them, allowed without it. Thomas v. Sorrel, Vaughan, 314, 348, 349; Cooke, ch. 267; 6 Barn. & Ald. 566. 541*] *But in modern times Parliament, by various laws, have authorized all these, after inquiry and compensation awarded by certain magistrates. 1 Burr. 263; Cro. Car. 266, 267, 5 Taunt. 634; Domat, B. 1, t. 8, sec. 2, 7 Adol. & Ellis, 124.

And thus, notwithstanding the theoretical omnipotence of Parliament, private rights and contracts have been in these particulars, about compensation and necessity for public use, as much respected in England as here.

So as to railroad companies, as well as turnpikes, under public trustees, and as to common highways; the former are often authorized there to erect bridges, and carry their roads over turnpikes and other highways; but it is on certain conditions, keeping them passable in that place or near, and on making compensation. Kemp. v. L. & B. Railway Co. 1 Railway Cases, 505, and Attorney-General v. The L. & S. Railroad, 1 Ib. 302, 224; 2 Ib. 711; 1 Gale & D. 324; 2 Ib. 1; 4 Jurist. 966; 5 Ib. 652; 9 Dowling, P. C. 563; 7 Adol. & Ellis, 124; 3 Maule & Selw. 526; 11 Leigh, 42.

But I freely confess, that no case has been found there by me exactly in point for this, such as the taking of the road or bridge of one corporation for another, or of taking for the public a franchise of individuals connected with them. Though at the same time, I have discovered no prohibition of it, either on principle or precedent, if making compensation and following the mode prescribed by statute.

The peculiarity in the present case consists in the facts that a part of the property taken belonged to a corporation of the State, and not to an individual, and a part was the franchise itself of the act of incorporation.

I concur in the views, that a corporation created to build a bridge like that of the plaintiffs in error is itself, in one sense, a franchise. 2 Bl. Com. 37; Bank of Augusta v. Earle, 13 Peters, 596; 4 Wheat. 657; 7 Pick. 394; 11 Peters, 474, 454, 472, 490, 641, 645; 11 Leigh, 76; 3 Kent's Com. 459. And, in another sense, that it possesses franchises incident to its existence and objects, such as powers to erect the bridge and to take tolls. See same cases.

I concur in the views, also, that such a franchise as the incorporation is a species of property. 7 N. Hamp. 66; Tuckahoe Canal Co. v. Tuckahoe & Camb. Railroad Co. 11 Leigh, 76. It is a legal estate vested in the corporation. 4 Wheat. 700; 11 Peters, 560. But it is often property distinct and independent of the other property in land, timber, goods, or choses in action, which a corporation, like a body not artificial, may own. 3 Bland, 449; 11 Leigh, 76.

*It is also property subject to be sold, [*542 sometimes even on execution, Semb. 4 Mass. 495; 11 Peters, 434, and may be devised or inherited. 17 Conn. 60. And while I accede to the principle urged by the counsel for the bridge, that the act of incorporation in this case was a contract, or in the nature of one between the State and its members, 1 Mylne & Craig, 162; 4 Peters, 514, 560; Lee v. Nailer, 2 You. & Coll. 618; King v. Pasmoor, 3 D. & R. 246; Dartmouth College v. Woodward, 4 Wheat. 628; 7 Cranch, 164; Terrett v. Taylor, 9 Cranch, 43, 52; 9 Wend. 351; 11 Peters, 257; Canal Co. v. Railroad, 4 Gill & Johns. 146; 3 Kent's Com. 459; Enfield Toll Bridge case, 17 Conn. 40; 1 Greenleaf, 79; 8 Wheat. 464; 10 Conn. 522; Peck. 269; 1 Alabama, 23; 2 Stewart, 30, I concur in the views of the court, that this or other property of corporations may be taken for the purpose of a highway, under the right of eminent domain, and that the laws of Vermont authorizing it are not in that respect and to that extent violations of the obligation of any contract made by it with the corporation. Bradshaw v. Rodgers, 20 Johns. 103, 742; The Trust. of Belf. Ac. v. Salmond, 2 Fairf. 113; Enfield Bridge case, 17 Conn. 40, 45, 61; 3 Paige, Ch. 45; Charles River Bridge v. Warren Bridge, 7 Pick. 394, 399; S. C. 11 Peters, 474; 1 Bland, 449; Bellona Co. case, 3 Bland. 449.

Because there was no covenant or condition in the charter or contract, that the property owned by it should not be liable to be taken, like all other property in the State, for public uses in highways. 7 N. Hamp. 69; 4 Wheat. 196; Jackson v. Lamphire, 3 Peters, 289.

Because, without such covenant, all their property, as property, must be liable to proper public uses, either by necessity, or the sovereignty of the State over it, or by implied agreement.

And because, on a like principle, taxes may be imposed on such property, as well as all other property, though coming by grant from the State, and may be done without violating the obligation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled. 5 Barn. & Ald. 157; 2 Railway Cases, 17 arg. 23; 7 Cranch, 164; New Jersey v. Wilson, 4 Peters, 511; Providence Bank v. Billings, 11 Peters, 567, Shaw, Ch. J. in Charles River Bridge v. Warren Bridge; Gordon v. Appeal Tax Court, 3 Howard, 146; 12 Mass. 252; 4 Wheaton, 699; 4 Gill & Johns. 132, 153; Williams v. Pritchard, 4 D. & E. 2. The grantees are presumed to know all these legal incidents or liabilities, and they being implied in the grant or contract, their happening is no violation of it. 8 Peters, 281, 287; 11 Peters, 641, 644; 3 Paige, 72.

*Vattel says: "The property of cer- [*543 tain things is given up to the individuals only with this reserve." B. 1, ch. 20, sec. 244.

In England anciently, when titles of land became granted with immunities from numerous ancient services, it was still considered that such lands were subject by implication, under a certain trinoda necessitas, to the expenses of repair of bridges as well as forts, and of repelling invasion. Tomlins, Dict. Trinoda Necessitas; 3 Bac. Abr. Highways, A.

Even the right to a private way is sometimes implied in a grant, from necessity. Cro. Jac. 189; 8 D. & E. 50; 4 Maule & Selw. 387; 1 Saund. 322, note.

It is laid down, also, by Justice Story, that "a grant of a franchise is not in point of principle distinguishable from a grant of any other property." Dartmouth College v. Woodward, 4 Wheat. 699, 701.

I concur, therefore, in the further views, that a corporation as a franchise, and all its powers as franchises, both being property, may for these and like reasons, in proper cases, be taken for public use for a highway. Pierce v. Somersworth, 10 N. Hamp. 370; 11 N. Hamp. 20; Pisca. Bridge v. N. Hamp. Bridge, 7 N. Hamp. 35, 66; 8 N. Hamp. 398, 143; 11 Peters, 645; Story, J., in Warren Bridge v. Charles River Bridge; 2 Kent's Com. 340, note; 2 Peters, 658; 5 Paige, Ch. 146; 1 Rice, 383; 2 Porter, 296; 7 Adol. & Ellis, 124; 3 Yerger, 41; 2 Fairf. 222; 23 Pick. 360; J. Bonaparte v. C. Railroad, Baldw. C. C. 205; Tuckahoe Canal Co. v. The T. & J. River Railroad Co. 11 Leigh, 42; Enfield Bridge Co. v. Hartford & New Haven Railroad, 17 Conn. 40; Armington v. Barnet, 15 Vermont, 745, and 16 Vermont, 446, this case; 3 Cowen, 733, 754; 11 Wendell, 590; Lex. & Oh. Railroad case, 8 Dana, 289; 18 Wend. 14.

It must be confessed, that some surprise has been felt to find this doctrine so widely sustained, and in so many of the States, and yet no exact precedent existing in England.

But in relation to it here, I am constrained, in some respects, to differ from others, and, as at present advised, agree to the last proposition, concerning the taking of the franchise itself of a corporation, only when the further exercise of the franchise as a corporation is inconsistent or incompatible with the highway to be laid out.

It is only under this limitation as to the franchise itself, that there seems to be any of the necessity to take it which, it will be seen in the positions heretofore and hereafter explained, should exist. Nor do I agree to it with that limitation, without another—that it must be in cases where a clear intent is manifested in the laws, that one corporation and its uses 544*] shall *yield to another, or another public use, under the supposed superiority of the latter and the necessity of the case. 4 Gill & Johns. 108, 150; Barbour v. Andover, 8 N. Hamp. 398.

Within these limitations, however, the acts of incorporation and all corporate franchises appear to me to possess no more immunity from reasonable public demands for roads and taxes, than the soil and freehold of individuals.

The land may come by grant or patent from the State, as well as the corporation, and both the grant and corporation may be contracts. But they are contracts giving rights of property, held, and of course understood to be held, subject to those necessary burdens and services and easements to which all other property is liable. And it is neither inconsistent with the grant of them, nor a violation of the contract contained in them, to impose those burdens and easements, unless an express agreement has been made to the contrary by the State in the act of incorporation or grant, as is sometimes done in respect to taxation; but where the corporation as a franchise, or its powers as franchises, can still be exercised usefully or profitably, and the highway be laid out as authorized, I see no reasons why these franchises should then be condemned or taken. The property owned by a banking or manufacturing corporation may, for instance, be condemned for highways, necessarily, where situated on a great line of travel; but why should their franchises be, if their continued existence and use may be feasible and profitable, and one not inconsistent with the taking and employment of their other property for a public highway?

In this instance, however, as a fact, the franchise was established and seems to be useful only in one locality. The continuance of it elsewhere than at this spot would be of no benefit to individual members or the public. If the bridge itself and land of the corporation at that place were taken, it was better for the latter that the franchise should be taken with them, if enhancing the damages any, because, unlike a bank or manufacturing company, the corporation could not do business to advantage elsewhere, even within the limited four miles, as there was no road elsewhere within their grant. The law of Vermont, too, was clear, that the toll bridge might be made to give way for a free highway. It is, therefore, only under the particular circumstances and nature of this case, that, in my apprehension, the taking of the franchise itself was not a violation of the contract. For, under different circumstances, if a franchise be taken and condemned for a highway, when not connected locally with other property wanted, when it can be exercised on ordinary principles elsewhere, when not *in some re- [*545 spects incident to, or tied up with, the particular property and place needed, I am not now prepared to uphold it. I am even disposed to go further, and say, that if any property of any kind is not so situated as to be either in the direct path for a public highway, or be really needed to build it, the inclination of my mind is, that it cannot be taken against the consent of the owner. Because, though the right of eminent domain exists in some cases, it does not exist in all, nor as to all property, but probably, as to such property only as from its locality and fitness is necessary to the public use. Semb. 4 Mylne & Craig, 116; Webb v. Manch. & Leeds Railroad Co. 1 Railway Cases, 576.

It may be such, not only for the bed of the road, but perhaps for materials in gravel, stone, and timber, to build it with. Yet even then it must be necessary and appropriate as incidents. 2 Dev. & Bat. 462; 13 East. 200.

And, also, for aught I now see, circumstances must, from its locality and the public wants, raise an urgent necessity for it. "The public necessities" are spoken of usually as the fit occasion to exercise the power, if it be not

derived from them in a great degree, and the reason of the case is confined to them. See cases before.

The ancient trinoda necessitas extended to nothing beyond such necessity.

Indeed, without further examination, I fear that even these limitations may not be found sufficient in some kinds of public highways—such as railroads, for instance. And I must hear more in support of this last position before acquiescing in their right to take, in invitum, all the materials necessary to build such roads—as the timbers on which their rails are laid, or the iron for the rails themselves.

Nor do I agree that, in all cases of a public use property which is suitable or appropriate can be condemned. The public use here is for a road, and the reasoning and cases are confined chiefly to bridges and roads, and the incidents to war. But the doctrine, that this right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse. Where the public use is one general and pressing, like that often in war for sites of batteries, or for provisions, little doubt would exist as to the right. Salus populi suprema est lex. So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age—such as its pressing demands for easier social intercourse, quicker 546*] *political communication, or better internal trade—and advancing with the public necessities from blazed trees to bridle paths, and thence to wheel roads, turnpikes, and railroads.

But when we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without this power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison?

So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist, which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence; while as to a light-house, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents, also, for such seizures of private property abroad, for objects like the former, though some such doctrines appear to have been advanced in this country. 3 Paige, 45. Again, many things belonging to bridges, turnpikes, and railroads, where public corporations for some purposes are not, like the land on which they rest, local and peculiar and public, in the necessity to obtain them by the power of the eminent domain. Such seem to be cars, engines, etc., if not the timber for rails, and the rails themselves. Gordon v. C. & J. Railway Co. 2 Railway Cases, 809.

Such things do not seem to come within the public exigency connected with the roads which justifies the application of the principle of the eminent domain. Nor does even the path for the road, the easement itself, if the use of it be not public, but merely for particular individuals, and merely in some degree beneficial to the public. On the contrary, the user must be for the people at large—for travelers—for all; must also be compulsory by them, and not optional with the owners; must be a right by the people, not a favor; must be under public regulations as to tolls, or owned, or subject to be owned, by the State, in order to make the corporation and object public, for a purpose like this. 3 Kent's Com. 270; Railroad Co. v. Chappell, 1 Rice, 383; Memphis v Overton, 3 Yerger, 53; King v. Russell, 6 Barn. & Cress. 566; King v. Ward, 4 Adol. & Ellis, 384.

*It is not enough that there is an act [*547 of incorporation for a bridge, or turnpike, or railroad, to make them public, so as to be able to take private property constitutionally, without the owner's consent; but their uses, and object, or interests, must be what has just been indicated—must in their essence, and character, and liabilities, be public within the meaning of the term "public use." There may be a private bridge, as well as private road, or private railroad, and this with or without an act of incorporation.

In the present instance, however, the use was to be for the whole community, and not a corporation of any kind. The property was taken to make a free road for the people of the State to use, and was thus eminently for a public use, and where there had before been tolls imposed for private profit and by a private corporation so far as regards the interest in its tolls and property.

And the only ground on which that corporation, private in interest, was entitled in any view originally to condemn land or collect tolls was, that the use of its bridge was public—was open to all and at rates of fare fixed by the Legislature and not by itself, and subjected to the revision and reduction of the public authorities.

It may be, and truly is, that individuals and the public are often extensively benefited by private roads, as they are by mills, and manufactories, and private bridges. But such a benefit is not technically nor substantially a public use, unless the public has rights. 1 Rice, 388. And in point of law it seems very questionable as to the power to call such a corporation a public one, and arm it with authority to seize on private property without the consent of its owners.

I exclude, therefore, all conclusions as to my opinions here being otherwise than in conformity to these suggestions; though, when, as in the present case, a free public use in a highway and bridge is substituted for a toll bridge, and on a long or great and increasing line of public travel, and thus vests both a new benefit and use, and a more enlarged one, in the public, and not in any few stockholders, I have no doubt that these entitle that public for such a use to condemn private property, whether owned by an individual or a corporation. Boston W. P. Co. v. B. & W. Railroad

Corp. 23 Pick. 360. And it is manifest that unless such a course can be pursued, the means of social and commercial intercourse might be petrified, and remain for ages, like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement. 2 Dev. & Bat. 456; 1 Rice, 395; 8 Dana, 309.

548*] *I exclude, also, any inference, that, in assenting to the doctrine, that an act of incorporation for a toll bridge is a contract, giving private interests and rights as well as public ones, and thereby not allowing a State to take the private ones or alter them, unless for some legitimate public use, or by consent, as laid down in 4 Wheat. 628. I can or do assent to the doctrine of some of the judges there in respect to public offices being such contracts as not to be changed or abolished by a State on public considerations, without incurring a violation of the contract.

I should be very reluctant to hold, till further advised, that public offices are not, like public towns, counties, etc., mere political establishments to be abolished or changed for political considerations connected with the public welfare. 9 Cranch, 43. The salaries, duration, and existence of the officers themselves seem to be exclusively public matters, open to any modification which the representatives of the public may decide to be necessary, whenever no express restriction on the subject has been imposed in the Constitution or laws. Quære. Hoke v. Henderson, 4 Dev. 1.

This would seem the implied condition of the office or contract, as much as that it may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it. See, as to the last, McCulloch v. Maryland, 4 Wheat. 316; Weston v. The C. C. of Charleston, 2 Peters, 449; Dobbins v. Comm. of Erie County, 16 Peters, 435.

Finally, I do not agree that even this franchise, as property, can be taken from this corporation without violating the contract with it, unless the measure was honest, bona fide, and really required for what it professed to be, beside being, as before remarked, proper, on account of the locality and nature of this property, to be condemned for this purpose.

And though I agree, that, for most cases and purposes, the public authorities in a State are the suitable judges as to this point, and that the judiciary only decide if their laws are constitutional, 2 Kent's Com. 340; 1 Rice, 383; that the Legislature generally acts for the public in this, 2 Porter, 303; 3 Bl. Com. 139, note; 4 D. E. 794, 797; that road agents are their agents, under this limitation, 1 Rice, 383; yet I am not prepared to agree, that if, on the face of the whole proceedings—the law, the report of commissioners, and the doings of the courts—it is manifest that the object was not legitimate, or that illegal intentions were covered up in forms, or the whole proceedings a mere "pretext," our duty would require us to uphold them. Ibid. Rice, 391. In England, 549*] though *this power exists, yet if used maliciously or wantonly, it is held to be void. Boyfield v. Porter et al. 13 East, 200.

In this case, however, while the fairness of it is impeached by the plaintiffs in error, yet on the record the object avowed is legal. It was to make travel free where it was before taxed, and the bridge, though remote from the changes desired in the old road, was still situated on the great line of travel over it, and not merely by color and finesse connected, and, from increases in population and business, seemed proper to be made free at the expense of the town or county.

Nor on the face of the record do the proceedings seem void, because the assessment may have been without a jury, when it was made by the legal officers, appointed for that purpose. 3 Peters, 280; 2 Dev. & Bat. 451, 460; Beekman v. Sar. Railroad, 3 Paige, Ch. 45. Nor void as made by the commissioners without notice, when the return states notice, and when there was a full hearing enjoyed by all before the court on the report.

Nor void because the compensation was too small to the corporation—as it was assessed in conformity to law—or too burdensome to the town alone to discharge, though the last might well have been flung on a larger number, like a county. 10 N. Hamp. 370; Tomlins, Dict. Ways, 2; 1 Rice, 392. Nor because the commissioners take a fee instead of an easement, when the Legislature provides for a fee as more expedient. 2 Dev. & Bat. 451, 467. Nor because some of the property condemned was personal, when it was mixed with the real, and when real or personal, if needed and appropriate, may at times be liable. 1 Rice, 383.

With these explanations, I would express my concurrence in the judgment of the court.

Mr. Justice Wayne delivered a dissenting opinion.

Order.

The West River Bridge Company, Plaintiffs in error, v. Jospeh Dix, and the Towns of Brattleboro' and Dummerston, in the County of Windham.

This cause came on to be heard on the transcript of the record from the Supreme Court of Judicature of the State of Vermont, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

*The West River Bridge Company, [*550 Plaintiffs in Error, v. The Towns of Brattleboro' and Dummerston, in the County of Windham, and Joseph Dix, Asa Boyden, and Phineas Underwood.

This cause came on to be heard on the transcript of the record from the Supreme Court of Judicature of the State of Vermont and the Chancellor of the First Judicial Circuit of the said State of Vermont, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Judicature and Chancellor of the First Judicial Circuit of the State of Vermont in this cause be, and the same is hereby affirmed, with costs.

CHARLES PATTERSON, Appellant,
v.
EDMUND P. GAINES et ux.[1]

Louisiana law—question as to legitimacy of child and right to property as against purchaser from executors of deceased.

The opinion of this court in the case of Gaines v. Relf and Chew, 2 Howard, 619, reviewed.

A court of equity can decide the question whether or not a party is the heir of a deceased person. It is not necessary to send the issue of fact to be tried by a court of law.

Where a marriage took place in Pennsylvania, it must be proved by the laws of Pennsylvania. In that State it is a civil contract, to be completed by any words in the present tense, without regard to form, and every intendment is made in favor of legitimacy.

Where the complainant in a bill offers to receive an answer without oath, and the defendant accordingly filed the answer without oath, denying the allegations of the bill, the complainant is not put to the necessity, according to the general rule, of contradicting the answer by the evidence of two witnesses or of one witness with corroborating circumstances. The answer, being without oath, is not evidence, and the usual rule does not apply.

In this case, however, even if the answer had been under oath and had denied the allegations of the bill, yet there is sufficient matter in the evidence of one witness, sustained by corroborating circumstances, to support the bill.

A marriage may be proved by anyone who was present and can identify the parties. If the ceremony be performed by a person habited as a priest, and per verba de presenti, the person performing the ceremony must be presumed to have been a clergyman.

If the fact of marriage be proved, nothing can impugn the legitimacy of the issue, short of the proof of facts showing it to be impossible that the husband could be the father.

By the laws of Louisiana and Pennsylvania, a marriage between a woman and a man who had then another wife living was void, and the woman could marry again without waiting for a judicial sentence to be pronounced declaring the marriage to be void.

If she does so marry again, and the validity of her second marriage be contested, upon the ground that she was unable to contract it because the first marriage was legal, it is not necessary for her to produce the record of the conviction of 551*] *her first husband for bigamy. The burden of proof lies upon those who make these objections to the second marriage, and the declarations of the bigamist, that he had a first wife living when he married the second, are evidence.

When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is that a child born after the marriage is legitimate, and it will be incumbent on him who denies it to disprove it, although in so doing he may not have to prove a negative.

Although the general rule is that a person cannot be affected, much less convicted, by any evidence, decree, or judgment to which he was not actually or in consideration of law privy, yet it has been so far departed from as that wherever reputation would be admissible evidence, there a verdict between strangers in a former action is evidence also.

Although by the Code of Louisiana a person holding property by sale from a donee of an excessive donation is liable to the forced heir only after an execution first had against the property of the donee, yet this rule does not apply to cases where the sale was made without any authority judicial or otherwise.

Where sales are made without this authority, the purchaser is presumed to have notice of it. It is his duty to inquire whether or not the requisitions of law were complied with.

The statute of limitations which was in force when the suit was brought is that which determines the right of a party to sue.

By the Louisiana code of 1808, a deceased person could not, in 1811, dispose of more than one fifth of his property, when he had a child. The child is the forced heir for the remaining four fifths.

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

It was a branch of the case of Gaines et ux. v. Chew et al. which is reported in 2 Howard, 619.

In the history of that case it is said, 2 Howard, 627, that in 1836, Myra (then Myra Whitney and now Myra Gaines) "filed a joint bill with her husband, in the Circuit Court of the United States for the District of Louisiana, against Relf and Chew, the executors in the will of 1811, the heirs of Mary Clark, and all the purchasers and occupants of the estate of which Clark died in possession, claiming to be the heir and devisee of Clark, and calling upon them all to account for the rents and profits of the several portions of the estate."

The joint bill, thus filed against a number of persons, was treated differently by the respondents. Some pursued one course and some another. Relf and Chew, the executors, demurred generally, and upon the argument of the demurrers, some questions arose upon which the judges differed in opinion. These questions were consequently certified to the Supreme Court and the answers to them constitute the case reported in 2 Howard, 619. Patterson was one of the occupants and purchasers of a part of the property of which Clark died seized, and he chose to answer the bill. The proceedings of the court under this answer are now under consideration.

The history of Zuline Carriere, the mother of Mrs. Gaines, is briefly given in 2 Howard, 620, and need not be repeated. The facts are there stated, of her marriage with a man by the *name of De Grange; of her after- [*552 wards learning that De Grange had a former wife living; of her separation from him and journey to New York to obtain proofs of this first marriage of De Grange; of De Grange's first wife arriving in New Orleans from France; of De Grange being committed to prison on a charge of bigamy, and subsequent escape from the country; of Clark's marriage with Zuline in Philadelphia; of the birth of Myra, the complainant in the present suit; of Clark's placing her in the family of Mr. and Mrs. Davis; of the circumstances attending the making of the will of 1811; and some of the testimony relating to a subsequent will made in 1813, leaving all his property to his daughter Myra. The statement of these things in 2 Howard is referred to, as being a more particular narrative than the mere outline which is here given. We propose to take up the case where that report left it.

The record in the present case was in a very confused condition. Papers were misplaced, and the entire record of proceedings in the

552

1.—Mr. Chief Justice Taney did not sit in this cause, a near family relative being interested in the event.

Mr. Justice McLean did not sit in this cause.

Mr. Justice Catron did not sit in this cause, by reason of indisposition.

NOTE.—As to illegitimate children—their incapacity to inherit, when they take as devisees under the description of children, see note to 10 L. ed. U. S. 408.

What constitutes a valid marriage, see note to 11 L. ed. U. S. 108.

Court of Probates, from 1834 to June 8, 1836, was introduced as evidence by the defendant, Patterson, in the Circuit Court; and also the proceedings of that court at a much earlier date. From them the following facts appear:

Clark died on the 16th of August, 1813. On the 18th of August, two days afterwards, the following petition was presented to the Court of Probates.

To the Honorable the Judge of the Court of Probates of the Parish of New Orleans.

The petition of Francisco Dusuau de la Croix, of this parish, planter, respectfully shows:

That your petitioner has strong reasons to believe, and does verily believe, that the late Daniel Clark has made a testament or codicil, posterior to that which has been opened before your honorable court, and in the dispositions whereof he thinks to be interested. And whereas it is to be presumed that the double of this last will whose existence was known by several persons, might have been deposited with any notary public of this city.

Your petitioner, therefore, prays that it may please your Honor to order, as it is the usual practice in such cases, that every notary public in this city appear before your honorable court within the delay of twenty-four hours, in order to certify on oath if there does or does not exist, in his office, any testament or codicil, or any sealed packet, deposited by the said late Daniel Clark.

And your petitioner, as in duty bound, will ever pray, etc.

(Signed) D. Seghers,
Of Counsel for the Petitioner

553*] *Francisco Dusuau de la Croix, the above petitioner, maketh oath that the material facts in the above petition set forth are true, to the best of his knowledge and belief.

(Signed) Dusuau de la Croix,
Sworn to before me, August 18th, 1813.
Thos. Beal, Reg. Wills.

The court ordered the notaries of the city to appear before it on the next day, when seven appeared and deposed that no testament nor codicil, nor sealed packet, had been deposited in their office by the late Daniel Clark, nor had any deposition, mortis causa, been made by him.

The will of 1811 was then admitted to probate. It was as follows:

Daniel Clark. In the name of God: I, Daniel Clark, of New Orleans, do make this my last will and testament.

Imprimis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all of the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate my friends, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate.

(Signed) Daniel Clark.
Ne varietur. New Orleans, 20th May, 1811.
J. Pitot, Judge.

Letters testamentary were granted to Relf on the 27th of August, 1813, and to Chew on the 21st of January, 1814, the latter being absent from New Orleans at the time of Clark's death.

Davis had removed to the North, with his family, in 1812, carrying with him Myra, who passed for his daughter and bore his name.

Things remained in this condition until 1832, when Myra married William Wallace Whitney, and about the time of her marriage became acquainted with her true name and parentage.

In 1834, Whitney and wife commenced a series of proceedings in the Court of Probates, which continued until the 8th of June, 1836, when the court dismissed their petition. It has been already stated, that this entire record was introduced into the case now under consideration by the defendant, Patterson, on the 13th of August, 1840. Many depositions were taken, which constitute a part of the mass of evidence in the case, although some of the witnesses were re-examined under the authority of a commission issuing from the Circuit Court of the United States, after the filing of [*554 the bill. They who were thus re-examined were Harriet Smith, alias Harper, Madame Caillaret, the sister of Zuline, Belle Chasse, and De la Croix. They whose depositions were not taken over again were Bois Fontaine, Mr. and Mrs. Davis, Pitot, Derbigny, Madame Benguerel, and Preval. The evidence of Madame Despau, another sister of Zuline, was only taken once, and then under a commission issuing from the Circuit Court.

It is not necessary to give a particular narrative of the proceedings before the Court of Probates, from 1834 to June, 1836. They were commenced in March, 1834, by a petition filed by Charles W. Shaumburg for letters of administration upon the estate of Clark, on the ground that the succession was in an unclaimed and abandoned condition, and that he had an interest in the settlement of the same. This petition was opposed by Relf and Chew. On the 18th of June, 1834, Whitney and wife became parties, by filing a petition praying that the will of 1811 might be annulled and set aside, that Myra Clark Whitney might be declared to be the heir of Clark, and that Relf and Chew might be ordered to deliver over the estate to her, etc.

On the 14th of January, 1835, Relf and Chew filed an answer to this petition, denying that Myra had any claim; that Clark was ever legally married, or that he ever had any legitimate offspring; and denying all the other allegations generally.

In the course of this controversy many depositions were taken.

On the 8th of June, 1836, the Court of Probates pronounced its judgment, nonsuiting the plaintiffs.

On the 28th of July, 1836, Whitney and wife filed a bill on the equity side of the Circuit Court of the United States, against Relf and Chew, the executors under the will of 1811, against the heirs of Mary Clark, and all the occupants and purchasers of the estate of which Clark died in possession. The bill charged that the will of 1813 was fraudulently suppressed, that its existence and suppression were notorious, and that all the purchasers did, in their consciences, believe that the will of 1811 had been fraudulently admitted to probate. It

moreover stated the whole case, of which an outline has been given, alleging, also, that the sales made by Relf and Chew were illegally made.

Relf and Chew demurred generally and also pleaded to the jurisdiction of the court. The proceedings in that branch of the case are set forth in 2 Howard, 619. Other defendants pursued other measures of defense, which it is not now necessary to mention.

555*] *On the 12th of December, 1837, Whitney's death was suggested, and the suit continued in the name of Myra alone.

On the 24th of May, 1839, Edmund P. Gaines and Myra, his wife, filed a supplemental bill, stating their intermarriage, and praying that the suit might be continued in their joint names as complainants.

On the 18th of April, 1840, the complainants filed an amended bill praying that Caroline de Grange, and her husband, John Barnes, might be made defendants to the original bill.

On the 21st of April, 1840, Patterson filed his answer, which was not under oath, but signed by his counsel, in conformity with the waiver of the complainants. The answer denied all right and title of the complainants in and to the following described piece or lot of ground situated on Philippa Street between Perdido and Poydras streets, having front, on Philippa street, one hundred and twenty-five feet French measure, by seventy feet in depth, the same being in a square of ground situated in Suburb St. Mary of this city, now the second municipality of New Orleans, and bounded by Philippa, Circus, Perdido, and Poydras streets.

It alleged that the property belonged to Clark in his lifetime and was legally sold by Relf and Chew, his executors, and denied all the allegations of the bill.

On the 25th of April, 1840, Patterson filed the following supplemental answer:

"The supplemental answer of Charles Patterson, one of the defendants in the above entitled suit, most respectfully represents:

"That the property described in his original answer is ninety feet in depth, instead of seventy-five, French measure, as therein stated, and further represents that your respondents purchased a part of said property from Gabriel Correjollas and the remainder from Etienne Meunier, and that the said Meunier purchased from the said Correjollas, and the said Correjollas purchased all the said property at an auction sale made in the year 1820 by the testamentary executors of the late Daniel Clark, all of which facts will more fully appear from the four several copies of the authentic deed of sale hereunto annexed as a part of this supplemental answer. And this respondent prays that this supplement be made a part of his original answer."

To this answer the deeds referred to were attached as exhibits.

556*] *As the claim of Mrs. Gaines in the present case was made, not as devisee under the will of 1813, but as forced heir under the Civil Code of 1808, ch. 3, sec. 1, art. 19, which prohibits a testator from willing away more than one fifth of his property if there is a legitimate child living at the time of his death, it is only necessary to insert in this statement such of the depositions as have a bearing upon the marriage of Clark, and the consequent legitimacy of his daughter Myra.

Madame Despau and Madame Caillaret were sisters of Zuline, and examined under a commission issuing from the United States court.

Their evidence was as follows:

Interrogatories to be propounded, on behalf of Complainants, to John Sibley, Madame Caillaret, Madame Despau, and Mrs. Eliza Clark.

1st. Were you, or not, acquainted with the late Daniel Clark, of New Orleans?

2d. Was the said Daniel Clark ever married? If so, when and to whom, and was there any issue of said marriage? State all you may know or have heard of said Clark upon this subject.

3d. Were you acquainted with a man in New Orleans by the name of De Grange? If so, when and where have you known him? Was he, or not, married when he first came to New Orleans, and did he, or not, so continue until after he finally left it? State all you may know or have heard touching this subject.

4th. If you know anything further material to the complainants in the controversy, state it.

Cross-Interrogatories.

1. Will you and each of you answering any interrogatories of the complainants state your age, employment, aand present residence, and if a married woman state your maiden name; and if married more than once state the names of your husbands, and by whom and when and where you resided during each year from 1810 to 1814?

2. If you answer the first interrogatory in chief affirmatively, state how that acquaintance originated. When and where did you first see Mr. Daniel Clark? Was your acquaintance with him intimate or not? Was it ever interrupted, and if so, for what reason? Did it continue uninterrupted until the death of Mr. Clark, and if so, how long a period did it embrace? Do you say that your intimacy with Mr. Clark was of such a nature as to enable you to become acquainted with *events [*557 in his life which were not disclosed to the entire circle of his acquaintance? And if so, have you a distinct recollection of any such event or events? And state the circumstances which strengthen your memory on this point.

3. Will you state where Mr. Clark resided when in New Orleans? Do you recollect the street and the house? Did he board or keep house? If he boarded, did he also lodge at the same house? And if so, who was the keeper of this house, and what was his or her general character? If he had a house, did he have a housekeeper? And if so, what was his or her general character? Did he reside in New Orleans during the summer months? And if not, where did he go? At whose house did he stop, or whom did he visit? And state what you know of the people whom he visited, and his own standing in society.

4. If, in answering the second interrogatory, you say that Mr. Daniel Clark was ever married, state when, where, and to whom. By what priest, clergyman, or magistrate, and who were the witnesses present? Were you among the witnesses? What other witnesses were present with you? Did you ever see the lady whom you say Mr. Clark married? And

if so, what was her personal appearance, her age, and name, and family? Where did she reside before the time you say she was married to Mr. Clark? How long did you know her before that time? Or were you acquainted with her until then? Did not Mr. Clark introduce her to you? State particularly everything you know in regard to the connection of Mr. Clark with the lady whom you call his wife, and state if she was ever married before or after the time you say she was married to Mr. Clark; if so, when, where, and to whom?

5. Did you ever know that there was any issue of said supposed marriage? If so, who told you? State your means of knowing anything about this circumstance. What was the name, age, sex, and the time of the birth of the child whose father you say was Mr. Clark? Do you know who nursed and reared this child? And if so, who was the nurse? State, if you please, if you saw the mother shortly after this child was born? And if so, where was she? Did she reside then at the house of Mr. Clark? And if not, why not, and where did she reside? Did Mr. Clark live with her at this time, and were they known generally to the neighbors as man and wife?

6. Was this supposed marriage of Mr. Clark's (if you say he ever was married) public or private? If public, did Mr. Clark introduce his wife to his friends and acquaintances in New Orleans? And if she was not introduced, state why she was not. Or was his marriage private? If so, why was it private? And what circumstances could, or did, probably 558*] *induce him to keep that marriage secret from his friends and the public?

7. Do you know Myra C. Whitney, one of the complainants in this controversy? If so, how long have you been acquainted with her? Did either of the complainants inform you, by letter or otherwise, that your testimony would be important to them in this suit? And if so, on what points did they wish you to be prepared?

8. If, in answering the third interrogatory, you say that you were acquainted with a man in New Orleans by the name of De Grange, state, if you please, where and when you first became acquainted with him, in what year. Were you intimate with him? And if so, did this intimacy continue without interruption? Was he born in the city of New Orleans? And if not, where was he born, and how long did he remain in said city? What was his employment? Was he married in New Orleans, or where was he married? Were you present at his marriage? And if so, state when and by whom he was married. Have you ever seen his wife? And if so, what was her personal appearance and age, and what was her name prior to her marriage with De Grange? Did you ever see De Grange's wife and the lady whom you say Mr. Clark married, in company together? If so, when and where, and how often? State particularly everything you know touching said De Grange, his wife, and their connection or relation with Mr. Clark.

9. Did you ever, or not, hear Mr. Clark acknowledge that he had any natural children in New Orleans? And particularly, did you ever, or not, hear him acknowledge two female children—the one named Caroline and the other named Myra? And is, or not, that Myra one of the complainants in this case? Did you ever hear him say that he intended to leave by will money or property enough to Myra to take the stain off her birth? If you heard him use such expressions, or those of a similar character, state what you suppose he meant by taking off the stain from the birth of his own legitimate daughter.

10. Will you state who was the mother of the complainant, Myra? And did the mother nurse Myra? If not, why not? Who did nurse her? Did her mother die, and leave her an infant, or was she too sick and too feeble to nurse that child? Did the mother of Myra, the complainant, nurse and raise her, or not? If not, who did? Mention particularly any and all the circumstances on which you found your opinion.

11. If you know when the complainant Myra was born, state the precise date and place, and state if you know by whom and where she was raised, and whose name she bore, and why she bore that name.

*12. State, if you please, what are [*559 your feelings and affections towards the complainants; whether you are related to or connected with either of them; and if you are, how and in what degree or way, and whether you have any interest in the event of this suit.

13. Will each one of you, answering any of these direct or cross-interrogatories, state whether you have seen or examined, read or heard read, any one of them, or copies of them, at any time or place, before you were called upon by the commissioner to answer them? If ay, state when, where, and by whom they were thus so shown or read to or by you, and for what purpose. State, also, each one of you, whether you have had any conversation or correspondence, within the last three or four years, with the complainants, or with either of them, respecting their supposed claims against the estate of Daniel Clark, and if you answer affirmatively, state why, when, and where such conversation or correspondence occurred, and the nature and amount of them so far as your memory will serve you; and who was present at such conversations. If you have any letters from the complainants, or from either of them, on the matters referred to in these direct and cross-interrogatories, annex them to your answers if possible; and if not possible, state why. If you have preserved and cannot annex them, give true extracts from them, and if that be not possible, state your recollections.

14. What is your maternal language? If not English, do you undertsand that language perfectly? And if you do not understand English, how have you contrived to answer the foregoing chief and cross-interrogatories? Who has translated them to you?

Answers of Madame Despau.

Answer to the first interrogatory.

I was well acquainted with the late Daniel Clark, of New Orleans.

Answer to the second interrogatory.

Daniel Clark was married in Philadelphia, in 1803, by a Catholic priest. I was present at

this marriage. One child was born of that marriage, to wit, Myra Clark, who married William Wallace Whitney, son of General T. Whitney, of the State of New York. I was present at her birth, and knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew, nor had any reason to believe, any other child besides Myra was born of that marriage. The circumstances of her marriage with Daniel 560*] Clark *were these: Several years after her marriage with Mr. De Grange she heard that he had a living wife. Our family charged him with the crime of bigamy in marrying the said Zuline; he at first denied it, but afterwards admitted it, and fled from the country; these circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential, first, to obtain record proof of De Grange having a living wife at the time he married my sister, to obtain which from the records of the Catholic church in New York (where Mr. De Grange's prior marriage was celebrated) we sailed for that city. On our arrival there, we found that the registry of marriages had been destroyed. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. De Grange's prior marriage. We proceeded to that city and found Mr. Gardette; he answered that he was present at said prior marriage of De Grange, and that he afterwards knew De Grange and his wife by this marriage —that this wife had sailed for France. Mr. Clark then said, "You have no reason longer to refuse being married to me. It will, however, be necessary to keep our marriage secret till I have obtained judicial proof of the nullity of your and De Grange's marriage." They, the said Clark, and the said Zuline, were then married. Soon afterwards, our sister, Madame Caillaret, wrote to us from New Orleans that De Grange's wife whom he had married prior to marrying the said Zuline, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy—Father Antoine, of the Catholic church in New Orleans, taking part in the proceedings against De Grange. Mr. De Grange was condemned for bigamy in marrying the said Zuline, and was cast into prison, from which he secretly escaped by connivance, and was taken down the Mississippi River by Mr. Le Briten d' Orgenois, where he got to a vessel, escaped from the country, and, according to the best of my knowledge and belief, never afterwards returned to Louisiana; this happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister it would be necessary that there should be brought by her an action against the name of De Grange. The anticipated change of government created delay, but at length, in 1806, Messrs. James Brown and Eligeas Fromentin, as the counsel of my sister, brought suit against the name of Jerome De Grange in the City Court, I think, of New Orleans. The grounds of said suit were, that said De Grange had imposed himself in marriage upon her at a time when he had living a lawful wife. 561*] *Judgment in said suit was rendered against said De Grange. Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. Mr. Clark became a member of the United States Congress in 1806. While he was in Congress, my sister heard that he was courting Miss ——,[1] of Baltimore. She was distressed, though she could not believe the report, knowing herself to be his wife; still, his strange conduct in deferring to promulgate his marriage with her had alarmed her; she and I sailed for Philadelphia, to get the proof of his marriage with my sister. We could find no record; and were told that the priest who married her and Mr. Clark was gone to Ireland. My sister then sent for Mr. Daniel W. Coxe, and mentioned to him the rumor. He answered that he knew it to be true that he (Clark) was engaged to her. My sister replied it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark, if he were disposed to contest it. He advised her to take counsel, and said he would send one; a Mr. Smythe came, and told my sister that she could not legally establish her marriage with Mr. Clark, and pretended to read to her a letter in English (a language then unknown to my sister) from Mr. Clark to Mr. Coxe, stating that he was about to marry Miss ——. In consequence of this information, my sister Zuline came to the resolution of having no further communication or intercourse with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia.

Answer to the third interrogatory.

I became acquainted with Mr. Jerome De Grange in 1793, when, as I understood, he first came to New Orleans. He was a nobleman by birth, and passed for a single or unmarried man; and courted and married Zuline, nee De Carriere, at the age of thirteen, the same who is the mother of Myra Clark Whitney. Zuline had two children by him, a boy and a girl; the boy died; the girl is still living; her name is Caroline; she is married to a physician by the name of Barnes. I was present at the birth of these children.

Answer to the fourth interrogatory.

I am not aware of knowing other important matter to the complainants, in this cause.

Answer to the first cross-interrogatory.

My name is Sophie Veuve Despau, nee De Carriere. My deceased husband was a planter. I was born in Louisiana. My *age is [*562 sixty-two. I now reside in Beloxi; from 1800 to 1814 I resided in Louisiana, in Philadelphia, and in Cuba.

Answer to the second cross-interrogatory.

I first knew Daniel Clark in New Orleans; his being the husband of my sister, Zuline De Carriere, placed me on a footing of intimacy with him during the time of their intercourse; that intimacy was afterwards interrupted by their separation.

Answer to the third cross-interrogatory.

I had reason to know that Mr. Clark, at different times, lived in different houses in New

1.—The name is omitted by the Reporter.

Orleans. I have before said that he did not give publicity to his marriage with said Zuline. He kept a very handsome establishment for her in New Orleans; and was in the habit of visiting her.

Answer to the fourth cross-interrogatory.

I have already stated that Mr. Clark was married to my sister, Zuline De Carriere, that I was present at her marriage (a private one), in Philadelphia. Besides myself, Mr. Dorvier, of New Orleans, and an Irish gentleman, a friend of Mr. Clark's from New York, were present at his marriage. A Catholic priest performed the marriage ceremony. I have already before stated that Zuline was married to Mr. Jerome De Grange before her marriage with Mr. Clark, and that thereafter she was married to Mr. Gardette, of Philadelphia.

Answer to the fifth cross-interrogatory.

I have already stated that I knew Myra Clark to be the issue, and the only issue, of the marriage of Zuline de Carriere and Daniel Clark. A few days after the birth of Myra Clark, she was placed by her father under the care of Mrs. Davis, the wife of Colonel S. B. Davis, with whom she lived until her marriage with Mr. Whitney. I have heard that Colonel Davis concealed from the said Myra her true history, and that she bore his name after her father's death. Zuline and Mr. Clark occupied different houses in New Orleans, but he always visited her, as heretofore mentioned, at her own house; their marriage was known only to a few friends; Mr. Clark told me that he had informed Colonel S. B. Davis Mr. Daniel W. Coxe, and Mr. Richard Relf, of his marriage with my sister Zuline.

Answer to the sixth cross-interrogatory.

I always understood and believed, at least for the first years of his marriage, that Mr. Clark was prevented from making it public on account of her unfortunate marriage with Mr. De Grange. His pride was great, and his stand-
563*] ing was of the *highest order in society, and that pride might have suggested his opposition to the promulgation of his marriage. He, however, always manifested by his conversations, which I frequently heard, the greatest affection for his daughter Myra.

Answer to the seventh cross-interrogatory.

I have already stated my knowledge of Myra Clark Whitney from her birth. As I never made any secret of my knowledge of her being the daughter of Daniel Clark, nothing was more likely than she and her late husband should hear of my acquaintance with her parentage, and many circumstances connected with it, as already related. And on this it was, I presume, that I have been called upon to give testimony in this affair. But neither of them, nor anybody else, ever dared to ask of me any declarations in the least inconsistent with truth and justice.

Answer to the eighth cross-interrogatory.

I have already in my former answer stated, particularly the third and fourth, my knowledge of Jerome De Grange, and of his first and second marriages. Before the detection of his bigamy, said Zuline had a son who died, and a daughter called Caroline, which bore his name. Since the death of Mr. Daniel Clark, Mr. Daniel W. Coxe and Mr. Hulings, of Philadelphia, gave her the name of Caroline Clark, and took her to Mr. Clark's mother, and introduced her as the daughter of her son. She of course believed their story, which induced her, in her will, to leave a portion of her property to Caroline. Caroline was born in 1801. I was present at her birth, as well as that of her brother.

Answer to the ninth cross-interrogatory.

I never heard Mr. Clark acknowledge his having any natural children, but have only heard him acknowledge one child, and that a lawful one, to wit, said Myra.

Answer to the tenth cross-interrogatory.

I have already given a full account of the mother of Myra, and of Myra herself, and her being with Mrs. Davis. I have stated all that I know of these matters, as called for by this interrogatory.

Answer to the eleventh cross-interrogatory.

The information called for by this interrogatory has already been given.

*Answer to the twelfth cross-interroga- [*564
tory.

I have already before stated myself to be the sister of Myra's mother. My feelings towards Myra are those of friendship and all becoming regard. I wish, however, that justice only be done towards her, but in or by the issue of the suit I have nothing to gain or lose.

Answer to the thirteenth cross-interrogatory.

I have seen or heard read the interrogatories or cross-interrogatories referred to, before called upon to answer them. Any conversations that I have had about this affair I have already given an account of.

Answer to the fourteenth cross-interrogatory.

My natural language is French; but my nephew is well acquainted with the English language, and when in need of a translator, I apply to him.

(Signed) Sophie Ve. Despau,
nee De Carriere.

Which answers, being reduced to writing, have been signed and sworn to in my presence, this twenty-eighth day of June, A. D. 1839. In testimony whereof, I have hereunto set my hand and seal, this day and year above written.

(Signed) Holmes P. Wentzell,
J. P. H. C. [L. S.]

One word erased on third page, also one word on fourth page; two words interlined on fourth page; twenty-five words erased on fifth page; one word interlined on sixth page, before signing.

(Signed) H. P. Wentzell,
J. P. H. C. [L. S.]

W. W. Whitney and Myra C. Whitney
v.
Richard Relf, Beverly Chew et al.

In pursuance of the annexed commission, issued from the United States Circuit Court of the Eastern District of Louisiana, I, the undersigned, justice of the peace in Hancock County, State of Mississippi, have caused to come before me Madame Rose Vve. Caillaret, nee De Carriere, who being duly sworn to declare the

truth on the questions put to her in this cause, in answer to the interrogatories annexed to said commission, says:

Answer to the first interrogatory.

I was well acquainted with the late Daniel Clark, of New Orleans.

565*] *Answer to the second interrogatory.

I was not present at the marriage of Zuline, nee De Carriere, who is my sister, with Daniel Clark, but I do know that said Clark made proposals of marriage for my sister, and subsequently said Zuline wrote to me that she and said Clark were married. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. De Grange was void, from the fact of his having then, and at the time of his marrying her, a living wife; these proposals were deferred being accepted till the record proof of De Grange's said previous marriage could be obtained, and said Zuline, with her sister, Madame Despau, sailed for the North of the United States, to obtain the record proof.

Answer to the third interrogatory.

I was acquainted with Mr. De Grange in New Orleans. He was considered an unmarried man on coming to New Orleans, and as such imposed on my sister Zuline to marry him; but it was afterwards proved he had a lawful wife still living. After this imposition of said De Grange, his said lawful wife came to New Orleans, and detected and exposed his bigamy in marrying the said Zuline, when he had a living and lawful wife at and before the time of his marrying Zuline. He was prosecuted, condemned, and cast into prison, and escaped privately from prison. He escaped from Louisiana, as it was reported, by the Spanish Governor's connivance. Le Breton d'Orgenois was said to aid De Grange, in getting him off. This happened some time before the Americans took possession of New Orleans. Mr. Clark's marriage with my sister Zuline was after the detection of De Grange's bigamy. The birth of their daughter, Myra Clark, was some years after the marriage.

Answer to the fourth interrogatory.

I am not aware of knowing anything more of importance in this suit, except the marriage of said Zuline with Mr. Gardette, of Philadelphia, before the death of Mr. Clark.

Answer to the first cross-interrogatory.

My name is Rose Veuve Caillaret, nee De Carriere. My age is sixty-eight years. I was born in Louisiana, and resided some time in France after this marriage of Zuline and Mr. Clark, and after that resided in the State of Mississippi.

Answer to the second cross-interrogatory.

I became acquainted with Mr. Clark in New Orleans. In consequence of his attachment

566*] and marriage to my sister *Zuline, an intimacy subsisted between him and myself. Our friendly intercourse continued during my residence in New Orleans.

Answer to the third cross-interrogatory.

When I resided in New Orleans, Mr. Clark lived in his own houses, with his own slaves to wait upon him. He had the reputation of being a man of immense wealth. He stood at the head of society, was considered a man of very great talents, and much beloved for his benevolence.

Answer to the fourth cross-interrogatory.

I have already stated all I knew about Mr. Clark's marriage with Zuline, and of her marriage with DeGrange. By this marriage she had two children, a boy and a girl. The boy is dead, the girl is still living; her name is Caroline, and she is married to Dr. Barnes. I have already stated that said Zuline also married Mr. Gardette.

Answer to the fifth cross-interrogatory.

It is to my knowledge, that Myra Clark, who married Mr. Whitney, is the child, and only child, of Mr. Clark by Zuline de Carriere. It is to my knowledge, that Mr. Clark put his daughter Myra under the charge of Mrs. Davis. Mr. Clark acknowledged to me that Myra was his lawful and only child. Mrs. William Harper nursed her for some time, from kindness. Mr. Clark's gratitude towards this lady, for nursing his child, lasted with his life. Said Myra was brought up and educated in the family of Colonel Davis, and supposed herself their child until within a few months of her marriage with Mr. Whitney.

Answer to the sixth cross-interrogatory.

I always heard that Mr. Clark's marriage with Zuline was private, and that he did not promulgate it, unless he did so in his last will made a little before his death, and lost or purloined after his death. He never explained to me his reasons for not publishing his marriage in his lifetime.

Answer to the seventh cross-interrogatory.

I have known Myra Clark Whitney for some years, making no secret about my knowledge I possessed of the matters of which I have herein spoken, and it being known that I was an elder sister of Zuline de Carriere. Therefore it was, I suppose, that I have been called on to testify in this cause; but no one has ever taken the liberty to intimate a wish for me to declare anything but the truth.

*Answer to the eighth cross-interroga- [*567
tory.

I have already said all I know about Mr. De Grange.

Answer to the ninth cross-interrogatory.

I never heard Mr. Clark make any acknowledgment of his having any natural children; and I never heard of his having another child than Myra Clark Whitney, and which Mr. Clark informed me was his lawful child.

Answer to the tenth cross-interrogatory.

I have already stated all I know as to the parentage and nursing and education of Myra Clark.

Answer to the eleventh cross-interrogatory.

I have already stated all I know about the parentage and name of Myra Clark, except that I have heard that after her father's death she was called Myra Davis.

Answer to the twelfth cross-interrogatory.

My feelings are friendly and kind towards Myra Clark Whitney, and I wish her such success only in her suit as is compatible with justice. I have no interest in the issue of it.

Answer to the thirteenth cross-interrogatory.

I have never seen the interrogatories put to me until called upon to answer them. I have already stated all I have to say about my conversations. I am not aware of ever having any correspondence with either of them on this subject.

Answer to the fourteenth cross-interrogatory.

French is my mother tongue, but my son is well acquainted with the English language, and when in need of a translator, I apply to him.

(Signed)
Veuve Caillaret, nee Rose Carriere.

As the opinion of the court refers also to the evidence of Bois Fontaine, it is deemed proper to insert it.

Interrogatories and Answers of Pierre Baron Bois Fontaine.

Wm. Wallace Whitney and Myra C., his wife, v. P. O'Bearn et al. } Court of Probates.

Interrogatories to be propounded to Witnesses on Behalf of the Plaintiffs.

1st. Were you acquainted with the late Daniel Clark, deceased, of New Orleans? If so, were you at any time on terms of intimacy with him?

568*] *2d. Did the said Daniel Clark leave at his death any child acknowledged by him as his own? If so, state the name of such child, whether such child is still living, and if living, what name it now bears; and also state when and where, and in what times, said acknowledgment of said child was made.

3d. Have you any knowledge of a will, said to have been executed by said Clark shortly before his decease. Did you ever read or see the said will, or did Daniel Clark ever tell you that he was making said will, or had made said will? If so, at what time and place, and if more than once, state how often, and when and where.

4th. If you answer the last question affirmatively, state whether the said Daniel Clark ever declared to you, or to anyone in your presence, the contents of said will. And if so, state the whole of said declarations, and the time, place, and manner in which they were made, before whom, and all the circumstances which occurred when such declaration was made.

5th. State how long before his death you saw the said Daniel Clark, for the last time, how long before his death he spoke of his last will, and what he said in relation to his aforesaid child.

6th. State whether you ever heard anyone say he had read the said will. If so, state whom, what was said, and whether the said person is now living, or not.

(Signed) Wm. M. Worthington,
For Plaintiff.

Cross-examined.

1st. Each witness examined, and answering any one of the foregoing interrogatories, is desired to state his name, age, residence, and employment; and whether he is in any manner connected with, or related to, any of the parties to the suit, or has any interest in the event of the same.

*2d. How long did you know Daniel Clark, and under what circumstances? And if you presume to state that Daniel Clark left any child at his decease, state who was the mother of said child, and who was the husband of that mother. State all the circumstances, fully and in detail, and whether said Clark was ever married, and if so, to whom, when, and where.

3d. If said Clark ever acknowledged to you, that he supposed himself to be the father of a child, state when and where he made such an acknowledgment, and all the circumstances of the recognition of such a child or children, and whether the act was public or private.

4th. Did said Clark consider you as an intimate friend; to *whom he might confide [*569 communications so confidential as those relating to his will? If any, state what you know, of your own personal knowledge, of the contents of said will, and be careful to distinguish between what you state of your own knowledge, and what from hearsay.

The defendants propound the foregoing interrogatories, with a full reservation of all legal exceptions to the interrogatories in chief, the same not being pertinent to the issue, and the last of said interrogatories being calculated merely to draw from the witness hearsay declarations.

(Signed) L. C. Duncan.
For Defendants.

In pursuance of the annexed commission, directed to me, the undersigned, justice of the peace, personally appeared Pierre Baron Bois Fontaine, who being duly sworn to declare the truth on the questions put to him in this cause, in answer to the foregoing interrogatories, says:

1st. In reply to the first interrogatory he answers: I was acquainted with the late Daniel Clark of New Orleans, and was many years intimate with him.

2d. In reply to the second interrogatory he answers: Mr. Clark left at his death a daughter named Myra, whom he acknowledged as his own, before and after her birth, and as long as he lived. In my presence he spoke of the necessary preparation for her birth, in my presence asked my brother's wife to be present at her birth, and in my presence he proposed to my sister and brother-in-law, Mr. S. B. Davis, that they should take the care of her after her birth. After her birth he acknowledged her to me as his own, constantly, and at various places. He was very fond of her, and seemed to take pleasure in talking to me about her.

When he communicated to me that he was making his last will, he told me he should acknowledge her in it as his legitimate daughter. The day before he died, he spoke of her with great affection, and as being left his estate in his last will. The day he died, he spoke of her with the interest of a dying parent, as heir of his estate in his last will. She is still living, and is now the wife of William Wallace Whitney.

3d. In reply to the third interrogatory he answers: About fifteen days before Mr. Clark's death I was present at his house, when he handed to Chevalier de la Croix a sealed packet, and told him that his last will was finished, and was in that sealed packet. About ten days before this, he had told me that it was done. Previous to this, commencing about

Howard v.

four months before his death, he had often told me that he was making his last 570*] *will. He said this in conversation with me on the plantation, and at his house; and I heard him mention this subject at Judge Pitot's. I frequently dined at Judge Pitot's with Mr. Clark on Sundays. The day before he died, he told me that his last will was below, in his office room, in his little black case. The day he died, he mentioned his last will to me.

4th. In reply to the fourth interrogatory, he answers: I was present at Mr. Clark's house about fifteen days before his death, when he took from a small black case, a sealed packet, handed it to Chevalier de la Croix, and said, "My last will is finished; it is in this sealed packet, with valuable papers; as you consented, I have made you in it tutor to my daughter. If any misfortune happens to me, will you do for her all you promised me? Will you take her at once from Mr. Davis? I have given her all my estate in my will, an annuity to my mother, and some legacies to friends. You, Pitot and Belle Chasse, are the executors." About ten days before this, Mr. Clark, talking of Myra, said that his will was done.

Previous to this he often told me, commencing about four months before his death, that he was making his last will. In these conversations he told me that in his will he should acknowledge his daughter Myra as his legitimate daughter, and give her all his property. He told me that Chevalier de la Croix had consented to be her tutor in his will, and had promised, if he died before doing it, to go at once to the North, and take her from Mr. Davis. That she was to be educated in Europe. He told me that Chevalier de la Croix, Judge Pitot, and Colonel Belle Chasse were to be executors in his will. Two or three days before his death, I came to see Mr. Clark on plantation business; he told me he felt quite ill. I asked him if I should remain with him. He answered that he wished me to. I went to the plantation to set things in order, that I might stay with Mr. Clark, and returned the same day to Mr. Clark, and stayed with him constantly till he died. The day before he died, Mr. Clark, speaking of his daughter, Myra, told me that his last will was in his office room below, in the little black case; that he could die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his mother comfortable by an annuity in it, and remembered some friends by legacies.

He told me how well satisfied he was that Chevalier de la Croix, Judge Pitot, and Belle Chasse were executors in it, and Chevalier de la Croix, Myra's tutor. About two hours before his death, Mr. Clark showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier de la Croix, as he was her tutor, as well as one of the executors 571*] *in it; and just afterwards Mr. Clark told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier de la Croix.

After this, and a very short time before Mr. Clark died, I saw Mr. Relf take a bundle of keys from Mr. Clark's armoire, one of which, I believe, opened the little black case. I had seen Mr. Clark open it very often.

After taking these keys from the armoire, Mr. Relf went below. When I went below, I did not see Mr. Relf, and the office room door was shut. Lubin told me that when Mr. Relf went down with the keys from the armoire, he followed, saw him there on getting down go into the office room, and that Mr. Relf on going into the office room locked the office room door. Almost Mr. Clark's last words were, that his last will must be taken care of on said Myra's account.

5th. In reply to the fifth interrogatory, he answers: I was with Mr. Clark when he died; I was by him constantly for the last two days of his life. About two hours before he died, he spoke of his last will and his daughter Myra in connection, and almost his last words were about her, and that this will must be taken care of on her account.

6th. In reply to the sixth interrogatory, he answers: When, after Mr. Clark's death, the disappearance of his last will was the subject of conversation, I related what Mr. Clarke told me about his last will in his last sickness. Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read it, it was finished, was dated, and signed by Mr. Clark; was an olographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her, gave an annuity to his mother, and legacies to some friends. The Chevalier de la Croix was tutor of said Myra, his daughter; Chevalier de la Croix, Colonel Belle Chasse, Judge Pitot, were executors; Judge Pitot and John Lynd are dead. The wife of William Harper told me she read it; Colonel Bell Chasse told me that Mr. Clark showed it to him not many days before his last sickness; that it was then finished. Colonel Belle Chasse and the lady, who was Madame Harper, are living.

In reply to the first cross-interrogatory, he answers: My name is Pierre Baron Bois Fontaine, my age about fifty-eight. I have been some time in Madisonville; the place of my family abode is near New Orleans, opposite side of the river. I was eight years in the British army. I was several years agent for Mr. Clark's plantations; since his death, I have been engaged *in various objects. I now [*572 possess a house and lots, and derive my revenue from my slaves, cows, etc. I am in no manner connected with, or related to, any of the parties of this suit; I have no interest in this suit.

In reply to the second cross-interrogatory, he answers: I knew Daniel Clark between nine and ten years; I knew him as the father of Myra Clark; she was born in my house, and was put by Mr. Clark, when a few days old, with my sister and brother-in-law, Samuel B. Davis. I was Mr. Clark's agent for his various plantations—first, the Sligo and the Desert, then the Houmas, the Havana Point, and when he died, of the one he purchased of Stephen Henderson. He respected our misfortunes, knowing that our family was rich and of the highest standing in St. Domingo before the Revolution. The mother of Myra Clark was a lady of the Carriere family. Not being present at any marriage, I can only declare it as my belief, Mr. Clark was her husband. To answer this question in detail, as is demanded, it is

necessary that I state what was communicated to me. It was represented to me that this lady married Mr. De Grange in good faith, but it was found out some time afterwards that he already had a living wife, when the lady nee Carriere separated from him. Mr. Clark some time after this married her at the North. When the time arrived for it to be made public, interested persons had produced a false state of things between them, and this lady being in Philadelphia, and Mr. Clark not there, was persuaded by a lawyer employed, that her marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette. Some time afterwards, Mr. Clark lamented to me that this barrier to making his marriage public had been created. He spoke to me of his daughter Myra Clark from the first as legitimate, and when he made known to me he was making his last will, he said to me that he should declare her in it as his legitimate daughter. From the above I believe there was a marriage.

In reply to the third cross-interrogatory, he answers: Mr. Clark made no question on this subject before and after her birth, and as long as he lived he exercised the authority of a parent over her destiny. He was a very fond parent; he sustained the house of Mr. Davis and Mr. Harper, because my sister had her in care, and Mrs. Harper suckled her. He sustained Harper as long as he lived, and conferred great benefits on my brother-in-law. He spoke of her mother with great respect, and frequently told me after her marriage with Mr. Gardette, that he would have made his marriage with her public, if that barrier had not been made, and frequently lamented to 573*] me *that this barrier had been made, but that she was blameless. He said he would never give Myra a step-mother. When in 1813 he communicated to me that he was making his last will for her, he showed great sensibility as to her being declared legitimate in it. While I was with him at his death-sickness, and even at the moment he expired, he was in perfect possession of his senses, and no parent could have manifested greater affection than he did for her in that period. Nearly his last words were about her, and that his will must be taken care of on her account. She, the said Myra, is the only child Mr. Clark ever acknowledged to me to be his. She was born in July 1805.

In reply to the fourth cross-interrogatory, he answers: I was a friend of that confidential character from the time of said Myra's birth. Mr. Clark treated me as a confidential friend in matters relating to her and to his affairs generally. In reply to the fourth interrogatory, I have stated what I know concerning Mr. Clark's last will; my recollection of these facts is distinct. The circumstances connected with them were of such a character, that my recollection of them could not be easily impaired.

(Signed) Pierre Baron Bois Fontaine.

And on the 25th day of April, A. D. 1840, the following decree was entered of record in the words and figures following, to wit:

Edmund P. Gaines et al. v. Chew & Relf et al. } No. 122.

This cause having come for final hearing, by consent of the complainants and the defendant Patterson, upon the bill, answer, replication, exhibits, depositions, and documents on file herein, and on the admission of the parties, that the estate in controversy in this case exceeds in value the sum of two thousand dollars, and the said complainants and the defendant Patterson expressly waiving and dispensing with the necessity of any other parties to the hearing or decision of this cause than themselves, and agreeing that the cause shall be determined alone upon its merits and the court, being now sufficiently advised of and concerning the premises, does finally decree and order that the defendant Patterson do, on or before the first day of the next term of this court, convey and surrender possession to the complainant, Myra Clark Gaines, of all those lots or parcels of land lying and being in the city of New Orleans, and particularly described in this answer and *exhibits, and to which he [*574 claims title under the said will of (1811) eighteen hundred and eleven; said conveyance shall contain stipulations of warranty against himself only, and those claiming under him. It is further decreed and ordered, that the defendant pay the complainants so much of their costs expended herein as has been incurred by reason of his being made a defendant in this cause.

From which decree the defendant prayed an appeal to the Supreme Court of the United States, which is granted.

And by consent of the complainants, bond and security is dispensed with. By consent, the copy of records of the Probate Court, with a full and complete transcript of the proceedings had in relation to the estate of the late Daniel Clark, on file in said court (hereafter to be filed), to constitute a part of the record herein.

Decree rendered April 25th, 1840.

Decree signed April 25th, 1840.

(Signed)

J. McKinley, Presiding Judge.

The cause having come up to this court by this appeal, was argued by Mr. Brent and Mr. May for the appellant, Patterson, and by Mr. Johnson and Mr. Jones for Gaines and wife.

The counsel for the appellant contended that the decree of the court below was erroneous, for the following reasons, viz:

1. Because the bill shows no cause for equitable relief.

2. Because there is no sufficient evidence of the alleged title in the complainant, as devisee of Daniel Clark.

3. That she is not the heir at law of Daniel Clark.

4. That she was the adulterine child of said Clark, by illicit commerce between said Clark and the mother of complainant, then the lawful wife of Jerome De Grange, and as such child incapable by law of inheriting or receiving by gift or will the property of said Clark.

5. That if not the adulterine child, she was Clark's illegitimate offspring, incapable of receiving from him more than one third of his estate.

6. That the appellant is a purchaser of a legal title to the property in suit, under a will legally admitted to probate, and under the authority of the executors therein named.

7. That the decree is otherwise erroneous and wrongful.

8. That she is not the child of Clark.

The argument of Mr. Brent and Mr. May was as follows:

The bill of complainant, was filed in the Circuit Court of the United States for the District of Louisiana, against the appellant and numer-575*] *ous other defendants. The answers (original and supplemental) of Patterson disclose the nature of his title as bona fide purchaser under the will of Daniel Clark, dated in 1811, and duly admitted to probate in the proper court.

Various depositions and documentary evidence were filed by the complainants and the appellant, and the case being set for hearing as between themselves, a final decree was rendered against Patterson for all the property held by him as purchaser under the will of 1811.

We allege error in that decree.

1st. Question. Is the appeal of Patterson properly and fairly before this court? True, there was no order of severance to justify the separate decree against one co-defendant, but we contend, that, under the circumstances of this case, it was competent for the appellant and appellees to set the case for final decree upon all the evidence taken, and the result of such action cannot be to prejudice the other parties in any respect; for if they can materially change the aspect of the case by additional evidence, the judgment of this court on our case will not conclude them. We refer in support of this position to the following authorities: 2 Dana, 422; 2 Bibb, 167; Pract. Reg. 16; 1 Peters, 306; 3 Mumford, 368, 374, 397; 6 Harr. & Johns. 10; 3 Dallas, 401.

The course pursued by Mr. Patterson in separating himself from his co-defendants is not the result of collusion with the appellees. If it were, it would be impotent. But it is the fruit of an anxious desire on his part to meet the claims of this claimant fully and fairly on the merits, without delay or resort to any of those dilatory proceedings which have thrice been overruled in this court.

Mr. Patterson wishes to know as speedily as possible whether he is the owner of this property; and he has introduced, as he believes, matter enough in this record to destroy this claim—at least he has introduced all the evidence known to him.

We are thus attentive to such an imputation of collusion, because, at the argument of a motion to dismiss this appeal made some years ago by the counsel of Caroline Barnes, one of the present counsel understood such an imputation to be made or insinuated in this court by the counsel of Caroline Barnes.

We will, in repudiating this charge, as we do indignantly, by the authority of Mr. Patterson, add to the denial, in his behalf, our own declaration, as officers of this high court, that our instructions have been to defeat the claim of Mrs. Gaines, if possible, by every fair and honorable argument; and in behalf of Mr. McHenry, of New Orleans, we state that a cor-576*] respondence between *him and the gentleman who was understood to make the charge has resulted in acquitting him, as counsel of Mr. Patterson, from every imputation.

2d Question. Has Mrs. Gaines any title to the property in dispute, as alleged devisee under the will of 1813?

We meet this question by showing from the record that, although there is evidence to prove that Clark had made a will some weeks before his death, declaring Myra his legitimate child and sole heir, yet that will is not proved to have been in existence at his death, save by his dying declarations, which are no evidence whatever of the will being then in existence. Jackson v. Betts, 6 Cowen, 382.

These dying declarations were the delirious ravings of a man in extremis, oblivious of the fact that he had himself destroyed a will made to practice a pious but posthumous fraud, for the purpose of gratifying an inordinate love for Myra, but a fraud which it is fair to presume, upon this evidence, his sober after-reflections induced him to shrink from, and with his own hands to destroy that will which, if he died without cancelling, would, to his conscience and his God, present him as dying with a falsehood on his lips.

But if the will were existent at his death, it was olographic, and there are not as many competent witnesses to the will as the law required, for the laws then in force exclude women as incompetent. 2 Partidas, 964, Law 9; 1 Ib. 23; Laws of Orleans, 230, art. 105.

But this court, in 2 Howard, 646, have settled that this will of 1813 cannot confer title until duly admitted to probate. Therefore, Mrs. Gaines's title, as devisee, cannot be relied on to sustain the decree against Patterson.

3d Question. Is Mrs. Gaines the child and forced heir of Daniel Clark?

Her bill of complaint alleges her birth in July, 1806, and that up to Clark's death, in 1813, she was called Myra Clark, but after his death, and up to her marriage in 1832, she was called Myra Davis, and was kept in ignorance of her true name and parentage, that is, from 1813 to 1832, a period of nineteen years, and until she was twenty-six years of age, and that in 1832 she learned her rights by accident.

Such is her own showing, and as part of her evidence she brings forward Davis, the very man who had been intrusted by Clark with the sacred deposit of his child. See Davis's own deposition, Record, 181, 5th, 6th, and 7th answers. And see Clark's solemn appeal to him in his Philadelphia letter, Record, 183.

Davis says that Clark told him Myra would be his heir. Record, 183, 184.

*Now, if Davis had not known [*577 and ascertained that Myra was an adulterous offspring, incapable by the laws of Louisiana of receiving the munificent but insane bequests of Clark, and that her claims founded on Clark's latter conduct were untenable, how can his treatment of Myra be viewed in any other light than as a shameless abandonment of his solemn trust?

If Davis suppressed the true history of Myra with a conviction that its knowledge would be her triumph, words could not be found adequate to the denunciation of his conduct. But we think the explanation of this conduct is to be found in the fact that Davis knew this unfortunate offspring of guilty parents to be banned and barred by the policy of the laws of Louisiana, and that to acquaint her with the intentions of Clark towards her would be to lead

her into endless and idle litigation. Neither Davis nor his wife attempts to explain their conduct in keeping Myra ignorant of her rights, if they believed she had any. And if her claims are just, the conduct of Davis is directly impeached by the evidence of her own witness, Belle Chasse. General repute called her the child of Davis. See the evidence of Madame Despau, Record, 165; Caillaret, Record, 169; Thiling, Record, 334; Coxe, Record, 337; Bois Fontaine, Record, 356; Mrs. Smith, Record, 136.

If, as we hereafter propose to establish, the intercourse between Clark and her mother was illicit at all times, then his belief as to his paternity amounts to nothing, especially when it is proved that she does not resemble Clark, as did Caroline Barnes, the elder child. See Coxe's deposition, Record, 336.

Clark's acknowledgments should have been before a notary and two witnesses. Code of 1808, p. 48, art. 24-26.

If alimony alone is sued for, such informal acknowledgments might be sufficient. Code of 1808, p. 50, art. 31; Ibid, p. 154, art. 45; Ibid. p. 156, art. 45.

If Myra was the illegitimate offspring of Clark, alimony is all she can claim. Code of 1808, p. 156, art. 46; Ibid. p. 48, art. 28; Ibid. p. 154, art. 45.

But going beyond the character of natural child, Mrs. Gaines claims to be the child of Clark by a lawful marriage of her mother with him. And in considering this claim, we first examine the nature and effect of Clark's declarations, which are said to prove the fact.

Conceding, ex gratia, that in 1813, by the pretended will of that year, Clark attempted formally to declare her legitimate, yet how can his genuine and undoubted will of 1811 be reconciled with such latter attempt?

1811 Myra was five years old, and living in New Orleans, as Clark well knew, and yet 578*] at the time of his undertaking a *sea voyage he executes that will, wholly pretermitting any notice of Myra, and willing all his estate to his mother.

Why did he overlook Myra? Was he the unprincipaled father, who would disinherit his young and innocent offspring? No, he was not unmindful of her claims, and he sought to provide for her in the only secret and stealthy mode permitted by the penal laws of Louisiana.

He executes various deeds to Belle Chasse, De la Croix, and Davis, on blind trust, for Myra's benefit, thus creating no legal right for Myra, but an honorable claim on the consciences of these friends for a handsome property. See their depositions.

Who can believe that an anxious father would thus hazard the whole property designed for his helpless and lawful child, by blind confidence in the honor of human beings, when by will or deed he could guard her rights effectually and beyond contingency?

We defy and challenge any satisfactory explanation of these acts, consistent with the claim of Mrs. Gaines. But if, as we allege, Clark knew her to be the adulterine offspring of Madame de Grange by him, then his conduct can well be understood. For, by the laws of Louisiana, an adulterous offspring can receive from its parent nothing but alimony, either in the shape of donations inter vivor or causa mortis. Code of 1808, p. 212, art. 17.

This statutory interdict, then was the cause of Clark's making his will of 1811, and creating blind trusts for the benefit of Myra.

But there are other acts of Clark which go to destroy his later attempt to efface the stain on Myra's birth, such as the secrecy with which her birth was guarded, and the haste with which he tore the tender infant from her mother's breast; his never suffering this child to dwell under his roof; and, lastly, his attempt, after his pretended marriage with the mother of Myra, to marry Miss ——. See deposition of Madame Despau.

These acts of Clark, when arrayed against the will of 1813, if it were here in court, subscribed by his hand, would speak the truth with a power and eloquence which no after-conduct of his could resist.

The truth is, that the inconsistent will of 1813 arose from the increase of affection for his natural child, who daily fastened on his heart, as proved by her own witnesses, and in the infatuation of his love he madly conceived the purpose of making a will declaring her his lawful child and universal legatee.

This pious fraud was frankly avowed to his bosom friend, the Chevalier de la Croix. See his deposition.

*But, doubtless, as he dwelt more [*579 upon the moral crime of perpetrating this fraud on society, and on the truth, he tore that will with his own hands, and hence its non-appearance, though, in the delirium of fever, he murmured of it as still existing.

Then we assert that Clark's acts and conduct are the strongest witnesses against the claim of Mrs. Gaines as his heir at law.

Let us see if the mother of Mrs. Gaines has not also testified against his pretended marriage.

If she was Clark's wife, as pretended, she afterwards committed rank bigamy in marrying Gardette, living Clark. See Coxe's evidence, and the marriage certificate.

Nay, she told Coxe, that, so far from being married to Clark, she had only his promise to marry.

Then both Clark and his pretended wife have testified against their intermarriage, and if they so testify, who is the witness to outweigh them? Madame Despau is the solitary witness to the marriage—a sister of Myra's mother.

Madame Despau impeaches herself by showing her privity with the marriages of her sister to both Clark and Gardette, and her reasons are flimsy for a justification. Record, p. 604. It was rash enough for her to stand by, in the lifetime of Jerome De Grange, the first husband of her sister, and see that sister marry Clark, with nothing to shield her from bigamy but the statement of Gardette, that, to his knowledge, De Grange had a prior living wife.

All this, as stated by her, is bad enough; but her inconsistency about De Grange twice flying, her attempt to palm off Caroline Barnes as the child of De Grange, her statement that the visit of herself and sister in 1803 was to hunt up the records at the North of De Grange's prior marriage, when Coxe proves that their visit was in 1802, and that in that year her sis-

ter, in Philadelphia, gave birth to Caroline, at which time De Grange was absent in Europe—all these things taint and condemn this witness, and her unsupported testimony to this factum of marriage must fall.

No one can doubt, on these facts, that, so far from Madame De Grange and Clark going to Philadelphia to hunt up records and have a marriage, they went there to shroud from the eye of observation the birth of Caroline, the first fruit of an adulterous intercourse between Clark and the mother of Myra.

If Madame Despau be falsa in uno, falsa est in omnibus. See The Santissima Trinidad, 7 Wheaton, 283. Madame Despau is the universal marriage witness of her sister, who, on her own evidence, had three husbands, all liv-
580*] ing at *the same time; first, De Grange, then Clark, and then Gardette. She says that while in Philadelphia, on the occasion of a visit, some years after the marriage of Clark, her sister married Mr. Gardette, because she was told, in the presence of Madame Despau, by Coxe and Smythe, a lawyer, that her sister could not prove her marriage to Clark. Record, 164.

Where, we ask, was her own proof? Where Mr. Dorvier, the other witness stated by her to Clark's marriage? But where was her sense of virtue, that would suffer her to stand by and see her sister marry Gardette, living Clark? And this bigamy with Gardette is perpetrated and connived at by two sisters who had warred against the bigamy of De Grange, as the complainant alleges.

If we believe Madame Despau, she and her sister, Madame De Grange, had, in 1808, to abandon all hope of proving a splendid marriage with Clark, which the child of that pretended marriage expects now to prove, after the lapse of thirty-nine years. Madame Despau says that her sister Zuline had two children by De Grange. Record, 164 and 166. Yet another sister, Caillaret, says no child was born of that union. Record, 293. And afterwards Madame Despau, in a subsequent deposition, shifts her evidence on this point and conforms it to Madame Caillaret's statement. But establish the factum of an intermarriage between Clark and the mother of Myra, which cannot be, yet that mother was already the lawful wife of Jerome De Grange, who was then and afterwards alive. This prior marriage of Zuline to De Grange is proved by Mrs. Gaines's own witnesses, Madame Despau and Madame Caillaret, in 1796. How then could Madame De Grange contract marriage with Clark in 1803, unless De Grange was dead, which is not pretended? Because it is said De Grange's marriage with Zuline was null, by reason of his having a prior wife alive in 1796. Where is the proof of this allegation?

There are but three attempts to prove this allegation in the record, viz.: First, the hearsay of Gardette, that he knew De Grange had a prior living wife. This hearsay is no evidence against us, as we have no claims under Gardette.

Second, that a report was current in New Orleans that a woman came there claiming to be the wife of De Grange. But where she came *from, or where she went, no one knows,* and common report is no evidence of such a fact. Mima Queen's Case, 7 Cranch, 290.

Third, the confessions of De Grange that his marriage with Zuline was void by reason of his prior marriage.

To this we answer, that these confessions are as much hearsay when brought against us, as Gardette's statements were; for *we do [*581 not claim under De Grange, and to let his unsworn statements go in evidence against us would be to make our rights depend upon his ex parte statements, without any means or opportunity to us of testing their truth or falsehood. Morgan v. Yarborough, 11 La. R. 76.

We have spoken of but three attempts to prove De Grange a bigamist, for we will not even call the failure to prove him so by record proof an attempt.

On the face of complainants' bill, it appears that the defendant, Patterson, claims under the will duly probated, and dated 1811. And Patterson, being a third possessor, cannot be ousted until she has discussed, that is impeached, the will of 1811, by proceeding against the legatees therein. Hodder v. Shepherd, 1 La. R. 507; Code of 1808, p. 214, art. 26; Ibid. p. 216, art. 37–39. She ought to have sued to discuss that will in four years after her majority, or eight years at farthest. 2 Partidas, 1046; 1 Ibid. 384; Constitution of 1812, art. 4. sec. 11.

By these laws she was barred in July, 1831, or July, 1835, at farthest, which is before the bill was filed, and the benefit of this prescription appears on the face of her bill, and need not be pleaded.

We insist that the title of Patterson was legally derived under the will of 1811, and that the sales were all regular and valid in every respect.

And in conclusion, if there be a doubt on this whole case, it should inure to the benefit of bona fide purchasers, whose titles ought not to be overturned in a case like this.

For Mrs. Gaines, personally, we feel every sympathy; but how often is it that the innocent offspring is made to suffer for the acts of the parent! And if ever parents deserved condemnation here or elsewhere, these parents have deserved it. A mother who, for the world's false esteem, would discard from her maternal breast two helpless infants, and never again look upon her own offspring—a mother who, upon the case made by her own daughter, stands convicted of adultery before her pretended marriage with Clark, and with bigamy afterwards—such a mother is above the judgment of human tribunals. And what shall we say of the conduct of Daniel Clark, if Myra be his lawful child, and Madame De Grange was his lawful wife? Courting another woman while his wife was living, and at his death forgetting that she had been his wife, although he had, as pretended, pronounced her blameless, participating in the crime of separating two infants from their mother to save the paltry pride of that mother—such a man, if the claims of this lady be just, should be consigned to infamy in all human estimation. Even now, *the web of destiny hangs around this [*582 unfortunate but innocent offspring, and the dreadful past cannot be recalled. After the lapse of forty years, the sun of truth shines

upon this dark and adulterous intrigue, revealing all its deformity on the highest judicial records, and showing the vanity of Clark's latter attempts to efface the stain, if it could be called a stain, which his own wild passions had placed upon his child at her birth.

The Reporter is compelled to omit the arguments of Mr. Johnson and Mr. Jones, the counsel for Gaines and wife, as their insertion would make the report of this case too long.

Mr. Justice Wayne delivered the opinion of the court:

The history of this case will be found in the report of the case of Gaines v. Relf and Chew, in 2 Howard, 619.

This is the fourth time that the cause has been before this court. Its decision, in each instance hitherto, has been in favor of the complainants.

The third time, it was brought here upon points upon which the judges in the Circuit Court were divided in their opinions. They arose upon the arguments of demurrers, filed by several of the defendants.

It was said there was a want of equity in the bill; that there was a complete remedy at law; that the bill was multifarious, and that there was a misjoinder of parties; that the will of 1813, upon which the complainants relied for recovery, had not been admitted to probate; and that if the complainants relied upon Mrs. Gaines being the forced heir of Daniel Clark, whatever that right might be, it was recoverable at law.

Upon the argument of the demurrers, three points were made upon which the judges could not agree, and they were certified to this court for its decision.

Those points were:

1st. Was the bill multifarious, and have the complainants a right to sue the defendants jointly in this case?

2d. Whether the court could entertain jurisdiction of the cause, without probate of the will set up by the complainants, which they charge to have been destroyed and suppressed.

3d. Has the court jurisdiction of this cause, or does it belong exclusively to a court of law?

On the first point, this court, for reasons which are as satisfactory to us as they were to the judges who then heard the argument, decided that the bill was not multifarious; that there was no misjoinder, excepting that the purchasers of the property of Daniel Clark had no interest in the rendition of the accounts by the executors, under the will of 1811, nor any 583*] with what *might be the interest of Caroline Barnes in the will of 1813; that those particulars ought not to be connected with the general object of the bill, but that it could be so amended, in both respects, in the Circuit Court, as to avoid the exceptions.

Upon the second point, this court, upon a full review of the authorities, came to this conclusion—that both the general and local law require the will of 1813 to be proved in the Court of Probates before any title can be set up under it; but that this result did not authorize a negative answer to the second point.

The court said, that, under the circumstances of the case, the complainants were entitled to full and explicit answers from the defendants in regard to the wills of 1813 and 1811, and that such answers, being obtained, might be used as evidence before the Court of Probates to establish the will of 1813, and to revoke that of 1811. The answer was pertinent to the inquiry, and nothing beyond it. We have adverted to it to show that the decree of the Circuit Court now under consideration has no connection with the will of 1813 and that it was made by that court under the answer given by the court to the third point.

The third point was, Has the court jurisdiction of the cause, or does it belong exclusively to a court of law?

This point involved the jurisdiction of the court in every aspect in which the bill could be viewed. So the court considered it. The claim made in the bill for Mrs. Gaines did not rest alone upon the alleged will of 1813, but also upon the allegation that she was the legitimate child of Daniel Clark, and under the law of Louisiana, was his forced heir. The court said, "The complainants in prosecuting their rights upon the ground of Mrs. Gaines being the heir at law, no probate of the will of 1813 will be required. They must rest upon the heirship of Mrs. Gaines, the fraud charged upon the executors to the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give proper relief without decreeing the revocation of the will of 1811."

Such were the answers given by this court to the points which had been certified to it.

The Circuit Court, in the subsequent trial of the cause between the complainants and the appellant, Mr. Patterson, has decreed that Mrs. Gaines is the forced heir of Daniel Clark, or in other words, that, being his legitimate child, she was entitled, under the laws of Louisiana, to her légitime in his estate at the time of his death.

*This decree was made upon the [*584 pleadings and proofs in the cause, put in by the complainants and the appellant, Charles Patterson. He was one of the defendants who had not demurred to the bill. Before those demurrers had been filed, Mr. Patterson had filed his answer, by his counsel, but not under oath, having availed himself of the waiver in this respect tendered to the defendants by the complainants. To that answer there was a general replication. The parties having introduced their proofs, the case was regularly in order for a hearing. It was heard at the earnest desire of both parties. No suggestion was made in the Circuit Court below, that it would direct an issue to be made for the trial of the legitimacy of Mrs. Gaines by a jury. No such desire has been expressed by the counsel of the appellant in this court, though it was intimated that it ought to have been done. We do not think it an occasion for such a course to be pursued.

The practice of granting issues is limited to cases in which the court, in the fair exercise of its discretion, considers that justice will best be obtained by that course. Discretion, we mean, as it is guided by what has been the practice of courts of chancery. Gardner v. Gardner, 22 Wendell, 526; Drayton v. Logan, Harp. Eq. 67; 8 Paige, 457, 601.

In the English chancery, except in the case of an heir at law or of a rector or vicar, it is not a matter of right. In the American courts of equity we know of no practice establishing an issue as a matter of right. In Virginia and others of our States, the heir's right to an issue is given by statute. As the English chancery, in the exceptions mentioned as a matter of right, has allowed them, upon the ground that the common law "invests a party filling a particular situation with certain rights, of which it is the object of the suit to devest him, we presume that where, by operation of the law, in either of the States, particular persons have an interest in the property of an ancestor, whatever might be the evidence in favor of the authenticity and genuineness of the will, if the heirs at law object to its being done, the court will not establish the will, without the opinion of a jury upon a devistavit vel non."

We have recurred to what has been hitherto decided in this cause concerning jurisdiction, to prevent hereafter, in the further progress of it against any of the defendants, any doubt about it; and that the principles upon which this court has asserted it might be better understood than they seem to have been at the bar. The Circuit Court, in rendering its decree, understood it perfectly. We have been particular, too, in repeating what was decided by this court in 2 Howard, 619, because it comprehends the subject matter upon which the juris-585*] diction *of the court was affirmed, and covered all who were parties, with the exceptions mentioned, and their obligations to answer, either jointly or separately, the bill as they pleased; though the whole of them, or any lesser number, might have a common defense. The object being that a final decree might be made between the complainants and each defendant, provided the interest or property upon which the decree is to attach was a part of the property of Daniel Clark and now separate in each defendant who might answer separately, or in any two or more of them who might do so jointly. Or if the defendants, as they had a right to do—except such of them as have already chosen not to answer conjointly, and have answered separately—should make a common answer, that the decree between the parties might be common to all, and attach upon the property of Daniel Clark in their hands, if the complainants make out the right of Mrs. Gaines, as forced heir of Daniel Clark. This disposes of the question of jurisdiction, and of the suggestion made in the course of the argument of the cause here, though not strongly insisted upon, that the jurisdiction or practice of the court did not permit a separate decree against Mr. Patterson, or any other defendant in the cause. If the decree against any of the defendants determines the character of the subject matter or property for which he is sued, making it a part of what shall be the aggregate from which the complainants' interest is to be calculated, it is a final decree, and perfect against the defendant, though it may require the confirmation of a further order of the court before it can be acted upon; as in cases of foreclosure, or where a fund may be distributable among a particular class of individuals, or where in the distribution of an estate, it becomes necessary to direct a master to report upon its kind or value, etc., etc., of which there is a full illustration in the decree given by this court in the case of Michoud v. Girod 3 Howard, 543.

The cause is now before this court upon the appeal of Mr. Patterson.

The argument of the learned counsel, Messrs. Brent and May, in favor of the reversal of the decree may be condensed as follows:

1. There is no circumstantial evidence in favor of the marriage between the mother of Mrs. Gaines and Daniel Clark.

2. The testimony of Madame Despau, who declares that she was present at the marriage, is not entitled to belief on many accounts.

3. Mr. Clark's acknowledgments that Myra, Mrs. Gaines, was his legitimate child, even if admissible, are contradictory, if De la Croix has spoken the truth, as he spoke differently *of her to that witness. And they are [*586 intrinsically overruled by his most solemn acts, in stealthily providing for her by blind trusts, and more especially by the will of 1811.

4. Conceding, exempli gratia, that there was a factum of the alleged marriage, still there is proof of the marriage of the mother of Mrs. Gaines with De Grange, and no legal or satisfactory proof of the nullity of that marriage; because De Grange's confessions that he had a wife alive at the time he married the mother of Mrs. Gaines are not evidence—particularly not so in this case, as the appellant does not claim the property for which he is sued under De Grange. The argument of counsel upon the point of a previous and subsisting marriage was this: There is direct proof of a marriage between Zuline Carriere, the mother of Mrs. Gaines, and De Grange. To annul it, there is no other testimony than the hearsay of De Grange's confessions, and Gardette's declarations, that, when De Grange married Zuline, he was then a married man—that it was a common rumor in New Orleans, that such was the fact—that a woman calling herself Mrs. De Grange, and claiming to be the wife of De Grange, came to New Orleans in pursuit of him, as her husband. It is said, if she did, her assertions were equally hearsay. Reputation in New Orleans that the marriage with Zuline was null would be no evidence of the fact. Further, it is said the attempt to prove De Grange's conviction for bigamy is a failure. But even if the record of his conviction had been produced, which was not done, it is res inter alios acta, and could not be admitted against the appellant, who does not claim under De Grange, but under conveyances from the executors to the will of 1811.

The counsel also contend, whether they are right or wrong in the foregoing positions is a matter of no consequence, except as showing the history of the case, and tending to prevent further litigation, because, by the code of Louisiana of 1808, re-enacted in this particular in the code of 1825, it is declared that a person holding property by sale from a donee of an excessive donation is only liable to the forced heir, after an execution first had against the property of the donee. Under both codes, too, the third possessors are only liable in the order of their purchases. That the légitime of the forced heir is not to be recovered in the specific property, but in the vaule of the légitime, as it

may be ascertained under the Louisiana codes. For these last positions, counsel rely upon the language of the codes, and upon the case of Hodder v. Shepherd et al. 1 La. R. 505. That was a case which arose under the code of 1808, but is cited in the new code as a judicial 587*] *exposition of both the old and new code, in this respect. It is said that this case is within the provisions of the code under the decision just cited, as Mary Clark, the mother of Daniel Clark and grandmother of Mrs. Gaines, as universal legatee of her son by the will of 1811, accepted the succession of his estate as the law of Louisiana required it to be done. That her power of attorney to the executors, Chew and Relf, authorized them to makes sales of the property of Daniel Clark as they were made, and gave to the purchasers valid titles, without any order of the Probate Court, or any judicial sale, being necessary. That the purchasers are not liable to be sued at all, until the forced heir exhausts the property, or, in other words, discusses the rights or property of the grandmother in her son's estate.

The statute of limitations, it was also said, barred a recovery by the complainants.

We have stated more particularly than we would otherwise have done the arguments urged by the counsel of the appellant, and in the strongest way in which they were presented. It was due to the importance of the case, to the interest of all concerned in this controversy, and because the arguments of both of the counsel command our respect. Parts of some of these objections have our acquiescence, others have not.

Our conclusions relating to the marriage of the mother of Mrs. Gaines to her father, the lawfulness of the marriage, and that she is the legitimate offspring of that marriage, differ from all that has been urged against them.

The marriage, the legitimacy of Mrs. Gaines, and the validity of the sales made by the executors, make the substance of this case put in issue by the pleadings. Were those pleadings different from what they are, there would be enough to prove the marriage and the legitimacy of Mrs. Gaines. But as the pleadings are, we cannot, upon the evidence, exclude such conclusions.

The marriage must be proved, according to what would be proof of it where it took place. This marriage took place in Pennsylvania, at Philadelphia, in the presence of a witness who says she was present, and that the ceremony was performed by a Catholic priest. "Marriage is a civil contract in Pennsylvania, to be completed by any words in the present tense, without regard to form." Hantz v. Sealy, 6 Binney, 405. "Marriage is to be decided by the laws of the place where celebrated." Phillips v. Gregg, 10 Watts, 168. Every intendment is to be made in favor of legitimacy. Senser v. Bower, 1 Penn. R. 453.

The bill asserts the marriage, its lawfulness, 588*] and that Mrs. *Gaines is the issue of the marriage; the answer is a denial of these allegations. The plaintiffs file a general replication. But as the appellant accepted the waiver offered in the bill, that their answers might be put in without being sworn to, and did not swear to his answer, he is not entitled to have the benefit of his answer as a denial of the plaintiff's case, unless the denial is contradicted by the evidence of two witnesses, or by one and corroborating circumstances.

In the case of The Union Bank v. Geary, 5 Peters, 99, this court said: "Indeed, we are inclined to adopt it as a general rule, that an answer not under oath is to be considered merely as a denial of the allegations of the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations." In Bartlett v. Gale, 4 Paige, Ch. R. 503 the Chancellor says: "But where an answer on oath is waived, although, as a pleading, the complainant may avail himself of admissions and allegations in the answer which go to establish the case made by the bill, such answer is not evidence in favor of the defendant for any purpose." An answer is always under oath, unless the plaintiff chooses to dispense with it, and then the court will order the answer of the defendant to be taken without oath. But whether the answer is not sworn to by the order of the court when the plaintiff waives it, or the waiver has been voluntarily accepted by the defendant, it is not evidence in his favor for any purpose. As this court said in 5 Peters, just cited, it is analogous to the general issue at law, and a single undiscredited witness will be sufficient to prove the allegations in the bill which the answer denies. There is such a witness in this case. We do not intend, however, to put the conclusion to which we have come respecting the marriage solely upon her testimony. It is so strongly corroborated by other proofs that the answer would be disproved if it had been sworn to.

Madame Despau says: "Daniel Clark was married in Philadelphia, 1803, by a Catholic priest. I was present at the marriage. One child was born of this marriage to wit Myra Clark (now Mrs. Gaines), who married William Wallace Whitney, son of General T. Whitney, of the State of New York. I was present at her birth, and knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew, nor had any reason to believe, any other child besides Myra was born of that marriage." The witness then proceeds to relate what she terms the circumstances of the marriage, including the previous marriage of Zuline Carriere with De Grange, his subsisting marriage when he married Zuline, and the result of it, when that fact had been discovered *by Zuline and her [*589 family. This witness is not discredited in any of the ways, or for any of the causes which can allowably be used for such a purpose. She is not contradicted by any witness.

Marriage may be proved by any person who was present, and can identify the parties. St. Devereux v. M. Dew Church, Burr. S. C. 506; 2 W. Black. 145.

If the marriage were in a foreign country, proof that it was solemnized in the manner usual in that country will be good presumptive proof that it was a valid marriage. Lacon v. Higgins, 3 Stark. 178.

Marriage by a person habited as a priest and being per verba de presenti, the person performing the ceremony must be presumed to have been a clergyman. Rex v. Brampton, 10 East, 282.

In what way is the attempt made to lessen the force of her testimony? In no other than by negative declarations of other persons who knew Clark, that they do not believe he was ever married, and by the witness De la Croix, who says—and he is the only witness who says so—that Clark spoke to him of Myra as his natural child. A hundred such witnesses would not be sufficient to impeach the testimony of one witness swearing positively to the fact of the marriage. And allowing that Clark did so speak to De la Croix, a husband's declarations of the illegitimacy of a child when the marriage has been so proved is not sufficient to rebut the presumption of its having been lawfully begotten, until the presumption is disproved by evidence showing the want of access between the husband and wife. Bury v. Phillpot, 2 M. & K. 349.

Once the marriage is proved, nothing shall be allowed to impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father. See opinion of the judges in Banbury Peerage case by Le Marchant. Access is presumed, unless the contrary be plainly proved.

But all the other witnesses, some of whom were more in Clark's confidence than De la Croix was, say that he spoke to them of Myra as his legitimate child, calling her such.

Pierre Baron Bois Fontaine declares that Clark treated him as a confidential friend in matters relating to Myra and to his affairs generally; that he was with Clark when he died. He says Clark repeatedly spoke to him of Myra as his legitimate child. Nearly his last words were about her. And further, he spoke of her mother with great respect, and frequently told him, after her marriage with Gardette, that he [*590 would have made his *marriage with her public if that barrier had not been made; but that she was blameless.

Mrs. Harriet Smith says: "Mr. Clark and my late husband, Mr. Harper, were intimate friends, etc. I suckled in her infancy Mr. Clark's daughter Myra. I did it voluntarily, in consequence of her having suffered from the hired nurses. Mr. Clark considered that this constituted a powerful claim on his gratitude and friendship, and he afterwards gave me his confidence respecting her." The interesting and truthful narrative of this witness of the relations between the father and the child, from her birth to the time of his death, and his frequent declarations that he would acknowledge her as his legitimate child, must make strong impressions upon any reader of it that she was such. Belle Chasse, the intimate and confidential friend of Clarke for many years, and who proved himself, as the facts in the case show, worthy of that relation, says: "With much reflection and deliberation, Clark spoke of his being occupied in preparing his last will. On these occasions, in the most impressive and emphatic manner, he spoke of Myra as the object of his last will, and that he should in it declare her to be his legitimate child and heiress of all his estate."

Madame Caillaret, the sister of Zuline, says she was not present at the marriage of her sister with Mr. Clark, "but I do know that Clark made proposals of marriage with my sister. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. De Grange was void, from the fact of his having then, and at the time of his marrying her, a living wife. These proposals were deferred being accepted until the record proof of De Grange's previous marriage could be obtained, and Zuline, with her sister, Madame Despau, sailed for the north of the United States, to obtain the record proof." Thus confirming what Madame Despau likewise says of Clark's proposals of marriage: "Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential first to obtain record proof of De Grange having a living wife at the time he married my sister, to obtain which from the records of the Catholic church in New York (where Mr. De Grange's prior marriage was celebrated), we sailed for that city. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. De Grange's prior marriage. We proceeded to that city, and found Mr. Gardette. He answered, that he had been present at the prior marriage of De Grange, and that he afterwards knew De Grange and his wife by this marriage—that this wife had sailed for France. Mr. Clark then said: 'You have no reason any longer to refuse being *married to me. It will, however, be [*591 necessary to keep our marriage secret till I have obtained judicial proof of the nullity of your and De Grange's marriage.' Clark and Zuline were then married." Madame Despau then relates their return to New Orleans, the prosecution of De Grange for bigamy, his imprisonment, escape, and flight from the country, without his having ever returned to Louisiana again. "All this happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that, before he could promulgate his marriage with my sister, it would be necessary for her to bring an action against the name of De Grange. The anticipated change of government caused delay; but at length, in 1806, Messrs. James Brown and Eligeas Fromentin, as the counsel of my sister, brought suit against the name of Jerome De Grange, in the City Court of New Orleans."

Now, rejecting all that Gardette is said to have said, all that Madame Despau says of the prosecution of De Grange for bigamy, and of the appearance of a female in New Orleans claiming De Grange for her husband, as not being within the allowable limits of hearsay testimony in a question of pedigree, the concurring testimony of two witnesses in the family as to Mr. Clark's proposals of marriage is such a corroboration of the declaration of one of them, that the marriage took place in her presence, as to make a basis broad enough to receive the declarations of the father, and his affectionate treatment of his child from her birth to his death, as conclusive of his marriage with her mother, and of her legitimacy. Such declarations, where there are probable grounds of a marriage, are the best proof in a question of pedigree. Just such—though they are within what is termed hearsay—as experience has shown to be necessary, in cases of doubt, to establish conjugal relations and the legitimacy of children. Such declarations, unlike those

which De la Croix says Mr. Clark made to him, have always been received to establish the legitimacy of a child, with or without proof of marriage; and when there is in a case the positive testimony of one witness to a marriage, they are conclusive proof of legitimacy.

What is urged against such a conclusion in this case?

The conduct of the parties in not promulgating their marriage, and not occupying the same house upon their return to New Orleans. In connection with that conduct, the testimony of De la Croix, that Colonel and Mrs. Davis, who reared Mrs. Gaines at the request of her father, knew nothing of this marriage; that the witnesses, Mr. Coxe and Mr. Hulings, who were for a long time the intimates of Mr. Clark—the former his partner in business—swear, to 592*] the best of their belief, *that he never married. And the subsequent connection with Gardette, without a dissolution of the marriage with Mr. Clark.

The first is a good objection, until it has been reasonably accounted for. We do not mean so accounted for as to make it proper, but enough so to separate such conduct from the suspicion of an illicit connection.

Madame Despau declares, when the marriage was contracted in Philadelphia, and afterwards upon their arrival in New Orleans, that Clark said the marriage could not be disclosed on account of Zuline's previous marriage with De Grange; that legal proof must be obtained of the previous marriage of De Grange, and that an action would have to be brought by Zuline "against his name." This is substantially confirmed by Madame Caillaret, in her statement of the proposals for a marriage by Mr. Clark, and it having been deferred for the reason given by Madame Despau for its concealment. It is confirmed by what other witnesses say, as well as Madame Despau, of the arrest and imprisonment of De Grange for bigamy, to which they all swear as within their own knowledge, and by the subsequent proceedings in the City Court against De Grange. Record, 206. Connect the preceding with the mode of proceeding in Louisiana to impeach a marriage with one unable to contract marriage, its existing application to De Grange, and what might then have been its application to Mrs. Clark if her marriage in Philadelphia had been disclosed before a sentence of the nullity of her marriage with De Grange had been obtained, and we shall have facts from which motives for concealment of it may be inferred diverse from and stronger than the usual suspicion of its having been caused by an illicit intercourse. It was not necessary to the validity of the marriage in Philadelphia, that a sentence of dissolution should have been first pronounced in Louisiana against De Grange. By the law of the latter, as well as by the law of Pennsylvania, the marriage with De Grange was void from the beginning. A void marriage imposes no legal restraint upon the party imposed upon from contracting another, though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding, wherever that may be done. Mr. Clark probably know what we have just stated concerning the validity of his marriage; but from his pride and temper as his character has been disclosed in this record, was it not probable, not to say natural, that such a man, anticipating his return to Louisiana, would resort to the course which was pursued to keep his feelings from being wounded, until a judicial sentence had restored *his wife to the unequivocal condition [*593 enjoyed by her before the imposition of De Grange? We speak of the fact, and not of its propriety. The latter has not our approbation, but we recognize what all of us know to be true, that concealment is as frequently the refuge of error as it is of crime, and that men of the world shun more than anything else the exposure of their follies, more especially such as the world may think to be so, and bearing upon the honor of the most delicate relation which a man can form in life. It is not a fiction, that men have been situated as Mr. Clark was, who have died without disclosing, as he did, even in behalf of their unoffending children, such a relation, and that women have been found to bear it. Such reflections would have no weight with us, unconnected with the proof that there is in this case of the marriage. But we think, with such proof, that they are appropriate to repel any presumption of illegitimacy in this instance, arising from the concealment of the marriage, or from the parties to it not having occupied the same house. The events which followed embittered the rest of this father's life, and, until now, have deprived his child of that legitimate standing which he was most anxious to give her, and which seems to have pressed most heavily upon him at the hour of his death. Bois Fontaine says, in reply to the third cross-interrogatory: "He spoke of her mother with great respect, and frequently told me, after her marriage with Gardette, that he would have made his marriage with her public if that barrier had not been made, and frequently lamented to me that it had been made; but that she was blameless. He said he would never give Myra a stepmother. When, in 1813, he communicated to me that he was making his last will, he showed great sensibility as to her being declared legitimate in it. While I was with him in his death-sickness, and even at the moment he expired, he was in perfect possession of his senses, and no parent could have manifested greater affection than he did for her. Nearly his last words were about her," etc.

Time with him was near its end, and the truth was told.

De la Croix's testimony, in the particular in which it is relied upon, differs from that of all the other witnesses, who have deposed to what Mr. Clark said to them, repeatedly, of the legitimacy of his child.

We regard it the less, for notwithstanding his intimacy with Mr. Clark, and the confidence which he had in De la Croix's suitableness to be the guardian of Myra, he says Mr. Clark never spoke to him about her, except on the occasion when he was asked to become his executor and her tutor. Record, 233, 234. This declaration to De la Croix, supposing it to have *been made in connection with the oc- [*594 casion when he says it was made by Mr. Clark, it is the testimony in the record most relied upon to disprove the legitimacy of Mrs. Gaines. But it cannot be allowed to exceed in weight the testimony of several other witnesses who

were more intimate with Mr. Clark than De la Croix was, who—from facts in the cause independently of any declarations of theirs—seems to have had more of his confidence, and to whom Mr. Clark spoke very differently of the same fact. A single declaration, directly the reverse of many to the same fact, may be made in such a manner, by the same person, as to disable us from coming to a conclusion coincident with that which the many assert. But if the latter are associated with other proofs bearing upon the point derived from other persons, stronger than any proofs which can be connected with the contradiction of them, we have a rule to guide us in our estimate of both, making the many prevail over the one, though it might, independently of all other proof connected with either, bring us to an opposite conclusion. The testimony of De la Croix cannot stand the test of this rule. Setting aside all that the other witnesses say contrary to it, there is the oath of one witness who swears to the marriage, which raises an intendment of legitimacy in the offspring conclusive until it has been disproved. Against such a rule, suspicions or doubts not resting upon proofs as strong as the proofs of the marriage must not be indulged. But for a brief illustration of the rule, let us take the case. De la Croix says Mr. Clark told him, upon the only occasion he ever spoke to him of Myra, that she was his natural child. Madame Despau says she was present at the marriage of Mr. Clark to the mother of Myra. Bois Fontaine says Mr. Clark said to him, speaking of the mother of Mrs. Gaines, that he would have made his marriage with her public, but for her subsequent connection with Gardette. Now, where is the weight of proof? Does De la Croix's testimony exceed that of the witness who swears to the marriage, and also Clark's declaration to Bois Fontaine admitting it? The contrary declarations may neutralize each other, in this aspect of the case, without lessening the positive.

In such a case, we have not a choice of conclusions, but must take that which the positive proves.

Hitherto, the testimony of De la Croix has been treated as if it was altogether unexceptionable. It is not so. There is in it that cold hardness of a man of the world, unmindful of the relations of former friendship whilst professing to regard them, but little in unison with kindness, and not at all so with the seriousness of exact truth. Such men will not swear to 595*] *what is false, but they may speak what is not true, by an indifference to exactness in what they do say. De la Croix's testimony is twice in the record taken at different times, and we have it both in French and English. No injustice is done him by translation. They are not so contradictory of each other as to justify of themselves any charge against intentional veracity; but they differ in particulars about Myra, as well as of other persons, so as to make it right that it should, as a whole, be received with great caution. Besides, for there must be no disguise of the facts which brings us to our conclusion concerning his testimony, there is upon the record a pecuniary relation between himself and the estate of Daniel Clark, which, unexplained, does not leave a favorable impression of his impartiality in this affair.

Again, suppose the fact of legitimacy in this case had been placed altogether upon the evidence of Belle Chasse and De la Croix, that of the former would not have been proof of it. But if Belle Chasse's testimony is fortified by that of others, speaking as strongly as he does of Clark's declarations of his daughter's legitimacy, it would not be reasonable to discard it for the testimony of De la Croix, which is unsupported by any other witness. Is the conclusion one less of proof, because Colonel and Mrs. Davis, who reared the child at the request of her father, were ignorant of his marriage? because Mr. Coxe and Mr. Hulings, who knew him well, say that they knew nothing of Mr. Clark's marriage, the two last declaring so to the best of their belief? All of this is negative testimony, implying ignorance of the fact of which they speak, and not knowledge of it—a fact susceptible of positive proof, or of proof by facts from which marriage may be inferred. The rest of the testimony of Mr. Coxe, Mr. Hulings, and De la Croix, in respect to the marriage, is excluded from our consideration, from not being within the rules by which hearsay is admissible in cases of pedigree. Neither of them relate anything as coming from the parents of Myra, or the relations on either side of the marriage. The only point in which the testimony of Mr. Coxe differs from that of Madame Despau is in his narrative of the arrangement made by him, at the request of Mr. Clark, for the birth of Caroline, now Mrs. Barnes. Madame Despau says she was the child of De Grange; Mr. Coxe, that Clark told him that she was his child. These declarations are at variance with each other as to the fact, but not contradictory. The fact may be as one or the other witness has related it. The difference, therefore, does not at all discredit Madame Despau. But the ignorance of Colonel and Mrs. Davis of the marriage, in connection with the arrangements *which were made by [*596 them, at the request of its father, for the birth of the child, and the father's great confidence in them it is said, is extraordinary and unaccountable. But is it not equally so, that, under such circumstances, he should not have communicated to them the reverse? The latter is ordinarily the usual confidence between the parties upon such occasions, and when it is not made, an inquiry suggests itself at once why it was not done. Its not having been done though extraordinary, proves nothing either one way or the other; the mind is left to connect other facts with it, for the purpose of enabling us to conclude what inference can justly be made from such an incident, so much out of the way of the confidence between parties upon such occasions. There are no such facts in this case to aid such an objection. There are facts independent of it, which happened afterwards, which repel it.

The witnesses speak of the extraordinary affection manifested by Mr. Clark for this child —his daily visits, parental and endearing fondness—his costly presents and manifested pride in her, as time developed her mind and appearance—and that he always called her Myra Clark. All of this is not inconsistent with what men of generous temper will and should do to repair as much as they can, in such cases, their indiscretion as to the birth of a child.

But when a parent does it, with subsequent declarations, made over and over again, to several persons, of a child's legitimacy, they may well be united with the latter to remove the objection, that Mr. Clark had not mentioned his marriage to Colonel and Mrs. Davis. Besides, let it be remembered that the evidence shows, up to that time, he had mentioned his marriage to no one. Madame Despau, his wife, and himself only knew the secret, and his influence over them made it his own, until they could speak free from the apprehensions excited in them by the declaration, that the marriage was not to be disclosed until the marriage with De Grange had been judicially annulled. He was a man of no ordinary character or influence upon those who were about him. His natural fitness to control became habitual, as his wealth and standing increased, and it was exercised and involuntarily yielded to by all who associated or who were in business with him. He was a man of high qualities, but of no rigor or virtue or self-control; energetic, enterprising, courageous, affectionate and generous, but with a pride which had yielded to no mortification until his affection subdued it to a sense of justice in behalf of his child. As to Mrs. Clark's subsequent connection with Gardette whilst she was the wife of Mr. Clark, considering it alone 597*] or with those reasons which *have been urged against the fact of that marriage, our conclusion is, that, inexcusable as her conduct was, there is not enough to make the fact of the marriage with Mr. Clark doubtful. Discarding from our consideration altogether the irritation and impositions to which this female had been subjected from her girlhood, and her well founded fears of the fidelity of Mr. Clark, and admitting she was very deficient in her apprehension of the sacredness of marriage, however much it may expose her virtue and her affection for her lawful husband to conclusions against both, we do not deem it to be a fact strong enough to set aside the testimony of one witness who swears positively to her marriage with Mr. Clark, all the corroborating proof of that fact in the case. It will raise a suspicion against the marriage, in this most curious and original chapter of domestic life, not easily removed from the minds of those who indulge it. But we cannot permit it to prevail over the legitimacy of her child, established, as we think ourselves obliged to say it has been, in conformity with those rules of evidence which long experience and the wisdom of those who have gone before us in courts of equity have deemed the best to ascertain, in cases of doubt, the affinity and blood relationship of social life.

But it is still said, admitting the marriage with Clark to have taken place in Philadelphia, that Mrs. Gaines cannot inherit from her father, his marriage with her mother being void, on account of her previous marriage with De Grange.

This will depend upon the marriage with De Grange having been a valid marriage. Or upon its being void for one of those causes which disable persons from contracting marriage. The burden of proof in such a case is not upon the party asserting the validity of the second marriage, but on the other, who asserts its invalidity on account of the validity of the first. Both are affirmative declarations. Ei incumbit probatio qui dicit, non qui negat. The argument is, the marriage with De Grange stands in the way of any right of Mrs. Gaines to inherit from her father, until the record of the conviction of De Grange for bigamy has been produced. We do not understand the law to be so. A bigamist may be proved so, in a civil suit, by any of those facts from which marriage may be inferred. Reputation of marriage is not enough, but facts from which it may be inferred are so. In a prosecution for the offense, there must be proof of an actual marriage. The confession of the bigamist will be sufficient in a civil suit, when made under circumstances which imply no objection to it as a confession. De Grange did make such a confession. Madame Benguerel says, in answer to the seventh interrogatory put to her: "My *husband and [*598 myself were very intimate with De Grange, and when we reproached him for his baseness in imposing upon Zuline, he endeavored to excuse himself by saying, that, at the time of his marrying her, he had abandoned his lawful wife, and never intended to see her again." Record, 212. And her answer to the cross-interrogatory is: "I am not related to nor connected with the defendants, nor with either of them, nor with the mother of the said Myra, nor am I interested at all in this suit. It was in New Orleans where I obtained my information. It will be seen by my answers how I knew the facts. I was well acquainted with De Grange and the said Zuline, and I knew the lawful wife of the said De Grange, whom he had married previous to his imposing himself in marriage upon Zuline." The credit of this witness is unassailed. Here, then, is proof enough of a subsisting marriage between De Grange and another female, when he married Mrs. Gaines's mother, to invalidate the latter.

But suppose Madame Benguerel had not given such testimony, or that her credit had been successfully assailed; what would then be the state of the objection? Just this: as all the other witnesses who speak of the prosecution of De Grange for bigamy speak of his conviction only as hearsay or common report, the defendant cannot call upon the plaintiff for record proof of it, without placing himself in the inconsistent attitude of rejecting the hearsay to be proof of its existence, but giving to him the right to call for its production. The testimony of Madame Benguerel was introduced by the plaintiffs without any obligation upon them to have done so. It establises the fact of De Grange's previous marriage, for all the purposes of this controversy. The denial, in the answer of the defendant, that Mr. Clark was ever married, is the assertion of a fact, of which the defendant cannot, in the nature of things, have positive knowledge, and is therefore no more than a declaration of his belief. One witness, therefore, overrules the denial. But there is no force in this objection for another reason. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is, that a child of the marriage is legitimate, and it will be incumbent upon him who denies it to disprove it, though in doing so he may have to prove a negative.

Further upon this point, the record of De Grange's conviction cannot be called for, as there is proof that it could not be found in the proper office in New Orleans, where it should be. The complainants do not rely upon such proof to establish the fact that De Grange was a married man when he married Zuline. 599*] *His declaration to Madame Benguerel associated with other facts, sufficiently proves it.

Before leaving this point, however, we will make a single remark upon what was said in the argument, that, if the record of De Grange's conviction had been produced, it would not have been competent testimony, from its being res inter alios acta.

The general rule certainly is, that a person cannot be affected, much less concluded, by any evidence, decree, or judgment, to which he was not actually, or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees. Duchess of Kingston's case, 11 Howell, State Trials, 261; Davies, Demandant, Lowndes, Tenant, 7 Scott, N. R. 141; Doe, d. Bacon, v. Brydges, 7 Scott, 333; Read v. Jackson, per Lawrence, J., 1 East, 355; Brisco v. Lomax, 8 Adol. & Ell. 198; Evans v. Rees, 10 Adol. & Ell. 151; Biddulph v. Ather, 2 Wel. 23; Tooker v. Duke of Beauford, 1 Burr. 146, as to manorial rights; Brisco v. Lomax, 8 Adol. & Ell. 198, as to disputed boundary; Laybourn v. Crisp, 4 Mees. & Wels. 320, as to questions of immemorial custom; Travers v. Challoner, Gwill, 1237, as to disputed modus and pedigree; Carr v. Heaton, Gwill. 1201. In Neal & Duke of Athol v. Wilding, Strange, 1157, the court rejected a special verdict in a former suit, the defendants not having been parties to that suit, which was offered to prove three of the descents which were necessary to make out the Duke's pedigree. Mr. Justice Wright differed from the majority of the judges on that occasion, and in Buller's N. P. 4th ed. p. 233, it is said that the opinion of that learned judge was generally approved, though the determination by the rest of the court was contrary. And the point has been since repeatedly ruled in conformity with the opinion of Mr. Justice Wright.

But it may be said that the real fact was not what our conclusion is upon this point. Let it be remembered by those who may say so, that possibilities are the enemies of truth, indicating more frequently than otherwise the unpreparedness of a mind to receive it, rather than its uncertainty. They have no standing in the law against a violent presumption, which is plena probatio, or full proof.

Having disposed of all the objections which were urged, or which can be raised upon this record, against the most interesting and essential fact in the case of the complainants, we 600*] *proceed to give our conclusions upon the legal points made for the reversal of the decree of the Circuit Court.

They were, that a suit at the instance of a forced heir cannot be maintained against a purchaser, until the donee's property has been discussed.

It was said the decree was not final.

That the statute of limitations barred a recovery.

And last, that the decree directs the property for which the defendant is sued to be conveyed and surrendered to Mrs. Gaines, instead of making it liable as a portion of Daniel Clark's estate, out of which the forced heir's légitime is to be calculated.

The first objection would prevail against the decree, if Mr. Patterson's was such a purchase. It is not so.

The defendant is the alienee of the purchasers who bought the property at auction, in the year 1820, from the executors of Mr. Clark under the will of 1811. It is admitted that the property was a part of Mr. Clark's estate when he died.

These sales were made without any authority, judicial or otherwise. They were made after the time when, by the law of Louisiana, the relation of the sellers as executors had expired. Nor can it be said they were legal on account of the power of attorney given to Mr. Relf and Mr. Chew by Mrs. Clark, the mother and universal legatee of the testator. She could give no power to the executors to dispense with the law prescribing the manner for making the sale of a succession. Her power of attorney was not of itself, nor was it treated by the executors, to make for her a legal acceptance of the succession. It was neither an express nor a tacit acceptance of the succession, casting upon her the responsibilities resulting to a donee of a succession by its acceptance. It might have been used as an act done by her from which her intention to accept the succession might have been inferred, which would have been a legal acceptance. But it was not so treated. Until the acceptance was made as the law required it to be, every act performed under it by the attorneys was void.

The power was also given when the possession of the estate was lawfully in the executors, for the purpose of enabling them to discharge their functions according to law. It could not invest them with any power, either when their connection with the estate as executors existed, or afterwards, to sell any part of it in a way not permitted by the law.

One of the executors, Mr. Relf, received letters testamentary on the 27th of August, 1813. The other, Mr. Chew, on the 21st January, 1814. Without delay, on the same day that he received letters, Mr. Relf applied for leave to sell the movable *and immovable [*601 property of his testator. It was granted. For reasons stated in a subsequent application, he applied for an extension of the order as to the time for making a sale. It was allowed, without any alteration of the times for advertising the property he wished to sell, as fixed in the first order. The movable effects were to be advertised ten days. The slaves and other immovable effects thirty days. The defendant depends upon these orders for the regularity of the sales and the validity of the purchase made by his alienor. Correjollas, the original purchaser. The sale of the property bought by Correjollas was made in 1820. The time for making the sales, according to the order of the court, had passed more than six years. The

time within which the executors could act as such by the law of Louisiana had expired. They had neither legal nor delegated authority from the donee of the estate, recognized as such by the law of Louisiana, to make the sale. It was a sale without judicial order—a sale in disregard of, and in violation of, the law—one which the law of Louisiana makes absolutely void. If considered as having been made under the orders for sale given by the court, it is also absolutely void. It is necessary to show, in all cases of forced sales, meaning such as are done by judicial order—particularly of the property of a succession, or estate of a deceased person—that all the formalities of the law have been strictly complied with, or the sale will be annulled. Delogny v. Smith, 3 La. R. 421; Donaldson v. Hall, 7 N. S. 113; Marsfield v. Comeaux, 7 N. S. 185; 8 N. S. 246; 4 La. R. 204; 11 Martin, 610, 675; 2 La. R. 328.

Under these decisions, and the view which we have taken of this point of the case, the fact of notice by the purchasers, and by the defendant from them, of the illegal and fraudulent sale, cannot be denied. The defendant knew, from the titles which he received from the purchaser, Correjollas, and from that bought by him from the other alienee of Correjollas, that the sales had been made by Mr. Relf and Mr. Chew in a representative character, and it was his duty to inquire if they legally filled it. Not having done so he has bought in his own wrong, and the title by which he claims the property must be annulled. We have confined our remarks strictly to the objection, that these sales were made by the donee, or universal heir of the will, without adducing other causes found in the proceedings of the executors, of which this record is but too fruitful, to show that the objection has no foundation in fact.

Of the statute of limitations, we will only say that the statute in force at the time the suit 602*] is brought determines the *right of the party to sue for a claim, and that the time under that in force when this suit was commenced had not expired. We ought, though, to say, to prevent future misapprehension, that it is not regularly in the pleading of this cause.

It is also said that the decree of the Circuit Court is not final, in the sense contemplated by the law, to give to this court appellate jurisdiction. Indeed, we do not see how a decree could be more so. Nothing is left open between the parties; it embraces the pleadings as well as the proofs in the cause, and directs the property held by the defendant, as it is set forth in the pleadings, to be conveyed and surrendered to Mrs Games. And it is only because the decree is subject to the objection, that the légitime of Mrs. Gaines in her father's estate is to be calculated out of the whole of it, so as to ascertain and preserve distinct from the controversy the disposable quantum to which the donee is entitled under the will of 1811, that we shall direct it to be reversed.

Mrs. Gaines, as the forced heir of her father, is entitled to such a portion of his estate as he could not deprive her of, either by donations *inter vivos or* mortis causa. The will of 1811 *is not null on* account of its being a donation *exceeding the* quantum which the father could legally dispose of, but is only reducible to that quantum.

To determine the reduction to which the donation in the will of 1811 is liable, the 29th article of title 2d of donations inter vivos and mortis causa, ch. 3, sec. 2, of the code of 1808, gives the rule. The disposable quantum in this instance would be one fifth of the aggregate of the property of the decedent in Louisiana; the légitime four fifths. Code of 1808, 212, tit. 22.

We shall direct the decree of the court below to be reversed, and adjudge that a decree shall be made in the said court, in this suit, declaring that a lawful marriage was contracted in Philadelphia, Pennsylvania, between Daniel Clark and Zuline Carriere, and that Myra Clark, now Myra Gaines, is the lawful and only child of that marriage. That the said Myra is the forced heir of her father, and is entitled to four fifths of his estate, after the excessive donation in the will of 1811 is reduced to the disposable quantum which the father could legally give to others.

That the property described in the answer of the defendant, Mr. Patterson, is a part of the estate of Daniel Clark at the time of his death, that it was legally sold by those who had no right or authority to make a sale of it, that the titles given by them to the purchaser and by the purchaser to the defendant, Mr. Patterson, including those given by the buyer *from [*603 the first purchaser to Mr. Patterson, are null and void, and that the same is liable, as a part of the estate of Daniel Clark, to the légitime of the forced heir, and that the defendant, Charles Patterson, shall surrender the same as shall be directed among other things to be done in the premises, as will appear in the decree and mandate of this court to the Circuit Court in Louisiana.

Order.

This appeal having been heard by this court, upon the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and upon the arguments of counsel, as well for the appellees, this court, upon consideration of the premises, doth now here adjudge, order and decree, that the decree of the said Circuit Court be, and the same is hereby reversed, with costs; and that such other decree in the premises be passed as is hereinafter ordered and decreed.

And this court, thereupon proceeding to pass such decree in this cause as the said Circuit Court ought to have passed, doth now here adjudge, order and decree, that it be adjudged and declared, and is hereby adjudged and declared, upon the evidence in this cause, that a lawful marriage was contracted and solemnized at Philadelphia, in the State of Pennsylvania, between the same Daniel Clark, in the bill and proceedings mentioned, and the same Zuline or Zuliene Carriere, in the bill and proceedings mentioned; and that Myra Clark, now Myra Clark Gaines, and one of the complainants in this cause, is the lawful and only issue of the said marriage, and was at the death of her said father, Daniel Clark, his only legitimate child and heir at law, and as such was exclusively invested with the character of his forced heir, and entitled to all the rights of such forced heir.

And this court doth further adjudge, order and decree, that all the property described and claimed by the defendant Patterson in his answer and supplemental answer, and in the exhibits thereto annexed, is part and parcel of the property composing the succession of said Daniel Clark; that the defendants Richard Relf and Beverly Chew, at the time and times when, under the pretended authority of the testamentary executors of the said Daniel Clark, and the attorneys in fact of the said Mary Clark in the will and proceedings mentioned, they caused the property so described and claimed by the defendant Patterson to be set up and sold at public auction, in December, 1820, and when they executed their act of sale, dated on the 18th February, 1821, to Gabriel Correjollas for *604*] *the two lots therein described (which two lots constitute the same property described and claimed by the defendant Patterson as aforesaid), had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction and the said act of sale to Correjollas in confirmation of the previous sale at auction, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant Patterson, at the time and times when he purchased the property so described and claimed by him as aforesaid (part from the said Correjollas, the vendee of the defendants Relf and Chew, and the residue from Etienne Meunier, the vendee of said Correjollas, himself the vendee of the same defendants), was bound to take notice of the circumstances which rendered the actings and doings of the said defendants in the premises illegal, null, and void; and that he ought to be deemed and held, and hereby is deemed and held, to have purchased the property in question with full notice that the said sale at auction under the pretended authority of the said defendants and their said act of sale to Correjollas were illegal, null, and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And the said court doth further adjudge, order and decree, that all the property claimed and held by the defendant Patterson as aforesaid now remains, unaliened and undisposed of, as part and parcel of the succession of the said Daniel Clark, notwithstanding such sales at auction and act of sale in the pretended right or under the pretended authority of the defendants Relf and Chew.

And the court doth further adjudge, order and decree, that the complainant, Myra Clark Gaines, is justly and lawfully entitled, as the only forced heir of said Daniel Clark, to her legitimate portion of four fifths of the succession, and have four fifths of the property so claimed and held by the defendant Patterson, as aforesaid, duly partitioned, apportioned, and delivered or paid over to her, together with four fifths of the yearly rents and profits accruing from the same, since the same came into the said defendant's possession; and for which the said defendant is hereby adjudged, ordered and decreed, to account to the said complainant.

And the court doth now here remand this cause to the said Circuit Court for such further proceeding as may be proper and necessary to carry into effect the following directions; that is to say—

1. To cause the said defendant Patterson forthwith to surrender all the property so claimed and held by him as aforesaid into the *hands of such curator, commissioner, [*605 or trustee as the said court may appoint for the purpose; whose duty it shall be, under the directions of the court, to manage the said property to the best advantage, till the whole matter and apportionment of the said two portions (being the said four fifths and one fifth) of the said property shall have been completed and finally liquidated, as a part of the succession of the said Daniel Clark, and in the mean time to collect and receive all the rents, issues, and profits of the same, and to account and bring the same into court, to be there apportioned and paid over, or in part retained for further directions.

2. To cause four fifths of the property so claimed and held by the defendant Patterson as aforesaid to be duly partitioned, appropriated, and delivered or paid over to the said complainant; and to retain the residue subject to further directions for the appropriation of the same; which either party shall be at liberty to move for; and if the same be proved and found indivisible by its nature, or cannot be conveniently divided, to cause it to be sold by public auction, after the time of notice and advertisements and as near as may be in the manner prescribed by law in the judicial sale of the property of successions; and, in case of such sale by auction, to apportion and pay over four fifths of the net proceeds of such sale to the said complainant, and to retain the residue subject to further directions, as aforesaid.

3. To cause an account to be taken by the proper officer of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since it came into the possession of the defendant Patterson; and four fifths of the same to be accounted and paid to the said complainant, and the residue to be retained subject to such further directions as aforesaid.

4. To give such directions and make such orders from time to time, as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by the parties and the officers of the court.

THE UNITED STATES, Appellants,

v.

HENRY YATES and Archibald McIntyre.

Appearance by counsel only cures want of citation—leave to withdraw.

Under the peculiar circumstances of this case, the counsel for the appellees was permitted to strike out his appearance, but such withdrawal must not authorize a motion to dismiss for want of a citation.

The appearance of counsel does not preclude a motion to dismiss for the want of jurisdiction, or any other sufficient ground, except the want of a

606*] citation. It is *the practice of the court to receive such notices after an appearance has been entered.

Under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. If the appeal has been regularly prosecuted, he is as much entitled to judgment in the one case as in the other.

THIS was an appeal from the District Court of the United States for Louisiana, under the Act of Congress passed on the 17th of June, 1844, providing for the adjustment of land claims within the States of Louisiana, Arkansas, etc.

A motion was made by Mr. Baldwin, whose name appeared as counsel for the appellees, to strike out his appearance, and in support of the motion he filed the following affidavit and letter.

"Harvey Baldwin, of the city of Syracuse, in the State of New York, being duly sworn, saith: That he is the attorney and counsel of the above named appellees, and as such brought and assisted in the trial of the above entitled suit in the District Court of Louisiana.

"That this deponent set out from his residence aforesaid for Europe, on the 10th day of July last, and returned therefrom on the 28th or 29th of December last.

"That while in Europe, this deponent, by a letter from his clerk, was informed, that, owing to some irregularities touching the appeal, said cause was at an end and would not be further prosecuted, or language to that effect. But this deponent was subsequently informed, by a letter from his wife, that the appeal taken therein was not abandoned, and that the return thereto would soon be filed, or words to that effect. Whereupon this deponent wrote to Major Hobbie, Deputy Postmaster-General of this city, and requested him to call on Mr. Carroll, the clerk of this court, and take such measures in the name of this deponent as might be necessary to save default, and protect the rights of this deponent's clients therein; which letter this deponent has since his arrival in this city obtained from said Hobbie, and, together with the envelope thereof, is hereunto annexed.

"And this deponent further saith, that, since his arrival in this city, he has been informed by the clerk of this court that said Hobbie called on him on or about the 29th day of December last, with the letter from this deponent, and ordered the appearance of this deponent entered for the appellees in said suit, and that said appearance was thereupon entered, pursuant to such direction and request.

"And this deponent further saith, that, having been apprised that there were some irreg-
607*] ularities in regard to said appeal, *he did not intend to have his appearance entered in said cause if by so doing it would prevent said appellees from taking advantage of such irregularity.

"And this deponent further saith, that having since his arrival in this city seen the return to said appeal, he is satisfied that irregularities touching the appeal in said cause do exist, and as the counsel for said appellees deems it his duty, as at present advised, to present them to the consideration of this honorable court. And further saith not.

"Harvey Baldwin.

"Sworn to in open court, 15th February, 1848.

"William Thomas Carroll,
"Clerk of Supreme Court U. S."

"Frankfort on the Maine,
November 15th, 1847.

"My dear Sir,—I wrote you a hasty note this morning, via Liverpool, requesting your kind attention to a suit I have in the United States court—Yates & McIntyre v. The United States, appeal from District Court of Louisiana by United States, under the Act of Congress of 1844.

"Since I arrived in this country, I have been informed that the appeal was abandoned, or, owing to some irregularity in appellants' proceedings, the appeal was at an end.

"This may or may not be so. If return has been made, my appearance for appellees ought, I suppose, to be entered; but I do not wish, by entering an appearance, to waive any irregularity or advantage which the appellees may have, without their consent. Will you do me the favor to call on Mr. Carroll, the clerk, and take such measures, in my name, as may be necessary to save default and protect the rights of my clients.

"I ought in justice to myself and them to say, that, under ordinary circumstances, they would not regard mere technicalities; but the lands in question have cost them more than they can ever hope to realize with the titles confirmed. For twenty years they have been struggling to get the government to do that which, by the terms of the Treaty of 1803, it solemnly promised to do, and the doing of which formed, stricti juris, a condition precedent to the perfection of its own title. Until this is or shall be done, our property remains unavailable. If, therefore, the government has by laches lost the right to prosecute the appeal, I see no reason, under the circumstances, why we should restore it to them.

"When you look into the matter, do what ever may be necessary to protect our interest, and hold me accountable at our first meeting, which I now hope will be sometime in the month of December next.

"H. Baldwin."

*Mr. Chief Justice Taney delivered [*608 the opinion of the court:

Upon the affidavits filed, the court will permit the attorney who has appeared for the appellees to withdraw his appearance. But this leave will not authorize a motion to dismiss for want of a citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he cannot afterwards withdraw it.

But the appearance does not preclude the party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for the one above mentioned. And a motion of that kind is, in the practice of this court, usually and most properly made by the attorney after his appearance is entered on the docket. And if such a motion is intended to be made in this case, the withdrawal of the ap-

pearance is not necessary to give the appellee a right to make it.

The serious objections which often exist to permitting an attorney to strike out his appearance for a defendant in a court exercising original jurisdiction, do not apply in an appellate court. And under the rules of this court, it is, in general, of no importance to the appellant, whether an appearance for the appellee is or is not entered on the record. For if he is entitled to his appeal, and has prosecuted it to this court according to law, the refusal or omission of the appellee to appear will not delay the trial, and a judgment against him will be as conclusive as if an appearance for him had been entered on the docket, and the case argued by his counsel.

12 L. ed.

Order.

On consideration of the motion by Mr. Baldwin, for leave to strike out his appearance, which had been improvidently entered (by an agent of his) for the appellees in this cause, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is now here ordered by the court, that the leave prayed for be, and the same is hereby granted.

Note by the Reporter.

The case was afterwards dismissed, upon the same grounds as in the preceding case of The United States v. Curry and Garland.

577

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1849.

BY BENJAMIN C. HOWARD,

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

VOL. VII.

26

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. LEVI WOODBURY, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*

ISAAC TOUCEY, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
ROBERT WALLACE, Esq., *Marshal.*

RULE OF COURT

No. 53.

ORDERED, that no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.

Counsel will not be heard unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points. And no other book or case can be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard ex-parte, upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1849.

Woodbury, J., does not concur in this rule.

MEMORANDUM BY THE REPORTER.

THE following dissents were omitted to be noted in the preceding volume:

Page 228. Bein and wife v. Heath.— Mr. Chief Justice Taney, Mr. Justice Nelson, and Mr. Justice Grier dissented from the opinion of the court.

Page 344. New Jersey Steam Navigation Company v. The Merchants' Bank of Boston.—Mr. Justice Grier concurred in opinion with Mr. Justice Daniel.

Page 437. Hogg v. Emerson. Mr. Chief Justice Taney, Mr. Justice Daniel, and Mr. Justice Grier dissented from the opinion of the court.

Page 605. United States v. Yates and McIntyre.—Mr. Justice Daniel and Mr. Justice Woodbury dissented from the opinion of the court.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

January Term, 1849,

AND REPORTED HEREIN,

VOL. 48.

AS HAVE ALSO BEEN REPORTED IN

7 HOWARD AND IN 17 CURTIS'S DECISIONS.

7 How.	Title.	17 Curt.	Here in.
1–2	Luther v. Borden		
	Luther v. Borden	1	581
2–3	" "		582
3–5	" "		583
5–8	" "		584
8–10	" "		585
10–12	" "		586
12–15	" "		587
15–17	" "		588
17–20	" "		589
20–22	" "		590
22–24	" "		591
24–27	" "		592
27–29	" "		593
29–32	" "		594
32–34	" "		595
34–37	" "		596
37–39	" "		597
39–41	" "		598
41–44	" "		599
44–46	" "		600
46–48	" "		601
48–51	" "		602
51–53	" "		603
53–56	" "		604
56–58	" "		605
58–60	" "		606
60–63	" "		607
63–65	" "		608
65–67	" "		609
67–70	" "		610
70–72	" "		611
72–75	" "		612
75–77	" "		613
77–79	" "		614
79–82	" "		615
82–84	" "		616
84–86	" "		617
86–88	" "		618
89	Wilkes v. Dinsman	55	618
89–90	" "		619
90–92	" "		620
92–94	" "		621
94–96	" "		622
96–99	" "		623
99–101	" "		624
101–104	Wilkes v. Dinsman	55	625
104–106	" "		626
106–108	" "		627
108–111	" "		628
111–113	" "		629
113–116	" "		630
116–118	" "		631
118–120	" "		632
121–123	" "		633
123–125	" "		634
125–128	" "		635
128–130	" "		636
130–132	" "		637
132	Patton v. Taylor	67	637
132–134	" "		638
134–136	" "		639
136–138	" "		640
138–140	" "		641
140–142	" "		642
142–145	" "		643
145–147	" "		644
147–149	" "		645
149–152	" "		646
152–154	" "		647
154–157	" "		648
157–159	" "		649
159–160	" "		650
160–161	Fourniquet v. Perkins	70	650
161–164	" "		651
164–166	" "		652
166–168	" "		653
168–171	" "		654
171–172	" "		655
172–173	Erwin v. Lowry	76	655
173–175	" "		656
175–178	" "		657
178–180	" "		658
180–182	" "		659
182–184	" "		660
185	United States v. Chicago	82	660
185–187	" "		661
187–190	" "		662
190–192	" "		663
192–194	" "		664
194–197	" "		665

How.	Title.	How.	Title.
197–198	United States v. Chicago	666	334–337	Smith v. Turner / Norris v. Boston	724
198–199	Smith v. Kernochen	666	337–339	" "	725
199–201	" "	667	339–341	" "	726
201–204	" "	668	341–344	" "	727
204–206	" "	669	344–346	" "	728
206–208	" "	670	346–349	" "	729
208–211	" "	671	349–351	" "	730
211–213	" "	672	351–353	" "	731
213–216	" "	673	353–356	" "	732
216–218	" "	674	356–358	" "	733
218–220	" "	675	358–361	" "	734
220	McLaughlin v. Bank of Potomac	675	361–363	" "	735
220–223	" "	676	363–365	" "	736
223–225	" "	677	365–368	" "	737
225–227	" "	678	368–370	" "	738
227–230	" "	679	370–373	" "	739
230–232	" "	680	373–375	" "	740
232–234	" "	681	375–377	" "	741
234	Wagner v. Baird	681	378–380	" "	742
234–237	" "	682	380–382	" "	743
237–239	" "	683	382–385	" "	744
239–241	" "	684	385–387	" "	745
241–244	" "	685	387–390	" "	746
244–246	" "	686	390–392	" "	747
246–248	" "	687	392–394	" "	748
248–251	" "	688	394–397	" "	749
251–253	" "	689	397–399	" "	750
253–256	" "	690	399–401	" "	751
256–258	" "	691	401–404	" "	752
258–260	" "	692	404–406	" "	753
260	Matheson v. Branch of the Bank	692	406–408	" "	754
260–262	" "	693	408–411	" "	755
262–263	McArthur v. Dun	693	411–413	" "	756
263–265	" "	694	413–415	" "	757
265–268	" "	695	415–418	" "	758
268–270	" "	696	418–420	" "	759
270–272	" "	697	420–422	" "	760
272–275	Mace v. Wells	698	422–425	" "	761
275–276	" "	699	425–427	" "	762
276–277	Bodley v. Goodrich	699	427–430	" "	763
277–279	" "	700	430–432	" "	764
279	Crawford v. Branch Bank	700	432–434	" "	765
279–281	" "	701	434–437	" "	766
281–283	" "	702	437–439	" "	767
283–284	Smith v. Turner / Norris v. Boston	702	439–442	" "	768
284–286	" "	703	442–444	" "	769
286–289	" "	704	444–446	" "	770
289–291	" "	705	446–449	" "	771
291–293	" "	706	449–451	" "	772
293–296	" "	707	451–454	" "	773
296–298	" "	708	454–456	" "	774
298–301	" "	709	456–458	" "	775
301–303	" "	710	458–461	" "	776
303–306	" "	711	461–463	" "	777
306–308	" "	712	463–466	" "	778
308–310	" "	713	466–468	" "	779
310–313	" "	714	468–470	" "	780
313–315	" "	715	470–473	" "	781
315–318	" "	716	473–475	" "	782
318–320	" "	717	475–477	" "	783
320–322	" "	718	477–480	" "	784
322–325	" "	719	480–482	" "	785
325–327	" "	720	482–484	" "	786
327–330	" "	721	484–487	" "	787
330–332	" "	722	487–489	" "	788
332–334	" "	723	489–492	" "	789
			492–494	" "	790
			494–496	" "	791
			496–499	" "	792

7 How.	Title.	17 Curt.	Here in.
499–501	Smith v. Turner		
	Norris v. Boston	122	793
501–503	" "		794
503–506	" "		795
506–508	" "		796
508–510	" "		797
510–513	" "		798
513–515	" "		799
515–518	" "		800
518–520	" "		801
520–522	" "		802
522–525	" "		803
525–527	" "		804
527–530	" "		805
530–532	" "		806
532–534	" "		807
535–537	" "		808
537–539	" "		809
539–541	" "		810
541–544	" "		811
544–546	" "		812
546–549	" "		813
549–551	" "		814
551–554	" "		815
554–556	" "		816
556–558	" "		817
558–561	" "		818
561–563	" "		819
563–566	" "		820
566–568	" "		821
568–570	" "		822
570–573	" "		823
573	" "		824
573–575	Tyler v. Hand	300	824
575–577	" "		825
577–580	" "		826
580–582	" "		827
582–585	" "		828
585–586	" "		829
586–587	Kennedy v. Hunt	305	829
587–589	" "		830
589–590	" "		831
590–592	" "		832
592–594	" "		833
595–597	Hugg v. Augusta Ins. and Banking Co.	310	834
597–599	" "		835
599–602	" "		836
602–604	" "		837
604–606	" "		838
606–609	" "		839
609–611	" "		840
611	" "		841
612–614	Peck v. Jenness	320	841
614–616	" "		842
616–618	" "		843
618–621	" "		844
621–623	" "		845
623–625	" "		846
625–626	" "		847
626–627	Colby v. Ledden	328	847
627–628	Shawhan v. Wherritt	328	847
628–630	" "		848
630–632	" "		849
632–635	" "		850
635–637	" "		851
637–640	" "		852
640–642	" "		853
642–644	" "		854
644–646	" "		855

7 How.	Title.	17 Curt.	Here in.
646–647	Sadler v. Hoover	333	855
647–649	" "		856
649–650	" "		857
650–651	Barnard v. Gibson	334	857
651–654	" "		858
654–656	" "		859
656–658	" "		860
658	United States v. Boisdore	336	860
658–660	" "		861
660–661	Missouri v. Iowa		
	Iowa v. Missouri	337	861
661–663	" "		862
663–666	" "		863
666–668	" "		864
668–671	" "		865
671–673	" "		866
673–675	" "		867
675–678	" "		868
678–680	" "		869
680–681	" "		870
681–683	Jones v. United States	349	870
683–685	" "		871
685–688	" "		872
688–690	" "		873
690–692	" "		874
692–693	" "		875
693–695	Harris v. Wall	358	875
695–697	" "		876
697–700	" "		877
700–702	" "		878
702–704	" "		879
704–706	" "		880
706–707	Townsend v. Jennison	361	880
707–709	" "		881
709–712	" "		882
712–714	" "		883
714–716	" "		884
716–719	" "		885
719–721	" "		886
721–723	" "		887
723–725	" "		888
726–728	Hardeman v. Harris	372	889
728–729	" "		890
729–730	Cutler v. Rae	374	890
730–732	" "		891
732–735	" "		892
735–737	" "		893
737–738	" "		894
738–739	Smith v. Hunter	382	894
739–742	" "		895
742–744	" "		896
744	" "		897
745–746	McDonald v. Hobson	386	897
746–749	" "		898
749–751	" "		899
751–754	" "		900
754–756	" "		901
756–758	" "		902
758–760	" "		903
760–761	Massingill v. Downs	392	903
761–763	" "		904
763–766	" "		905
766–768	" "		906
769–771	Udell v. Davidson	396	907
771–772	" "		908
772–773	Neilson v. Lagow	399	908
773–775	" "		909
776	Lewis ex rel. Longworth v. Lewis	400	909

7 How.	Title.	17 Curt.	Here in.
776–778	Lewis ex rel. Longworth v. Lewis	400	910
778–780	" "		911
780–783	" "		912
783–784	" "		913
784–785	Van Rensselaer v. Watt	407	913
785–787	Lawrence v. Allen	407	914
787–790	" "		915
790–792	" "		916
792–795	" "		917
795–797	" "		918
797	" "		919
798–799	Backus v. Gould	414	919
799–802	" "		920
802–804	" "		921
804–807	" "		922
807–809	" "		923
809–811	" "		924
811–812	" "		925
812–813	Nesmith v. Sheldon	416	925
813–816	" "		926
816–818	" "		927
818–819	" "		928
819–820	Stearns v. Page	418	928
820–822	" "		929
822–824	" "		930
824–827	" "		931
827–829	" "		932
829–831	" "		933
831–832	Stearns v. Page	418	934
833	United States v. King	425	934
834–836	" "		935
836–838	" "		936
838–841	" "		937
841–843	" "		938
843–845	" "		939
845–848	" "		940
848–850	" "		941
850–852	" "		942
852–855	" "		943
855–857	" "		944
857–860	" "		945
860–862	" "		946
862–864	" "		947
864–867	" "		948
867–869	" "		949
869–871	" "		950
871–874	" "		951
874–876	" "		952
876–878	" "		953
878–881	" "		954
881–883	" "		955
883–885	" "		956
885–888	" "		957
888–890	" "		958
890–893	" "		959
893–894	" "		960

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1849.

1*] *MARTIN LUTHER, Plaintiff in Error,

v.

LUTHER M. BORDEN et al., Defendants in Error.[1]

RACHEL LUTHER, Complainant,

v.

LUTHER M. BORDEN et al., Defendants.

Trespass—justification, martial law, military officer acting under orders—power to recognize State government as duly constituted, vested in Congress—decisions of State courts thereon—President's power under statute—State government may declare martial law—Legislature judges of necessary exigency—certificate of division of opinion—practice.

At the period of the American Revolution, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles II., making only such alterations, by acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent State.

But no mode of proceeding was pointed out by which amendments might be made.

In 1841 a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution, to be submitted to the people for their adoption or rejection.

This convention framed a constitution, directed a vote to be taken upon it, declared afterwards that it had been adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island.

Under it, elections were held for Governor, members of the Legislature, and other officers, who assembled together in May, 1842, and proceeded to organize the new government.

But the charter government did not acquiesce in these proceedings. n the contrary, it passed stringent laws, and finally passed an act declaring the State under martial law.

In May, 1843, a new constitution, which had been framed by a convention called together by the charter government, went into operation, and has continued ever since.

The question which of the two opposing governments was the legitimate one, viz., the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts.

The Political Department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

The courts of Rhode Island have decided in favor of the validity of the charter government, and the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

*The question whether or not a majority of [*2 those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding.

The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation.

The President of the United States is vested with certain power by an act of Congress, and in this case he exercised that power by recognising the charter government.

Although no State could establish a permanent

1.—Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice McKinley were absent on account of ill health when this case was argued.

NOTE.—What is a State. See note to 8 L. ed. U. S. 25.

Martial law, what is; different from military law; extent of; in whom the power to declare resides; when it may be exercised; suspension of writ of habeas corpus practically equivalent thereto, in this country; occasions of such suspension; what is military necessity.

Martial law has been confounded with military law, but the two are very different. The latter consists of the "rules and articles of war," and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the "usage and custom of military service." It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally, with them, a part of the general law of the land. Halleck's International Law and Laws of War, 373.

Martial law is quite distinct from military law. Martial law exists only in time of war, and originates in military necessity. It derives no authority from the civil law, nor assistance from the civil tribunals, for it overrules, suspends and replaces both. Idem; 1 Kent's Com. 7th ed. 370; marg. p. 341, note a.

It is from its very nature an arbitrary power, and extends to all the inhabitants of the district where it is in force. Military law extends to all military persons, but not to those in a civil capacity. De Hart, Ch. 2; Hough on Courts-Martial, 384; Harwood, Naval Courts-Martial, 7, 8.

The right to declare, apply and enforce martial law, is one of the sovereign powers, and resides in the governing authority of the State, and it depends upon the constitution of the State whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence. Halleck's International Law and Laws of War, 373.

military government, yet it may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands.

After martial law was declared, an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object; and if the power is exercised for the purposes of oppression, or any injury, wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

THESE two cases came up from the Circuit Court of the United States for the District of Rhode Island, the former by a writ of error, and the latter by a certificate of division in opinion. As the allegations, evidence, and arguments were the same in both, it is necessary to state those only of the first. They were argued at the preceding term of the court, and held under advisement until the present.

Martin Luther, a citizen of the State of Massachusetts, brought an action of trespass quare clausum fregit against the defendants, citizens of the State of Rhode Island, for breaking and entering the house of Luther, on the 29th of June, 1842. The action was brought in October, 1842.

At the November Term, 1842, the defendants filed four pleas in justification, averring, in substance—

An insurrection of men in arms to overthrow the government of the State by military force.

That, in defense of the government, martial law was declared by the General Assembly of the State.

That the plaintiff was aiding and abetting said insurrection. That at the time the trespasses were committed, the State was under martial law, and the defendants were enrolled in the fourth company of infantry in the town of Warren, under the command of J. T. Child.

That the defendants were ordered to arrest the plaintiff, and, if necessary, to break and enter his dwelling-house.

That it was necessary, and they did break and enter, etc., doing as little injury as possible, etc., and searched said house, etc.

To these pleas there was a general replication and issue.

The cause came on for trial at November Term, 1843, when the jury, under the rulings 3*] of the court, found a verdict for *the defendants. During the trial, the counsel for the plaintiff took a bill of exceptions, which was as follows:

Rhode Island District, sc.:

Martin Luther
v.
Luther M. Borden et al.

Circuit Court of the United States, November Term, 1843.

Be it remembered, that, upon the trial of the aforesaid issue before said jury, duly impaneled to try the same—

The defendants offered in evidence, in support of their first, second, and third pleas—

1st. The charter of the Colony of Rhode Island and Providence Plantations, and the acceptance of the same at a very great meeting and assembly of all the freemen of the then Colony of Rhode Island and Providence Plantations, legally called and held at Newport, in the said colony, on the 24th day of November, A. D. 1663.

That on the 25th day of November, A. D. 1663, the former lawful colonial government of the said colony dissolved itself, and the said charter became and was henceforth the fundamental law or rule of government for said colony. That, under and by virtue of said charter, and the acceptance thereof as aforesaid, the government of said colony was duly organized, and by due elections was continued, and exercised all the powers of government granted by it, and was recognized by the inhabitants of said colony, and by the King of Great Britain and his successors, as the true and lawful government of said colony, until the 4th day of July, A. D. 1776.

That the General Assembly of said colony, from time to time, elected and appointed delegates to the General Congress of the delegates of the several colonies of North America, held in the years 1774, 1775, and 1776, and to the Congress of the United States of America, in the years 1776 and 1778. And that said delegates of said Colony of Rhode Island and Providence Plantations were received by, and acted with, the delegates from the other colonies and States of America, in Congress assembled, as the delegates representing the said Colony and State of Rhode Island and Providence Plantations; and that on the 4th day of July, A. D. 1776, said delegates of the said Colony of Rhode Island and Providence Plantations united with the delegates of the other colonies as representatives of the United States of America, and as such assented to and signed in be-

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It cannot de despotically or arbitrarily exercised any more than any other belligerent right can be so exercised. Cushing, Opinions of U. S. Atty's-Gen. Vol. VIII. p. 365 et seq.; Wolfius Jus Gentium, sec. 863; Grotius de Jur. Bel. a Pac. lib. 2, Cap. 8; Kluber, Droit des Gens, sec. 255; O'Brien's American Military Law, 28.

The laws of different countries differ in regard to the application and exercise of this power. Block, Dic. de l'Admin. Francaise, passim; Esriche, Dic. de Leg. y Jurisprudientia, passim; Cushing, Opinions of U. S. Atty's Gen. Vol. VIII. 336, et seq. Hale, Hist. Com. Law, 39.

In the state of siege, the place is put under martial law, or under the authority of the military power, where the civil law is suspended for the time being, or at least is made subordinate to the military. Halleck on International Law and Laws of War, 374.

There are numerous instances in which martial *law has been declared and enforced in time of rebellion or insurrection,* not only in India and British colonial possessions, but also in England and Ireland. No act of parliament seems to be required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the fact of martial law. Stephen, Commentaries, Vol. II. p. 602; Hausard, Parl. Deb. N. S. Vol. XI.; third series, Vol. CXV.; Grant v. Gould, 2 H. Black. 98; 1 Black. Com. 136; Bowyer, Universal Pub Law, 424; Halleck, Internat. Law and Laws of War, 375.

The suspension of the writ of habeas corpus is not, in itself, a declaration of martial law; it is simply an incident, though a very important incident, to such declaration. But practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, and a declaration of martial law would be utterly useless unless accompanied by the suspension of the privilege of such writ. Hence, in the United States the two.

half of said colony the Declaration of the Independence of the United States of America.

4*] *That afterward, to wit, at the July session of the General Assembly of said State of Rhode Island and Providence Plantations, said General Assembly, by resolution thereof, did approve the said Declaration of Independence made by the Congress aforesaid, and did most solemnly engage that they would support the said General Congress in the said declaration with their lives and fortunes.

That afterwards, to wit, on the 9th day of July, 1778, the said State of Rhode Island and Providence Plantations, by her delegates duly authorized thereunto, became a party to the articles of confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, and ratified and confirmed the same; and, as one of the United States of America under said articles of confederation and perpetual union, was received, recognized, and acted with and by the other States of the said confederation, and by the United States of America in Congress assembled, during the continuation of said confederacy.

That after the dissolution of said confederacy, to wit, on the 29th day of May, A. D. 1790, said State of Rhode Island and Providence Plantations, in convention duly called, elected, and assembled under an act of the General Assembly of said State, ratified the Constitution of the United States, and under the same became, and ever since has been, one of the said United States, and as such, under the Constitution and laws of the United States, and of the said State of Rhode Island and Providence Plantations, hath ever elected and sent, and doth now send, senators and representatives to the Congress of the United States, who have been since, and now are, received and recognized as such by the said United States, and in all respects have ever been received and recognized by the several States, and by the United States, as one of the said United States under the said Constitution thereof.

That from the said 4th of July, A. D. 1776, to the present time, the said charter and the said government of the said State of Rhode Island and Providence Plantations, organized under the same, hath ever been acted under and recognized by the people of said State, and hath been recognized by each of the said United States, and hath been recognized and guaranteed by the said United States as the true, lawful, and republican constitution and form of government of said State; and that the said charter continued to regulate the exercise and distribution of the powers of said government of said State, and, except so far as it hath been modified by the Revolution and the new order *of things consequent thereon, continued [*5 to be the fundamental law of said State, until the adoption of the present constitution of said State, and the organization of the government under the same.

That all the officers of the said government of said Colony and State of Rhode Island and Providence Plantations, organized under said charter as aforesaid, were elected in conformity with said charter and with the existing laws, from the first organization of the government under the said charter until the organization of the government under the present constitution of said State, and were and continued to be in the full exercise of all the powers of said government, and in the full possession of all the State-houses, court-houses, public records, prisons, jails, and all other public property, until the regular and legal dissolution of said government by the adoption of the present constitution, and the organization of the present government under the same.

2. That the General Assembly of said State, at their January session, in the year of our Lord one thousand eight hundred and forty-one, passed resolutions in the words following, to wit:

"Resolved by this General Assembly (the Senate concurring with the House of Representatives therein), That the freeman of the several towns in this State, and of the city of Providence, qualified to vote for general officers be, and they are thereby requested to choose, at their semi-annual town or ward meetings, in August next, so many delegates, and of the like qualifications, as they are now respectively entitled to choose representatives to the General Assembly, to attend a convention, to be holden at Providence, on the first Monday of November, in the year of our Lord one thousand eight hundred and forty-one, to frame a new constitution for this State, either in whole or in part, with full powers for this purpose; and if only for a constitution in part, that said convention have under their especial consideration the expediency of equalizing the representation of the towns in the House of Representatives.

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martial law and the suspension of the writ is regarded as one and the same thing. Luther v. Borden, 7 How. 1; Martin v. Mott, 12 Wheat. 19; Story, Com. on the Constitution, sec. 1342; Johnson v. Duncan, 3 Martin, N. S. 530.

There must be two co-existing facts; the fact of rebellion or invasion; and the fact that the public safety requires it; in order to make valid a suspension of the writ of habeas corpus. Const. U. S. ch. 1, art. 1, sec. 9, clause 2. Ex-parte Bollman and Swartwout, 4 Cranch, 101.

The President would seem to be the proper person to execute this power. Idem.

There have been a number of occasions on which it has been suspended by the executives and military authorities of the United States. Parton, Life of Jackson; Hamilton, Hist. of the Republic, Vol. VI.; Wilkinson, Memoirs; Cushing, Opinions of the U. S. Atty's-Gen. Vol. VIII. p. 374.

The right to declare, apply and exercise martial law, is one of the rights of sovereignty, and is as essential to the existence of a State as is the right to declare or carry on war. Cushing, Opinions of U. S. Atty's-Gen. Vol. VIII. p. 365, et seq.; Halleck's Int. Law and Laws of War, 380.

Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution or dictation. Instructions for the government of armies of the United States in the field, published in General Orders No. 100, A. G. O., April 24, 1863; Scott's Digest of Military Law, 441, 442.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usage of war. Idem, 443, 444.

"Resolved, That a majority of the whole number of delegates which all the towns are entitled to choose shall constitute a quorum; who may elect a president and secretary; judge of the qualifications of the members, and establish such rules and proceedings as they may think necessary; and any town or city which may omit to elect its delegates at the said meetings in August may elect them at any time previous to the meeting of said convention.

"Resolved, That the constitution or amendments agreed upon by said convention shall be submitted to the freemen in open town or ward meetings, to be holden at such time as may be [*6] *named by said convention. That said constitution or amendments shall be certified by the president and secretary, and returned to the Secretary of State; who shall forthwith distribute to the several town and city clerks, in due proportion, one thousand printed copies thereof, and also fifteen thousand ballots; on one side of which shall be printed '(Amendments or Constitution) adopted by the convention holden at Providence, on the first Monday of November last;' and on the other side, the word 'approve' on the one half of the said ballots, and the word 'reject' on the other half.

"Resolved, That at the town or ward meetings, to be holden as aforesaid, every freeman voting shall have his name written on the back of his ballot; and the ballots shall be sealed up in open town or ward meeting by the clerks, and, with lists of the names of the voters, shall be returned to the General Assembly at its next succeeding session; and the said General Assembly shall cause said ballots to be examined and counted, and said amendments or constitution being approved of by a majority of the freemen voting, shall go into operation and effect at such time as may be appointed by said convention.

"Resolved, That a sum not exceeding three hundred dollars be appropriated for defraying the expenses of said convention, to be paid according to the order of said convention, certified by its president."

That at their May session, in the year of our Lord one thousand eight hundred and forty-one, the said General Assembly passed resolutions in the words following, to wit:

"Resolved by this General Assembly (the Senate concurring with the House of Representatives therein), That the delegates from the several towns to the State convention to be holden in November next, for the purpose of framing a State constitution, be elected on the basis of population, in the following manner, to wit: Every town of not more than eight hundred and fifty inhabitants may elect one delegate; of more than eight hundred and fifty, and not more than three thousand inhabitants, two delegates; of more than three thousand, and not more than six thousand inhabitants, three delegates; of more than six thousand, and not more than ten thousand inhabitants, four delegates; of more than ten thousand, and not more than fifteen thousand inhabitants, five delegates; of more than fifteen thousand inhabitants, six delegates.

"Resolved, That the delegates attending said convention be entitled to receive from the general treasury the same pay as members of the General Assembly.

"Resolved, That so much of the resolutions to which these are in amendment as is inconsistent herewith be repealed."

*And that at their January session, in the [*7 year of our Lord one thousand eight hundred and forty-two, the said General Assembly passed resolutions in the words following, to wit:

"Whereas a portion of the people of this State, without the forms of law, have undertaken to form and establish a constitution of government for the people of this State, and have declared such constitution to be the supreme law, and have communicated such constitution to the General Assembly; and whereas many of the good people of this State are in danger of being misled by these informal proceedings, therefore,

"It is hereby resolved by this General Assembly, That all acts done by the persons aforesaid, for the purpose of imposing upon this State a constitution, are an assumption of the powers of government in violation of the rights of the existing government, and of the rights of the people at large.

"Resolved, That the convention called and organized in pursuance of an act of this General Assembly, for the purpose of forming a constitution to be submitted to the people of this State, is the only body which we can recognize as authorized to form such a constitution, and to this constitution the whole people have a right to look, and we are assured they will not look in vain, for such a form of government as will promote their peace, security, and happiness.

"Resolved, That this General Assembly will maintain its own proper authority, and protect and defend the legal and constitutional rights of the people."

And that at their January session, in the year of our Lord one thousand eight hundred and forty-two, the said General-Assembly passed an act in the words following, to wit:

"An Act in amendment of an act, entitled an act revising the act entitled an act regulating the manner of admitting freemen, and directing the manner of electing officers in this State.

"Whereas the good people of this State have elected delegates to a convention to form a constitution, which constitution, if ratified by the people, will become the supreme law of the State; therefore,

"Be it enacted by the General Assembly as follows: All persons now qualified to vote, and those who may be qualified to vote under the existing laws previous to the time of such their voting, and all persons who shall be qualified to vote under the provisions of such constitution, shall be qualified to vote upon the question of the adoption of the said constitution.

"That under and by virtue of the resolutions and acts last aforesaid, a written constitution of government for the said State of Rhode Island and Providence Plantations was framed by a *convention legally called, elected, and [*8 assembled, and that said proposed constitution was, in pursuance of the said resolutions and acts, on the 21st, 22d, and 23d days of March, A. D. 1842, submitted for adoption or rejection to all persons qualified by the existing laws of said State to vote, and also to all persons

who, under the provisions of said constitution, were qualified to vote, in the legal town and ward meetings of said State and of the city of Providence, legally called and assembled, and was by a majority of the persons so qualified by law to vote thereon, and actually voting thereon, rejected. That the said Martin Luther and his confederates, in causing and fomenting the said rebellion, voted against the adoption of said constitution; a copy of which is hereunto annexed, marked A."

3d. The defendants further offered all the acts, resolutions, and proceedings of the said General Assembly of the said Colony and State of Rhode Island and Providence Plantations, from the organization of the said government under the said charter, until the organization of the present government under the present constitution.

4th. The defendants offered evidence, that on the 24th day of June, A. D. 1842, and for a long time before, and from that time continually, until after the time when the said trespasses are alleged in the plaintiffs said declaration to have been committed, large numbers of men, among whom was the said Martin Luther, were assembled in arms in different parts of the said State of Rhode Island and Providence Plantations, for the purpose and with the intent of overthrowing the government of said State, and destroying the same by military force; and with such illegal, malicious, and traitorous intent and purpose, at and during the times aforesaid, did, in different parts of said State, make and levy war upon said State, and upon the government and citizens thereof, and did attempt and enterprise the hurt, detriment, annoyance, and destructiton of the inhabitants of said State, and the overthrow of the government thereof.

5th. That in order to protect and preserve said State, and the government and the citizens thereof, from the destruction threatened by said rebellion and military force, the General Assembly of said State, on the 25th day of June, A. D. 1842, enacted and declared martial law in the words following:

"An Act establishing Martial Law in this State.

"Be it enacted by the General Assembly as follows: Section 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State."

9*] *And thereupon, on the 26th day of June, A. D. 1842, Samuel Ward King, Governor, captain-general, and commander-in-chief in and over said State of Rhode Island and Providence Plantations, issued his proclamation in the words and figures following:

"By his Excellency, Samuel Ward King, Governor, Captain-General, and Commander-in-Chief of the State of Rhode Island and Providence Plantations.

"A Proclamation.

"Whereas the General Assembly of the said State of Rhode Island and Providence Plantations did, on the 25th day of June, A. D. 1842, pass the act following, to wit:

"'An Act establishing Martial Law in this State.

"'Be it enacted by the General Assembly as follows: Section 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of His Excellency the Governor of the State.'

"I do therefore issue this my proclamation, to make known the same unto the good people of this State, and all others, that they may govern themselves accordingly. And I do warn all persons against any intercourse or connection with the traitor Thomas Wilson Dorr, or his deluded adherents, now assembled in arms against the laws and authorities of this State, and admonish and command the said Thomas Wilson Dorr and his adherents immediately to throw down their arms and disperse, that peace and order may be restored to our suffering community, and as they will answer the contrary at their peril. Further, I exhort the good people of this State to aid and support by example, and by arms, the civil and military authorities thereof, in pursuing and bringing to condign punishment all engaged in said unholy and criminal enterprise against the peace and dignity of the State.

"In testimony whereof, I have caused the seal of said State to be affixed to these presents, and have signed the same with my hand. Given at the city of Provi-
[L. S.] dence, on the 26th day of June, A. D. 1842, and of the Independence of the United States of America the sixty-sixth.

"Samuel Ward King.

"By his Excellency's command.

"Henry Bowen, Secretary."

*6th. That at the time when the tres- [*10 passes mentioned and set forth in the plaintiff's said declaration are alleged to have been committed, and at divers other times before that time, the plaintiff was aiding and abetting the aforesaid traitorous, malicious, and unlawful purposes and designs of overthrowing the government of said State by rebellion and military force, and in making war upon said State, and upon the government and citizens thereof.

7th. That at the time when the pretended trespasses mentioned in the plaintiff's declaration are alleged to have been committed, the said State was under martial law as aforesaid, and the said defendants were enrolled in the company of infantry in the said town of Warren, in the fourth regiment of the militia of said State, and were under the command of John T. Child.

8th. That said John T. Child, on the 25th day of June, A. D. 1842, was duly commissioned and sworn as a quartermaster of the fourth regiment of the first brigade of militia of Rhode Island, and continued to exercise such command until after the time when the trespasses mentioned in the plaintiff's declaration are alleged to have been committed; that on the 27th day of June, A. D. 1842, the said John T. Child received written orders from Thomas G. Turner, Esq., lieutenant-colonel commanding said regiment, and duly commissioned and sworn, "to continue to keep a strong armed

guard, night and day, in the said Warren, and to arrest every person, either citizens of Warren or otherwise, whose movements were in the least degree suspicious, or who expressed the least willingness to assist the insurgents who were in arms against the law and authorities of the State."

9th. That these defendants were ordered, by the said John T. Child, their commander as aforesaid, to arrest and take the said Martin Luther, and, if necessary for the purpose of arresting and taking said Luther, these defendants were ordered to break and enter the dwelling-house of said Luther.

10th. That these defendants, in compliance with said orders, and for the purpose of arresting and taking said Luther, proceeded to his house and knocked at the door, and, not being able to obtain admission therein, forced the latch of the door of said house, and entered the same for the purpose of making said arrest, doing as little damage as possible.

11th. That at the time these defendants were ordered to arrest the said Martin Luther, as before stated, the town of Warren was in danger of an attack from the said Martin Luther and his confederates, and the inhabitants of said town were in great alarm on account thereof.

11*] *And the counsel for the plaintiff, to maintain and prove the issue on his part, offered in evidence the following matters, facts and things, in manner following, to wit:

1st. The plaintiff offered in evidence the proceedings and resolutions of a convention of the State of Rhode Island and Providence Plantations, passed 29th May, 1790, a copy whereof is hereunto annexed, marked A.

2d. The plaintiff offered in evidence the report of a committee of the House of Representatives of the State of Rhode Island, etc., made in June, 1829, upon certain memorials to them directed therein, praying for an extension of the right of suffrage in said State, a copy of which is hereunto annexed, marked B.

3d. The plaintiff offered in evidence resolutions passed by the General Assembly of said State, at their session, January, 1841, a copy of which is hereunto annexed, marked C.

4th. The plaintiff then offered in evidence the memorial addressed to said Assembly, at said session, by Elisha Dillingham and others, a copy of which is hereunto annexed, marked D.

5th. The plaintiff offered evidence to prove that, in the last part of the year 1840, and in the year 1841, associations were formed in many, if not in all, the towns in the State, called "Suffrage Associations," the object of which was to diffuse information among the people upon the question of forming a written republican constitution, and of extending the right of suffrage. To prove this, he offered the officers and members of said associations, also the declaration of principles of said associations, passed February 7, 1841, and the proceedings of a meeting thereof on the 13th day of April, 1841; and also offered witnesses to prove that a portion of the people of this State assembled at Providence, on the 17th day of April, 1841, under a call from the Rhode Island *Suffrage Association, to* take into consideration *certain matters connected* with the existing state of suffrage in said State, and to prove the proceedings of said meeting; and this he offered to prove by the testimony of the chairman of said meeting, and the clerk of the same, and of other persons present thereat; all of which proceedings and declaration, resolutions, etc., are hereunto annexed, marked E.

6th. The plaintiff offered to prove that, on the 5th day of May, A. D. 1841, a mass convention of the male inhabitants of this State, consisting of four thousand and upwards, of the age of twenty-one years and upwards, met at Newport, in said State, in pursuance of notice for that prupose; whereat, among other things, it was resolved by said convention as follows: (See copy of said resolutions hereunto annexed, marked F.)

7th. The plaintiff offered to prove that the said mass convention *at Newport afore-[*12 said adjourned their meeting from said 5th day of May to the 5th day of July, 1841, to Providence, in said State, at which place and time last mentioned said convention re-assembled, consisting of six thousand persons and upwards, of the age of twenty-one years and upwards, the same being the free male inhabitants of said State, when and where, among other things, it was resolved by said convention as follows: (See copy of said resolutions hereunto annexed, and marked G.)

8th. The plaintiff offered in evidence certain resolutions of the General Assembly of said State, passed at their May session, 1841; also a certain bill (or act) presented by a member of said Assembly, at the same session, and the proceedings of said Assembly thereupon, copies of which are hereunto annexed, marked H a, H b.

9th. The plaintiff offered in evidence the minority report from the Committee on the Judiciary upon the bill or act mentioned in the eighth offer, made to said General Assembly at their June session, A. D. 1841, and the action of said General Assembly thereupon, copies of which are hereunto annexed, marked I a, I b.

10th. The plaintiff offered to prove that the said State committee, by virtue of the authority in them vested by the said mass convention, notified the inhabitants of the several towns, and of the city of Providence, in this State, to assemble together and appoint delegates to a convention, for the purpose of framing a constitution for this State aforesaid, and that every American male citizen, twenty-one years of age and upwards, who had resided in this State as his home one year preceding the election of delegates, should have the right to vote for delegates to said convention, to draft a constitution to be laid before the people of said State; and that every thousand inhabitants in the towns in said State should be entitled to one delegate, and each ward in the city of Providence to three delegates, as appears by the following request duly published and proclaimed; also an address from said committee to the people of the State. See the copies of said request and address, hereunto annexed, and marked J a, J b.

11th. The plaintiff offered to prove that the said notice, request or call was duly published and promulgated in public newspapers printed and published in said State, and by handbills which were stuck up in the public houses, and

at various other places of public resort, in all the towns, and in every ward in the city of Providence, in said State.

12th. The plaintiff offered to prove, that, at the adjourned mass convention aforementioned, 13*] as held at Providence, in said *State, on the 5th day of July, A. D. 1841, the people of the State then present did by vote duly taken enlarge said State committee by the addition of the following named persons, all citizens of this State, to wit:

Providence County, Henry L. Webster, Philip B. Stiness, Metcalf Marsh.

Newport County, Silas Sissons.

Bristol County, Abijah Luce.

Kent County, John B. Sheldon.

Washington County, Wager Weeden, Charles Allen.

13th. The plaintiff offered to prove that, at the meeting of the said State committee, on the 20th day of July, 1841, at Providence aforesaid, when the said notice, request or call was ordered, the following members of said committee were present, and approved of the aforesaid call, and of all the proceedings then had, to wit: Samuel H. Wales, Henry L. Webster, Benjamin Arnold, Jr., Welcome B. Sayles, Metcalf Marsh, Philip B. Stiness, Dutee J. Pearce, Silas Sissons, Benjamin M. Bosworth, Abijah Luce, Sylvester Himes.

14th. The plaintiff then offered to prove that in the month of August, 1841, citizens of this State, qualified as aforesaid, did meet in their several towns, and in the several wards in the said city of Providence, and made choice of delegates, in conformity with said notice, to meet in convention to form a draft of a constitution to be laid before the people of this State; and he offered the chairman presiding at said meetings, and the persons acting as clerks of the same, the votes or ballots then and there cast by the persons voting thereon, and of the persons then and there voting, to prove the aforesaid facts, and to prove the number of citizens so voting.

15th. The plaintiff offered to prove that the said delegates did meet in convention, in said city of Providence, in the month of October, 1841, and drafted a constitution, and submitted it to the people of said State for their examination, and then adjourned, to meet in said city of Providence, in the month of November, A. D. 1841; and he offered to prove this by the production of the original minutes, or records, of the proceedings of said convention, verified by the oaths of the presidents and secretaries thereof, and of divers persons attending the same, as members thereof, or delegates thereto.

16th. The plaintiff offered to prove that, in pursuance of said adjournment, the said delegates did again meet in convention, in said Providence, in said month of November, and then completed the draft of the following constitution (a copy of which is hereunto annexed marked K), and submitted the same to the people of said State for their adoption or rejec- 14*] tion, recommending *them to express their will on the subject, at meetings to be duly presided over by moderators and clerks, and by writing their names upon their tickets, and to be holden in their several towns, and in the several wards of the city of Providence, on Monday, the 27th day of December, and on the two next successive days; and that any person entitled to vote, who, from sickness or other cause, might be unable to attend and vote in the town or ward meeting on the days aforesaid, might write his name on a ticket, and obtain the signature upon the back of the same, as a witness thereto, of a person who had given in his vote, which tickets were in the following form, to wit: "I am an American citizen, of the age of twenty-one years, and have my permanent residence, or home, in this State; I am (or not) qualified to vote under the existing laws of this State. I vote for (or against) the constitution formed by the convention of the people assembled in Providence, and which was proposed to the people by said convention on the 18th day of November, A. D. 1841"; which votes the moderator or clerk of any town or ward meetings should receive on either of the three days succeeding the three days before named; and which he offered to prove by the production of said original minutes and records as aforesaid, verified as aforesaid, and by the testimony of said persons aforesaid, and by the 14th article of said constitution.

17th. The plaintiff offered to prove that meetings were held in the several towns, and wards of the city of Providence aforesaid, and on the days aforesaid, for the purposes aforesaid; in pursuance of the requirements of said constitution; and the said moderators and clerks did receive, on said three successive days, such votes of persons qualified as aforesaid, and then carefully kept and made registers of all the persons voting, which, together with the tickets given in by the voters, were sealed up and returned by said moderators and clerks, with certificates signed and sealed by them, to the secretary of said convention, to be counted and declared at their adjourned meeting, on the 12th day of January, A. D. 1842; all of which he offered to prove by the testimony of the several moderators presiding at said meeting, and of the clerks of the same, and of the secretaries of said convention, and by the production of the original votes or ballots cast or polled by the persons then and there voting, the original registers of all said persons so voting, and the said certificates, signed and sealed as aforesaid, verified by the oaths of said moderators and clerks.

18th. The plaintiff offered to prove that the said convention of delegates did meet in said Providence, on the said 12th day of January, 1842, and did then and there count the said votes; *and the said convention there- [*15 afterwards, on the said 13th day of said January, did pass the preamble and resolutions following, to wit:

"Whereas, by the return of the votes upon the constitution proposed to the citizens of this State by this Convention, the 18th day of November last, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said constitution by a large majority; and the will of the people, thus decisively made known, ought to be implicitly obeyed and faithfully executed.

"We do therefore resolve and declare that said constitution rightfully ought to be, and is, the paramount law and constitution of the State of Rhode Island and Providence Plantations.

"And we further resolve and declare, for ourselves, and in behalf of the people whom we represent, that we will establish said constitution, and sustain and defend the same by all necessary means.

"Resolved, That the officers of this convention make proclamation of the return of the votes upon the constitution, and that the same has been adopted and become the constitution of this State; and that they cause said proclamation to be published in the newspapers of the same.

"Resolved, That a certified copy of the report of the committee appointed to count the votes upon the constitution, and of these resolutions, and of the constitution, be sent to his Excellency the Governor, with a request that he would communicate the same to the two houses of the General Assembly." A copy of which resolutions and proceedings is annexed, marked L c.

And he further offered to prove that the same was sent to said Governor, and by him communicated to the said General Assembly, and by them laid on the table; and that, by a subsequent resolution of the House of Representatives in said General Assembly, the further consideration thereof was indefinitely postponed. All these matters he offered to prove by the production of the original minutes or records of the convention aforesaid, verified by the oaths of the president, vice-presidents, and secretaries thereof; by the report of the committee appointed by said convention to count said votes, verified by the certificate of the secretaries of said convention, and by the oaths of the members of said committee, and by the certificate of Henry Bowen, Secretary of State under the then acting government, and of Thomas A. Jenks, one of the clerks of the then House of Representatives. And he further offered to prove, that, at the same session of said Assembly, a member of the House of Representatives submitted to that body, for their 16*] *action, a resolution referring all the matters connected with the formation and adoption of the aforesaid constitution to a select committee, with instructions to them to ascertain and report the number of votes cast, and the number of persons voting for the same, with full power to send for persons and papers; which resolution was rejected by said House of Representatives, as appears by copies of the records of the said House for said session, hereunto annexed, and marked L a, and the exhibit hereunto annexed, marked L b, and the testimony of witnesses.

19th. The plaintiff then offered to prove that the officers of said convention did make the proclamation required by the said resolution of the said convention; and he offered to prove this by a copy of said proclamation, certified by said officers, the oaths of said officers, and the testimony of other witnesses. See form of proclamation annexed, marked X.

20th. The plaintiff then offered to prove that the said constitution was adopted by a large majority of the male people of this State, of the age of twenty-one years and upwards, who were qualified to vote under said constitution, and also adopted by a majority of the *persons entitled to* vote for general officers *under the then existing* laws of the said State, and according to the provisions thereof; and that so much of the same as relates to the election of the officers named in the sixth section of the fourteenth article of said constitution, on the Monday before the 3d Wednesday of April, A. D. 1842, to wit, on the 18th day of said April, and all the other parts thereof on the first Tuesday of May, 1842, to wit, on the 3d day of said May, and then and there became, and was, the rightful and legal constitution of said State, and paramount law of said State; and this he offered to prove by the production of the original votes or ballots cast or polled by the persons voting for or against the adoption of said constitution, by the production of the original registers of the persons so voting, verified by the oaths of the several moderators and clerks of the meetings held for such votings, by the testimony of all the persons so voting, and by the said constitution.

21st. The plaintiff produced a copy of said constitution, verified by the certificates of Joseph Joslin, president of said convention of delegates elected and assembled as aforesaid, and for the purposes aforesaid, and of Samuel H. Wales, one of the vice-presidents, and of John S. Harris and William Smith, secretaries of the same; and offered the said Joslin, Wales, Harris, and Smith, as witnesses to prove the truth of the matters set forth in said certificates; which said copy, upon the proof aforesaid, he claimed to be a true and authenticated copy of said constitution, and which constitution he claimed to be the paramount law of the said State.

*22d. The plaintiff offered to prove, [*17 that, by virtue of, and in conformity with, the provisions of said constitution, so adopted as aforesaid, the people of said State entitled to vote for general officers, senators and representatives, to the General Assembly of said State, under said constitution, did meet, in legal town and ward meetings, on the third Wednesday of April next preceding the first Tuesday of May, 1842, to wit, on the 18th day of April, 1842, and did elect duly the officers required by said constitution for the formation of the government under said constitution; and that said meetings were conducted and directed according to the provisions of said constitution and the laws of said State; and this he offered to prove by the evidence of the moderators and clerks of said meetings, and the persons present at the same.

23d. The plaintiff offered in evidence that the said general officers, to wit, the Governor, Lieutenant-Governor, Secretary of State, senators and representatives, all constituting the General Assembly of said State under said constitution, did assemble in said city of Providence on the first Tuesday of May, A. D. 1842, to wit, on the 3d day of May, 1842, and did then and there organize a government for the said State, in conformity with the provisions and requirements of said constitution, and did elect, appoint, and qualify officers to carry the said constitution and laws into effect; and, to prove the same, he offered exemplified copies of the acts and doings of said General Assembly, hereunto annexed, and marked N a, N b, N c.

24th. The plaintiff offered in evidence a duly certified copy of that part of the census of the

United States for the year 1840 which applies to the District and State of Rhode Island, etc., hereunto annexed, and marked O.

25th. The plaintiff offered in evidence a certificate signed by Henry Bowen, Secretary of State of the then existing government of the State of Rhode Island, etc., showing the number of votes polled by the freemen in said State for ten years then last past; a copy of which is hereunto annexed, marked P. Also, under the same certificate, an act marked Q. purporting to establish martial law.

26. And the plaintiff offered in evidence an authenticated copy of an act of the General Assembly under the charter government, passed at their June session, A. D. 1842, entitled "An Act to provide for calling a Convention of the People," etc., and an act in amendment thereto; which said copy is hereunto annexed, marked Q a. And also a copy of———from the records of the House of Representatives (under said government), at their March session, A. D. 1842, hereunto annexed, marked R.

18*] *Whereupon, the counsel for the plaintiff requested the court to charge the jury, that, under the facts offered in evidence by the plaintiff, the constitution and frame of government prepared, adopted, and established in the manner and form set forth and shown thereby was, and became thereby, the supreme law of the State of Rhode Island, and was in full force and effect, as such, during the time set forth in the plaintiff's writ and declaration, when the trespass alleged therein was committed by the defendants, as admitted in their pleas.

That a majority of the free white male citizens of Rhode Island, of twenty-one years and upwards, in the exercise of the sovereignty of the people, through the forms and in the manner set forth in said evidence, offered to be proved by the plaintiff, and in the absence, under the then existing frame of government of the said State of Rhode Island, of any provision therein for amending, altering, reforming, changing, or abolishing the said frame of government, had the right to re-assume the powers of government, and establish a written constitution and frame of a republican form of government; and that having so exercised such right as aforesaid, the pre-existing charter government, and the authority and the assumed laws under which the defendants in their plea claim to have acted, became null and void and of no effect, so far as they were repugnant to and conflicted with said constitution, and are no justification of the acts of the defendants in the premises.

And the court, pro forma, and upon the understandings of the parties to carry up the rulings and exceptions of the said court to the Supreme Court of the United States, refused to give the said instructions, or to admit in evidence the facts offered to be proved by the plaintiff, but did admit the testimony offered to be proved by the defendants; and did rule that the government and laws, under which they assume in their plea to have acted, were in full force and effect as the frame of government and laws of the State of Rhode Island, and did constitute a justification of the acts of the defendants, as set forth in their pleas.

To which refusals of the court so to instruct the jury as prayed for, as well as to the instructions so as aforesaid given by the court to the jury, the plaintiff, by his counsel, excepted, and prayed the exceptions to be allowed by the court. And after the said instructions were so refused, and so given as aforesaid, the jury withdrew, and afterwards returned their verdict for the defendants.

And inasmuch as the said several matters of law, and the said several matters of fact, so produced and given in evidence on the part of the said plaintiff and the said defendants, and by *their counsel insisted on and objected [*19 to in manner as aforesaid, do not appear by the record and verdict aforesaid; the said counsel for the plaintiff did then and there propose the aforesaid exceptions to the said refusals and opinions of said court, and requested them to put the seal of said court to this bill of exceptions, containing the said several matters so produced and given in evidence for the party objecting as aforesaid.

And thereupon the judges of the aforesaid court, at the request of the counsel for the party objecting, did put their said seal to this bill of exceptions, the same being found to be true, pursuant to the law in such cases provided, at the term of said court and the trial aforesaid.

Joseph Story. [seal.]

The papers referred to in the above bill of exceptions, and made a part of it, were so voluminous that it is impossible to insert them. They constituted a volume of 150 pages.

The case was argued by Mr. Hallett and Mr. Clifford for the plaintiff in error, although the brief was signed by Mr. Turner, Mr. Hallett, Mr. R. J. Walker, and Mr. Clifford. On the part of the defendant in error, it was argued by Mr. Whipple and Mr. Webster.

The brief filed on behalf of the plaintiff in error recited the facts contained in the bill of exceptions and documents attached thereto, in chronological order, and concluded thus:

Points.

And upon these facts the plaintiff in error will maintain, that, by the fundamental principles of government and of the sovereignty of the people acknowledged and acted upon in the United States, and the several States thereof, at least ever since the Declaration of Independence in 1776, the constitution and frame of government prepared, adopted, and established as above set forth was, and became thereby, the supreme fundamental law of the State of Rhode Island, and was in full force and effect, as such, when the trespass alleged in the plaintiff's writ was committed by the defendants.

That this conclusion also follows from one of the foregoing fundamental principles of the American system of government, which is, that government is instituted by the people, and for the benefit, protection, and security of the people, nation, or community. And that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible *right to reform, alter, or [*20 abolish the same, in such manner as shall be judged most conducive to the public weal.

But that, in the case at bar, the argument is sufficient, even should it limit the right (which

the plaintiff disclaims) to a majority of the voting people, such majority having, in fact, adopted and affirmed the said constitution of Rhode Island.

To sustain this general view, the following proposition is submitted as the theory of American government, upon which the decision of this cause must depend.

The institution of American liberty is based upon the principles, that the people are capable of self-government, and have an inalienable right at all times, and in any manner they please, to establish and alter or change the constitution or particular form under which that government shall be effected. This is especially true of the several States composing the Union, subject only to a limitation provided by the United States Constitution, that the State governments shall be republican.

In order to support this proposition, we have to establish the following points:

1st. That the sovereignty of the people is supreme, and may act in forming government without the assent of the existing government.

2d. That the people are the sole judges of the form of government best calculated to promote their safety and happiness.

3d. That, as the sovereign power, they have a right to adopt such form of government.

4th. That the right to adopt necessarily includes the right to abolish, to reform, and to alter any existing form of government, and to substitute in its stead any other that they may judge better adapted to the purposes intended.

5th. That if such right exists at all, it exists in the States under the Union, not as a right of force, but a right of sovereignty; and that those who oppose its peaceful exercise, and not those who support it, are culpable.

6th. That the exercise of this right, which is a right original, sovereign, and supreme, and not derived from any other human authority, may be, and must be, effected in such way and manner as the people may for themselves determine.

7th. And more especially is this true in the case of the then subsisting government of Rhode Island, which derived no power from the charter or from the people to alter or amend the frame of government, or to change the basis of representation, or even to propose initiatory measures to that end.

Upon the foregoing hypothesis, then, the following questions arise:

1st. Had the people of Rhode Island, in the 21*] month of December, *1841, without the sanction or assent of the Legislature, a right to adopt a State constitution for themselves, that constitution establishing a government, republican in form, within the meaning of the Constitution of the United States?

2d. Was the evidence of the adoption by the people of Rhode Island of such a constitution, offered in the court below by the plaintiff in this cause, competent to prove the fact of the adoption of such constitution?

3d. Upon the issuing of the proclamation of the convention, by which it had been declared duly adopted, namely, on the 13th day of January, 1842, and the acts under it, did not that constitution become the supreme law of the *State of Rhode Island*?

If these questions are answered in the negative, then the theory of American free governments for the States is unavailable in practice.

If they be answered in the affirmative, then the consequences which necessarily follow are—

1st. The charter government was, ipso facto, dissolved by the adoption of the people's constitution, and by the organization and proceedings of the new government under the same.

2d. Consequently, the Act of March, 1842, "in relation to offences against the sovereign power of the State," and the Act "declaring martial law" passed June 24, 1842, were both void.

3d. The Act of June, 1842, being void, affords no justification of the acts complained of in the plaintiff's declaration.

4th. Those acts, by the common law, amount to trespass, the facts being admitted by the defendants.

It has already been said that Mr. Hallett alone argued the case on behalf of the plaintiff in error, but the reporter is much at a loss how to give even a skeleton of the argument, which lasted for three days, and extended over a great variety of matter. The following points were discussed, and authorities read:

1st. What is a state?

Sidney on Government, pp. 15, 24, 349, 399; Locke on Government, B. 2, ch. 8, secs. 95, 96, etc.; Burgh's Pol. Dis. Vol. I. pp. 3, 4, 6; Vattel, L. N. p. 18; Virginia Convention, 1775; Wilson's Works, Vol. I. pp. 17, 304, 305; Federalist, No. 39, p. 150; 2 Dall. Rep. 419, 463, 464; 3 Dall. Rep. 93, 94; 1 Tuck. Bl. Com. App. p. 10; 1 Story's Com. on Const. p. 193, sec. 208; 1 Elliott's Deb. Gilp. ed. p. 65.

2d. Who are the people?

The early political writers indiscriminately use the words "community," "society," "State," "nation," "body of the community," and "great body of the people," to ex- [*22 press the same idea, and sometimes the words "the governed" are used in the same sense.

Sydney on Government, ch. 1, 2, 3; Locke on Government, B. 2, ch. 8, sec. 95 et seq., ch. 13, etc.; Burgh's Pol. Dis. Vol. I., ch. 2, 3, Vol. III., pp. 275–278; Vattel, L. N. p. 18; Virginia Convention, 1775, pp. 16, 27, 42, 78; Declaration of Amer. Ind. etc.; Trevett v. Weeden, Varnum's Argument in 1787; Wilson's Works, Vol. I., pp. 17, 20, 25, 417, 420, Vol. II., p. 128, Vol. III. p. 291; Federalist, Nos. 1, 7, 14, 21, 22, 39, 40, 63; Virginia Convention, 1788, pp. 46, 57, 58, 64, 65, 67–70, 79, 87, 95, etc.; 2 Dall. Rep. 448, 449, 452, 454, 458, 470–472; 3 Dall. Rep. 86, 92–94; 1 Tuck. Bl. Com. Pt. 1, note at p. 89, App. pp. 4, 9, 87; 1 Cranch, Rep. 176; Helvidius, p. 78, by Mr. Madison; Rayner's Life of Jefferson, 377, 378; John Taylor, of Car. pp. 4, 412, 413, 519, 447; Rawle on the Const. pp. 14–17.

He cites Vattel, and uses the word "people" in the same sense Vattel had used the word "State."

4 Wheaton's Reports, p. 404; Story's Com. on the Const. Vol. I. B. 2, secs. 201–204, etc.; Virginia Convention, 1829, 1830; Debates in Congress, Michigan Reg. Deb. Vol. XIII. pt. 1; Everett's Address, Jan. 9, 1836; Burke's Report.

All the American political writers, etc., use the term "people" to express the entire numer-

ical aggregate of the community, whether State or national, in contradistinction to the government or Legislature.

Mr. Burke, in his report, cited above, says, that "the (political) people include all free white male persons of the age of twenty-one years, who are citizens of the State, are of sound mind, and have not forfeited their right by some crime against the society of which they are members."

3d. Where resides the ultimate power or sovereignty:

Sydney on Government, pp. 70, 349, 436; Locke on Government, p. 316; Burgh's Pol. Dis. I. pp. 3, 4, 6, Vol. III. pp. 277, 278, 299, 447; Paine's Rights of Man, p. 185; Roger Williams on Civil Liberty; Virginia Convention of 1776; Dec. of Amer. Ind.; Wash. Farewell Address; Trevett v. Weeden, Barnum's Argument; Wilson's Works, Vol. I. pp. 17, 21, 25, 415, 417, 418, 420, Vol. II. p. 128; Vol. III. pp. 277, 278, 299, 447; Federalist, No. 22, p. 87, No. 39, p. 154, No. 40, p. 158, No. 46, p. 188; Virginia Deb. of 1788, pp. 46, 65, 69, 79, 187, 230, 248, 313; Chisholm v. Georgia, 2 Dall. Rep. 448, Iredell, 454, 457, 458, Wilson, 470-472, Jay, 304, Patterson; Vanhorne's case, 3 Dall. Rep. 93, Iredell; Doane's case, 3 Dall. Rep. 93, Iredell; 1 Tuck. Bl. Com. App. pp. 4, 9, 10; 1 Cranch, Rep. 176; Rayner's Life of [*24 Jefferson, pp. 377, 378; *John Taylor, of Car. pp. 412, 413, 489, 490; 4 Wheaton's Rep. p. 404, Marshall; Rawle on the Const. p. 17; 1 Story's Com. on the Const. pp. 185, 186, 194, 195, 198-300; Virginia Convention of 1829, 1830; Admission of Michigan, Buchanan, Benton, Strange, Brown, Niles, King, Vanderpoel, Toucey; Everett's Address, p. 4; 4 Elliott's Deb. 223; R. I. Declaration of Rights, art. 2 and 3.

4th. The right of the people to establish government.

Sydney, Lock, Burgh, cited ante; Dec. of Amer. Ind.; Wash. Farewell Ad.; Virginia Convention of 1776; Roger Williams; Wilson; The Federalist; Virginia Deb. of 1778; 2 Dall. Rep.; 1 Tuck. Bl. Com. App.; 1 Cranch; Rayner's Life of Jefferson; John Taylor, of Carolina; 4 Wheaton's Reports; Rawle on the Constitution; 1 Story's Com. on Const.; Virginia Convention of 1829, 1830; Admission of Michigan; 2 Elliott's Debates, 65, Pat. Henry.

5th. The mode in which the right may be exercised.

The English authors already cited, although they all assert the right of the people to change their form of government as they please for their own welfare, do not in any instance come nearer to pointing out any specific mode of doing it than by saying that "they may meet when and where they please, and dispose of the sovereignty, or limit the exercise of it."[1]

Sydney on Government, ch. 3, sec. 31, p. 399.

In the Virginia Declaration of June 12, 1776, art. 3, they say it may be done "in such manner as shall be judged most conducive to the common weal."

Declaration of American independence; Wilson's Works, Vol. I. pp. 17, 21, 418, 419, Vol. III. p. 293; Federalist, No. 21, p. 78, No. 39, p. 154, No. 40, p. 158, No. 43, p. 175; Virginia Convention of 1788, 2 Elliott's Deb. pp. 46, 65, 67; 2 Dall. Rep. p. 448; Iredell, p. 464, Wilson, Jay; 1 Tuck. Bl. Com. part 1, p. 89, note; Appendix, pp. 92-94; Rayner's Life of Jefferson, pp. 377, 378; 4 Wheaton's Rep. p. 404, Marshall; Rawle on the Const. p. 17; 1 Story's Com. on the Const. pp. 198, 300, 305, 306; Virginia Convention of 1829, 1830, p. 195.

The anti-republican doctrine that legislative action or sanction is necessary, as the mode of effecting a change of State government, was broached for the first time, under the United States government, by one senator in the debate in Congress upon the admission of Michigan, December, 1846. See Congres- [*24 sional Globe and Appendix for 1836-1837. It was opposed in the Senate by Mr. Buchanan (pp. 75, 147), Mr. Benton (pp. 78, 79), Mr. Strange (p. 80), Mr. Brown (p. 81), Mr. Niles (pp. 82, 83), Mr. King (p. 85); in the House by Mr. Vanderpoel (p. 131), Mr. Toucey (p. 185).

See Kamper v. Hawkins, 1 Virginia Cases, 28, 29, 36, 37, 46, 47, 50, 51, 57, 58, 62, 64, 65, 67-74.

The instances of Tennessee, Michigan, Arkansas, and the recent case of New York.

So far as the foregoing authorities are proof of anything, they establish the following positions, viz.:

1. That in the United States no definite, uniform mode has ever been established for either instituting or changing a form of State government.

2. That State Legislatures have no power or authority over the subject, and can interfere only by usurpation, any further than, like other individuals, to recommend.

3. That the great body of the people may change their form of government at any time, in any peaceful way, and by any mode of operations that they for themselves determine to be expedient.

4. That even where a subsisting constitution points out a particular mode of change, the people are not bound to follow the mode so pointed out; but may at their pleasure adopt another.

5. That where no constitution exists, and no fundamental law prescribes any mode of amendment, there they must adopt a mode for themselves; and the mode they do adopt, when adopted, ratified, or acquiesced in by a majority of the people, is binding upon all.

6th. When and by what act does a State constitution become the paramount law?

A constitution, being the deliberate expression of the sovereign will of the people, takes effect from the time that will is unequivocally expressed, in the manner provided in and by the instrument itself.

The Constitution of the United States became the supreme law upon its ratification by nine States, in the mode pointed out by the Constitution itself.

A similar rule of construction has been adopted by the several States ever since.

Constitution of New York, p. 123 of Amer. Const.; Pennsylvania, p. 139; Delaware, p. 157, sec. 8; Kentucky, p. 241; Louisiana, p. 300, sec.

1.—For the reason, see Madison, 2 Ell. Deb. 95, and Pinckney, 4 Ell. Deb. 319, that for our system "we cannot find one express example in the experience of the world."

7; Mississippi, p. 316, sec. 5; Michigan, p. 392, sec. 9.

This constitution was adopted in convention, 25*] May 11, 1835, *ratified by the people on the first Monday of October, a Legislature elected in the same month, held a session in November, organized their judiciary March, 1836, but were not admitted into the Union until January 26, 1837. Validity has been given to her legislative acts passed in March, 1836; therefore her constitution took effect as the supreme law, upon its ratification by the vote of the people, on the first Monday of October, 1835.

That this constitution was so considered, see speech of Mr. Morris, in Gales & Seaton's Cong. App. p. 68; Mr. Benton, Mr. King, Mr. Vanderpoel, Mr. Toucey, Congressional Globe and Appendix, 1836–1837.

See also 1 Story's Com. on Const. Judge Nelson says (1 Virginia Cases, p. 28): "It is confessedly the assent of the people which gives validity to a constitution." Judge Henry, p. 47; 9 Dane's Abr. p. 18, sec. 8, p. 26, sec. 14, p. 22, sec. 11, when the United States Constitution became binding, p. 38, sec. 28, p. 41, sec. 32, p. 44, sec. 35.

These authorities establish the position that constitutions take effect and become binding from the time of their ratification by the vote of the people; which, in the language of Washington, is of itself "an explicit and authentic act of the whole people."

7th. The difference between a change of government and a revolution.

2 Dall. Rep. 419, 464, 308; Wilson's Works, Vol. I., pp. 383, 384; "A change of government has been viewed," etc.; Ibid., pp. 20, 21; Federalist, No. 21, Hamilton, p. 78, No. 39, p. 154, No. 40, p. 158, No. 43, p. 175, Madison; Washington's Farewell Address; the several State constitutions; Helvidius, Madison; Rawle on the Const.; 1 Story's Com. on the Const. p. 300; 1 Cranch, p. 176, Marshall; 9 Dane's Abr. pp. 67, 68, sec. 56.

All these go to establish the constitutional right of changing State forms of government. But the right of revolution, in the common and European acceptation of the term, implying a change by force, is nowhere sanctioned, so far as individual States are concerned, in the Constitution of the United States, if it may be in that of any of the States. On the contrary, as such revolution may involve insurrection and rebellion, as in the cases of Massachusetts and Pennsylvania, the Constitution of the United States, art. 1, sec. 8, secs. 14 and 18, makes express provision to resist all such force with the whole military force of the nation, if required, and the Act of Congress of February 28, 1795, for calling out the militia, was passed to carry that provision into effect. So that, 26*] under the American system *of government, a revolution and a mere peaceful change of government are entirely distinct and different things—one being provided for, the other, in effect, guarded against.

8th. Why a revolution to change the form of a State government can never be resorted to within the limits of the United States Constitution, while a State remains in the Union.

The United States Constitution, art. 4, sec. 4, *provides that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence."*

Now, therefore, if revolution includes insurrection and rebellion (all of which are attempts to change a subsisting government by force), then they create that "domestic violence" which is contemplated by the Constitution, and which, by the Act of 1795, they have by law provided for suppressing. How, then, can revolution be resorted to, to change a State government? With respect to the Constitution of the United States the case may, I think, be different.

As to the decision of State courts.

The rule applies to cases where the decision of a State court has become a rule of property, and to the construction of local statutes. Green v. Neal, 6 Pet. 291. It must be a fixed and received construction. Shelby v. Guy, 11 Wheat. 361; Gardner v. Collins, 2 Pet. 85.

But the Rhode Island court, in the trial of Governor Dorr for treason, refused to consider the people's constitution, or to decide between that and the charter government. They held (p. 38) that, "if a government had been set up under what is called the people's constitution, and they had appointed judges to give effect to their proceedings, and deriving authority from such a source, such a court might have been addressed upon a question like this; but we are not that court."

The rule of State decision does not apply to this case—

1. Because it involved no rule of property nor construction of a statute enacted by a Legislature acknowledged by both parties, but related to the existence of a constitution and government under it.

2. The court never decided which was the valid constitution, but refused to take jurisdiction of that question or to hear it at all.

3. The excitement of the times forms an exception.

4. It was made a political question, and not a judicial construction, as far as it entered into the case.

*Mr. Whipple, for the defendant in [*27 error, said, that the question to be decided was, whether a portion of the voters of a State, either the majority or minority, whenever they choose, assembling in mass meeting without any law or by voting where there is no opportunity of challenging votes, may overthrow the constitution and set up a new one. But he would leave the discussion of general principles to his associate, and confine himself to the more minute facts of the case.

The court below ruled out the evidence offered by the plaintiff in error. Were they right? They offered parol proof of a new constitution, which was said to have been adopted by an out-door proceeding, not recognized by any law. No parallel can be found to this case in any government, the freest that ever existed, where it was attempted by such a summary proceeding to bind all those who had no participation in it.

The charter and laws of Rhode Island were liberal and even radical. It was eminently a

government of the people. [Mr. Whipple here went into a particular examination of the charter and laws to illustrate this point.] The usage has been always for the Legislature to receive and act upon petitions for extension of the right of suffrage, and this usage constitutes the law. All changes must originate with the Legislature.

The following proposition is true, viz.: That no resistance to law is to be countenanced, unless in case of oppression irremediable otherwise. Was this the case here? Difficulties had existed for thirty years in the way of framing a constitution, not consisting in an electoral vote, but in the basis of representation. Towns had grown up and claimed a greater share in representation in the Legislature. But in conventions, the allotment of representatives was according to the scale of representation then existing in the Legislature, and they kept things just as they were. Power remained in the same hands. In January, 1841, the Legislature passed resolutions, calling a convention, organized upon the same basis upon which it stood itself, and on the 7th of February, 1841, the Suffrage Association adopted a declaration of principles, one of which was as follows, viz.:

"Resolved, That whenever a majority of the citizens of this State who are recognized as citizens of the United States shall, by delegates in convention assembled, draft a constitution, and the same shall be accepted by their constituents, it will be, to all intents and purposes, the law of the State."

Yet in the petition upon which the Legislature acted it is said, "Your petitioners would not take the liberty of suggesting to your honorable body any course which should be pur-*28*] sued *but would leave the whole affair in your hands, trusting to the good sense and discretion of the General Assembly."

And yet, within a fortnight after the Legislature had provided for a convention, in conformity with this petition, these same persons took the affair into their own hands, and issued the declaration of principles above mentioned. Was there ever a case where a Legislature submitted alterations of a constitution to be voted upon by any other than qualified voters? And yet Rhode Island did more than this. By the resolutions of January, 1841, she permitted every male inhabitant to vote upon the adoption of the constitution which might be proposed. [Mr. Whipple here read and commented on many documents, to show that the friends of the "people's constitution" only wanted to get ahead of the legislative convention, and that of course there was no case of irremediable oppression.]

The "declaration of principles" above mentioned is founded upon the idea that the people can change the constitution whenever they choose to do so, according to the resolution above quoted; and yet the thirteenth article of the Dorr constitution says that all propositions to amend the constitution must originate in the Legislature, and then be ratified by the people. Although our amended constitution gave to the petitioners all they asked, yet they voted against it when before the people for adpotion, and it was rejected by a small majority. [Mr. Whipple here commented on the irregularities in voting upon the adoption of the Dorr constitution.

It has been contended by the opposite counsel, that they had a right, in the court below, to prove, by parol, the adoption of their constitution; that every male inhabitant over twenty-one years of age has a natural right to vote; that their votes are binding upon the government; that their government had a right to take the military arsenal by force; and that this court has a right to decide that our government, now and always represented in Congress, was not a legitimate government.

There is no such thing as a natural right to vote. There are three classes of rights: natural, such as those recognized in the Declaration of Independence; civil, such as the rights of property; and political rights. Society has nothing to do with natural rights except to protect them. Civil rights belong equally to all. Everyone has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class. If it was a natural right, it would appertain to every human being, females and minors. Even the Dorr men excluded all under twenty-one, and those who *had [*29 not resided within the State during a year. But if the State has the power to affix any limit at all to the enjoyment of this right, then the State must be the sole judge of the extent of such restriction. It can confine the right of voting to freeholders, as well as adults or residents for a year. The boasted power of majorities can only show itself under the law, and not against the law, in any government of laws. It can only act upon days and in places appointed by law.

But it is urged by the opposite counsel, that the great doctrine of the sovereignty of the people, and their consequent power to alter the constitution whenever thy choose, is the American doctrine, in opposition to that of the Holy Alliance of Europe, which proclaims that all reforms must emanate from the throne. Let us examine this so-called American doctrine. I say that a proposition to amend always comes from the Legislative body. [Mr. Whipple here examined, seriatim, the Constitution of the United States, and the constitutions of each State, to show that this principle ran through the whole of them.]

Look at the subject in another aspect. In Congress each House must agree, and even then the President may veto a bill. Sixteen millions of people in the large States may be in favor of amending the Constitution, but their will may be thwarted by four millions in the small States. What then becomes of this vaunted American doctrine of popular sovereignty, acting by majorities? There is no such thing in the United States as a forcible revolution. The Constitution forbids it. The framers of it gave to the federal government power to put down a rebellion, because they saw that remedies for all grievances were provided by law.

Mr. Webster, on the same side.

This is an unusual case. During the years 1841 and 1842, great agitation existed in Rhode Island. In June, 1842, it subsided. The Legislature passed laws for the punishment of offenders, and declared martial law. The grand jury indicted Dorr for treason. His trial came on in 1844, when he was convicted and sen-

tenced to imprisonment for life. Here is a suit in which the oppisite counsel say that a great mistake has happened in the courts of Rhode Island; that Governor King should have been indicted. They wish the governor and the rebel to change places. If the court can take cognizance of this question, which I do not think, it is not to be regretted that it has been brought here. It is said to involve the fundamental principles of American liberty. This is true. It is always proper to discuss these, if 30*] the appeal be made to reason, *and not to the passions. There are certain principles of liberty which have existed in other countries, such as life, the right of property, trial by jury, etc. Our ancestors brought with them all which they thought valuable in England, and left behind them all which they thought were not. Whilst colonies, they sympathized with Englishmen in the Revolution of 1688. There was a general rejoicing. But in 1776 the American people adopted principles more especially adapted to their condition. They can be traced through the Confederation and the present Constitution, and our principles of liberty have now become exclusively American. They are distinctly marked. We changed the government where it required change; where we found a good one, we left it. Conservatism is visible throughout. Let me state what I understand these principles to be.

The first is, that the people are the source of all political power. Everyone believes this. Where else is there any power? There is no hereditary Legislature, no large property, no throne, and primogeniture. Everybody may buy and sell. There is an equality of rights. Anyone who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign. Jay said that in this country there were many sovereigns and no subject. A portion of this sovereign power has been delegated to government, which represents and speaks the will of the people as far as they chose to delegate their power. Congress have not all. The State governments have not all. The Constitution of the United States does not speak of the government. It says the United States. Nor does it speak of State governments. It says the States: but it recognizes governments as existing. The people must have representatives. In England, the representative system originated, not as a matter of right, but because it was called by the king. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system, it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is, that the qualification which entitles a man to vote must be prescribed by previous laws, directing how it is to be exercised, and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. *One principle is, that the people often [*31 limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities. The fifth article of the Constitution of the United States is a clear proof of this. The necessity of having a concurrence of two thirds of both houses of Congress to propose amendments, and of their subsequent ratification by three fourths of the States, gives no countenance to the principles of the Dorr men, because the people have chosen so to limit themselves. All qualifications which persons are required to possess before they can be elected are, in fact, limitations upon the power of the electors; and so are rules requiring them to vote only at particular times and places. Our American mode of government does not draw any power from tumultuous assemblages. If anything is established in that way, it is deceptive. It is true that at the Revolution governments were forcibly destroyed. But what did the people then do? They got together and took the necessary steps to frame new governments, as the did in England when James II. abdicated. William asked Parliament to assemble and provide for the case. It was a revolution, not because there was a change in the person of the sovereign, but because there was a hiatus which must be filled. It has been said by the opposing counsel, that the people can get together, call themselves so many thousands, and establish whatever government they please. But others must have the same right. We have then a stormy South American liberty, supported by arms to-day and crushed by arms tomorrow. Our theory places a beautiful face on liberty, and makes it powerful for good, producing no tumults. When it is necessary to ascertain the will of the people, the Legislature must provide the means of ascertaining it. The Constitution of the United States was established in this way. It was recommended to the States to send delegates to a convention. They did so. Then it was recommended that the States should ascertain the will of the people. Nobody suggested any other mode.

The opposite counsel have cited the examples of the different State in which constitutions have been altered. Only two provided for conventions, and yet conventions have been held in many of them. But how? Always these conventions were called together by the Legislature, and no single constitution has ever been altered by means of a convention gotten up by mass meetings. There must be an authentic mode of ascertaining the public will somehow and somewhere. If not, it is a government of the strongest and most numerous. It is said, that if the Legislature refuses to call a convention, the case then *resem- [*32 bles the Holy Alliance of Europe, whose doctrine it was that all changes must originate with the sovereign. But there is no resemblance whatever. I say that the will of the people must prevail, but that there must be some mode of finding out that will. The people here are as sovereign as the crowned heads at Laybach, but their will is not so easily discovered. They cannot issue a ukase or edict. In 1845, New York passed a law recommending to the people to vote for delegates to a con-

vention; but the same penalties against fraud were provided as in other elections. False oaths were punished in the same way. The will of the people was collected just as in ordinary occasions.

What do the Constitution and laws of the United States say upon this point? The Constitution recognizes the existence of States, and guarantees to each a republican form of government, and to protect them against domestic violence. The thing which is to be protected is the existing State government. This is clear by referring to the Act of Congress of 1795. In case of an insurrection against a State, or the government thereof, the President is to interfere. The Constitution proceeds upon the idea that each State will take care to establish its own government upon proper principles, and does not contemplate these extraneous and irregular alterations of existing governments.

Let us now look into the case as it was tried in the court below, and examine—

1st. Whether this court can take judicial cognizance of, and decide, the questions which are presented in the record.

2d. Whether the acts which the plaintiff below offered to prove were not criminal acts, and therefore no justification for anybody.

3d. Whether in point of fact any new government was put into operation in Rhode Island, as has been alleged.

[Mr. Webster here examined the pleas, etc., and narrative of proceedings, as above set forth.] The new constitution was proclaimed on the 13th of January, 1842. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen governor. On the third of May the Legislature met, sat that day and the next, and then adjourned to meet on the first Monday in July, in Providence. But it never met again. What became of it? The whole government went silently out of existence. In November, 1842, the people voted to adopt a constitution which had been framed under legislative authority, and in May, 1843, this new constitution went into operation and has ever since continued. If this displaced Mr. Dorr's government, then there was an interregnum in the State of nearly a year. But be-
33] tween *the first Monday in July, 1842, and May, 1843, what had extinguished this government of Mr. Dorr? It must have gone out of itself, and, in fact, only lasted for two days, viz., the 3d and 4th of May, 1842. In August, 1842, Dorr was indicted for treason, tried in March, 1844, and found guilty. [Mr. Webster here read an extract from the charge of Chief Justice Durfee.]

To return to the first point mentioned. Can this court, or could the court below, take cognizance of the questions which are raised in the record? If not, the proof was properly rejected.

The question which the court was called upon to decide was one of sovereignty. Two Legislatures were in existence at the same time. Both could not be legitimate. If legal power had not passed away from the charter government, it could not have got into Dorr's. The position taken on the other side is that it had so passed away, and it is attempted to be proved by votes and proceedings of meetings, etc., out of doors. This court must look elsewhere—to the Constitution and laws, and acts of the government of the United States. How did the President of the United States treat this question? Acting under the Constitution and law of 1795, he decided that the existing government was the one which he was bound to protect. He took his stand accordingly, and we say that this is obligatory upon this court, which always follows an executive recognition of a foreign government. The proof offered below, and rejected by the court, would have led to a different result. Its object was to show that the Dorr constitution was adopted by a majority of the people. But how could a court judge of this? Can it know how many persons were present, how many of them qualified voters, and all this to be proved by testimony? Can it order to be brought before it the minutes and registers of unauthorized officers, and have them proved by parol? The decisions of the Legislature and the courts of Rhode Island conclude the case. Will you reverse the judgment in Dorr's case?

The second proposition is a branch of the first, viz.:

If the court below had admitted the evidence offered by the other side, and the facts which they alleged had been established by proof, still they would not have afforded any ground of justification. The truth of this proposition is sufficiently manifest from these two considerations, namely, that the acts referred to were declared to be of a criminal nature by competent authority, and no one can justify his conduct by criminal acts.

3. Let us now inquire whether, in point of fact, any new government *was put into [*34 operation in Rhode Island, as has been alleged.

It has been before stated that the government of Mr. Dorr, if it ever existed at all, only lasted for two days. Even the French revolution, rapid as it was, required three. During those two days, various officers were appointed; but did anyone ever hear of their proceeding to discharge their several duties? A court was appointed. But did any process ever issue under its authority? Was any person ever sued or arrested? Or did any officer, so appointed, venture to bring his official functions into practical operation upon either men or property? There was nothing of this. The government was nothing but a shadow. It was all paper and patriotism; and went out on the 4th of May, admitting itself to be, what everyone must now consider it, nothing but a contemptible sham.

Mr. Clifford, (Attorney-General) concluded the argument on behalf of the plaintiff in error. He confined his attention almost exclusively to the point that a State had no right to declare martial law. But of his argument the Reporter has no notes.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and en-

tering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damages as possible. The plaintiff replied that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication the parties proceeded to trial.

The evidence offered by the plaintiff and the 35*] defendants is *stated at large in the record; and the questions decided by the Circuit Court, and brought up by the writ of error, are not such as commonly arise in an action of trespass. The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.

This is a new question in this court, and certainly a very grave one; and at the time when the trespass is alleged to have been committed it had produced a general and painful excitement in the State, and threatened to end in bloodshed and civil war.

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavoring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles II. in 1663; making only such alterations, by acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this Union; and it continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the Legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances *of which we are now speaking*, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the Legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election * of a convention to form a new constitu- [*36 tion to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which he offered to vote for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people—permitting everyone to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the Legislature; and directed elections to be held for a governor, members of the Legislature and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, Secretary of State, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the Legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as *unlawful and dis- [*37 organizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a

new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But, notwithstanding the determination of the charter government, and of those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings, which it is not material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island.

The difficulties with the government of which Mr. Dorr was the head were soon over. They had ceased before the constitution was framed by the convention elected by the authority of the charter government. For after an unsuccessful attempt made by Mr. Dorr in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepatchet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation the charter government continued to assert its authority [*38] *and exercise its powers, and to enforce obedience, throughout the State, arresting and imprisoning, and punishing in its judicial tribunals, those who had appeared in arms against it.

We do not understand from the argument that the constitution under which the plaintiff acted is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the Secretary of State of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas.

It is this opinion of the Circuit Court that we are now called upon to review. It is set forth more at large in the exception, but is in substance as above stated; and the question presented is certainly a very serious one. For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed by its Legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation *to [*39 its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition

to the old government. And in more than one of the cases evidence was offered on the part of the defense similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not: and when that decision was made, the Judicial Department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority.

Indeed, we do not see how the question could 40*] be tried and *judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Door took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the *charter government.*

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest.

*Besides, if the Circuit Court had en- [*41 tered upon this inquiry by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

And if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgments as to the freehold qualification of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

The court had not the power to order a census of the freeholders to be taken; nor would the census of the United States of 1840 be any evidence of the number of freeholders in the State in 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen: and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under

what form of government they were living during the year in controversy?

But this is not all. The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted. The decision would, therefore, have depended upon the relative 42*] *credibility of witnesses, and the weight of testimony; and as the case before the Circuit Court was an action at common law, the question of fact, according to the seventh amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the Constitution which the plaintiff supported was adopted by a majority of the citizens of the State, or of the voters entitled to vote by the existing law. Another jury in another case might find otherwise. And as a verdict is not evidence in a suit between different parties, if the courts of the United States have the jurisdiction contended for by the plaintiff, the question whether the acts done under the charter government during the period of contest are valid or not must always remain unsettled and open to dispute. The authority and security of the State governments do not rest upon such unstable foundations.

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. *It rested with Congress, too, to deter- [*43 mine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the Legislature of such State or of the executive (when the Legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the Legislature or of the executive, and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

*It is true that in this case the militia [*44 were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere,

and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin v. Mott, 12 Wheat. 29–31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a 45*] State *government. The power given to the President in each case is the same, with this difference only: that it cannot be exercised by him in the latter case, except upon the application of the Legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said, that, "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to *the case now* before the court. Undoubtedly, *if the President in* exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service *might lawfully [*46 arrest anyone, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of opposition, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners, to proceed against certain descriptions of persons in certain places by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right in the reign of Charles I.

But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defense, when assailed by an armed force; and the cases and commentaries concerning these commissions cannot, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government.

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court. The admission of evidence to prove that the charter government was the established government of the State was an irregularity, but is not material to the judgment. A circuit court of the United States sitting in Rhode Island is presumed to know the constitution and law of the State. And in order to make up its opinion upon that subject, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer. But this error of the Circuit Court does not affect the result. For whether this evidence was or was not received, the Circuit Court, for the reasons hereinbefore stated, was bound to recognize that government as the paramount and established authority of the State.

Much of the argument on the part of the plaintiff turned upon political rights and polit- [*47] ical questions, upon which the *court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must therefore be affirmed.

Rachel Luther
v.
Luther M. Borden et al.

Mr. Chief Justice Taney delivered the opinion of the court:

This case has been sent here under a certificate of division from the Circuit Court for the District of Rhode Island. It appears, on the face of the record, that the division was merely formal, and that the whole case has been transferred to this court, and a multitude of points (twenty-nine in number) presented for its decision. We have repeatedly decided that this mode of proceeding is not warranted by the act of Congress, authorizing the justices of a circuit court to certify to the Supreme Court a question of law which arose at the trial, and upon which they differed in opinion. And many cases in which, like the present one, the whole case was certified, have been dismissed for want of jurisdiction. The same disposition must be made of this. The material points, however, have been decided in the case of Martin Luther against the same defendants, in which the opinion of this court has been just delivered, and which was regularly brought up by writ of error upon the judgment of the Circuit Court. The case before us depends mainly upon the same principles, and, indeed, grew out of the same transaction; and the parties will understand the *judgment of this court [*48 upon all the material points certified, from the opinion it has already given in the case referred to.

This case is removed to the Circuit Court.

Martin Luther
v.
Luther M. Borden et al.

Mr. Justice Woodbury, dissenting:

The writ in this case charges the defendants with breaking and entering the plaintiff's dwelling-house on the 29th of June, 1842, and doing much damage.

The plea in justification alleges, that, on June 24th, 1842, an assembly in arms had taken place in Rhode Island, to overawe and make war upon the State. And therefore, in order to protect its government, the Legislature, on the 25th of that month, passed an act declaring the whole State to be under martial law. That the plaintiff was assisting in traitorous designs, and had been in arms to sustain them, and the defendants were ordered by J. Child, an officer in the militia, to arrest the plaintiff, and, supposing him within the house named in the writ, to break and enter it for the purpose of fulfilling that order; and, in doing this, they caused as little damage as possible.

The replication denied all the plea, and averred that the defendants did the acts complained of in their own wrong, and without the cause alleged.

To repel the defense, and in vindication of the conduct of the plaintiff, much evidence was offered; the substance of which will be next stated, with some leading facts proved on the other side in connection with it.

The people of Rhode Island had continued to live under their charter of 1663 from Charles II. till 1841, with some changes in the right of suffrage by acts of the Legislature, but without any new constitution, and still leaving in force a requirement of a freehold qualification for voting. By the growth of the State in commerce and manufactures, this requirement had for some time been obnoxious; as it excluded so many adult males of personal worth and possessed of intelligence and wealth, though not of land, and as it made the ancient apportionment of the number of representatives, founded on real estate, very disproportionate to

the present population and personal property in different portions and towns of the State.

This led to several applications to the Legislature for a change in these matters, or for provision to have a convention of the people called to correct it by a new constitution. These all failing, voluntary societies were formed in 1841, 49*] *and a convention called by them of delegates, selected by the male adults who had resided one year in the State, with a view chiefly to correct the right of suffrage and the present unequal apportionment of representatives. This, though done without the formalities or recommendation of any statute of the State, or any provision in the charter, was done peacefully, and with as much care and form as were practicable without such a statute or charter provision. A constitution was formed by those delegates, a vote taken on its ratification, and an adoption of it made, as its friends supposed, and offered to prove, by a decided majority, both of the freehold voters and of the male adults in the State.

Political officers for the executive and legislative departments were then chosen under it by those in its favor, which officers assembled on the 3d of May, 1842, and took their respective oaths of office and appointed several persons to situations under the constitution, and among them the existing judges of the superior court.

After transacting some other business the next day—but the old officers in the State under the charter not acknowledging their authority, nor surrendering to them the public records and public property—they adjourned till July after, and never convened again, nor performed any further official duties. Nor did institute actions for the possession of the public records and public property; but T. Dorr, the person elected governor, at the head of an armed force on the 25th of June, 1842, in his supposed official capacity, made some attempt to get possession of the public arsenal; but failing in it, he dismissed the military assembled, by a written order, on the 27th of June, and left the State. He stated as a reason for this, "that a majority of the friends of the people's constitution disapprove of any further forcible measures for its support."

In the mean time, the officers under the old charter, having, as before suggested, continued in possession of the public records and property, and in the discharge of their respective functions, passed an act, on the 24th of June, placing the State under martial law. A proclamation was then issued by the governor, warning the people not to support the new constitution or its officers, and another act was passed making it penal to officiate under it. An application was made to the President of the United States for assistance in quelling the disturbances apprehended, but was answered by him on the 29th of May, 1842, not complying with the request, though with expressions of willingness to do it, should it, in his opinion, afterwards become necessary.

Nothing further seems to have been done by 50*] him in the *premises, except that on the 29th of June, the day of trespass complained of in this action, a proclamation was prepared *under* his direction, but not issued, denouncing *such of the supporters of the new constitution* as were in arms to be "insurgents," and commanding them to disperse.

It was next shown by the respondents, that Dorr, the governor elect under the new constitution, was, in August, 1842, indicted for treason against the State and being apprehended in 1844, was then tried and convicted.

It further appears that the court, at the trial of the present cause, ruled out the evidence offered by the plaintiff in support of his conduct, and admitted that which went to justify the defendants, and decided that the old charter, and not the new constitution, was in force at the time the act passed declaring martial law, and that this law was valid, and, as pleaded, justified the defendants in their behavior.

Without entering here at more length into details concerning the unhappy controversy which agitated Rhode Island in 1842, it is manifest that it grew out of a political difficulty among her own people, in respect to the formation of a new constitution. It is not probable that the active leaders, and much less the masses, who were engaged on either side, had any intention to commit crimes or oppress illegally their fellow-citizens. Such, says Grotius, is usually, in civil strife, the true, liberal view to be taken of the masses. Grotius on War, B. 3, ch. 11, sec. 6. And much more is it so, when, in a free country, they honestly divide on great political principles, and do not wage a struggle merely for rapine or spoils. In this instance each side appears to have sought by means which it considered lawful and proper, to sustain the cause in which it had embarked, till peaceful discussions and peaceful action unexpectedly ripened into a resort to arms, and brother became arrayed against brother in civil strife. Fortunately, no lives were destroyed, and little property injured. But the bitterness consequent on such differences did not pass off without some highly penal legislation, and the extraordinary measure of the establishment of martial law over the whole State. Under these circumstances, it is too much to expect, even at this late day that a decision on any branch of this controversy can be received without some of the leaven of former political excitement and prejudice, on the one side or the other, by those who were engaged in its stirring scenes. Public duty, however, seems to require each member of this court to speak freely his own convictions on the different questions which it may be competent for us to decide; and when one of those members, like myself, has the misfortune to differ in any respect from the rest, to explain *with frankness, and undeterred by con- [*51 sequences, the grounds of that difference.

This difference, however, between me and my brethren extends only to the points in issue concerning martial law. But that being a very important one in a free government, and this controversy having arisen in the circuit to which I belong, and where the deepest interest is felt in its decision, I hope to be excused for considering that point fully; and for assigning, also, some additional and different reasons why I concur with the rest of the court in the opinion, that the other leading question, the validity of the old charter at that time, is not within our constitutional jurisdiction. These two inquiries seem to cover the whole debatable

ground, and I refrain to give an opinion on the last question, which is merely political, under a conviction that, as a judge, I possess no right to do it, and not to avoid or conceal any views entertained by me concerning them, as mine, before sitting on this bench and as a citizen, were frequently and publicly avowed.

It must be very obvious, on a little reflection, that the last is a mere political question. Indeed, large portions of the points subordinate to it, on this record, which has been so ably discussed at the bar, are of a like character, rather than being judicial in their nature and cognizance. For they extend to the power of the people, independent of the Legislature, to make constitutions—to the right of suffrage among different classes of them in doing this—to the authority of naked majorities—and other kindred questions, of such high political interest as during a few years to have agitated much of the Union, no less than Rhode Island.

But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbé Sieyes, but the people. Judges, for constitutions, must go to the people of their own country, and must 52*] *merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation.

Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after theirs ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them. We speak what is the law, jus dicere, we speak or construe what is the constitution, after both are made, but we make, or revise, or control neither. The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are per se questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is meum and tuum—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as *belong to [*53 mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times. Again, instead of controlling the people in political affairs, the judiciary in our system was designed rather to control individuals, on the one hand, when encroaching, or to defend them, on the other, under the Constitution and the laws, when they are encroached upon. And if the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the Legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution, than on the people themselves in their primary capacity as makers and amenders of constitutions.

Hence the judiciary power is not regarded by elementary writers on politics and jurisprudence as a power co-ordinate or commensurate with that of the people themselves, but rather co-ordinate with that of the Legislature. Kendall v. United States, 12 Peters, 526. Hence, too, the following view was urged, when the adoption of the Constitution was under consideration: "It is the more rational to suppose that the courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Federalist, No. 77, by Hamilton. "Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both," etc., etc.

But how would this superiority be as to this court, if we could decide finally on all the political claims and acts of the people, and overrule or sustain them according only to our own views? So the judiciary, by its mode of appointment, long duration in office, and slight accountability, is rather fitted to check legislative power than political, and enforce what the political authorities have manifestly ordained. These last authorities are, by their pursuits and interests, better suited to make rules; we, to expound and enforce them, after made.

The subordinate questions which also arise here in connection with the others, such as whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and none others; and whether, in great exigencies of oppression by the Legislature itself, and refusal by it to give relief, the people may not take the subject into their own hands, 54*] independent of the Legislature; *and whether a simple plurality in number on such an occasion, or a majority of all, or a larger proportion, like two thirds or three fourths, shall be deemed necessary and proper for a change; and whether, if peacefully completed, violence can afterwards be legally used against them by the old government, if that is still in possession of the public property and public records; whether what are published and acted on as the law and constitution of a State were made by persons duly chosen or not, were enrolled and read according to certain parliamentary rules or not, were in truth voted for by a majority or two thirds; these and several other questions equally debatable and difficult in their solution are in some aspects a shade less political. But they are still political. They are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealous fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves.

Non nostrum tantas componere lites. Where, then, does our power, as a general rule, begin? In what place runs the true boundary line? It is here. Let the political authorities admit as valid a constitution made with or without previous provision by the Legislature, as in the last situation Tennessee and Michigan were introduced into the Union. See Federalist, No. 40, and 2 Ell. Deb. 57; 13 Regis by Y. 95, 1164, and Cong. Globe, App. 78, 137, 147. Let the collected will of the people as to changes be so strong, and so strongly evinced, as to call down no bills of pains and penalties to resist it, and no arming of the militia or successful appeals to the general government to suppress it by force, as none were in some cases abroad as well as in America, and one recently in New York, which might be cited beside those above. See A. D. 1846, and opinion of their judges. In short, let a constitution or law, however originating, be clearly acknowledged by the existing political tribunals, and be put and kept in successful operation. The judiciary can then act in conformity to and under them. Kemper v. Hawkins, 1 Va. Cas. 74, App. Then, when the claims of individuals come in conflict *under them, it* is the true province of the ju*diciary to decide* what they rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully and wisely made.

Again, the Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their constitutions. *See article 3, sec. 2. [*55 Though at first the federal judiciary was empowered to entertain jurisdiction where a State was a party in a suit, it has since been deprived even of that power by a jealous country, except in cases of disputed boundary. Article 3, sec. 2; Amendment 11th; Massachusetts v. Rhode Island, 12 Peters, 755.

If it be asked what redress have the people, if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those, they go to the ballot boxes, to the Legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of constitution. And when the former fail, and these last are forbidden by statutes, all that is left in extreme cases, where the suffering is intolerable and the prospect is good of relief by action of the people without the forms of law, is to do as did Hampden and Washington, and venture action without those forms, and abide the consequences. Should strong majorities favor the change, it generally is completed without much violence. In most States, where representation is not unequal, or the right of suffrage is not greatly restricted, the popular will can be felt and triumph through the popular vote and the delegates of the people in the Legislature, and will thus lead soon, and peacefully, to legislative measures ending in reform, pursuant to legislative countenance and without the necessity of any stronger collateral course. But when the representation is of a character which defeats this, the action of the people, even then, if by large majorities, will seldom be prosecuted with harsh pains and penalties, or resisted with arms.

Changes, thus demanded and thus supported, will usually be allowed to go into peaceful consummation. But when not so allowed, or when they are attempted by small or doubtful majorities, it must be conceded that it will be at their peril, as they will usually be resisted by those in power by means of prosecutions, and sometimes by violence, and, unless crowned by success, and thus subsequently ratified, they will often be punished as rebellious or treasonable.

If the majorities, however, in favor of changes happen to be large, and still those in power refuse to yield to them, as in the English revolution of 1688, or in our own of 1776, the popular movement will generally succeed, though it be only by a union of physical with moral strength; and when triumphant, it will, as on those occasions, confirm by subsequent forms of law what may have begun without them.

There are several other questions, also, which may arise under our form of government that are not properly of judicial *cognizance. [*56 They originate in political matters, extend to political objects, and do not involve any pecuniary claims or consequences between individ-

uals, so as to become grounds for judicial inquiry. These questions are decided sometimes by Legislatures, or heads of departments, or by public political bodies, and sometimes by officers, executive or military, so as not to be revisable here. See Decatur v. Paulding, 14 Peters, 497.

Looking to all these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new constitution; and, as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinion, enforce it till duly altered. But it is not necessary to rest this conclusion on reasoning alone. Several precedents in this court, as well as in England, show the propriety of it.

In Foster et al. v. Neilson, 2 Peters, 309, where the title to the property depended on the question, whether the land was within a cession by treaty to the United States, it was held that after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that the question was a political one, the decision of which, having been made in this manner, they must conform to. See, also, 6 Peters, 711, and Garcia v. Lee, 12 Peters, 520; 13 Peters, 419. In The Cherokee Nation v. The State of Georgia, 5 Peters, 20, the court expressed strong doubts whether it was not a political question, not proper for their decision, to protect the Cherokee Indians in their possessions, and to restrain the State of Georgia and construe and enforce its treaty obligations. Justice Johnson seemed decisive that it was.

In Massachusetts v. Rhode Island, 12 Peters, 736. 738, it was held that the boundaries between States was a political question per se, and should be adjusted by political tribunals, unless agreed to be settled as a judicial question, and in the Constitution so provided for. Garcia v. Lee, Ib. 520.

In Barclay v. Russel, 3 Ves. 424, in respect to confiscations, it was held to be a political question, and a subject of treaty, and not of municipal jurisdiction. p. 434.

In Nabob of the Carnatic v. The East India Company, 2 Ves. Jun. 56, the court decided that political treaties betwen a foreign state and subjects of Great Britain, conducting as a state under acts of Parliament, are not a matter of municipal jurisdiction, and to be examined and enforced by the judiciary.

Another class of political questions, coming still nearer this, is, Which must be regarded as 57*] the rightful government abroad *between two contending parties? That is never settled by the judiciary, but is left to the decision of the general government. The Cherokee case, 5 Peters, 50; and Williams v. Suffolk Ins. Co. 13 Peters, 419; 2 Cranch, 241; Rose v. Himeley, 4 Cranch, 268; United States v. Palmer, 3 Wheat. 634, and Gelston v. Hoyt, Ib. 246; The Divina Pastora, 4 Wheat. 64; 14 Ves. 353; 11 Ves. 583; 1 Edw. Ad. 1.

The doctrines laid down in Palmer's case are as directly applicable to this in the event of two contending parties in arms in a domestic war as in a foreign. If one is recognized by the executive or Legislature of the Union as the de facto government, the judiciary can only conform to that political decision. See, also, The Santissima Trinidad, 7 Wheat. 336, 337; and, further, that if our general government recognizes either as exclusively in power, the judiciary must sustain its belligerent rights, see 3 Sumner, 270. In the case of The City of Berne v. The Bank of England, 9 Ves. 348, it was held that "a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits." The same rule has been applied by this court in case of a contest as to which is the true constitution, between two, or which possesses the true legislative power in one, of our own States—those citizens acting under the new constitution, which is objected to as irregularly made, or those under the old territorial government therein. Semb Scott et al. v. Jones et al. 5 Howard, 374. In that case we held that no writ of error lies to us to revise a decision of a State court, where the only question is the validity of the statute on account of the political questions and objections just named. It was held, also, in Williams v. Suffolk Ins. Co. 2 Sumner, 270, that where a claim exists by two governments over a country, the courts of each are bound to consider the claims of their own government as right, being settled for the time being by the proper political tribunal. And hence no right exists in their judicial authorities to revise that decision. pp. 273, 275; S. C. 13 Peters, 419. "Omnia rite acta. It might otherwise happen, that the extraordinary spectacle might be presented of the courts of a country disavowing and annulling the acts of its own government in matters of state and political diplomacy."

This is no new distinction in judicial practice any more than in judicial adjudications. The pure mind of Sir Matthew Hale, after much hesitation, at last consented to preside on the bench in administering the laws between private parties under a government established and recognized by other governments, and in full possession de facto of the records and power of the kingdom, but without feeling satisfied on inquiring, as a *judicial question, [*58 into its legal rights. Cromwell had "gotten possession of the government," and expressed a willingness "to rule according to the laws of the land"—"by red gowns rather than red coats," as he is reported to have quaintly remarked. And this Hale though justified him in acting as a judge. Hale's Hist. of the Com. Law, p. 14, Preface. For a like reason, though the power of Cromwell was soon after overturned, and Charles II. restored, the judicial decisions under the former remained unmolested on this account, and the judiciary went on as before, still looking only to the de facto government for the time being. Grotius virtually holds the like doctrine. B. 1, ch. 4, sec. 20, and B. 2, ch. 13, sec. 11. Such was the case, likewise, over most of this country, after the Declaration of Independence, till the acknowledgment of it by England in 1783. 3 Story's Com. on Const. secs. 214, 215. And such is believed to have been the course in France under all her dynasties and régimes, during the last half century.

These conclusions are strengthened by the

circumstance, that the Supreme Court of Rhode Island, organized since, under the second new constitution, has adopted this principle. In numerous instances, this court has considered itself bound to follow the decision of the State tribunals on their own constitutions and laws. See cases in Smith v. Babcock, 2 Wood. & M. 5 Howard, 139; Elmendorf v. Taylor, 10 Wheat. 159; Bank of U. S. v. Daniel et al. 12 Peters, 32. This, of course, relates to their validity when not overruling any defense set up under the authority of the United States. None such was set up in the trial of Dorr, and yet, after full hearing, the Supreme Court of Rhode Island decided that the old charter and its Legislature were the political powers which they were bound to respect, and the only ones legally in force at the time of this transaction; and accordingly convicted and punished the governor chosen under the new constitution for treason, as being technically committed, however pure may have been his political designs or private character. Report of Dorr's Trial, 1844, pp. 130, 131. The reasons for this uniform compliance by us with State decisions made before ours on their own laws and constitutions, and not appealed from, are given by Chief Justice Marshall with much clearness. It is only necessary to refer to his language in Elmendorf v. Taylor, 10 Wheat. 159.

Starting, then, as we are forced to here, with several political questions arising on this record, and those settled by political tribunals in the State and general government, and whose decisions on them we possess no constitutional authority to revise, all which, apparently, is 59*] left for us to decide is the *other point—whether the statute establishing martial law over the whole State, and under which the acts done by the defendants are sought to be justified, can be deemed constitutional.

To decide a point like this last is clearly within judicial cognizance, it being a matter of private personal authority and right, set up by the defendants under constitutions and laws, and not of political power, to act in relation to the making of the former.

Firstly, then, in order to judge properly whether this act of Assembly was constitutional, let us see what was the kind and character of the law the Assembly intended, in this instance, to establish, and under which the respondents profess to have acted.

The Assembly says: "The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is hereby declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State." Now, the words "martial law," as here used, cannot be construed in any other than their legal sense, long known and recognized in legal precedents as well as political history. See it in 1 Hallam's Const. Hist. ch. 5, p. 258; 1 MacArthur on Courts Martial, 33. The Legislature evidently meant to be understood in that sense by using words of such well settled construction, without any limit or qualification, and covering the whole State with its influence, under a supposed exigency and justification for such an unusual course. I do not understand this to be directly combated *In the opinion just delivered* by the Chief Justice. That they could mean no other than the ancient martial law often used before the Petition of Right, and sometimes since, is further manifest from the fact that they not only declared "martial" law to exist over the State, but put their militia into the field to help, by means of them and such a law, to suppress the action of those denominated "insurgents" and this without any subordination to the civil power, or any efforts in conjunction and in co-operation with it. The defendants do not aver the existence of any civil precept which they were aiding civil officers to execute, but set up merely military orders under martial law. Notwithstanding this, however, some attempts have been made at another construction of this act, somewhat less offensive, by considering it a mere equivalent to the suspension of the habeas corpus, and another still to regard it as referring only to the military code used in the armies of the United States and England. But when the Legislature enacted *such a [*60 system "as martial law," what right have we to say that they intended to establish something else and something entirely different? A suspension, for instance, of the writ of habeas corpus— a thing not only unnamed by them, but wholly unlike and far short, in every view, of what they both said and did? Because they not only said, eo nomine, that they established "martial law," but they put in operation its principles; principles not relating merely to imprisonment, like the suspension of the habeas corpus, but forms of arrest without warrant, breaking into houses where no offenders were found, and acting exclusively under military orders rather than civil precepts.

Had the Legislature meant merely to suspend the writ of habeas corpus, they, of course, would have said that, and nothing more. A brief examination will show, also, that they did not thus intend to put in force merely some modern military code, such as the Articles of War made by Congress, or those under the Mutiny Act in England. They do not mention either, and what is conclusive on this, neither would cover or protect them, in applying the provisions of those laws to a person situated like the plaintiff. For nothing is better settled than that military law applies only to the military; but "martial law" is made here to apply to all. Hough on Courts-Martial, 384, note; 27 State Trials, 625, in Theobald Wolfe Tone's case.

The present laws for the government of the military in England, also, do not exist in the vague and general form of martial law, but are explicitly restricted to the military, and are allowed as to them only to prevent desertion and mutiny, and to preserve good discipline. 1 Bl. Com. 412; 1 MacArthur on Courts-Martial, p. 20. So, in this country, legislation as to the military is usually confined to the general government, where the great powers of war and peace reside. And hence, under those powers, Congress, by the Act of 1806, 2 Stat. at Large, 359, has created the Articles of War, "by which the armies of the United States shall be governed," and the militia when in actual service, and only they. To show this is not the law, by which other than those armies shall be governed, it has been found necessary, in order to include merely the drivers or arti-

ficers "in the service," and the militia after mustered into it, to have special statutory sections. See articles 96 and 97. Till mustered together, even the militia are not subject to martial law. 5 Wheat. 20; 3 Story, Com. Const. sec. 120. And whenever an attempt is made to embrace others in its operation, not belonging to the military or militia, nor having ever agreed to the rules of the service, well may they say, we have not entered into such [*61] bonds—in hæc vinculæ, non veni. *2 H. Bl. 99; 1 Bl. Com. 408, 414; 1 D. & E. 493, 550, 784; 27 State Trials, 625. Well may they exclaim, as in Magna Charta, that "no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land." There is no pretense that this plaintiff, the person attempted to be arrested by the violence exercised here, was a soldier or militiaman then mustered into the service of the United States, or of Rhode Island, or subject by its laws to be so employed, or on that account sought to be seized. He could not, therefore, in this view of the case, be arrested under this limited and different kind of military law, nor houses be broken into for that purpose and by that authority.

So it is a settled principle even in England, that, "Under the British constitution, the military law does in no respect either supersede or interfere with the civil law of the realm," and that "the former is, in general, subordinate to the latter" Tytler on Military Law, 365; while "martial law" overrides them all. The Articles of War, likewise, are not only authorized by permanent rather than temporary legislation, but they are prepared by or under it with punishments and rules before promulgated, and known and assented to by those few who are subject to them, as operating under established legal principles and the customary military law of modern times. 1 East, 306, 313; Pain v. Willard, 12 Wheat. 539, and also 19; 1 MacArthur, Courts-Martial, 13 and 215. They are also definite in the extent of authority under them as to subject matter as well as persons, as they regulate and restrain within more safe limits the jurisdiction to be used, and recognize and respect the civil rights of those not subject to it, and even of those who are, in all other matters than what are military and placed under military cognizance. 2 Stephen on Laws of Eng. 602; 9 Bac. Abr. Soldier, F; Tytler on Military Law, 119. And as a further proof how rigidly the civil power requires the military to confine even the modified code martial to the military, and to what are strictly military matters, it cannot, without liability to a private suit in the judicial tribunals, be exercised on a soldier himself for a cause not military, or over which the officer had no right to order him; as, for example, to attend school instruction, or pay an assessment towards it out of his wages. 4 Taunt. 67; 4 Maule & Selw. 400; 2 H. Bl. 103, 537; 3 Cranch, 337; 7 Johns. 96.

The prosecution of Governor Wall in England, for causing, when he was in military command, a soldier to be seized and flogged so that he died, for an imputed offense not clearly military and by a pretended court-martial without a full trial, and executing Wall for the offense after a lapse of twenty years, illustrate *how jealously the exercise of any mar- [*62 tial power is watched in England, though in the army itself and on its own members. See Annual Register for 1802, p. 569; 28 State Trials, p. 52, Howell's ed.

How different in its essence and forms, as well as subjects, from the Articles of War was the "martial law" established here over the whole people of Rhode Island, may be seen by adverting to its character for a moment, as described in judicial as well as political history. It exposed the whole population, not only to be seized without warrant or oath, and their houses broken open and rifled, and this where the municipal law and its officers and courts remained undisturbed and able to punish all offenses, but to send prisoners, thus summarily arrested in a civil strife, to all the harsh pains and penalties of courts-martial or extraordinary commissions, and for all kinds of supposed offenses. By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the next lamp post, under the sentence of some drum head court-martial. See Simmon's Pract. of Courts-Martial, 40. See such a trial in Hough on Courts-Martial, 383, where the victim on the spot was "blown away by a gun," "neither time, place, nor persons considered." As an illustration how the passage of such a law may be abused, Queen Mary put it in force in 1558, by proclamation merely, and declared, "that whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law." Tytler on Military Law, p. 50, ch. 1, sec. 1.

For convincing reasons like these, in every country which makes any claim to political or civil liberty, "martial law," as here attempted and as once practiced in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. 1 Hallam's Const. Hist. 420. And it would be not a little extraordinary, if the spirit of our institutions, both State and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate or even by a Legislature.

It is true, and fortunate it is that true, the consequent actual evil in this instance from this declaration of martial law was smaller than might have been naturally anticipated. But we must be thankful for this, not to the harmless character of the law itself, but rather to an inability to arrest many, or from the *small opposition in arms, and its short [*63 continuance, or from the deep jealousy and rooted dislike generally in this country to any approach to the reign of a mere military despotism. Unfortunately, the Legislature had probably heard of this measure in history, and even at our Revolution, as used by some of the British generals against those considered rebels; and, in the confusion and hurry of the crisis, seem to have rushed into it suddenly, and, I fear, without a due regard to private rights, or

their own constitutional powers, or the supervisory authority of the general government over wars and rebellions.

Having ascertained the kind and character of the martial law established by this act of Assembly in Rhode Island, we ask next, how, under the general principles of American jurisprudence in modern times, such a law can properly exist, or be judicially upheld. A brief retrospect of the gradual, but decisive, repudiation of it in England will exhibit many of the reasons why such a law cannot be rightfully tolerated anywhere in this country.

One object of parliamentary inquiry, as early as 1620, was to check the abuse of martial law by the king which had prevailed before. Tytler on Military Law, 502. The petition of Right, in the first year of Charles I. reprobated all such arbitrary proceedings in the just terms and in the terse language of that great patriot as well as judge, Sir Edward Coke, and prayed they might be stopped and never repeated. To this the king wisely replied—"Soit droit fait come est desire—Let right be done as desired." Petition of Right, in Statutes at Large, 1 Charles I. Putting it in force by the king alone was not only restrained by the Petition of Right early in the seventeenth century, but virtually denied as lawful by the Declaration of Rights in 1688. Tytler on Military Law, 307. Hallam, therefore, in his Constitutional History, p. 420, declares that its use by "the commissions to try military offenders by martial law was a procedure necessary within certain limits to the discipline of an army, but unwarranted by the constitution of this country." Indeed, a distinguished English judge has since said, that "martial law," as of old, now "does not exist in England at all," "Was contrary to the constitution, and has been for a century totally exploded." Grant v. Gould, 2 H. Bl. 69; 1 Hale, P. C. 346; Hale, Com. Law, ch. 2, p. 36; 1 MacArthur, 55. This is broad enough, and is correct as to the community generally in both war and peace. No question can exist as to the correctness of this doctrine in time of peace. The Mutiny Act itself for the government of the army, in 36 Geo. III. ch. 24, sec. 1, begins by reciting, "Whereas, no man can be forejudged of life or limb, or 64*] subjected *in time of peace to any punishment within the realm of martial law. Simmon's Pract. of Courts-Martial, 38.

Lord Coke says, in 3 Inst. 52: "If a lieutenant, or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by color of martial law, this is murder." "Thom. Count de Lancaster, being taken in open insurrection, was by judgment of martial law put to death," and this, though during an insurrection, was adjudged to be murder, because done in time of peace, and while the courts of law were open. 1 Hallam's Const. Hist. 260. The very first Mutiny Act, therefore, under William III. was cautious to exonerate all subjects except the military from any punishment by martial law. Tytler on Military Law, 19, note. In this manner it has become gradually established in England, that in peace the occurrence of civil strife does not justify individuals or the military or the *king in using* martial law over the people.

It appears, also, that nobody has dared to exercise it, in war or peace, on the community at large, in England, for the last century and a half, unless specially enacted by Parliament, in some great exigency and under various restrictions, and then under the theory, not that it is consistent with bills of rights and constitutions, but that Parliament is omnipotent, and for sufficient cause may override and trample on them all, temporarily.

After the civil authorities have become prostrated in particular places, and the din of arms has reached the most advanced stages of intestine commotions, a Parliament which alone furnishes the means of war—a Parliament unlimited in its powers—has, in extremis, on two or three occasions, ventured on martial law beyond the military; but it has usually confined it to the particular places thus situated, limited it to the continuance of such resistance, and embraced in its scope only those actually in arms. Thus the "Insurrection Act" of November, 1796, for Ireland, passed by the Parliament of England, extended only to let magistrates put people "out of the king's peace," and subject to military arrest, under certain circumstances. Even then, though authorized by Parliament, like the general government here, and not a State, it is through the means of the civil magistrate, and a clause of indemnity goes with it against prosecutions in the "kings ordinary courts of law." Annual Register, p. 173, for A. D. 1798; 1 MacArthur, Courts-Martial, 34. See, also, the cases of the invasions by the Pretender in 1715 and 1745, and of the Irish rebellion in 1798. Tytler on Military Law, 48, 49, 369, 370, App. No. 6, p. 402, the act passed by the Irish Parl.; Simmon's *Practice of Courts-martial, App. [*65 633. When speaking of the absence of other and sound precedents to justify such martial law in modern times here, I am aware that something of the kind may have been attempted in some of the doings of the British Colonial governors towards this country at the Revolution.

In the Annual Register for 1775, p. 133, June 12th, it may be seen that General Gage issued his proclamation, pardoning all who would submit, except Samuel Adams and John Hancock, and further declaring, "that, as a stop was put to the due course of justice, martial law should take place till the laws were restored to their due efficacy."

Though the engagements at Lexington and Concord happened on the 19th of April, 1775, though Parliament had in February previous declared the colonies to be in a state of rebellion (1 Ibid. p. 247), and though thousands of militia had assembled near Bunker Hill before the 12th of June, no martial law had been established by Parliament, and not till that day did General Gage, alone and unconstitutionally undertake, in the language of our fathers, to "supersede the course of the common law, and, instead thereof, to publish and order the use and exercise of martial law." Ibid. p. 261; Journal of Old Cong. 147, a declaration on 6th of July, 1775, drawn up by J. Dickenson.

Another of these outrages was by Lord Dunmore, in Virginia, November 7th, 1775, not only declaring all the slaves of rebels free, but "de-

claring martial law to be enforced throughout this colony." Annual Register for 1775, p. 28; 4 American Archives, 74. This was, however, justly denounced by the Virginia Assembly as an "assumed power, which the king himself cannot exercise," as it "annuls the law of the land and introduces the most execrable of all systems, martial law." 4 American Archives, 87. It was a return to the unbridled despotism of the Tudors, which, as already shown, one to two hundred years before, had been accustomed, in peace as well as war, to try not only soldiers under it, but others, and by courts-martial rather than civil tribunals, and by no settled laws instead of the municipal code, and for civil offenses no less than military ones. 2 H. Bl. 85; 3 Inst. 52; Stat. at Large, 1 Charles I.; Tytler on Military Law, passim.

Having thus seen that "martial law" like this, ranging over a whole people and State, was not by our fathers considered proper at all in peace or during civil strife, and that, in the country from which we derive most of our jurisprudence, the king has long been forbidden to put it in force in war or peace, and that Parliament never, in the most extreme cases of rebellion, allows it, except as being sovereign 66*] and unlimited in power, *and under peculiar restrictions, the next inquiry is, whether the Legislature of Rhode Island could, looking to her peculiar situation as to a constitution, rightfully establish such a law under the circumstances existing there in 1842. And, to meet this question broadly, whether she could do it, regarding those circumstances, first, as constituting peace, and next, as amounting to war. In examining this, I shall refrain from discussing the points agitated at the bar, whether the old charter under which it took place was a wise one for a republic, or whether the acts of the Legislature rendering it so highly penal to resort to peaceful measures to form or put into operation a new constitution without their consent, and establishing "martial law" to suppress them, were characterized by the humanity and the civilization of the present age towards their own fellow-citizens. But I shall merely inquire, first, whether it was within the constitutional power of that Legislature to pass such a law as this during peace, or, in other words, before any lawful and competent declaration of war; leaving all questions of mere expediency, as belonging to the States themselves rather than the judiciary, and being one of the last persons to treat any of them with disrespect, or attempt to rob them of any legitimate power.

At the outset it is to be remembered, that, if Parliament now exercises such a power occasionally, it is only under various limitations and restrictions, not attended to in this case, and only because the power of Parliament is by the English constitution considered as unlimited or omnipotent. But here legislative bodies, no less than the executive and judiciary, are usually not regarded as omnipotent. They are in this country now limited in their powers, and placed under strong prohibitions and checks. 8 Wheat. 88; 3 Smedes & Marshall, 673.

This court has declared that "the Legislatures are the creatures of the Constitution. They owe their existence to the Constitution. They derive their powers from the Constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void." Vanhorne's Lessee v. Dorrance, 2 Dall. 308; Vattel, ch. 3, sec. 34. In most of our Legislatures, also, as in Rhode Island in A. D. 1798, by a fundamental law, there has been incorporated into their constitutions prohibitions to make searches for papers or persons without a due warrant, and to try for offenses except by indictment, unless in cases arising in the army or navy or militia themselves.

The genius of our liberties holds in abhorrence all irregular inroads upon the dwelling-houses and persons of the citizen, *and [*67 with a wise jealousy regards them as sacred, except when assailed in the established and allowed forms of muncipal law. Three of the amendments to the Constitution of the United States were adopted, under such influences, to guard against abuses of power in those modes by the general government, and evidently to restrict even a modified "martial law" to cases happening among military men, or the militia when in actual service. For one of them, amendment fourth, expressly provides, that "the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The others are amendments third and fifth. And who could hold for a moment, when the writ of habeas corpus cannot be suspended by the Legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency? Much more is this last improbable, when even the mitigated measure, the suspension of the writ of habeas corpus, has never yet been found proper by Congress, and, it is believed, by neither of the States, since the federal Constitution was adopted. 3 Story's Com. on Const. sec. 1325.

Again, the Act of June 24th, 1842, as an act of legislation by Rhode Island, was virtually forbidden by the express declaration of principles made by the Rhode Island Assembly in 1798; and also by the views expressed through the delegates of their people upon adopting the federal Constitution, June 16th, 1790. These may be seen in 1 Elliott's Deb. 370, declaring, in so many words, "that every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property," and warrants to search without oath and seizures by general warrant are "oppressive," and "ought not to be granted."

But as these views were expressed in connection with the constitution of the general government, though avowed to be the principles of her people generally, and as the doings in 1798 were in the form of a law, and not a constitution, it was subject to suspension or repeal; and hence it will be necessary to look in-

to the charter to Rhode Island of 1663, her only State constitution till 1842, to see if there be any limitation in that to legislation like this, establishing martial law.

So far from that charter, royal as it was [*68] in origin, permitting *an unlimited authority in the Legislature, it will be found expressly to forbid any laws "contrary and repugnant unto" "the laws of this our realm of England," and to require them to be, "as near as may be, agreeable" to those laws. See Document, p. 12.

This, so far from countenancing the establishment of martial law in Rhode Island, contrary to the Petition of Right in England and her Bill of Rights, regulated it by the same restrictions, "as near as may be." Nor did our Revolution of A. D. 1776 remove that restraint, so far as respects what was then the body of English laws. For although Rhode Island chose to retain that charter with this restriction after the Revolution, and made no new constitution with other limitations till 1842 or 1843, yet probably "the laws of England" forbidden to be violated by her Legislature must be considered such as existed when the charter was granted in 1663, and as continued down to 1776. After that, her control over this country de jure ceasing, a conformity to any new laws made would not be required. But retaining the charter as the sole guide and limit to her Legislature until she formed a new constitution, it seems clear that her Legislature had no right, on the 25th of June, 1842, to put the whole State under martial law by any act of Parliament in force in England in 1663 or in 1776, because none such was then in force there, nor by any clause whatever in her charter, as will soon be shown, nor by any usages in her history, nor by any principles which belong to constitutional governments or the security of public liberty.

To remove all doubt on this subject, the charter does expressly allow "martial law" in one way and case to be declared and thus impliedly forbids it in any other. Expressio unius est exclusio alterius. But so far from the martial law allowed by it being by permission of the Legislature and over the whole State, it was to be declared only in war waged against a public enemy, and then by the "military officer" appointed to command the troops so engaged; and then not over their whole territory and all persons and cases, but he was to "use and exercise the law martial in such cases only as occasion shall necessarily require." P. 15.

Even this power, thus limited, as before shown, related to the troops of the State, and those liable to serve among them in an exigency, and when in arms against an enemy. They did not touch opponents, over whom they could exercise only the municipal laws if noncombatants, and only the law of nations and belligerents rights when in the field, and after war or rebellion is recognized as existing by the proper authorities. Again, it would be extraordinary [*69] indeed if in England *the king himself is restrained by Magna Charta and by the Petition as well as Declaration of Rights, binding him to these limits against martial law since the Revolution of 1688 (4 Bl. Com. 440; 2 *Peters, 656), and yet* he could grant a charter which should exonerate others from the obligations of Magna Charta and the general laws of the kingdom, or that they could be exonerated under it as to the power of legislation, and do what is against the whole body of English law since the end of the sixteenth century, and what Parliament itself, in its omnipotence and freedom from restrictions, has never, in the highest emergencies, thought it proper to do without numerous limitations, regulations, and indemnities, as before explained.

Beside this, it may well be doubted whether, in the nature of the legislative power in this country, it can be considered as anywhere rightfully authorized, any more than the executive, to suspend or abolish the whole securities of person and property at its pleasure; and whether, since the Petition of Right was granted, it has not been considered as unwarrantable for any British or American legislative body, not omnipotent in theory like Parliament, to establish in a whole country an unlimited reign of martial law over its whole population; and whether to do this is not breaking up the foundations of all sound municipal rule, no less than social order, and restoring the reign of the strongest, and making mere physical force the test of right.

All our social usages and political education, as well as our constitutional checks, are the other way. It would be alarming enough to sanction here an unlimited power, exercised either by Legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the whole frame of jurisprudence to be overturned, and everything placed at the mercy of the bayonet.

No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men.

Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however *the Assembly of Rhode Island, un- [*70 der the exigency, may have hastily supposed that such a measure in this instance was constitutional. It is but a branch of the omnipotence claimed by Parliament to pass bills of attainder belonging to the same dangerous and arbitrary family with martial law. But even those have ceased to succeed in England under the lights of the nineteenth century, and are expressly forbidden by the federal Constitution; and neither ought ever to disgrace the records of any free government. Such laws (and martial law is only still baser and more intolerable than bills of attainder) Mr. Madison denounces, as "contrary to the first principles of the social compact, and to every principle of sound legislation." Federalist, No. 44.

In short, then, there was nothing peculiar in the condition of Rhode Island as to a constitution in 1842, which justified her Legislature in peace, more than the Legislature of any other State, to declare martial law over her whole people; but there was much in her ancient charter, as well as in the plainest principles of constitutional liberty, to forbid it. Considering this, then, and that some cases already cited show that domestic violence is still to be regarded, not as a state of war, giving belligerent rights, but as conferring only the powers of peace in a State, through its civil authorities, aided by its militia, till the general government interferes and recognizes the contest as a war, this branch of our inquiries as to martial law would end here, upon my view of the pleadings, because the defendants justify under that law, and because the State Legislature alone possessed no constitutional authority to establish martial law, of this kind and to this extent, over her people generally, whether in peace or civil strife. But some of the members of this court seem to consider the pleadings broad enough to cover the justification, under some rights of war, independent of the act of the Assembly, or, as the opinion just read by the Chief Justice seems to imply, under the supposed authority of the State, in case of domestic insurrection like this, to adopt an act of martial law over its whole people, or any war measure deemed necessary by its Legislature for the public safety.

It looks, certainly, like pretty bold doctrine in a constitutional government, that, even in time of legitimate war, the Legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet. But bolder still is it to justify a claim to this tremendous power in any State, or in any of its officers, on the occurrence merely of some domestic violence.

We have already shown that, in this last 71*] event, such a claim *is entirely untenable on general principles, or by the old charter of Rhode Island, and was denounced as unlawful by our fathers when attempted against them at the Revolution, and has in England been punished as murder when exercised to kill one, though taken in open arms in an insurrection. See cases ante.

The judgment which the court has pronounced in this case seems to me, also, to be rested, not on any right of this kind in peace, but, on the contrary, to uphold the act of martial law only as a war measure. But the grounds have not been shown, to my conviction, for supposing that war and war measures, and the rights of war, existed legally in Rhode Island when this act passed. And, finally, it seems to me that the insurrection then existing was not in a stage of progress which would justify any mere belligerent rights; but if any, it was such rights in the general government, and not in the Legislature of the State, obtained, too, by mere implication, and, as to so formidable a measure as this, operating so loosely and recklessly over all its own citizens. It is admitted that no war had duly been declared to exist, either by Rhode Island or the United States, at the time this war measure was adopted, or when the trespass under it was committed. Yet, had either wished to exercise any war powers, they would have been legalized in our political system, not by Rhode Island, but the general government. Const. art. 1, sec. 8; 3 Story's Com. on Const. secs. 215, 217; 1 Bl. Com. by Tucker, App. p. 270.

It may not be useless to refresh our minds a little on this subject. The Congress expressly provides that "the Congress shall have power to declare war." Art. 1, sec. 8. This is not the States, nor the President, and much less the Legislature of a State. Nor is it foreign war alone that Congress is to declare, but "war"—war of any kind existing legitimately or according to the law of nations. Because Congress alone, and not the States, is invested with power to use the great means for all wars—"to raise and support armies," "to provide and maintain a navy," "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and "to provide for organizing, arming, and disciplining the militia." The largest powers of taxation, too, were conferred on Congress at the same time, and in part for this cause, with authority to borrow money on the credit of the Union, and to dispose of the public lands. But the States, deprived of these means were at the same time properly relieved from the duty of carrying on war themselves, civil or foreign, because they were not required to incur expenses *to suppress even "domestic [*72 violence," or "insurrections," or "rebellions." By a provision (sec. 4, art. 3), "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature (or of the executive when the Legislature cannot be convened), against domestic violence." This exclusiveness of the war power in Congress in all cases, domestic or foreign, is confirmed, too, by another authority given to Congress, not only to organize and discipline the militia, no less than to have regular armies and navies, but "to provide for calling forth the militia" "to suppress insurrections." Sec. 8, art. 1. And lest it might be argued that this power to declare war and raise troops and navies was not exclusive in the general government, as is the case with some other grants to it deemed concurrent, about weights and measures, bankrupt laws, etc. (see cases cited in Boston v. Norris, post, 283), the reasons for this grant as to war, and an express prohibition on the States as to it, both show the power to be exclusive in Congress. Thus, the reasons as to the power itself are cogent for having it exclusive only in one body, in order to prevent the numerous and sudden hostilities and bloody outbreaks in which the country might be involved, with their vast expenses, if thirty States could each declare and wage war under its own impulses. 1 Bl. Com. by Tucker, App. p. 270. And to remove all doubt on that point, the Constitution proceeded expressly to provide in another clause a prohibition on the States (sec. 10, art. 1)—that "no State shall, without the consent of Congress," "keep troops or ships of war in time of peace," "or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

This accorded with the sixth and ninth ar-

ticles of the old Confederation, which vested in it exclusively the power to declare war, and took the power of waging it from the States, unless in case of sudden attacks by Indians or pirates, or unless actually invaded by enemies, or in such imminent danger of it that time cannot be had to consult Congress. 1 Laws of U. S. 15, 16, Bioren's ed.

No concurrent or subordinate power is therefore left to the States on this subject, except by occasional and special consent of Congress, which is not pretended to have been given to Rhode Island; or unless "actually invaded" by some enemy, which is not pretended here; or unless "in such imminent danger as will not admit of delay," which manifestly refers to danger from a foreign enemy threatening invasion; or from Indians and pirates. Another 73*] circumstance to prove this, beside *the language itself being used in connection with foreign invasions and the danger of them, and not insurrections, is the like clauses in the old Confederation being thus restricted. One of those (article 9th) declares that "the United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article." 1 Laws of U. S. 16, Bioren's ed. And the sixth article, after providing against foreign embassies, troops, and vessels of war by a State, adds: "No State shall engage in any war unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." Nor, by an additional provision, could a State grant commissions to ships of war or letters of marque, "except it be after a declaration of war by the United States," and only against the kingdom or State against whom the war had been declared, "unless such State be infested by pirates, in which case vessels of war may be fitted for that occasion," etc. 1 Laws of U. S. 15, Bioren's ed.

It is impossible to mistake the intention in these provisions, and to doubt that substantially the same intention was embodied by restrictions in the present Constitution, similar in terms, though not entering into so great details. What is, however, decisive as to this intent in the Constitution is the action on it by the second Congress, only a few years after, and of which some were members who aided in framing the Constitution itself. That Congress, May 2d, 1792, authorized force to be used by the President to aid in repelling the invasions here referred to in the Constitution, and they are described in so many words, as "shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." 1 Stat. at Large, 264. So again in the Act of Feb. 28, 1795 (1 Stat. at Large, 424), and still further sustaining this view, the power to aid in suppressing insurrections in a State is given in a separate section, showing that they were not deemed the invasions and the "imminent danger" of them expressed in different sections of the act of Congress as well as of the Constitution. If, however, this "imminent danger" could, by any stretch of construction be considered broader, it did not exist here so as to prevent "delay" in applying to the President first; because, in truth, before martial law was declared, time had existed to make application to Congress and the President, and both had declined to use greater force, or to declare war, and the judicial tribunals of the State were still unmolested in *their course. Besides [*74 this, at the time of the trespass complained of here, the few troops which had before taken up arms for the new constitution had been disbanded, and all further violence disclaimed.

Whoever, too, would justify himself under an exception in a law or constitution, must set it up and bring his case within it, neither of which is attempted here as to this exception; but the justification is, on the contrary, under this head, placed by the defendant and the court, on the existence of war, and rights consequent on its existence.

Some mistake has arisen here, probably from not adverting to the circumstance that Congress alone can declare war, and that all other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage, to be punished by prosecutions in the courts; or as insurrections, rebellions, or domestic violence, to be put down by the civil authorities, aided by the militia; or, when these prove incompetent, by the general government, when appealed to by a State for aid, and matters appear to the general government to have reached the extreme stage, requiring more force to sustain the civil tribunals of a State, or requiring a declaration of war, and the exercise of all its extraordinary rights. Of these last, when applied to as here, and the danger has not been so imminent as to prevent an application, the general government must be the judge, and the general government is responsible for the consequences. And when it is asked, what shall a State do, if the general government, when applied to, refrains to declare war till a domestic force becomes very formidable, I reply, exert all her civil power through her judiciary and executive, and if these fail, sustain them by her militia, co-operating, and not independent, and if these fail, it is quite certain that the general government will never hesitate to strengthen the arm of the State when too feeble in either of these modes to preserve public order. And how seldom this will be required of the general government, or by means of war, may be seen by our unspotted, unbroken experience of this kind, as to the States, for half a century, and by the obvious facts, that no occasion can scarcely ever, in future, arise for such interference, when the violence, at the utmost, must usually be from a minority of one State, and in the face of the larger power of the majority within it, and of the co-operation, if need be, of the whole of the rest of the Union.

Carry these constitutional provisions with us, and the facts which have existed, that there had been no war declared by Congress, no actual invasion of the State by a foreign enemy, no imminent danger of it, no emergency of any kind, *which prevented time or delay to [*75 apply to the general government, and remember that, in this stage of things, Congress omitted or declined to do anything, and that the President also declined to consider a civil vio-

lence or insurrection as existing so as to justify his ordering out troops to suppress it. The State, then, in and of itself, declared martial law, and the defendants attempted to enforce it. In such a condition of things, I am not prepared to say that the authorities of a State alone can exercise the rights of war against their own citizens; persons, too, who, it is to be remembered, were for many purposes at the same time under the laws and protection of the general government. On the contrary, it seems very obvious, as before suggested, that in periods of civil commotion the first and wisest and only legal measure to test the rights of parties and sustain the public peace under threatened violence is to appeal to the laws and the judicial tribunals. When these are obstructed or overawed, the militia is next to be ordered out, but only to strengthen the civil power in enforcing its processes and upholding the laws. Then, in extreme cases, another assistance is resorted to in the suspension of the writ of habeas corpus. And, finally, if actual force, exercised in the field against those in battle array and not able to be subdued in any other manner, becomes necessary, as quasi war, whether against a foreign foe or rebels, it must first, as to the former, be declared by Congress, or recognized and allowed by it as to the latter, under the duty of the United States "to protect each of them against invasion" and "against domestic violence." Art. 4, sec. 4. When this is not done in a particular case by Congress, if then in session, it is done by the President in conformity to the Constitution (art. 1, sec. 8) and the Act of Congress of February 28th, 1795 (1 Stat. at Large, 424), "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Under all these circumstances, then, to imply a power like this declaration of martial law over a State as still lawfully existing in its Legislature would be to imply what is forbidden by all constitutional checks, forbidden by all the usages of free governments, forbidden by an exclusive grant of the war power to Congress, forbidden by the fact that there were no exceptions or exigencies existing here which could justify it, and, in short, forbidden by the absence of any necessity in our system for a measure so dangerous and unreasonable, unless in some great extremity, if at all, by the general government, which alone holds the issues of war and the power and means of waging it.

Under these views and restrictions, the States have succeeded well, thus far—over half a cen- [*76 tury—in suppressing domestic *violence in other ways than by martial law. The State courts, with the aid of the militia, as in Shays' rebellion and the Western insurrection, could, for aught which appears, by help of the posse comitatus, or at least by that militia, have in this case dispersed all opposition. They did this in both of those instances, so much more formidable in numbers, and made no resort to martial law. See before, and Minot's History, 163, 178. In one of them, not even the writ of habeas corpus was suspended by the State, and never by the United States though empowered to do that in dangerous emergencies. 2 Kent's Com. 24; 2 Story's Com. on Const. sec. 1335. But if civil process, aided by the militia, should fail to quell an insurrection against State laws, which has never yet happened in our history, then an appeal lies, and is appropriate, to the general government for additional force, before a resort can be had to supposed belligerent rights, much less to any exploded and unconstitutional extremes of martial law.

As before shown, such an appeal had been made here, but not complied with, because, I presume, the civil authority of the State, assisted by its own militia, did not appear to have failed to overcome the disturbance. How, then, let me ask, had the State here become possessed of any belligerent rights? How could it in any way be possessed of them, at the time of the passage of the act declaring martial law, or even at the time of the trespass complained of? I am unable to discover. Congress, on this occasion, was in session, ready to act when proper and as proper, and it alone could, by the Constitution, declare war, or, under the Act of May 2d, 1792, allow the militia from an adjoining State to be called out. 1 Stat. at Large, 264. But Congress declared no war, and conferred no rights of war. The Act of Feb. 28th, 1795 (1 Stat. at Large, 424), seems to be made broader as to the power of the President over all the militia, and, indeed, over the regular troops, to assist on such an occasion, by another act of March 3d, 1807 (2 Stat. at Large, 443.) But the President, also, did nothing to cause or give belligerent rights to the State. He might, perhaps, have conferred some such rights on the militia, had he called them out, under the consent of Congress; but it would be unreasonable, if not absurd, to argue that the President, rather than Congress, was thus empowered to declare war, or that Congress meant to construe such insurrections, and the means used to suppress them, as wars; else Congress itself should in each case pronounce them so, and not intrust so dangerous a measure to mere executive discretion. But he issued no orders or proclamations. Had he done so, and marched troops, though the action of the Executive under *the standing law is not wag- [*77 ing war, yet, I concede, it is attempting to suppress domestic violence by force of arms, and in doing it the President may possess and exert some belligerent rights in some extreme stages of armed opposition. It is he, however, and those acting under his orders, who, it will be seen, may possibly then, at times, use some such rights, and not the State or its organs. Nor is it till after the President has interfered that such rights arise, and then they arise under the decision and laws and proceedings of the general government. Then the organs of that government have come to the conclusion that the exercise of force independent of the civil and State authorities has become necessary. Federalist, No. 29. The President has been considered the paramount and final judge as to this, whether in invasion or rebellion, and not the governors or Legislatures of States. This was fully settled during the war of 1812 with England. 3 Story's Com. on Const. sec. 1206; 11 Johns. 150. He may then issue his proclamation for those in insurrection to disperse, and, if not dispersing, he may afterwards call out the militia to aid in effecting it. Martin v. Mott, 12 Wheat. 30. But not till then do

any belligerent rights exist against those even in arms, and then only by or under him. It is a singular coincidence, that, in England, it is held to be not "lawful" for the chief magistrate to order out the militia in case of "rebellion and insurrection," without "the occasion being first communicated to Parliament, if sitting, and, if not sitting, published by proclamation." 1 MacArthur, 28; 12 Statutes at Large, 432, 16 George III., ch. 3; 8 Stat. at Large, 634, sec. 116. And here, under the Act of 1793, the President himself could not call out the militia from another State to assist without consulting Congress, if in session, much less could he declare war. 1 Stat. at Large, 264, sec. 2.

When the President issues his orders to assemble the militia to aid in sustaining the civil authorities of the State to enforce the laws, or to suppress actual array and violence by counter force, obedience to those orders by the militia then undoubtedly becomes a military duty. 12 Wheat. 31. So in England. 8 Stat. at Large, sec. 116; 11 Johns. 150; 4 Burrows, 2472; 12 Johns. 257. And a refusal to obey such a military summons may be punished in due form, without doubt, by a court martial. Houston v. Moore, 5 Wheat. 1, 20, 35, 37; 3 Story's Com. on Const. sec. 120. When such troops, called out by the general government, are in the field on such an occasion, what they may lawfully do to others, who are in opposition, and do it by any mere belligerent rights, is a very different question. For now I am ex-
78*] amining only whether any *belligerent rights before this event existed, on the part of the State, as matters then stood, commensurate with the strong measure of putting martial law in force over the whole State. The precedents, as well as the sound reasons and principles just adverted to, are all, in my view, the other way.

Under our present Constitution, the first, if not nearest, precedent in history as to the course proper to be followed in any State insurrection is Shays' rebellion in Massachusetts. Having occurred in 1787, before the formation of the federal Constitution, and having been suppressed by the State alone under its own independent authority (Minot's History of Shays' Insurrection, p. 95), it was untrammeled by any of the provisions now existing about war and insurrections in that Constitution. But the course pursued on that occasion is full of instruction and proof as to what was deemed the legal use of the militia by the State, when thus called out, under the old Confederation, and the extent of the rights of force incident to a State on a rebellion within its limits. We have before shown that the provisions in the old Confederation as to war were much the same in substance as in the present Constitution. Now, in Shays' rebellion the resort was not first had at all to the military, but to civil power, till the courts themselves were obstructed and put in jeopardy. And when the militia were finally called out, the whole State, or any part of it, was not put under martial law. The writ of habeas corpus was merely suspended for a limited time, and the military ordered to aid in making arrests under warrants, and not by military orders, as here. They were directed to *protect civil officers* in executing their duty, and nothing more, unless against persons when actually in the field obstructing them. Ibid. 101.

The language of Governor Bowdoin's orders to Major-General Lincoln, January 19th, 1787, shows the commendable caution deemed legal on such an occasion: "Consider yourself in all your military offensive operations constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose your marching to execute these orders."

This gives no countenance to the course pursued on this occasion, even had it been attempted to be justified in the pleadings as a right of war, though in a domestic insurrection and not yet recognized as existing so as to require countenance and assistance through the interposition of force by the general government. Even General Gage did not, though illegally, venture to declare martial law in 1775 till the fact occurred, as he averred, that the municipal laws could not be executed. Much less was it unlikely here that these laws could not have *been executed by the civil [*79 power, or at least by that assisted by the militia, when the judges of the Supreme Court of Rhode Island had been appointed their own judges, and been approved by those who were considered in an insurrectionary condition.

In substantial accordance with these views was, likewise, the conduct of the general government in the insurrection against its own laws in the only other case of rebellion of much note, except the controverted one of Burr's, in our national history. It was in Western Pennsylvania, in 1793, and where the rebellion, or violent resistance, and even treason, as adjudged by the courts of law in The United States v. The Insurgents of Pennsylvania, 2 Dallas, 335, were committed against the government of the United States.

So far, however, from martial law having then been deemed proper or competent to be declared by Congress, and enforced anywhere, or even the writ of habeas corpus suspended, the troops were called out expressly to co-operate with the civil authorities, these having proved insufficient. Findley's Hist. App. 316, 317. But that of itself did not seem to be considered as per se amounting to war, or as justifying war measures. The government, therefore, neither declared war, nor waged it without that declaration, but did what seems most humane and fit on such occasions, till greater resistance and bloodshed might render war measures expedient; that is, marched the troops expressly with a view only to "cause the laws to be duly executed."

Nor was this done till Judge Peters, who officiated in that district in the courts of the United States, certified that he had issued warrants which the marshal was unable to execute, without military aid. 1 American State Papers, 185. The acts of Congress then required such a certificate, before allowing the militia to be called out. 1 Stat. at Large, 264. The marshal also wrote that he needed "military aid." 1 Am. State Papers, 186. The additional force, authorized by Congress, was expressly for that same purpose, as well as to suppress such combinations. 1 Stat. at Large, 403. And though with these objects, so fully did it seem proper to reach this last one by means of the

first, the orders in the field were to a like effect, and the arrests made were by authority of the civil officers, and those seized were carried before those authorities for hearing and trial. Findley, 181.

The Secretary of War, likewise, issued public orders, in which, among other things, it is stated, that "one object of the expedition is to assist the marshal of the district to make prisoners," etc. "The marshal of the District of Pennsylvania will move with you and give you the names of the offenders, their descrip-
80*] tions, *and respective places of abode, who are to be made prisoners under criminal process." And so exclusively did Congress look to the laws of the land for a guide, that special sessions of the Circuit Court nearer the place of offense were allowed (March 2d, 1793, 1 Stat. at Large, 334) to be called, when necessary, to try offenders.

The President, throughout the excitement, evinced the characteristic moderation and prudence of Washington, constantly enjoined a subordination of the military to the civil power, and accompanied the troops in person to see that the laws were respected. Findley's History of the Western Insurrection, p. 144. "He assured us," says Findley (p. 179), "that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." That he had issued orders "for the subordination of the army to the laws." P. 181. This was in accordance with the course pursued in England on some similar occasions. 1 McArthur on Courts-Martial, 28. And though some arrests were to be made, they were to be in a legal civil form, for he said, nothing remained to be done by them but to "support the civil magistrate in procuring proper subjects to atone for the outrages that had been committed." Findley, 187. The orders or warrants executed seem to have emanated from the federal judge of the Pennsylvania District. pp. 200, 201, 204, ch. 16.

The arrests in 1805 and 1806, in what is called Burr's conspiracy, furnish another analogy and precedent. They were not made till an oath and warrant had issued, except in one or two cases. And in those the prisoners were immediately discharged, as illegally arrested, as soon as writs of habeas corpus could be obtained and enforced. By the Constitution (art. 3, sec. 9), "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

And Congress then declined to suspend that writ, much less to declare martial law, even where the supposed rebellion existed. Nor was the latter done by the States, in the rebellions of 1787 and 1794, as before explained, but merely the writ of habeas corpus suspended in one of them. It is further characteristic of the jealousy of our people over legislative action to suspend the habeas corpus though expressly allowed by the Constitution, that, after a bill to do it in 1807 seems to have passed the Senate of the United States, through all its readings in one day, and with closed doors, the House of Representatives rejected it, on the first reading, by a vote of 113 to 19. See the Journals of the two Houses, 25th and 27th *Jan. 1807. And this although the bill [*81 to suspend the habeas corpus provided it should be done only when one is charged on oath with treason or misdemeanor affecting the peace of the United States, and imprisoned by warrant on authority of the President of the United States, or the Governor of a State or Territory. It was not deemed prudent to suspend it, though in that mild form, considering such a measure at the best but a species of dictatorship, and to be justified only by extreme peril to the public safety. And Mr. Jefferson has left on record his opinion, that it was much wiser, even in insurrections, never even to suspend the writ of habeas corpus. 2 Jefferson's Cor. and Life, 274, 291. But what would have been thought then of a measure of "martial law," established over the whole country, acting, too, without oath or warrant, and under no grant by the Constitution, instead of a mere suspension of a writ, and which suspension was permitted by the Constitution in certain exigencies? Again, if only to repeal or suspend the habeas corpus requires a permissive clause in the Constitution, how much more should the repeal or suspension of all municipal laws? Indeed, the Mutiny Act itself, as for instance that of 53 George III., ch. 18, sec. 100, does not allow the military to break open a house to arrest so bad a culprit as a deserter without a warrant and under oath. 38 Stat. at Large, 97.

So, though a rebellion may have existed in Burr's case in the opinion of the Executive, and troops had been ordered out to assist in executing the laws and in suppressing the hostile array, this court held that an arrest by a military officer or one concerned in the rebellion though ordered by the Executive, was not valid, unless he was a person then actually engaged in hostilities, or in warlike array, or in some way actually abetting those who then were so. Bollman and Swartout's case, 4 Cranch, 75, 101, 126; 1 Burr's Tr. 175. And if an arrest was made without an order of the commander-in-chief, the court would discharge at once. Alexander's case, 4 Cranch, 75, 76, in note. It should also be by warrant, and on oath; and, in most cases, these were then resorted to by General Wilkinson. Annual Register for 1807, p. 84. And so jealous were the people then of abuses, that a neglect by him of obedience to the requisitions of the habeas corpus, in some respects, led to a presentment against his conduct by the grand jury of New Orleans. Annual Register for 1807, p. 98. But here no actual arrest was made, though attempted, and what was less justifiable, without oath or warrant the house was broken into, and hence any justification by martial law failing which might be set up for the former would seem more clearly to fail for the latter. Certainly it must *fail unless the latter [*82 was proper in this way, under all the circumstances, though no one was there liable to be arrested, and none actually arrested.

This doctrine of their failing is familiar in municipal law in breaking houses to seize persons and property on legal precept, when none are found there liable to be seized. 5 Coke, 93, a; Bac. Abr. Execution, W.

In civil dissensions, the case stands very differently from foreign ones. In the latter, force

is the only weapon, after reason and negotiation have failed. In the former, it is not the course of governments, nor their right, when citizens are unable to convince each other, to fly at once to arms and military arrests and confiscations. The civil power can first be brought to bear upon these dissensions and outbreaks through the judiciary, and usually can thus subdue them.

All these principles, and the precedents just referred to, show that the course rightfully to be pursued on such unfortunate occasions is that already explained; first resorting to municipal precepts, next strengthening them by co-operation of the militia if resisted, and then, if the opposition are in battle array, opposing the execution of such precepts, to obtain further assistance, if needed, from the general government to enforce them, and to seize and suppress those so resisting in actual array against the State.

But affairs must advance to this extreme stage through all intermediate ones, keeping the military in strict subordination to the civil authority except when acting on its own members, before any rights of mere war exist or can override the community, and then, in this country, they must do that under, the countenance and controlling orders of the general government. Belligerent measures, too, must come, not from subordinates, but from those empowered to command, and be commensurate only with the opposing array—the persons, places, and causes where resistance flagrante bello exists of the reckless character justifying violence and a disregard of all ordinary securities and laws. It is not a little desirable that this doctrine should prove to be the true one, on account of its greater tendency to secure orderly and constitutional liberty instead of rude violence, to protect rights by civil process rather than the bayonet, and to render all domestic outbreaks less bloody and devastating than they otherwise would be.

There having been, then, no rights of war on the part of the State when this act of Assembly passed, and certainly none which could justify so extreme a measure as martial law over the whole State as incident to them, and this act being otherwise unconstitutional, the justification set up under it must, in 83*] *my opinion, fail. If either government, on the 24th of June, possessed authority to pass an act establishing martial law to this extent, it was, of course, that of the United States—the government appointed in our system to carry on war and suppress rebellion or domestic violence when a State is unable to do it by her own powers. But as the general government did not exercise this authority, and probably could not have done it constitutionally in so sweeping a manner and in such an early stage of resistance, if at all, this furnishes an additional reason why the State alone could not properly do it.

But if I err in this, and certain rights of war may exist with one of our States in a civil strife like the present, in some extreme stage of it, independent of any act of Congress or the President recognizing it, another inquiry would be, whether, in the state of affairs existing at this time, such rights had become perfected, and were broad enough, if properly pleaded, to cover this measure of martial law over the whole State, and the acts done under it, in the present instance. The necessities of foreign war, it is conceded, sometimes impart great powers as to both things and persons. But they are modified by those necessities, and subjected to numerous regulations of national law and justice, and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control, and make its exercise under certain circumstances and in a certain manner justifiable or void, with almost as much certainty and clearness as any provisions concerning municipal authority or duty. So may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its right and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. 6 American Archives, 186. But no further, nor wider. Johnson v. Davis et al. 3 Martin, 530, 551. On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans.

But in civil strife they are not to extend beyond the place where insurrection exists. 3 Martin, 551. Nor to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it. Grant v. Gould et al. 2 H. Bl. 69. Nor, even within the scene, can they extend to the person or property of citizens against whom no probable cause exists which *may justify it. Sutton v. John- [*84
ston, 1 D. & E. 549. Nor to the property of any person without necessity or civil precept. If matters in this case had reached such a crisis, and had so been recognized by the general government, or if such a state of things could and did exist as to warrant such a measure, independent of that government, and it was properly pleaded, the defendants might perhaps be justified within those limits, and under such orders, in making search for an offender or an opposing combatant, and, under some circumstances, in breaking into houses for his arrest.

Considerations like these show something in respect to the extent of authority that could have been exercised in each of these cases as a belligerent right, had war been properly declared before and continued till that time (6 American Archives, 232), neither of which seems to have been the case. It is obvious enough that, though on the 24th of June, five days previous, Luther had been in arms at Providence, several miles distant, under the governor appointed under the new constitution, in order to take possession of some of the public property there, and though in the record it is stated that the defendants offered to prove he was at this time in arms somewhere, yet, the fact not being deemed material under the question of martial law, on which the defense was placed, it does not seem to have been investigated. How it might turn out can be

ascertained only on a new trial. But to show it is not uncontroverted, the other record before us as to this transaction states positively that Mrs. Luther offered to prove there was no camp nor hostile array by any person in the town where this trespass was committed, on the 29th of June, nor within twenty-five miles of it in any part of the State, and that Dorr had, on the 27th instant, two days previous, published a statement against "any further forcible measures" on his part, and directing that the military "be dismissed."

The collection which had there happened, in relation to the disputed rights as to the public property under the new constitution, seems to have been nothing, on the evidence, beyond a few hundreds of persons, and nothing beyond the control of the courts of law, aided by the militia, if they had been wisely resorted to—nothing which, when represented to the Executive of the United States, required, in his opinion, from its apprehended extent or danger, any war measures—the calling out of the militia of other States, or aid of the public troops, or even the actual issue of a proclamation; and the persons who did assemble had, it appears, two days before the trespass, been disbanded, and further force disclaimed, without a gun being fired, or blood in any way shed, on that occasion.

85*] *Under the worst insurrections, and even wars, in our history, so strong a measure as this is believed never to have been ventured on before by the general government, and much less by any one of the States, as within their constitutional capacity, either in peace, insurrection, or war. And if it is to be tolerated, and the more especially in civil feuds like this, it will open the door in future domestic dissensions here to a series of butchery, rapine, confiscation, plunder, conflagration, and cruelty, unparalleled in the worst contests in history between mere dynasties for supreme power. It would go in practice to render the whole country—what Bolivar at one time seemed to consider his—a camp, and the administration of the government a campaign.

It is to be hoped we have some national ambition and pride, under our boasted dominion of law and order, to preserve them by law, by enlightened and constitutional law, and the moderation of superior intelligence and civilization, rather than by appeals to any of the semibarbarous measures of the darker ages, and the unrelenting, lawless persecutions of opponents in civil strife which characterized and disgraced those ages.

Again, when belligerent measures do become authorized by extreme resistance, and a legitimate state of war exists, and civil authority is prostate, and violence and bloodshed seem the last desperate resort, yet war measures must be kept within certain restraints in all civil contests in all civilized communities.

"The common laws of war, those maxims of humanity, moderation and honor," which should characterize other wars, Vattel says (B. 3, ch. 8, secs. 294 and 295), "ought to be observed by both parties in every civil war." Under modern and Christian civilization, you cannot needlessly arrest or make war on husbandmen or mechanics, or women and children. Vattel, B. 3, ch. 8, sec. 149. The rights of war are against enemies, open and armed enemies, while enemies and during war, but no longer. And the force used then is not to exceed the exigency—not wantonly to injure private property, nor disturb private dwellings and their peaceful inmates. Vattel, B. 3, ch. 8, sec. 148. Much will be allowed to discretion, if manifestly exercised with honesty, fairness, and humanity. But the principles of the common law, as opposed to trials without a jury, searches of houses and papers without oath or warrant, and all despotic invasions on private personal liberty—the customary usages to respect the laws of the land except where a great exigency may furnish sufficient excuse—should all limit this power, in many respects, in practice. 2 Stephens on Laws of England, 602. The *more [*86 especially must it be restrained in civil strife, operating on our own people in masses and under our system of government in distributing authority between the States and the Union, as the great powers of war are intrusted to the latter alone, and the latter is also to recognize when that which amounts to a rebellion exists, and interfere to suppress it, if necessary with the incidents to such interference. Under the right of war the defense must also rest, not only on what has been alluded to, but, as before suggested, on the question whether the insurrection at the time of this trespass was not at an end. For if one has previously been in arms, but the insurrection or war is over, any belligerent rights cease, and no more justify a departure from the municipal laws than they do before insurrection or war begins. If any are noncombatants, either as never having been engaged in active resistance, or as having abandoned it, the rights of civil warfare over them would seem to have terminated, and the prosecution and punishment of their past misconduct belongs then to the municipal tribunals, and not to the sword and bayonet of the military.

The Irish Rebellion Act, as to martial law, was expressly limited "from time to time during the continuance of the said rebellion." Tytler on Military Law, 405. And in case of a foreign war it is not customary to make prisoners and arrest enemies after the war has ceased and been declared abandoned, though the terms of peace have not been definitely settled. And if any of them voluntarily, like Bonaparte, abandon the contest, or surrender themselves as prisoners, the belligerent right to continue to imprison them after the war is at an end, much less to commit violence, as here, on others, with a view to capture them, is highly questionable, and has been very gravely doubted. Vattel, B. 3, ch. 8, sec. 152, 154. Circumstances like these make the rule of force and violence operate only to a due extent and for a due time, within its appropriate sphere, and secure beyond that extent and time the supremacy of the ordinary laws of the land. Much more in a social or civil war, a portion of the people, where not then in arms, though differing in opinion, are generally to be treated as noncombatants, and searched for and arrested, if at all, by the municipal law, by warrant under oath, and tried by a jury, and not by the law martial.

Our own and English history is full of such

arrests and trials, and the trials are held, not round a drum head or cannon, but in halls of justice and under the forms of established jurisprudence. See State Trials, passim. The writ of habeas corpus, also, unless specially sus-87*] pended by the Legislature having *power to do so, is as much in force in intestine war as in peace, and the empire of the laws is equally to be upheld, if practicable. Ibid. 532; 4 Cranch, 101; 2 H. Bl. 69.

To conclude, it is manifest that another strong evidence of the control over military law in peace, and over these belligerent rights in civil strife, which is proper in a bold and independent judiciary, exists in this fact, that whenever they are carried beyond what the exigency demands, even in cases where some may be lawful, the sufferer is always allowed to resort, as here, to the judicial tribunals for redress. 4 Taunt. 67, and Baily v. Warder, 4 Maule & Selw. 400; see other cases before cited.

Bills or clauses of indemnity are enacted in England, otherwise officers would still oftener be exposed to criminal prosecution and punishment for applying either belligerent rights or the military law in an improper case, or to an excess in a proper case, or without probable cause. 1 MacArthur on Courts-Martial, 33, 34; Tytler on Military Law, 49 and 489; see last act in Appendix to Tytler and Simmons. And when in an insurrection an opponent or his property is treated differently from what the laws and Constitution, or national law, sanction, his remedy is sacred in the legal tribunals. And though the offender may have exposed himself to penalties and confiscations, yet he is thus not to be deprived of due redress for wrongs committed on himself.

The plaintiff in one of these records is a female, and was not at all subject to military duty and laws, and was not in arms as an opponent supporting the new constitution. And if the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them to do so, unless a justification is made out fully on correct principles. This can and should be done without any vindictive punishment, when a party appears to have acted under a supposed legal right. And, indeed, such is the structure of our institutions, that officers, as well as others, are often called on to risk much in behalf of the public and of the country in time of peril. And if they appear to do it from patriotism, and with proper decorum and humanity, the Legislature will, on application, usually indemnify them by discharging from the public treasury the amount recovered for any injury to individual rights. In this very case, therefore, the defense seems to be by the State, and at its expense. It shows the beautiful harmony of our system, not to let private damage be suffered, wrongfully without redress, but at the same time, not to let a 88*] public agent suffer, *who, in a great crisis, appears to have acted honestly for the public, from good probable cause, though in some degree mistaking the extent of his powers, as well as the rights of others. But whether *any of the rights of* war, or rights of a citizen *in civil strife, independent of* the invalid act of the Assembly declaring martial law over all the State, have here, on the stronger side against the feebler, been violated, does not seem yet to have been tried. The only point in connection with this matter which appears clearly to have been ruled at the trial was the legality or constitutionality of that act of Assembly. I think that the ruling made was incorrect, and hence that there has been a mistrial.

The judgment should in this view be reversed; and though it is very doubtful whether, in any other view, as by the general rights of war, these respondents can justify their conduct on the facts now before us; yet they should be allowed an opportunity for it, which can be granted on motion below to amend the pleas in justification.

Order.

Martin Luther
v.
Luther M. Borden et al.

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

Rachel Luther
v.
Luther M. Borden et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Rhode Island, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, and it appearing to this court, upon an inspection of the said transcript, that no point in the case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and decreed by this court, that the cause be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Circuit Court to be proceeded in according to law.

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*CHARLES WILKES, Plaintiff in Error, [*89

v.

SAMUEL DINSMAN.

Marines included in the terms "any person enlisted for the navy"—infliction of punishment by commander of public armed vessel, when justified.

In a suit brought by a marine against the commanding officer of a squadron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evi-

NOTE.—Naval courts martial—jurisdiction of, as to persons and offenses; how constituted, etc.

Military offenses are not included in the Act of Sept. 24, 1789 (giving Circuit Court cognisance of all crimes and offenses cognisable under the author-

dence a letter which he had written to the Secretary of the Navy, relating to the circumstances of the enlistment.

An acquittal of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual.

The Act of Congress passed on the 2d of March, 1837, 5 Stat. at Large, 153, authorized a re-enlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the navy." Prior laws recognize marines as part of the navy.

Under the same act the commander of the squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it.

At the time of enlistment, the marine corps being subject to such laws and regulations as might, at any time, be established for the better government of the navy, it was a part of the contract of enlistment that the party should obey them, whenever passed. It was therefore no objection to such laws that were passed after his entering the service.

By the third article for the government of the navy, the commander is authorized to cause twelve lashes to be inflicted, for scandalous conduct, without a court-martial. Every successive disobedience of orders is a fresh offense, and subject to additional punishment.

The commander had not only a right to cause corporal punishment to be inflicted, but to resort to any reasonable measures necessary to insure submission. He had, therefore, a right to imprison the refractory party on shore, if done without malice.

The commander was acting as a public officer, invested with certain discretionary powers, and cannot be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. His position is quasi judicial.

Hence, the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable.

It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error.

THIS case was brought up by writ of error from the Circuit Court of the United States for Washington County in the District of Columbia.

It was an action of trespass vi et armis, for assault and battery and false imprisonment, brought, in the Circuit Court, by Dinsman, a marine in the service of the United States, who served in the exploring expedition, which was commanded by Wilkes.

The facts were these:

On the 14th of May, 1836, Congress passed an act (5 Stat. at Large, 23), authorizing the President to send out a surveying and exploring expedition to the Pacific Ocean and South Seas, and appropriating $150,000 for the object.

On the 21st of November, 1836, Dinsman enlisted in the marine corps of the United States for four years.

*On the 2d of March, 1837, Congress [*90 passed an act, 5 Stat. at Large, 153, entitled, "An Act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen." The second section was as follows, viz:

"That when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer of the fleet, squadron, or vessel in which such person may be to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof."

In October, 1837, Thomas Ap Catesby Jones, then commanding the vessels which were preparing to sail on the expedition, issued a general order, proposing to give three months' pay as bounty, and forty-eight hours of liberty on shore, to all the petty officers, seamen, and marines who should re-enter for three years from the first of the ensuing November.

In the same month, viz., October, 1837, a contract was made between Jones and the non-commissioned officers and privates of marines, which was as follows:

"We, the subscribers, non-commissioned officers and privates of marines, do, and each of us doth, hereby agree to and with Thomas Ap Catesby Jones, captain of the United States navy, in manner and form following, that is to say: In the first place, we do hereby agree, for the consideration hereinafter mentioned, to enter into the South Sea surveying and exploring service of the United States, and in due and seasonable time to repair on board such armed vessel or vessels as may be ordered on that service; and to the utmost of our power and ability, respectively, to discharge our several services or duties, and in everything to be conformable and obedient to the several requirings and lawful commands of the naval officers who may, from time to time, be placed over us.

"Second. We do also oblige and subject our-

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ity of the United States). Courts-martial are the proper tribunals for their decision, and therefore the acts of Congress punish offenses of this kind by court-martial, as well when committed by the militia of the United States, as by the army and navy. Houston v. Moore, 5 Wheat. 29; Constitutional Law, by T. Sergeant, ch. 16, p. 130, 131.

Naval general courts-martial have cognizance of all such crimes and acts as are pointed by the laws and regulations for the government of the navy, as are repugnant to good order and discipline, and their jurisdiction embraces all persons, of whatever condition, who belong to the navy, during their period of obligation to serve. General courts-martial only are competent to try capital offenses and commissioned officers. Harwood, Naval Courts-Martial, 17.

The persons over whom their jurisdiction extends.

1. The marine corps belongs to the navy, and is subject to its general courts-martial, except when detached for service with the army by order of the President. Act of June 30, 1834, for the better organization of the marine corps, sec. 2, Statutes at Large.

Officers of the army and marines may be associated for the purpose of holding courts-martial and trying offenders belonging to either. Articles of War, 68.

If proceedings have been commenced before, the court-martial may proceed after the term of service has expired, or the time at which the prisoner is entitled to claim his discharge. American Jurist, April, 1830; Opinion of Mr. Justice Wilde; De Hart, ch. 2.

If once lawfully discharged from service, the offender cannot afterwards be arrested, or held amenable to be tried by court-martial for an offense committed during the period of his military service. Ibid.

Except a soldier for the crime of desertion. Act of January 11, 1812, sec. 16.

And neither discharge nor dismissal from the land or naval service shall exempt from trial any person employed therein who shall violate the "Act

selves to serve during the term of the cruise, and we do severally oblige ourselves, by these articles, to comply with, and be subject to, such rules and discipline of the navy of the United States as are, or that may be, established by the Congress of the United States.

91*] *"Third. The said Thomas Ap Catesby Jones, for and in behalf of the United States, doth hereby covenant and agree to and with the said non-commissioned officers and privates of the marines, who have hereunto signed their names, and each of them, that they shall be paid for such services the amount per month which, in the column hereunto annexed, is set opposite to each of their names, respectively; and likewise to advance to each and every of them three months' bounty, the receipt whereof they do hereby acknowledge; and that they shall be punctually discharged at the expiration of the term of their enlistment, or as soon thereafter as each vessel of the expedition shall return to a port of safety in the United States.

Name.	Grade.	Pay per month.	Signatures.	Witness
Samuel Dinsman	"	$7	Samuel X Dinsman his mark.	James Edelin.
Philip Beab	Private.	"	Philip X Beab his mark.	James Edelin.

On the 25th of October, 1837, a part of the bounty was paid, amounting to $15, and soon afterwards the remaining $6, making together three months' pay.

On the 20th of April, 1838, Lieut. Com. Charles Wilkes was appointed to the command of the squadron.

On the 2d of August, 1838, A. O. Dayton, the fourth auditor of the Treasury Department, wrote letters to the pursers of the vessels, directing them to charge the marines with the amount of bounty which had been paid to them, alleging that it was prohibited by law.

In the course of the month of August, 1838, the expedition sailed.

On the 1st of September, 1838, Captain Wilkes addressed a letter to the Secretary of the Navy, expressing surprise that the pursers had been directed by the fourth auditor to charge the marines with the amount paid to them as bounty, and informing the secretary that he had ordered the pursers not to do so. With this letter were sent some other papers, illustrative of the transaction. The pursers obeyed the order of Captain Wilkes.

In the months of November and December, 1840, the transactions occurred, which are set forth with great particularity in the bills of exception.

On the 24th of November, 1842 (the squadron having returned home), Dinsman brought his action against Wilkes. *In the mean- [*92 time, however, a court-martial had been held upon Wilkes, one of the charges before which was "cruelty and oppression," founded upon the same occurrences which are set forth in the bills of exceptions. The finding of the court was, that the accused was "not guilty."

In March, 1845, the cause came on for trial before the Circuit Court, the counsel on both sides having previously agreed that the defendant might give the special matter in evidence as though it was fully pleaded. The jury found a verdict of guilty, and assessed the damages of the plaintiff at five hundred dollars.

The following bills of exceptions were taken in the progress of the trial:

Plaintiff's 1st Bill of Exceptions.

Samuel Dinsman v. Charles Wilkes.

At the trial of this case, the plaintiff, to support the issues on his part joined, read in evidence, to have the same effect, by consent of parties, as if the original enlistment of the said plaintiff were produced, the certificate of Major

to prevent and punish fraud upon the government of the United States," approved March 2, 1863, sec. 2.

One cannot be tried by court-martial for an offense committed after his discharge. Hickman on the Law and Practice of Naval Courts-Martial, ch. xi.

Citizens not belonging to the navy are not subject to court-martial. Ibid. Harwood, Naval Courts-Martial, 22.

Spies, and all who shall endeavor to corrupt any person to betray his trust, are subject to court-martial. Vattel's Law of Nations, Hickman, ch. xi.

Offenses committed on board of vessels having letters of marque and reprisal, during the hostilities then existing with Great Britain, were by the Act of June 26, 1812, punishable by court-martial consisting of officers of the navy. 2 U. S. Statutes at Large, ch. cvii. p. 759; 1 Opin. Atty's-Gen'l. 177.

A subject of a foreign prince or state, who voluntarily enters the naval service of the United States, is equally amenable to be tried by courts-martial as a natural born citizen. Vattel's Law of Nations, p. 297, quoted by Hickman, ch. xi.; Harwood, Naval Courts-Martial, 25.

Courts-martial may punish witnesses who refuse to give evidence, prevaricate, or behave with contempt to the court, and for contempts committed in the face of the court, and of a public and self-evident kind. Article 13, Naval Laws; De Hart, ch. vi. Case of Major Browne.

The naval law empowers courts-martial to punish, at their discretion, "any person in the navy who shall, when on shore, plunder, abuse or maltreat any inhabitant, or injure his property in any way, or commit any other offense not specified elsewhere in the articles." Naval Laws, Art. 7, sec. 8; article 8; Benet, ch. xix.; 6 Opin. Att'e-Gen. 426, 422; 3 Id. 466; 5 Id. 698.

In case of an officer of the navy, held in confinement by the civil authorities, upon an indictment

Parke G. Howle, adjutant of the marine corps of the United States; and also read in evidence, for the purpose of showing the forms and mode of such enlistment, without objection, certain blank forms, used and adopted in all regular enlistments or re-enlistments into said marine corps. And said Howle testified, he being examined as a witness, that, by the rules and regulations of said corps, the said forms of said enlistment were required to be indorsed by the recruiting officer, for the purpose of identifying the officer by whom such enlistment was made, and that such enlistment was regularly made.

The said plaintiff then gave evidence, further tending to prove, that he embarked, under orders as a private in said marine corps, in the United States Exploring Expedition, which sailed from the United States on or about the 18th day of August, A. D. 1838, under the command of the defendant, who was a lieutenant in the navy of the United States; that afterwards, while the United States ship Vincennes, one of the vessels of said expedition, was at the island of Oahu, one of the Sandwich Islands, in the Pacific Ocean (from which American vessels frequently sailed to the United States), the term of four years, for which the said plaintiff had enlisted as aforesaid, expired and was fully ended; and the said plaintiff, then and there, to wit, on the 16th day of November, A. D. 1840, on board said ship, claimed of the defendant his discharge from the service of the United States, and refused to perform the duties required of him by the defendant 93*] (still commanding *said expedition and said ship), and his subordinate officers; whereupon the defendant, then and there, committed the trespasses, as alleged in the declaration in this case on the part of the said plaintiff; and afterwards the said expedition and the said ship sailed from the said island, carrying said plaintiff on board of said ship, commanded by the said defendant in person; and that, while the said plaintiff was on board of said ship, as last aforesaid, he was repeatedly flogged and put in irons, by order of said defendant, for refusing to perform the duties of a marine on board of said ship required of him by order of said defendant; and the said plaintiff was detained on board said ship, or some other vessel of said expedition, continually, by order of said defendant, and against his consent, until the return of said ship or other vessel to the United States, about the 15th of June, A. D. 1842, although the said ship touched at various foreign ports before her said return to the United States, and after the term for which said plaintiff had enlisted, as aforesaid, was completed and expired.

The said plaintiff then rested his case.

And thereupon the defendant offered evidence tending to show that after the passage, by the Congress of the United States, of the Act of 1836, making appropriations for the naval service, the President of the United States proceeded to carry the said act into effect, and appointed Thomas Ap. C. Jones, a captain in the United States navy, to command the expedition authorized by said act; that the vessels designed for the expedition were assembled at New York, under the command of said Jones, and were there in the month of October, 1837 and on the 21st day of said October, the said Jones issued his general order No. 2; that the said general order was read to the ship's crew of the ship Relief, on which ship the said plaintiff was at that time serving as a marine under his said enlistment; that it was read by the officer then in command of said ship, and by him placed in the "booby hatch," a conspicuous part of said ship, to which all the men had access, for their perusal, and remained there during the greater part of the morning; that the said Jones also addressed an order to the pursers of the squadron, hereinafter appended; the defendant then produced to the court the following written papers, viz.: a paper purporting to be a contract between said Jones and the plaintiff, with other persons, and a paper purporting to be a receipt for bounty, and then proved to the court, by the subscribing witnesses thereto, that said papers were signed by the said plaintiff as they purport to be, and that before signing the same the said papers were read to said plaintiff; and that said first paper, purporting to be a contract as aforesaid, was prepared by order *of said Jones, and that [*94 the subscribing witnesses thereto were commissioned officers of the United States; and that after the signing of said papers, the said plaintiff received, on the 25th of October, 1837, the sum of $15, and subsequently the further sum of $6, making $21 in all, being a sum equal to three months' pay, and the same was paid to and received by said plaintiff as bounty; and the defendant further offered evidence to the court, tending to show, that from that time forth to his return to the United States, in the said month of June, 1842, the said plaintiff received from the said United States his monthly pay of $7 per month, being the amount stipula-

for homicide committed on shore, the Att'y-Gen. held that "until he be discharged from the prosecution now pending before the civil tribunal no court-martial can be held upon him." 3 Opin. Att'y-Gen. 466.

When a murder was alleged to have been committed on board of a frigate of the United States in the port of Norfolk, Va. Attorney-General Pinckney was of opinion that a naval court-martial ought not to try and punish the crime, but that the jurisdiction belonged to the ordinary civil tribunal. 5 Opin. At'ty-Gen. 698.

But a naval court-martial is competent to take cognizance of the crime of murder when alleged to have been committed by any person belonging to a "public ship or vessel of war of the United States, without the territorial jurisdiction of the same." Article 5, Naval Laws.

In the legal discussions to which the case of Commander McKenzie gave rise, Ex-Chancellor Kent, and Mr. Justice Betts of the Southern District of N. Y. maintained confidently the competency and legality of a naval court-martial, as having, at least, concurrent jurisdiction with the civil courts. Harwood, Naval Courts-Martial, 39, 31.

Jurisdiction of naval courts-martial is exclusive, and civil tribunals have no jurisdiction, in case of a captain, on trial before a naval court-martial, on a charge of murder on the high seas, on board of a United States sloop of war, by hanging some of the crew for mutiny. United States v. McKenzie, 1 N. Y. Leg. Obs. 371, per Judge Betts, in charge to grand jury; 1 Kent's Com. 7th ed. 370; marg. p. 341, note a; Johnston v. Sutton, 1 Term R. 548.

As to naval courts-martial, the offenses punishable by them, the kind and degree of punishment, of whom they shall consist, method of procedure, confirmation, remission or mitigation of sentences, see Revised Statutes of United States, sec. 1624, 2d ed. pages 275–284.

ted in the said shipping articles, over and above the sum of $21, paid and received as aforesaid as bounty; and he further offered evidence to the court to show that the said Jones resigned his said command before the sailing of the said expedition; and that, on the 20th of April, 1838, it was given to the defendant by order of the Secretary of the Navy of that date.

The said defendant sailed from the United States in the month of August, 1838, in command of the said squadron under the instructions of the President, which it is agreed may be read from the printed history of the said expedition.

That, about the time of the sailing of the said expedition, the pursers thereof received from the fourth auditor of the treasury a communication, inquiring by what authority the said bounty had been paid to the marines, of whom one was the said plaintiff, and disallowing it in the accounts of said pursers, and requiring them to charge the same to the men on their pay accounts and deduct the same therefrom, which said last communication was reported by said pursers to the defendant; and thereupon the defendant issued his order of the 14th September, 1838, now read to the court, which order was thereupon obeyed by said pursers, and the said "bounty money" never was charged to said men.

And the said defendant then offered to read in evidence to the jury the said written papers, so as aforesaid signed by the plaintiff, and also the said letter of said defendant, addressed to the pursers as aforesaid, in connection with each other, and with all the evidence hereinbefore stated; but the plaintiff, by his counsel, objected to the admissibility of the said written paper, purporting to be a contract or shipping articles, and also to the admissibility of the said receipt for bounty, and also to the admissibility of the said letter of the said defendant, whether the same are offered as independent evidence, or in connection with each other, or with other evidence; but the court overruled said objections, and suffered all of said papers and the said letter to be read in evidence to the jury, as 95*] competent *testimony. And the said plaintiff excepts to the opinion of the court, and to the admissibility of each and every of said papers, and said letter so admitted, and claims the same benefit of exceptions as each of said papers and the said letter were separately excepted to; and this, their bill of exceptions, is signed, sealed, and enrolled this 24th day of April, A. D. 1845. W. Cranch. [Seal.]

To this bill of exceptions were attached the following papers, referred to in a preceding part of this statement, viz:

1. The date of enlistment, in November, 1836.

2. A blank form of enlistment.

3. An order from Commander Thomas Ap Catesby Jones to the pursers, directing them to pay three months' bounty.

4. The contract between Jones and the marines.

Defendant's 1st Bill of Exceptions.

On the further trial of this cause, and after all the evidence contained in the foregoing bills of exceptions, as well as those taken by the plaintiff in his said first bill, as also those taken by defendant, and the rulings of the court therein contained, the defendant, further to maintain the issue on his part joined, offered to give evidence tending to show, that, after the sailing of the said squadron under his command, to wit, in August, 1838, from the waters of the United States, and after the receipt by the pursers of the said squadron of the said letter of the fourth auditor, inquiring by what authority the said pursers had paid the said bounty to the said marines, and requiring them to charge them therewith, the marines on board his said ship murmured at the said requisition of the said fourth auditor, and that said plaintiff was on board the said ship, and so continued up to the time of the said supposed grievances, without objection; and after the said supposed grievances he continued to serve as a marine in the said squadron, and received pay as such marine, until his arrival in the United States, where he was discharged. And, also, that Simeon A. Stearns was the non-commissioned officer in command of said marines during the whole cruise, from the time of their sailing to their arrival in the United States, there being no commissioned officer of marines attached to the said expedition; that he also acted as quartermaster of marines, and he was the only medium of communication, according to the rules and regulations of the service, between the said marines and the said defendant, commanding as aforesaid. And, thereupon, he offered further evidence to show *that the defendant, at [*96 the time he issued to the said pursers the said order, contained and set out in plaintiff's first bill of exceptions, not to charge the men with the said bounty, he communicated the said order, so issued by him as aforesaid, to the then Secretary of the Navy, by a letter, in the words and figures following, to wit (copied in the record), and accompanied the said offer with proof that the said letter was received by the said Secretary of the Navy; and also offered to read the said letter (or report in the form of a letter), made by the said Sergeant Simeon A. Stearns to the defendant, and referred to in his (the defendant's) said letter, last mentioned, to the said Secretary of the Navy, accompanying the said offer with proof of the handwriting of said Stearns, and that he is now (if living) out of the jurisdiction of the United States.

And the plaintiff, by his counsel, objected to the reading of the same, or either of them, to the jury, and the said court refused to permit the said papers, or either of them, to be read in evidence to the jury; and thereupon the defendant, by his counsel, excepts to the said ruling of the said court, and prays that this bill of exceptions may be signed, sealed, and enrolled, according to the statute, which is done accordingly, this 25th day of April, 1845.

W. Cranch. [Seal.]

Defendant's 2d Bill of Exceptions.

And on the further trial of the said issues, the said defendant, after all the evidence contained in the foregoing bills of exceptions, made part hereof, and the several rulings of the court set out therein, offered in evidence the proceedings of a court-martial, held in the city of New York (and which it is admitted was lawfully called and proceeded in), for the trial of the said defendant, Charles Wilkes, on certain

charges and specifications prepared against him by the Executive of the United States; and among others, upon the charge and specification hereinafter appended; and that the said court-martial duly proceeded to try the said Charles Wilkes on the said charge and specification, and that, on the trial thereof, the said Philip Baab, one of the plaintiffs in said trial, was examined as a witness, and the judgment of the said court on the said charge and specification was as hereinafter appended. And the said plaintiff agreeing that the said extracts may be made from the said record, and considered as if the whole record were herein inserted, objects to the reading of any part of the said record as evidence in this cause, except the statements of said plaintiff Baab, contained in said record, which the plaintiff's counsel does not object to, so far as they are relevant to the 97*] issues *joined; and the court sustains the said objection, and refuses to permit the same to be given in evidence; and the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this exception, and to cause the same to be enrolled according to the statute, all which is done and ordered, this 25th day of April, 1845.

W. Cranch. [seal.]

Specification referred to in the foregoing bill of exceptions, to wit:

Charge 4th.—Cruelty and oppression.

Specification.

In this, that the respective terms of service of Samuel Pensyl, Philip Baab, George Smith, and Samuel Dinsman, "private marines," then serving on board the United States ship Vincennes, having fully expired on the 16th day of November, 1840, the said Wilkes did refuse to give said marines their discharge, in conformity with the terms of their enlistment; that upon said marines declining to do further duty, the said Wilkes did cause them, on or about the 16th of November, 1840, to be put in double irons, and shortly after, on the same day, to be sent on shore at Honolulu, and to be confined in the fort at a place infested with vermin; that, upon the second day of their confinement, they were separated and kept in solitary confinement; that on the 27th of November, 1840, by order of said Wilkes, they were deprived of one half their ration, which consisted mostly of "poe" and goat's meat; that on the 2d of December, 1840, the said marines were taken out and carried on board the United States ship Vincennes, in irons, except George Smith, who was taken on board the Peacock; that said Wilkes asked them if they would go to duty, and upon their respectfully stating that the term of their enlistment had expired, the said Wilkes then confined them in double irons in the "brig," a place of confinement for prisoners in said ship; that on the 4th of December, he, the said Wilkes, had the said Samuel Pensyl, Philip Baab, and Samuel Dinsman seized up in the gangway, and inflicted on them one dozen lashes each; that he again confined them; that on the 7th of the same month, he had inflicted on them another dozen of lashes each; that after this system of lashing and confinement, for the preservation of their lives, the said marines were compelled, against the terms of their enlistment and against their free will, to do duty in the squadron, under the command of said Wilkes.

*Judgment of Court Martial. [*98

Judgment of the court-martial on the above specification, referred to in defendant's second exception, to wit:

The 4th charge.

That the specification of the 4th charge is not proven, and

That the accused, of the 4th charge, is not guilty.

Defendant's Statement of Evidence.

On the further trial of this cause, and after the evidence contained in the aforegoing bills of exceptions on the part of plaintiff and defendant, and made part hereof, the defendant further gave evidence to show that the said squadron, under the command of the said defendant, continued on the said cruise, and proceeded to the great southern seas, and explored and surveyed the Antarctic region as far as it was possible, and in that service the said ship Vincennes received extensive and serious injury; that, proceeding on her said cruise, the said ship Vincennes, in the month of September, 1840, arrived in the port of Honolulu, in the island of Oahu, one of the Sandwich Islands, in the Pacific Ocean, and there came to anchor in the inner harbor, and close to the shore, and proceeded to refit and repair; that it was necessary to the safety of the ship, while undergoing these repairs, to be thus close to the shore, and in the inner harbor, and it would have been unsafe, if not entirely impracticable, to have made them elsewhere; that she had then made a long voyage, and been constantly at sea for a long period of time, during which her foremast had received such injuries that it was found necessary to take it out; her seams were open, and the whole hull required repairing, to be recaulked and painted; her hold had to be broken up, and her stowage overhauled; the water casks were taken out, the sails taken off, and the ship almost stripped and dismantled; that about this time the period of service of some of the seamen who had not shipped for the whole cruise was about to expire, and the defendant, anxious to retain them in the service, addressed the ship's crew, and endeavored to prevail on each of the seamen whose term of service was about to expire to reship, and, as an inducement to them, offered to give them liberty on shore; and as a reward to all those who had served so long and faithfully, and who were yet bound to continue on the cruise, in the exploration and survey of the Northern Pacific, he offered the same favor to them; leave was granted to all, and after their leave had expired, they set about overhauling and repairing the ship; while this work was going on, *the natives, many of whom [*99 live almost in the water, were exceedingly troublesome, and surrounded the ship continually, and thus kept up a communication with the men on duty; that soon after the arrival of the said ship at said port, the officers charged with the exploration and survey, and with other scientific duties, went on shore, taking with them their instruments, and such men as were necessary to enable them to perform their duties; the defendant himself being also engaged at the observatory, on shore, pursuing his duty,

aided by such officers and men as were necessary, yet keeping within sight of the ship, having a constant communication with her, and going on board as often as was found necessary, and throughout retaining the command; that the general charge of the ship was left to the first lieutenant, who, it is admitted, was a competent, faithful, intelligent, and vigilant officer, aided from day to day by such officers as could be spared from the discharge of other duties pertaining to the expedition; that the general object of the expedition was a peaceful voyage, to explore and survey coasts, seas, and islands, and to make such investigations as might be found practicable in aid of science; and these general objects being held the primary purpose, for the most part, the detail of the ship's service and duty was made subordinate to them, and thus more of the officers and men were for the time withdrawn from the immediate duties of the ship than otherwise would have been; that under these circumstances, while lying in the said port, the marines on board being employed, among other duties, in keeping guard over such men as were from time to time imprisoned in the ship, and before the happening of the events complained of in the declaration, on one occasion, a man confined in double irons, under charge of the marines, was during the night permitted to escape, having first managed to get his irons off; it being the duty of the sentinel to be close to and keep constant guard over him, and, the sentinels or guards being changed every two hours, it was found impossible to discover during whose watch the escape had been made; on another occasion, a man thus imprisoned was, against the rules, etc. of the ship, furnished with liquor, and, while under guard, permitted to get drunk; on another occasion, a man thus imprisoned under guard of the marines was permitted to make his escape, and it thus became evident to the defendant that there was among the marines on board great relaxation of vigilance and neglect of duty; and on the 16th of November, 1840, Baab and two other marines, separately and collectively, the defendant then being engaged in duty on shore, and the first lieutenant having charge of the ship, refused any longer to do duty as such 100*] *marines, pretending their term of service was up, and saying they wished to be sent home; that the first lieutenant immediately reported these facts to the defendant, who came on board and summoned the said Baab, and the other two marines, before him, and inquired of them if they still refused to do duty; they replied, as they had before to the first lieutenant, and did refuse; thereupon the defendant ordered them into custody, and directed that they should be sent on shore, and imprisoned in the fort on the island; that a few days afterwards, Dinsman, in like manner refused to do duty, and was sent to the said fort. The defendant then offered the evidence of four officers of the said ship, to show that it would have been unsafe, if not impracticable, in the then condition of the said ship, to have confined the said plaintiff on board; that the fort on the said island, in which the plaintiff was confined, was used as a place of confinement for the seamen of merchant vessels lying in the said port; and that seamen who had been confined therein were enlisted in said port, and brought from said fort into the said ship Vincennes; that the governor professed Christianity, spoke English, and resided within the said fort, where he was visited from time to time by various officers of the said ship; that the prison of the said fort is nothing more than the houses erected for the military, and is composed of small huts or houses built in the native fashion, having the back toward the wall of the fort, with the front looking out upon an open space, in front also of the governor's house; that there are no doors to close these huts or cells, the climate being so mild as not to require them, and, the doors being always open, they are thus allowed a freer circulation of air, and rendered more comfortable; that the furniture consists, in some instances, of a matting on the floor, matting around the walls, and a bunk filled with matting for sleeping; in others there is no mat on the floor (the floor of all is of earth), matting only on two sides, and a bunk filled with mats on the floor; that the food supplied to the prisoners is the common food of the inhabitants, and wholesome, palatable, and invigorating, consisting of a vegetable called "taro," and fish; that the plaintiff was allowed to go out once a day, out of the walls of the fort, under the charge of a native officer, and his irons were then taken off; that the sergeant of the marines, there being no commissioned officer in command, commanded them, and was also their quartermaster, and as such was bound to look after their comfort, and report their wants to the defendant; and according to the discipline of the ship, and the rules and usage of the service, he was the only person to whom the marines could look, and through whom they *could communicate with the defend- [*101
ant; that the said sergeant did visit the plaintiff while in prison, and never did report that he was suffering from confinement or otherwise in want of proper food or raiment; that such report, if ever made, must have been made through the first lieutenant of the said ship, and never was made to or through him; they further showed, that, according to the discipline of the said ship, and the rules and regulations of the navy, it was the duty of said sergeant of marines to make report to said first lieutenant of every case in which any vermin of any sort or description were found upon any marine, or among his clothing, and no such report was made to the said first lieutenant by the said sergeant of or concerning the said plaintiff; and also that, in the execution of the duties required of the defendant and the officers and men under his command, in and by the instructions of the President, as set out in the said printed book, no part of the armed force employed in the said expedition was more important than the marines, who were not only required on board said ships for the ordinary duties thereof, but who were more essential for the protection of the officers and men on shore, while making exploration, surveys, and observations, and gathering the information and facts directed by said instructions; that their services were deemed at the time the said vessels were at Honolulu most requisite in the subsequent part of the cruise; that the said ships were then to visit the wild shores, and the officers and men to come into contact

with the ferocious savages, of the Northwest Coast of America, where the marine force was especially needed; and it was deemed of the utmost importance to keep that force as large as possible, and that the after-experience of the voyage confirmed these impressions; that it was with this view deemed essential to the public interest to keep said plaintiff on board said ship, and to require him to perform the duty of a marine; that the said defendant, with all reasonable despatch, proceeded with the repairing and refitting of the said ships, which was not completed until the survey and exploration of the said island of Oahu had been finished, and so soon as the said ship was in order the said plaintiff was brought on board; that, upon being brought on board, he was required by the defendant to go to duty, and refused, and was ordered to be imprisoned in irons; the next day he was brought up, the ship being then under weigh, and having left the said port, and again interrogated by the defendant, and required to go to duty; that he expostulated with said plaintiff, and explained his position, and his duty to punish him if he persisted in such refusal; that he called before said plaintiff the sergeant who 102*] commanded him, *and who had signed with him the said articles contained in the said contract marked A, and required him to state to said plaintiff explicitly the terms of that contract; that the said sergeant did, in fact, explain it to him, and inform him that he was bound to serve out the cruise; that plaintiff denied having signed any such contract, and refused to go to duty; that defendant pointed out to plaintiff how essential his services were to the public interest, and he still refused; that defendant then ordered him to receive twelve lashes on his bare back, and the punishment was accordingly inflicted in the manner pointed out in the rules and regulations of the navy; that defendant then ordered him to be released; and permitted to go at large among the crew, stating that he did so to give him an opportunity to converse with his comrades, and learn his obligations, and return to duty; that, on the evening of the same day, the sergeant again reported plaintiff as refusing to do duty; he was again called before defendant, and required to go to duty, and again refused, and was committed to prison as before, and the next morning again brought before defendant, required to go to duty, refused to do so, and was punished according to the said usage and discipline, and rules and regulations; that he afterwards went to duty; the defendant then further gave evidence, by the said naval officers, and other civilians attached to said expedition, and on board the said ship, that, on the several occasions of punishment aforesaid, the defendant not exhibit any appearance of violence or passion, but was calm, temperate, and cool, and expressed his regret at the necessity he was under of punishing the said plaintiff.

And the defendant further gave evidence, tending to show that said plaintiff was not confined in double irons, or separately, in the said prison, but was at large within the walls of said fort; and that said fort was a comfortable place of residence and more so than the prison of the ship in the situation in which the said ship was during the time of said improvement; and further, that defendant had reasonable cause to fear the spread of the disaffection among the said marines; and that the officers knew not whom to trust at the time and times of the imprisonment aforesaid of said plaintiff; and that, shortly before the imprisonment of said plaintiff, two marines on board the ship Peacock had been arrested, and sent on board the ship Vincennes; that, previous to the arrest of said plaintiff, he, with other men, had agreed among themselves, before they reached Honolulu, to demand their discharge as soon as the terms of their enlistment had expired, and they were in a port where they could be sent *home; that, on arriving at Honolulu, [*103 and after most of the seamen had reshipped, and no offer had been made to the marines to reship, they had a conversation, and required their sergeant to report to the captain that their terms were up, and they required to be discharged in that port where there were vessels to take them home; and that, while the said ship Vincennes and the Peacock were lying in the said port of Honolulu, two of the marines on board the Peacock were arrested for insubordination and disobedience, and they, together with an orderly seaman, were sent on board the Vincennes, about the 7th of October, and confined in the said ship Vincennes until a court-martial was convened for their trial, which was held on board the Peacock, and by which they were sentenced to be punished, which sentence was carried into effect; and after that time the said ship Peacock underwent a thorough overhauling, and very extensive repairs. While she was lying in the said harbor, and while she was undergoing such repairs, some of her men deserted from her; and it was long after the said court-martial, and after the execution of its sentence on the said two marines, and they were discharged from imprisonment, and returned to duty, that the said plaintiff refused to go to duty.

Plaintiff's Statement of Evidence.

After the evidence contained in the plaintiff's first exception, made part hereof, and the foregoing statement of defendant, the plaintiff further gave evidence, tending to show, that, at the time of committing the trespasses in the first count of the declaration alleged, and during all the time that said trespasses continued, the defendant could have securely confined said plaintiff on board the said ship Vincennes, without any difficulty and with safety to the said ship Vincennes, her officers and crew; and further, that the said United States ship Peacock, and the other vessels belonging to said squadron, and under the command of the said defendant, were at the time of the said imprisonment of said plaintiff in said fort at Oahu, present in the harbor of Honolulu, at said island, and that said ship Peacock was lying within the distance of one hundred yards from the said ship Vincennes, at the time the said plaintiff was sent to be imprisoned in the said fort; and further, that said ship Peacock was at that time in a state of good discipline, and that said plaintiff could without any difficulty have been confined on said ship Peacock with perfect safety to said ship, her officers and crew, and that the defendant had no reasonable or probable cause to believe that he could not have securely confined the said plaintiff on board either of the said ships, *without any difficulty, and with [*104

perfect safety to said ships, their officers and crew, and without any danger of their causing mutiny, or insubordination.

And the said plaintiff further gave evidence tending to show that he was by order of the defendant imprisoned in the said fort, in a cell in said fort, in solitary confinement, for a period of 15 days (Baab 18 or 20 days); that said fort was a low, damp, filthy place, was the common prison for criminals and malefactors among said native inhabitants of Oahu, and the cell in which plaintiff was confined was dark and was not ventilated, and that the same was abounding in vermin; that said fort was distant a half mile from said ship Vincennes, during all the time of said imprisonment; that, during all the time the said plaintiff was so imprisoned in said fort, he was in double irons, by order of the defendant, and was under the control and discipline of the native governor of said fort, and the native sentinels, therein; that, during said imprisonment, the only food allowed or supplied to said plaintiff was supplied by the native officers of said fort, and was only "taro" and fish, and nothing else; and that said fish was sometimes, when so supplied, in a rotten state, and said "taro" was an unpalatable and unwholesome food to those unaccustomed to feed on it.

That, during the said imprisonment, a change of clothing, nor any part thereof, was not supplied to said plaintiff, but the same was refused to be supplied; and that he became filthy in his person, and when he was brought away from said fort, and put on board said ship Vincennes, by order of defendant, that said plaintiff was filled with vermin. That, during the whole of said imprisonment in said fort, the said plaintiff was abandoned by the defendant to the sole care, attention, and discipline of the native officers about said fort. That, during the whole time of said imprisonment of said plaintiff in said fort, the defendant securely kept and confined on said ship Vincennes, as prisoners, a chief of the Fejee Islands, and others of the crew of the said ship; and that on the said ship Peacock more than four or five prisoners were at that time securely confined; and gave evidence by the first lieutenant of said ship Peacock, tending to prove that, at the time of said imprisonment of said plaintiff in said fort, fifty-five marines could have been securely confined in said ship Peacock.

And the said plaintiff further gave evidence tending to prove that the trespasses by floggings and imprisonments inflicted on said plaintiff, by order of the defendant, on said ship Vincennes, as alleged in the declaration in this cause, were immoderate, excessive, disproportionate to the offense alleged against him, and of greater severity than is allowed by the rules 105*] and *regulations for the government of the navy of the United States, or the laws and customs in such cases at sea; and that the detention of the plaintiff on said ship or ships, by order of the defendant, after the expiration of his term of enlistment into the said marine corps, was not essential to the public interest, and that defendant had no reasonable or probable cause to believe that such detention was essential to the public interest. That, soon after the enlistment of said plaintiff had expired at the island of Oahu, and he had requested his discharge and leave to return to the United States, the defendant discharged about fifteen seamen, at their request to be discharged, and permitted them to go to the United States; that the marine guard of said ship Vincennes was larger in numbers and force of men, by three or four, than the usual and customary complement of marines on vessels of her class in the navy of the United States; that the defendant, of his own authority, and against his instruction from the President of the United States, deviated from the course of his cruise, as directed in said instructions, and of his own authority prolonged the cruise of said vessels belonging to said exploring expedition.

Defendant's 3d Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff signed the said contract marked A, and afterwards received the bounty stipulated therein, and signed a receipt therefor, and remained and continued on board a vessel of the United States under the command of an officer of the United States navy, employed in the expedition in the said contract named, doing duty as a marine, and receiving wages therefor until the return of the said expedition to the United States in the month of June, 1842 (except when imprisoned as hereinafter stated); and that after the signing of said contract by said plaintiff, the defendant, then being an officer in the navy of the United States by order of the President took the command of said expedition, and continued in command thereof during the whole cruise; that the said plaintiff sailed from the United States in the ship Vincennes, one of the ships of the United States navy detailed for the said service, and under the immediate command of the defendant; that the said ship, with the said defendant as commander, and the said plaintiff as one of the marines on board, sailed to the Southern Pacific Ocean and the South Seas, and during her cruise received such injuries and became so much out of repair as to render it necessary to overhaul and repair her; and that she reached the port of Honolulu, in the island of Oahu, in the month of September, *1840, and was [*106 there, for the purpose of the said repairs and the safety of the ship, brought into the inner harbor and close to the shore; and while there for the purpose of said repairs and refitting, her foremast was taken out, her hold broken up, and other extensive work done on board; and that, while said repairs were being made, the defendant and other officers, and such men as were necessary for that purpose, were on shore, making such explorations, surveys, and observations as were required by the instructions of the President.

And that while said repairs were so as aforesaid being made, and the said defendant and other officers and men were so employed on shore, and the marine guard on board said ship suffered men placed under their guard to escape, and another to get drunk, while under guard; and afterwards the plaintiff, with other marines, severally and collectively refused to do duty on board said ship, and were therefore ordered by the defendant to be confined in a fort on the island, in charge of the natives of the island. And if they shall be of opinion further

from the facts and circumstances, and the whole evidence, that it would have been unsafe to confine the said plaintiff on board the said ship, and that the said fort was under the charge of a governor who spoke English, and was used as the place of confinement for the seamen of the merchant service, of this and other countries, in the said island; that the sergeant of marines was the officer in command of said marines and the plaintiff on board the said ship, and was also their quartermaster; and that it was his duty to report to the defendant the situation of the said marines, from time to time, and to look after their comfort; and that the said sergeant of marines visited the said fort while said plaintiff was confined there, and made no report to the defendant; that the prisons of the said fort had no doors to them, and the said plaintiff was kept as other prisoners were, and that they were again brought on board the said ship so soon as they could with safety be brought there; then such imprisonment was within the lawful authority and duty of the said defendant, and he is not liable therefor in this action.

And if they shall further find that the said plaintiff was brought from the said fort on board the said ship as soon as it was safe to bring him there, and, upon being brought on board, the said defendant, still being in command of said ship, required him to go to duty, and he refused to do so, and thereupon he had him confined in prison on board said ship, in irons, and the next day caused plaintiff to be brought before him, and remonstrated with him, and caused his immediate officer to explain to him his obligation, and the nature of [*107] the contract, and then required him to go to duty, and he refused, and thereupon he ordered him to be punished, and he was punished, according to the rules and regulations of the navy; which rules and regulations it has been agreed the jury may find; and after such punishment, directed him to go at large among the crew, that he might converse with them, and so learn his duty, and he did go at large; and on the evening of the same day again refused to go to duty, and was again imprisoned by the defendant; and was again the next day brought before the defendant, and refused to go to duty, and was punished as aforesaid; then it was lawful for the said defendant to punish the said plaintiff as often as, being called upon as aforesaid, he refused to go to duty; and the said defendant is not liable in this action for the said imprisonment and corporal punishment.

Which instruction the court refused to give; and, on refusing, assigned, as reasons therefor, and so instructed the jury, that the word "unsafe" seems too vague, uncertain, and equivocal to justify in law such an imprisonment in the fort on the island, in charge of the natives. I think the jury must be satisfied, by the evidence, that there was an urgent necessity of using the fort, in order to justify such imprisonment, especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept."

On the second part of the instruction prayed, the court said: "I think it is not a sufficient justification *to find that the punishment was according to the rules and regulations of the navy.* In the petty offenses which by those rules are punishable by flogging, there is a limit within which the officer has a discretion, which should be exercised soundly and reasonably; and, in order to justify the officer, the jury must be satisfied that it was so exercised. In the case of such petit offenses I think each punishment settles all previous offenses of that kind. If, after such punishment a new offense be committed, it will of course be liable to a new punishment. The shipping articles alone did not justify the corporal punishment. In no case, unless by express statute, can corporal punishment be lawful, unless it be reasonable, according to the aggravation and circumstances of the case, and the reasonableness must be found by the jury, or the punishment cannot be justified." To which refusal by the court to give the said instruction so prayed by the defendant, and also to the opinion and instructions so given by the court to the jury, the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, and to cause the same to be enrolled according to the statute; which is done this 29th day of April, 1845. W. Cranch. [Seal.]

*Defendant's 4th Bill of Exceptions. [*108

And thereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury should not find that the said plaintiff made the said contract and received the said bounty, but that he was previous to the said alleged grievances, an enlisted marine on board the said United States ship Vincennes, a public vessel of the United States employed on foreign service under the command of the defendant, and that the defendant was the commander of the expedition on which she was employed, and the time of service of the said plaintiff, enlisted as aforesaid, expired while he was on board said ship on foreign service, and his detention was deemed essential to the public interests by the said commander, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy; which instruction the court refused to give, in the form in which it was prayed, being of opinion, and so instructed the jury, that the burden of proof was on the defendant to show that the detention of the said plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander; and thereupon the said defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done; and the same is ordered to be enrolled, according to the statute, this 30th day of April, 1845. W. Cranch. [Seal.]

Defendant's 5th Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the ——— day of ———, enlisted as a marine in the naval service of the United States, and was never discharged therefrom by the President of the United States; and, being so enlisted, he was, during his term

aforesaid, ordered on board the Vincennes, a United States man-of-war, under the command of the defendant, on foreign service, and while on board said vessel, on such foreign service, his term of service expired; and if, from the said evidence, the jury shall further find that the detention of the said plaintiff on board the said ship was essential to the public interests, then it was lawful for the defendant so to detain the said plaintiff as aforesaid, and, being so detained, he was thereby subject to the rules and regulations of the navy of the United States; and if the jury shall further find that 109*] the said plaintiff, being so detained *as aforesaid, refused to do duty on board the said ship, upon being required to do so by the defendant, then it was lawful for the defendant to punish him with stripes, according to the said rules and regulations, for every offense, not exceeding twelve lashes; and every such refusal was a new offense, for which he was subject to punishment; and every such punishment was a full satisfaction for every such offense to the time of the infliction thereof. Which instruction the court refused to give; and thereupon the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this bill of exceptions, which is done, according to the statute, this 30th day of April, 1845.

W. Cranch. [Seal.]

Defendant's 6th Bill of Exceptions.

Whereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the ——— day of ———, enlisted into the marine corps of the United States; and afterwards, on the ——— day of April, 1838, while in the said service, and during the said enlistment, was ordered on board the Vincennes, a vessel in the navy of the United States, and, as such marine, proceeded in the said ship on foreign service, under the command of the defendant; and the time of service of the said plaintiff, enlisted as aforesaid, expired while he was on board the said ship on foreign service, and his detention was deemed essential, by the commander of the expedition in which he was engaged, to the public interests, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy, and being so subject, if he refused to do duty on board said vessel when required by said commander, then it was lawful for the said commander, in his discretion, to punish him under the rules and regulations of the navy, not exceeding twelve lashes for every such refusal, provided the said punishment was inflicted between each of said refusals, and he is not liable therefor in this action; which instruction the court refused to give; and thereupon the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 30th day of April, 1845.

W. Cranch. [Seal.]

Defendant's 7th Bill of Exceptions.

Whereupon the plaintiff, by his attorney, *110*] *prayed the court* *to instruct the jury, *that if the jury believe*, from the evidence aforesaid, that the said defendant could have securely kept and confined the said plaintiff on board the said ship Vincennes, or on board the said ship Peacock, with safety to the said ships, their officers and crews, then the defendant had no right to imprison said plaintiff in said fort in the island of Oahu; and the jury may give such damages therefor as upon the whole evidence aforesaid they may think the said plaintiff entitled to, provided the jury shall find that the said ships Vincennes and Peacock were together, at the time of said imprisonment, in the said harbor of Honolulu, and were under the command of the defendant, and that said imprisonment in said fort was caused and continued by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his attorney, excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845. W. Cranch. [Seal.]

Defendant's 8th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury believe that the floggings and imprisonments of the said plaintiff, on board the said ship Vincennes, alleged in the declaration in this cause, were immoderate, excessive, unreasonable in degree, and disproportioned to the alleged offenses, and that such punishment was severer in degree than the rules and regulations for the government of the navy of the United States, or the laws and customs in such cases at sea, authorize, then the plaintiff may recover such damages therefor as, upon the whole evidence, the jury may think he ought to have; provided the jury shall find that the said floggings and imprisonments were inflicted by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845. W. Cranch. [Seal.]

Defendant's 9th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if the jury believe, from the evidence aforesaid, that the detention of the plaintiff, as alleged in the declaration in this cause, after the term of his said enlistment in the marine corps had fully expired, was not essential to the public interests, then such detention was unlawful, and the plaintiff *is entitled to recover such [*111 damages therefore as, in the opinion of the jury, from the whole evidence, he ought to have; provided the jury shall find that the said plaintiff was detained by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845. W. Cranch. [Seal.]

The case came up to this court upon these bills of exceptions, and was argued by Mr. Bradley and Mr. Toucey (Attorney-General) for the plaintiff in error, and Mr. May for the defendant in error.

The points raised by Mr. Bradley, the opening counsel, which were contested by Mr. May

and sustained by the Attorney-General, were as follows:

I. The court erred in ruling out the evidence in the first exception, because—

1. The papers were official reports by the defendant, ante litem motam, tending (1.) to show that the re-enlistment was recognized by the government, and that the government approved the detention of the men during the cruise, as being essential to the public interest; (2.) to rebut any presumption of malice.

II. The court erred in ruling out the evidence of the court martial, because—

1. It was a bar to any recovery by the plaintiff.

2. It tended to meet every presumption of malice, by showing that his conduct had undergone a judicial investigation for these matters before a competent court.

3. It tended to show a complete recognition and sanction by the government of all the acts complained of, and it then depends upon the authority of the government.

III. The court erred in refusing the prayer stated in the third exception; and also in the instruction they gave.

1. If the word "unsafe" was too indefinite, the prayer might have been refused; but the qualification and instruction that there must be "an urgent necessity" was equally indefinite, and is not in itself accurate.

2. The rules and regulations of the navy import a justification.

IV. And there is error in each and every one of the other exceptions.

1. Because the question of detention is within the discretion of the commander, and imports [*112 a justification. If not *conclusive, it is prima facie, and the burden of proof was on the plaintiff to impeach it, and aver and prove malice.

2. (1.) Because, if he was lawfully detained, the plaintiff was lawfully subject to the rules and regulations of the navy, and for refusing to go to duty he was liable to be punished not exceeding twelve stripes, by order of the commander, for every such offense, and the refusals given in evidence were independent and substantive offenses. (2.) A refusal to go to duty is not such a disobedience of orders as necessarily implies a mutinous spirit or intent. There is a discretion in the officer to determine whether it is one of those petty offenses which tend to corrupt the morals of the crew, and which may be punished by order of the commander, or of that higher grade which requires severer punishment.

3. Because the court limited the question of "safety" to the ships, officers, and crews, without regard to the prisoner himself; and the word "safety" is equally indefinite with the word "unsafe."

4. (1.) Because they submitted to the jury the interpretation of the rules and regulations of the navy, and to find also "the laws and customs at sea governing the national vessels of the United States." (2.) Because the contract of enlistment and the re-enlistment given in evidence subjected the plaintiff to the rules and regulations of the navy, independent of any laws and customs at sea, except in cases not provided for by said rules and regulations; and this case was provided for by them.

5. (1.) Because the ninth exception either excludes from consideration the effect of the re-enlistment, which the court was bound to interpret; or if it is left open by the phrase, "if he did so detain them," it is too obscure, and the jury may well have been misled by it into the supposition that the court had taken that matter from them. (2.) It does not put the detention on the ground of constraint, and being against the will of the plaintiff.

With respect to the first exception, Mr. Bradley cited the acts of Congress referred to in the statement of this case, and contended that Dinsman had voluntarily made a contract by which he agreed to obey all the laws for the regulation of the navy, and, at all events, the evidence ought to have gone to the jury to rebut the presumption of malice.

2d exception. The judgment of the court-martial was sanctioned by the President, and consequently Wilkes's detention of Dinsman was approved. Perhaps it was not a legal bar to the action, but was good evidence to show that Wilkes was acting under a sense of duty, and not actuated by malice. Bull. N. P. 19; 12 Mass. Rep. 579.

*3d exception. The terms of re-en- [*113 listment were the same as the original except in two points, namely, that it provided for a term of service in the exploring expedition, and for an indefinite time. Could not Congress legislate for this? They passed an act to regulate the exploring expedition, and the contract with Jones was in fact a contract with the United States. We say, therefore, that the chastisement which was inflicted was authorized by law. The opinion of the court below would destroy all discipline in the navy. On the subject of imprisonment on shore in the merchant service, and to inflict corporal punishment, he cited Shee's Abbott on Shipping, chap. 4, part 2, p. 177; Ware 18, 19, 207, 230, 371, 503; 1 Story, 106; 4 Mason, 511, 512; 5 Mason, 193; 1 Sumner, 397, 398.

Under the contract, therefore, without reference to the statute, Wilkes had a right to inflict this punishment.

But the navy regulations also justified it. The marine corps is a part of the navy. Naval Laws, 100, 156, 164. The Act of 1837 necessarily gave the commanding officer a discretion to judge whether or not the interests of the service required the detention of Dinsman. If the jury were satisfied that he deemed it expedient to do so, it was enough. The law protected him unless malice was shown, and it was for the other side to prove malice.

5th exception. Every refusal to do duty was a fresh offense. Rules and Regulations for the Navy, art. 3, 14, 30; Act of April 23, 1800.

7th and 8th exceptions. The power of the officer over the man, and the interpretation of the navy regulations, were not matters of fact for the jury. They were questions of law. The court ought to have decided whether or not the contract of re-enlistment was binding.

Mr. May, for defendant in error, recited all the facts in the case, and proceeded to examine what were the rights of Wilkes in the case, and how acquired. The earlier laws were almost all repealed by the Act of June 30, 1834. See Naval Laws, 156.

The enlistment took place on the 21st of November, 1836, and was for four years. Consequently it expired on the 21st of November, 1840. But it has been argued that a re-enlistment was made, to extend over the entire cruise. There is no authority in any law for such a contract; none which justifies an indefinite enlistment. If there is, let it be shown. The agreement with Jones was not a valid contract. Jones had no authority to make it. Besides, 114*] the man was already enlisted *for four years, and whilst thus in service was incapable of making another and different contract.

The Act of March 2d, 1833, provides that no bounty shall be allowed, and the fourth auditor was right in taking this view of it. The contract was therefore in violation of law, and cannot be binding. Even supposing the contract with Jones to be good, it was only with him personally, and did not pass to his successor. Where a public contract is made under legal authority, and in the line of duty, by an officer, it is binding. 1 Cranch, 363. But Jones had no legal authority.

It is argued that this contract is like those which are made in the merchant service. The form of these is given in Abbott on Shipping (Story's ed.), page 550. The term of service is required to be fixed for the protection of seamen.

Suppose that the contract of re-enlistment with Jones was valid, what were Wilkes's rights under it? They must be only what Congress gave by the act providing rules and regulations for the navy. Do these authorize an imprisonment out of the ship? Let the other side show any such.

But it has been said that the Act of 1837 gave to Wilkes a right to detain this man. That act relates only to seamen and boys. It does not include marines, either in the title or body of the law. Whenever any act of Congress intends to include the marine corps, it always says so. The late Attorney-General, Mr. Legaré, gave an opinion that marines were not included in this act. The act was passed after the enlistment was made, and cannot be retroactive. The enlistment took place on the 14th of November, 1836, and the Act was passed on the 2d of March, 1837. On the subject of retrospective laws, Mr. May cited 1 Gallison, 139; 4 Serg. & Rawle, 408; 2 Peters, 657; 6 Cranch, 174; 16 Mass. Rep. 245.

Wilkes' rights over Dinsman were not unlimited or despotic. They were regulated either, 1st, by statute; 2d, by usage.

[Mr. May then examined the statutes and navy regulations, and contended that the authority which he had exercised was not justified by them.]

2d. Usage.

The authorities show that the power of a captain is not unlimited. 2 Carr. & Payne, 148; Shee's Abbott on Ship. 177, 178; 1 Hagg. Adm. 272; 2 Starkie, 452; 1 Cowper, 161; 14 Johns. 119; Gilpin, 232; 4 Mason, 511, 512; 1 Story, 106; 1 Ware, 18, 19, 372, 503; Pet. Adm. 174, 175; Ware, 224, where the whole subject is traced; 1 Wood. & M. 267.

If the master inflicts an unusual punishment, *he is responsible.* It is very doubtful whether *115*] he can lawfully* confine a *seaman in a *foreign jail.* The eighth article of the Constitution of the United States says, that cruel and unusual punishments shall not be inflicted; and the question whether or not a punishment is one of this forbidden class is a question of fact for a jury.

1st exception. Wilkes wished to read his own letter to the Secretary of the Navy. This was not proper evidence, and could not even mitigate damages, because it afforded no proof of the state of his mind two years after it was written, when these severe punishments were inflicted. The exception does not state the purpose for which it was offered. It is now said that it was to show that the government approved his conduct. But there was no evidence offered below, that the Secretary of the Navy approved of or even answered it.

2d exception. Dinsman was no party to the record of the court-martial by which Wilkes was acquitted. Buller's N. P. and 12 Mass. Rep. 597, have been referred to; but in both these cases, the plaintiff was a party to the proceeding. The opinions of officers of the court-martial are no evidence of Wilkes' state of mind; and, besides, there were many other charges upon which he was tried.

3d exception. The prayer here is based upon the contract with Jones. But this contract was void, and therefore the court below was right. There is no authority anywhere given by law, by which an officer of the navy can confine a man on shore. The rules of the merchant service do not apply, because vessels of war have ample means of imprisonment within themselves. The prayer proposed to submit to the jury whether or not Dinsman was punished according to the rules and regulations of the navy. But this was a question of law. The rules, etc., were not offered in evidence, and therefore the jury could not decide.

4th exception. The act of Congress does not leave it to the mere arbitrium of an officer whether to detain a seaman or not. The burden of proof is upon him, to show that the detention was essential to the interests of the service. The act of Congress directs the officers to "report to the Navy Department," and implies therefore that he is responsible for his acts.

5th exception. It has been said that every refusal to do duty is a fresh offense. If this argument be sound, a man might be whipped to death for refusing to perform duty after the term of his enlistment had expired.

6th exception. This depends on the same principle.

7th and 8th exceptions. If the above principles are correct, the prayers in these exceptions are even less beneficial than we had a right to expect, and are not erroneous.

*9th exception. We are not bound [*116 to prove malice. The law infers it from the acts done. 3 East, 599; 1 Greenleaf's Ev. sec. 34; 2 Greenleaf, sec. 94; 1 Sumner, 399; 2 Starkie on Ev. 904, 905.

Mr. Toucey, Attorney-General, for the plaintiff in error:

The letter to the Secretary of the Navy and the proceedings of the court-martial, mentioned in the first and second bills of exception, were improperly ruled out. The letter was an official letter relating to public duty. The court-martial had acquitted Captain Wilkes.

The third bill of exceptions, as to the plaintiff's imprisonment in the fort.

The court refused to let the defense rest upon the point of the safety of the ship to which the plaintiff belonged; but the validity of the defense upon urgent necessity, as something more than the mere safety of the ship. The clause, "especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept," does not qualify the charge; because, if the jury did not find this, the charge still remained. Here the court says the safety of the ship is not a sufficient justification for removing a mutineer to the fort, but there must be an urgent necessity, and that would justify it. The jury must necessarily have been misled by this instruction and great injustice done to an officer who looked to the safety of his ship as the first and principal point of duty.

The court refused to charge the jury, that, if the plaintiff refused to go to duty, and was punished for it according to the rules and regulations of the navy, it was a sufficient defense; but charged, affirmatively, that this was not a sufficient justification. The court charged very correctly, that, "in the petty offenses which, by those rules, are punishable by flogging, there is a limit within which the officer has a discretion;" and then charged the other way, that the jury must judge whether he exercised that discretion soundly and reasonably. In other words, that he has no discretion which he can exercise, but the jury must exercise it for him, upon the testimony of witnesses, after the occasion has passed away.

The court further instructed the jury, that the shipping articles alone did not justify the corporal punishment, and that the reasonableness of it must be found by the jury. The shipping articles in this case is the contract of enlistment. The plaintiff expressly agreed to be subjected to the rules and discipline of the navy. If punished in a given case precisely according to those rules, the act is justified by [*117] the agreement, and the charge that its reasonableness must be found by the jury is misapplied and erroneous. The question of "reasonableness" arises in those cases only where the law authorizes the application of reasonable force. But where the law, and the consent of the party, authorize the application of force according to certain definite rules, the only question is, whether it has been applied according to those rules.

The fourth and ninth bill of exceptions may be considered together.

By the fourth the court refused the instruction, that, if the plaintiff's detention was deemed essential to the public interests by the commander, the defendant, as such commander, had a right to detain him, and that the plaintiff was thereby made subject to the rules and regulations for the government of the navy. The court further instructed the jury affirmatively, that the burden of proof was on the defendant, to show that the detention of the plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander.

By the ninth, the court, at the plaintiff's request, charged, that, if the jury believed the detention not essential to the public interests, the plaintiff might recover.

The Act of the 2d of March, 1837, 5 Stat. at Large, 153, provides, "that when the time of service of any person enlisted for the navy shall expire when he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer, etc., to send him to the United States in some public or other vessel, unless his detention be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof." It further provides, that the person so detained "shall be subject in all respects to the laws and regulations for the government of the navy, until their return to the United States, and all such persons as shall be so detained, and all such as shall voluntarily re-enlist to serve until the return of the vessel in which they shall be serving and their regular discharge therefrom in the United States, shall, while so detained, and while so serving under their re-enlistment, receive an addition of one-fourth to their pay." Are the marines comprehended in these terms? The words are, "when the time of service of any person enlisted for the navy shall expire." Marines are enlisted for the navy. The court assumed they were within the law. They are pre-eminently within its reason, and are precisely within its letter. The contract with them was [*118] only commensurate with the power conferred by that act. It was to take effect after the existing term expired; it was not material when it was made; it might be necessary to make it before the cruise; it is enough that it secured consent to what the law authorized.

The charge of the court absolutely excluded the agreement to serve during the cruise; it submitted to the jury the question which the commander was authorized by the act of Congress to decide, and by his duty as an officer required to decide. The question is one of discretion, a question of government, a mere political question. It must be decided before the person or crew could be detained. The necessity is a present one, in foreign parts. The duty is devolved on the commander to act one way or the other, to send the men home, or detain them according to that decision. It is expressly made his duty to report the causes of the detention, that is, the grounds of the decision, which would be impossible unless he made it. The power to be exercised of detaining the men is expressly conferred on him. It is the declared consequence of its exercise, that they shall be subject to the rules and regulations for the government of the navy. Others are to act upon that decision thus made, and are not required to revise it, or permitted to question it. It is the duty of all the subordinate officers, and of the crews of the different ships, to obey the orders of the commanding officer founded on that decision, and such order is not only a sufficient warrant for their obedience, but they are liable to the penalty of death if they disobey it. It is the duty of the Treasury Department and pension office to act upon it. The power itself, in its

essential character, is a practical power of government. It is part and parcel of the executive power, as applicable to the navy, and belonging to its officers. Without its certain exercise, there could be no authority or discipline. It is impossible that the grounds of the order should be submitted to a jury before it be known whether it is to be obeyed. Nor can they be submitted to a jury upon evidence. It would not be practicable to prove them. No one knows what those grounds are, except the officer who makes the order. They lie often within his own knowledge exclusively, and he cannot be a witness. They are often the result of his sagacity and foresight, as well as observation, and are incapable of proof. It is the greatest absurdity to suppose that an act of Congress has left it doubtful, and to be ascertained afterwards by the verdict of a jury, whether a fleet in actual service is a voluntary association, or a legally organized body under the government of law; whether the crews of a squadron are in the naval service or not; whether the commander 119*] or any of *his subordinate officers have any lawful command; or that these questions are to be decided, perhaps years afterwards, in each particular case, according to the uncertain and varying opinions of a jury. And the cruelty of it would be as great as its absurdity. It would be a refinement of cruelty to require an officer to act upon a combination of circumstances incapable of proof, and upon his own knowledge, judgment, and sagacity, and then punish him for want of proof, or perhaps for being wiser than twelve men ignorant upon the subject. The government has a general power independent of the act. The true view is, that the point was decided by the government. The action of Commodore Jones here at home in the presence of the government; the payment of the bounty; the action of the Treasury Department in paying the men as in the service; the absence of any disapproval; the approval of the acquittal on the charge for detaining and coercing them. Whether the matter was decided by the President personally through the Navy Department, or through the commander of the expedition, the same result follows—the decision is conclusive upon the Judicial Department. As to the rule relative to the discretion of a public officer, when it is made his duty to decide and to act, and of others to act according to that discretion. The question is an important one. It involves a great principle, essential to the powers of government. The discretion within the limits assigned to it, though in an executive officer, partakes of the character of judicial discretion. The authorities are conclusive. Drew v. Colton, 1 East, 565, in note; Seamen v. Patten, 2 Caines, 312; Vanderheyden v. Young, 11 Johns. 150; Martin v. Mott, 12 Wheat. 19; Decatur v. Paulding, 14 Pet. 497; Kendall v. Stokes, 3 How. 97, 98; Brashear v. Mason, 6 How. 101, 102.

The court also held, that when, in the discharge of his duty to the best of his judgment, the commander had decided to detain the men, it was to be presumed that he had acted wrong, and the burden of proof lay upon him to show *that he had* acted right. In Martin v. Mott, *this court lay down* the contrary rule.

*122

The fifth bill of exceptions.

The court refused the instruction, that, if the jury should find the detention of the plaintiff essential to the public interests, it was lawful for the defendant to detain him, and, for a refusal to do duty, to punish him according to the rules and regulations of the navy, with stripes not exceeding twelve, etc. In such case clearly he was liable to be detained; he was subject to the rules and discipline of the navy; he was liable to be punished for mutiny or insubordination under those rules. The Act of *30th of June, 1834, 4 Stat. at Large, [*120 712, provides, "that the said corps shall, at all times, be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached with the army by order of the President."

The instruction refused in the sixth bill of exceptions is similar to the last, except that it was lawful for the commander in his discretion to punish, under the rules and regulations of the navy.

The seventh bill of exceptions.

The court, at the plaintiff's request, instructed the jury, that, if the defendant could have securely kept and confined the plaintiff in the Vincennes or the Peacock, with safety to the ships, their officers and crews, the defendant had no right to imprison the plaintiff in the fort. The breadth of the proposition is, that, had it required the exclusive attention of every officer, seaman, and marine to have kept and confined the plaintiff on board safely, the defendant could not justify sending the mutineer to the fort during the stay at the Island. The jury could not do otherwise than convict, under this instruction; because it was doubtless possible for the commander, officers, and men safely to confine one man on board either of the ships, and save them, their officers and crews, from destruction.

The eighth bill of exceptions.

At the plaintiff's request, the court charged, that, if the punishment was immoderate, excessive, unreasonable, disproportioned, severer than the rules of the navy or the laws and customs in such cases at sea authorize, the plaintiff might recover. This excluded the commander from the protection of the rules and regulations for the navy. If, in the opinion of the jury, the punishment was immoderate, etc., and, though not more severe than the rules and regulations of the navy authorized, yet more severe than the laws and customs in such cases at sea authorized, they were directed to convict the defendant.

By the instructions given and withheld, the defendant was deprived—

1st. Of the benefit of showing the sanction of his government in every form known to the laws.

2d. Of the fundamental rule of the safety of the ship, as a guide to the officer exercising discretionary power conferred for that end.

3d. Of the benefit of the renewed contract of enlistment, by which the men agreed to be detained during the cruise.

4th. Of the benefit of the Act of 1837, giving him power to detain the men abroad, after the expiration of their terms, when the public interests require it.

121*] *5th. Of the protection of the rules and regulations for the government of the navy, when acting within them.

6th. Of the discretionary use of the consular prisons, when necessary in the suppression of mutiny.

7th. Of the usual presumption in favor of the exercise of official discretion.

8th. And finally, of legal protection in the upright exercise of discretionary power conferred on him as a public officer for public ends, where the law imposed on him the duty to exercise it.

1. The commander of the exploring expedition was a public officer, intrusted with power which it was his duty to exercise, and it was his right to show on the trial that he acted by direction of his government, or with its sanction.

2. The safety of the ship or squadron was a fundamental rule to guide him in the exercise of the discretion which the law had given him. It is the law of the highest necessity.

3. After the passage of the Act of March 2d, 1837, it was competent for him to make with the men the agreement of October, 1837, that they would serve during the term of the cruise, and until the vessel should return to a port of safety in the United States.

4. Independently of this contract, he had legal power under the act to require the men thus to serve. Thus intrusted with certain power for a public object, it was his duty to exercise that power according to his view of the exigency; that is, according to his view of present circumstances, and he is protected by the law which imposed that duty, if he discharged it uprightly.

5. Whether the case be one of renewed contract, or of detention under the act, the marines, during the period of such service, were subject to the rules and regulations established for the government of the navy, and liable to be punished for mutiny or insubordination according to such rules and regulations, and the officer conforming to them is justified by them.

6. Within those rules and regulations he has the power of confining an offender, and as they do not limit him to any particular place of confinement, and it is admitted he may use the consular prison, it is necessarily intrusted to him to determine whether the ship's prison or the consular prison shall be used for that purpose; and if he decide that question in good faith, with pure motives, he is not answerable for any error in judgment.

7. If his decision may be reviewed and reversed by a jury upon the mere question of expediency, there is neither law, reason, nor propriety which forbids the commander to remove a mutineer from the squadron to the consular 122*] prison, though it *may be possible to confine him in some one of the ships with safety. Even in the case of a private vessel it may be done, if it be safer or better to do so, or a great offense has been committed. Wilson v. The Mary, Gilpin, 32; Magee v. The Moss, Ib. 233; United States v. Wickham, 1 Wash. C. C. 316; Thorne v. White, 1 Pet. Adm. 168; Abbott on Shipping, Story's ed. 137.

8. It is to be taken, prima facie, that a public officer has done his duty. It is not to be presumed that he has been guilty of an act of infidelity to the public trust committed to him. As declared by this court in Martin v. Mott, every public officer is presumed to act in obedience to his duty, until the contrary be shown. The onus probandi does not lie on him.

Mr. Justice Woodbury delivered the opinion of the court:

The original action in this case was trespass by a marine in the exploring expedition against its commanding officer.

It will be seen, by the statement of the case, that the injury complained of was a punishment inflicted on the plaintiff by the defendant, in November, 1840, near the Sandwich Islands, for disobedience of orders, or a refusal to perform duty when directed.

The plaintiff claimed that the term for which he was bound to serve as a marine had then expired; that the defendant had no right or justification to detain him longer on board; and that, his refusal to do duty longer being the only reason, and an insufficient one, for punishing him at all, under such circumstances he was entitled to recover damages of the defendant for subjecting him to receive twelve lashes, and for a repetition of the punishment on a subsequent day, after another request and refusal by him to obey. And also, in the meantime, for putting him in irons, and confining him in a native prison on the island of Oahu.

The defendant pleaded the general issue; and by agreement of parties, any special matter was allowed to be given in evidence under that issue.

Various questions of law arose during the trial, which are presented on the record in nine separate bills of exceptions by the defendant, and one by the plaintiff. Some of them are of an ordinary character; but others possess much interest, and are important in their consequences, not only to these parties, but to the government and the community at large.

In a public enterprise like the exploring expedition, specially authorized by Congress in in 1836 (see Act of Congress of 14th of May, 1836, 5 Statutes at Large, 20, sec. 2), for purpose of commerce and science, very valuable to the country, and not entirely *without [*123 interest to most of the civilized world, it was essential to secure it from being defeated by any discharge of the crews before its great objects were accomplished, or by any want of proper authority, discretionary or otherwise, in the commander, to insure, if possible, a successful issue to the enterprise.

It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.

The humblest seaman or marine is to be sheltered under the ægis of the law from any real wrong, as well as the highest in office. Considerations connected with these views are

involved in most of the points ruled by the court below.

But the first and second exceptions taken by the defendant raise incidental questions, which it may be better to dispose of separately, before proceeding to the principal points involved.

One of these questions is the propriety of rejecting a letter written by the defendant, in relation to the bounty given to the seamen and marines on their re-enlisting or contracting to serve till the expedition should terminate.

As this letter related to that material transaction, and was a part of the res gestæ, it seems competent. Ridley v. Gyde, 9 Bingham, 349, 354; Hadley v. Carter, 8 N. H. 40; Aiken v. Bemis, 2 Wood. & M.

It was also official correspondence of the commander in respect to official matters, and seems to have been justifiable as evidence on that account. 1 Greenleaf on Ev. sec. 491.

The other question relates to the propriety of excluding the proceedings of a court-martial, which, after the return of Captain Wilkes, was convened, and acquitted him of this among other charges.

We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offense, the parties then being the same likewise, and the tribunal acquitting competent to examine and acquit. Aspden et al. v. Nixon et al. 4 How. 467; Burnham v. Webster, 1 Wood. & M. 172. And though sometimes, yet questionably, they have been deemed a bar to civil suits for damages, where the plaintiff was the prosecutor before the court-martial for that injury. Buller, N. P. 19; Hannaford v. Hunn, 2 Carr. & Payne, 146, semble.

124*] *But here the parties were not the same, nor the plaintiff a complainant before the court-martial, and the courts of common law have jurisdiction over the wrong, though committed at sea. Warden v. Bailey, 4 Taunt. 70–75; 1 McArthur on Courts-Martial, 268; Wilson v. McKenzie, 7 Hill, 95; O'Brien on Military Law, 223, semble; Luscomb v. Prince, 12 Mass. 579.

The remaining exceptions relate first to the leading question, whether the duty of service by the plaintiff had expired when the punishment for the disobedience of orders was inflicted.

It is conceded that the term of his original enlistment for four years had then terminated. But after that term commenced, in 1836, Congress passed a new law, March 2d, 1837, which is supposed to reach a case of this kind, and to have justified a contract of re-enlistment made by the plaintiff, which extended beyond the original term, and till after the punishment complained of. 5 Stat. at Large, 153.

This new law, to be sure, speaks in its title of the "enlistment of seamen;" but in the body of it provision is made as to the "service of any person enlisted for the navy."

It is enacted there, that it shall be lawful to enlist persons to serve for five years, and a premium is given to such as "shall voluntarily re-enlist to serve until the return of the vessels." See 3d section of Act of March 2d, 1837.

In the present instance, the exploring expedition having been detained in this country by obstacles in the preparations, and a change in the commander, till it became probable the original terms of service of the seamen and marines would expire before the cruise ended, the Secretary of the Navy, in September, 1837, after the above act passed, and before the squadron sailed, authorized a "bounty to the petty officers, seamen, and marines," who would re-enlist and engage to serve during the term of the cruise. Thereupon many did so re-enlist and engage to serve, and among them the plaintiff, and the bounty was paid to them all on so doing, in October, 1837.

The papers admitted to show this, though excepted to by the plaintiff, we think entirely competent.

After this it would be very difficult to hold that the plaintiff had not legally become liable to serve during the cruise, instead of merely his original term of four years. Because, though marines are not, in some senses, "seamen," and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of "marines" *indicate *the place and nature of their [*125 duties generally. And, besides the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part "of the crews of each of said ships." Act of 27th March, 1794, 1 Stat. at Large, 350, sec. 4. Their pay was also to be fixed in the same way as that of the seamen. Sec. 6, p. 351.

So it was again by the Act of April 27th, 1798, 1 Stat. at Large, 552. And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. See Act of Congress, 11th July, 1798, 1 Stat. at Large, 595, 596.

Thus paid, thus serving, and thus governed like and with the navy, it is certainly no forced construction to consider them as embraced in the spirit of the Act of 1837 by the description of persons "enlisted for the navy."

The reason of the law on such occasions for re-enlistment applies with as much force to them as to ordinary seamen, because, when serving on board public vessels where their first term seems likely to expire before the cruise ends, their services may, under the public necessities, be equally needed with those of the seamen till the cruise ends; and hence all of them may rightfully re-enlist for the cruise, at any time, in anticipation of this.

Such was the construction put on this section at the time by the Navy Department and navy officers on board, by making proposals and paying a bounty to both marines and seamen who would re-enlist. But what is calculated to remove any doubts as to the justice of this view is, that such was the construction adopted by the plaintiff himself, and fully acquiesced in by his conduct in voluntarily agreeing beforehand to re-enlist for the cruise, and receiving the bounty for it, and sailing under that engagement.

He thus waived any doubt, and, proceeding to sea under such new engagements supposed to be authorized by the act of Congress, he would seem to be morally as well as legally

estopped to deny their validity, and the liabilities to duty and to punishment consequent upon them. Volenti non fit injuria.

If, however, the legal right of the commander was imperfect to require and enforce longer performance of duty under the engagements, there is another provision of the Act of March, 1837, by which it seems quite clear that, without such voluntary re-enlistment and engagement, the commander had power to detain the plaintiff after his original term expired, if, in his opinion, the public interest required it. In the second section of the law (5 Stat. at Large, 126*] 153) it is *enacted, that, "when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he may be serving shall return to the United States," etc., etc.

Now, considering the marines as embraced in the spirit, if not the exact letter, of this provision; for reasons heretofore assigned, connected with its language and object, and their position in conjunction with the navy, it would follow that the commander, supposing the detention of the plaintiff on board "essential to the public interests," could rightfully direct him to remain; and in the event he did so, as is averred here, the third section of the Act of 1837 provides that the plaintiff should be "subject in all respects to the laws and regulations for the government of the navy," until his return to the United States. 5 Stat. at Large, 153.

There is still another statute, which, in our view of it, adds more strength to these conclusions. It is an act as early as June 30th, 1834 (4 Stat. at Large, 713), and by the second section it provides as to the marine corps, "that the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy. That corps thus, in some respects, became still more closely identified with the navy. The term "the better government of the navy" need not be restricted to mere punishment, or to courts-martial, but may include any provision by law intended to secure the safety of the crew and vessel, and insure due subordination and sound discipline in any exigency of the public service. The continuance of all serving on board till the cruise ended was afterwards wisely provided for, when required "by the public interests." The plaintiff was, therefore, bound to submit to it. He must be presumed to have known this provision before his new contract of enlistment, and before he sailed, and indeed to have known before his first enlistment that he was to be subject to any new laws which might be enacted for the better government of the navy, and hence that the defendant, after the Act of 1837 passed, could continue, under the public exigencies, to require the performance of duty by him till the cruise ended, and to punish him when disobedient—if not overstepping the limits prescribed by the naval code, and the usages consistent therewith which prevail in maritime service. *Nor was it [*127 competent for him to object to this detention, as if retrospective in its operation, being authorized by an act passed after his first enlistment, because before that enlistment, Congress, June 30th, 1834, had enacted, as before cited, that the marine corps should be subject to and under the laws and regulations which are or may be hereafter established for the better government of the navy.

Having thus ascertained that the defendant had further jurisdiction over the plaintiff, and it being admitted that the latter refused to perform his orders, and in the language of the fourteenth article, that he disobeyed the lawful orders of his superior officer (2 Stat. at Large, 47), and this on an important subject, and under circumstances likely to extend to many more of the crew, and to end in mutiny or an abandonment of the expedition, if not suppressed with promptitude and decisive energy, the next inquiry is whether the punishment was inflicted within the license of the law.

It is not the province of the judiciary to decide on the expediency or humanity of the law, but merely its existence and the conformity or non-conformity to it by the defendant.

Where a private in the navy, therefore, is guilty of any "scandalous conduct," the commander is, by the third article of the laws for the government of the navy, authorized to inflict on him twelve lashes, without the formality of a court-martial. 2 Stat. at Large, 47.

If disobedience was not such conduct, but, under the fourteenth article, exposed the offender to severe punishment by a court-martial, the plaintiff could hardly complain that it was mitigated to only the twelve lashes which the captain was authorized to inflict without calling such a court, by article thirtieth, as well as article third (Ibid. 49), and no more stripes were given here for any one act of disobedience than the third and thirtieth articles warrant.

Nor were they accompanied by any circumstance of unusual severity or of cruelty, either in the manner or the instrument employed. After an interval of two or three days, according to the counts in the writ, as well as the proposed proof, and after explanations and exhortations to duty, and time given for reflection, followed by renewed disobedience, the same number of stripes was repeated, because deemed necessary in order to enforce duty.

After another interval for like purposes, on a subsequent day, upon a new refusal, the punishment was again inflicted, and the plaintiff thereupon returned to duty.

If precedents were needed to justify this course, it has been settled in a penal prosecution that a like act, when prohibited, *if [*128 distinctly repeated, even on the same day, constitutes a second offense, and incurs an additional penalty. Brooks qui tam v. Milliken, 3 D. & E. 509.

Again, if this disobedience could not be considered a technical offense under either of the articles already referred to, it surely is an offense in nautical service, and one of much magnitude at times, and the thirty-second article provides that all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished ac-

cording to the laws and customs in such cases at sea. 2 Stat. at Large, 49.

In the discipline of the merchant service, where an act of disobedience is persisted in, and endangers the due subordination of others, the captain is justified, not only in punishing personally, but in resorting to any reasonable measures necessary to produce submission and safety. See Cobley v. Fuller, 2 Wood. & M. and cases there cited, and 9 Law Reporter, 386.

Under this portion of the inquiry arises also the question as to the ruling about putting the plaintiff in irons, and about the confinement of him on shore in a prison of the natives.

This appears to have been done under the same aspect of the case, looking to the preservation of sound discipline, and the safe imprisonment of the plaintiff till he consented to return to his duties.

It appears that several other marines in the squadron were taking like insubordinate ground with the plaintiff, and that the escape of two prisoners confined on board had already been allowed; that many more appeared anxious to quit the vessels, doubtless under the seductive attractions of the islands near; that several of the officers and men were engaged at a distance in making scientific observations; and that, under such circumstances, a confinement of the plaintiff on shore for a few days might be a prudent precaution to prevent a defeat of the chief objects of the expedition.

This, therefore, without proof of malice, is not actionable, nor does it amount to putting a seaman on shore in a foreign country to desert him there, contrary to the act of Congress, as that must be done maliciously, and then is properly punishable by statute, no less than on principles of admiralty law. 4 Statutes at Large, 117, sec. 10; Abbott on Shipping, 177; Jay v. Allen, 1 Wood. & M. 268; United States v. Netcher, 1 Story, 307. But if it was only to imprison him there for a few days, and, under all the circumstances, was considered by the defendant to be with more propriety and safety than in the squadron, it was justifiable, unless 129*] accompanied by malice. *The William Harris, Ware, 367, and The Nimrod, Ib. 9; Wilson v. The Mary, Gilpin, 31; 3 Kent's Com. 182.

As to the cleanliness of the prison, the healthfulness of the food, and the general treatment while there, the evidene is contradictory, and is not now a matter for our decision.

The only remaining consideration, in order to dispose of all which is left in any of the exceptions, is the competency of the commander to decide on these various questions without being amenable to the plaintiff in an action at law for any mere error of judgment in the exercise of his discretion, which may have been involuntarily committed under the exigencies of the moment.

In order to settle this point correctly, it being in itself a very important one, as well as running through several of the exceptions, it will be necessary to advert to the circumstances, that Captain Wilkes was not acting here in a private capacity and for private purposes; but, on the contrary, the responsible duties he was performing were imposed on him by the government as a public officer. In the next place, those duties were not voluntarily sought or assumed, but met and discharged in the routine of his honorable and gallant profession, and under high responsibilities for any omission or neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable. 2 Strange, 820; 6 D. & E. 443. Now, in respect to those compulsory duties, whether in re-enlisting or detaining on board, or punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. See the cases hereafter cited.

Nor can a mandamus issue to such an officer, if he is intrusted with discretion over the subject matter. Paulding v. Decatur, 14 Peters, 497; Brashear v. Mason, 6 How. 102.

His position, in such case, in many respects, becomes quasi judicial, and is not ministerial, as in several other cases of liability by mere ministerial officers. 11 Johns. 108; Kendall v. United States, 12 Peters, 516; Decatur v. Paulding, 14 Peters, 516. And it is well settled that "all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts." Evans v. Foster, 2 N. H. 377; 14 Peters, 600, App.

Especially is it proper, not only that a public officer, situated *like the defendant, [*130 be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending it as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives and the respectability and honor of his country's flag in charge.

In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. 12 Wheaton, 30.

Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim. 2 Carr. & Payne, 158, note; 4 Taunton, 67.

When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next and show the moderation or justification of the blows used. 2 Greenleaf on Ev. sec. 99.

The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable. Gidley v. Palmerston, 7 Moore, 111; Vanderheyden v. Young, 11 Johns. 150; 6 Harr. & Johns. 329; Martin v. Mott, 12 Wheaton, 31.

This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown. 1 Greenl. sec. 35–37. But that the officer, being intrusted with a discretion for public purposes, is not to 131*] be punished *for the exercise of it, unless it is first proved against him, either tnat he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression, or, in the words of Lord Mansfield, in Wall v. McNamara, that he exercised it as "if the heart is wrong." 2 Carr. & Payne, 158, note. In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error. Harman v. Tappenden et al. 1 East, 562, 565, note.

It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country, and even in this court, in illustration of the soundness of these positions.

Thus in Drewe v. Coulton, 1 East, 562, note, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J. says: "This is, in the nature of it, an action for misbehavior by a public officer in his duty. Now, I think that it cannot be called misbehavior unless maliciously and willfully done, and that the action will not lie for a mistake in law." "By willful I understand contrary to a man's own conviction."

"In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no." See these last cases collected in Seaman v. Patten, 2 Caines, 313, 315.

In a case in this country (Jenkins v. Waldron, 11 Johns. 121), Spencer, J., says, for the whole court, on a state of facts much like the case in East: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice." Similar views were again expressed by the same court in the same volume, p. 160, in Vanderheyden v. Young. And in a like case, the Supreme Court of New Hampshire recognized a like principle. "It is true," said the Chief Justice for the court, "that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy." But there is no liability in such case without malice alleged and proved. Wheeler v. Patterson, 1 N. H. 90.

Finally, in this court, like views were expressed, through Justice Story, in Martin v. Mott, 12 Wheat. 31: "Whenever a statute gives a discretionary power to any person, to be *exercised by him upon his own [*132 opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts." "Every public officer is presumed to act in obedience to his duty, until the contrary is shown."

Under these established principles and precedents, it will be seen that the rulings below must be held erroneous whenever the court departed from them, and required the defendant, as on several occasions, to go forward, and in the first instance to prove details rebutting any error or excess.

As, for illustration, to prove in the outset facts showing a necessity to detain the plaintiff, before the latter had offered any evidence it was done from malice or without cause; or to prove that the prison on shore was safer and more suitable for the plaintiff's confinement than the vessels, under the peculiar circumstances then existing, until the plaintiff had first shown that no discretion existed in the defendant to place him there, or that he did it mala fide, or for purposes of cruelty and oppression; or to prove that the punishment inflicted was not immoderate, and not unreasonable, when it is admitted to have been within the limits of his discretion, as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as prima facie right till the opposite party disprove this presumption. The judgment below must therefore be reversed, and a venire de novo awarded, and the new trial be governed by the principles here decided.

HUGH M. PATTON, Administrator, and Hugh M. Patton et al., Heirs of Robert Patton, Deceased, Appellants,

v.

JAMES TAYLOR, Administrator, and James Taylor, John W. Tibbatts and Ann W., his wife, George T. Williamson and Jane M., his wife, and Horatio T. Harris and Keturah L., his wife, Heirs of James Taylor, Deceased.

Purchaser in possession of land, not relieved in equity from payment of purchase money on ground of defect in vendor's title, unless fraud is proved—trustee—witness—competency.

A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase money, upon the two grounds of want

of title in the vendor, and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.

Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.

It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested, when he held certain notes only for the purpose of paying the money over to his clients, when recovered.

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

Patton was a citizen of Virginia, and Taylor of Kentucky.

On the 30th of January, 1818, Taylor addressed a letter, dated Frankfort, Kentucky, to Patton, in Virginia, in which he gave an account of certain other lands, and then proceeded as follows;

"I shall go from this to Lexington, to the court which commences this week, and do what I think right. I think your price too high for your land for me to make much, if any, profit from it; but must conclude to take it at five thousand dollars, for the two tracts of 1,000 acres each, payable one half in one year from the time you send me the deed, and the other half in two years from that time; I mean the two tracts entered and surveyed in the name of Thos. Gaskins; it appears to have been patented in the name of Hicks & Campbell; you can have the deed made out, as I suppose you have the patents, and I suppose the chain of title; which it will be necessary to forward, also to be recorded here, if it is not done; I shall expect a general warranty deed, expressing more or less as to the mode of authenticating the deed; our mutual friend, Col. Mercer, can give you information if you should be at loss, as he has conveyed to me several times. The land lies in the Virginia military district, and in the County of Hopkins. I presume you will have no objection to making the conveyance, and taking my bonds; and indeed this shall oblige me to consider the contract binding on me, as above stated, on receiving the deed as aforesaid for the said land, payable as aforesaid.

"If you want any security, or a mortgage, say so."

The letter then proceeded to speak of other matters. It may be proper to remark, that it was contended in the argument, that, in transcribing and printing, an error had occurred in the punctuation. The words "if it is not done" belonged, it was said, to the words which follow them, viz., "I shall expect," etc., which, it was argued, would materially change the meaning.

On the 13th of July, 1818, Patton replied, by a letter from which the following is an extract:

"Fredericksburg, 13th July, 1818.

"Gen. James Taylor:

"Dear Sir,—I am favored with yours of the 22d of June, and not less surprised than you seem to be about the 2,000 acres of land, in name of Thomas Gaskins, offered you, the 17th of March last year, at 15s. per acre; and, in yours of the *5th of July, you advise [*134 me to take $4,000, as the lands in that quarter were generally of an inferior quality, and could not rise in value. In that month I wrote to you that I would not take less than 15s. per acre; to this letter, though one was requested, I never had any reply, nor did you ever say you would accept my offer, until the 30th of January, six months after the last offer was made, for the letter of the 18th of December was only putting you in mind of the offer made in July. This letter, I will candidly acknowledge, I did not remember having written, not having kept any copy. There is something in the extended delay of your answer which I do not like, nor do I think it right; but I am anxious to avoid all misunderstanding, and, during my whole life, have never stood on trifles. You may, therefore, have the land at 17s. per acre, one half payable in twelve months from the time my offer was renewed, and the remainder twelve months afterwards. Your own bonds will be considered as sufficient security for the amount. By this decision I am placed in an awkward situation with the young man with whom I made a conditional contract, and who has not, as I am informed of, returned from that country.

"The land patents are in the name of Thomas Gaskins, for whose services the land was rendered, were by him convened to William Forbes, and by him to Hicks & Campbell, of whom I received and will give you a deed, with a warranty, as soon as you reply to this letter. I hope Willis's representatives will not buy, and you are at liberty to take any lot you think best, but I will not take 15s. for any part of it."

NOTE.—When equity will restrain the collection of purchase money, for failure of title, etc.

The suppression by the vendor of a knowledge of fatal defects in the title of the property conveyed constitutes such fraud as will authorize the interference of equity to prevent the collection of the purchase money, notwithstanding the remedy at law for breach of covenants for title, if the vendor be insolvent so that a judgment against him would be worthless. Ingram v. Morgan, 4 Humph. 66; Yonge v. McCormick, 6 Fla. 368; Ralston v. Miller, 8 Rand. 44; Buchanan v. Lorman, 3 Gill, 51; Strodes v. Patton, 1 Marsh. Dec. 228; Hilleary v. Crow, 1 Harr. & J. 542; Truly v. Wanzer, 5 How. 141; Wanzer v. Truly, 17 How. 584; Prout v. Gibson, 1 Cranch, C. C. 389; Fishback v. Williams, 3 Bibb, 342; Richardson v. Williams, 3 Jones Eq. 116.

Where the purchaser of land is in actual possession *under covenants* of warranty, he is not entitled to an injunction against the collection of purchase money, on the ground of failure of consideration resulting from want of title. In such cases eviction at law is regarded as an indispensable part of purchaser's claim to relief in equity, and he being still in possession under covenants of warranty, no injunction will be allowed. Bumpus v. Platner, 1 Johns. Ch. 213; Abbott v. Allen, 2 Johns. Ch. 519; Gayle v. Fattle, 14 Md. 69; Beale v. Selvely, 8 Leigh, 658; Wilkins v. Hogue, 2 Jones, Eq. 479; Elliott v. Thompson, 4 Humph. 99; Seuter v. Hill, 5 Sneed, 505; Truly v. Wanzer, 5 How. 141; Anon, 2 Ch. Cas. 19. But see, contra, Clarke v. Hardgrove, 7 Grat. 399; Koger v. Kane, 5 Leigh, 606; Bartlett v. London, 7 J. J. Marsh. 641; Yonge v. McCormick, 6 Fla. 368; Gay v. Hancock, 1 Rand. 72; Miller v. Argyle's Ex'rs, 5 Leigh, 460; Bullitt's Ex'rs. v. Songster's Adm'rs, 3 Munf. 55; Dorsey v. Hobbs, 10 Md. 412; Buchanan v. Lorman, 3 Gill, 51.

And in no event will mere general allegations of

On the 3d of September, 1818, Patton and wife executed a deed in fee-simple to Taylor for the land in question, with a covenant for further assurances and a general warranty.

The bonds for the purchase money appear to have been previously executed, and were as follows, viz.:

"I, James Taylor, of the County of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay to Robert Patton, of the town of Fredericksburg, and State of Virginia, the sum of $2,500, in current money, on the 30th day of January, 1819, as witness my hand and seal, this 5th day of August, 1818. James Taylor.

"Witness: Philip H. Jones."

On which there were the following receipts, to wit:

Receipt for $600.

"July 1st, 1817, received from James Taylor the sum of six hundred dollars of the within. Hugh M. Patton."

135*] *"By direction of Hugh M. Patton, agent of Robert Patton, the within note is credited with $450, as due January 30, 1819; and I this day received from James Taylor three hundred and seventy-three and eighty-two hundredths dollars, November 19, 1819.

"T. F. Talbott,

$373 82/100 "Attorney for Robert Patton."

"I, James Taylor, of the County of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay Robert Patton, his heirs or assigns, of the town of Fredericksburg, and State of Virginia, the sum of $2,500, in current money, on the 30th January, 1820, as witness my hand and seal, this 1st day of July, 1818.

"James Taylor. [seal.]"

On which there was the following assignment, to wit:

Assignment.

"For value received, I assign the within bond to Theo. F. Talbott.

"Robert Patton,

"By H. M. Patton, his Att'y in fact.

"July 1st, 1819."

In May, 1819, Hugh M. Patton, the son and agent of Robert Patton, went to Kentucky, and there executed the assignment above mentioned to Talbott, as security for a debt due by Robert Patton, and for the collection of which Talbott was the attorney.

On the 23d of October, 1819, Taylor addressed to Patton the following letter:

"Newport, October 23d, 1819.

"Sir,—At the time you forwarded me the deed for the land I bought of you in the County of Hopkins, patented to Thos. Gaskins, you sent me nothing to show how the title had passed to you. The land is listed on the auditor's books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you. When your son, Hugh M. Patton, your agent, was here, I inquired of him how you derived your title from Southcombe, and whether he had a regular conveyance from Gaskins. He told me that you had some kind of transfer from Southcombe for all his debts, lands, etc., but did not seem to know much about it, but promised me, immediately on his getting home, to inform you of my uneasiness and doubts whether the chain of title was perfect, and to notify me, and indeed to request of you to send me a copy of the different conveyances, or, if they were in this county, to inform me where they could be found. I have not *had a line from [*136 either of you since his return. I also consider myself very badly treated on another score. Your son had drawn a bill for $300, in favor of Talbott, of Lexington, on which he procured Mr. Talbott to be indorser; and, to indemnify him from doing so, he had lodged with him my bond to you for the first payment of the said land. Your son wished to get the bond released, and requested of me to give Mr. Talbott a guarantee that the bill should be duly honored. This I did not hesitate to do. A few weeks ago I received a notification from the F. and M. Bank of Lexington, that the bill, although accepted by you, had been returned to the bank protested for nonpayment; and I am called on by Mr. Talbott to take up the bill, and relieve him. I made every exertion in my power, when your son was here, to aid him in discharging a debt due here, which was in the hands of Mr. Talbott for collection, and was largely in advance for your taxes in this State and Ohio. The times, as to a good circulating medium, are truly embarrassing; but, had I been sure the title to the land sold me had been secure, I could have made sales to have met the payments, or nearly so; but I have been deterred from selling one acre, although offered the specie funds for a considerable purchase. Taking the whole transaction together, I must confess it is not such as I expected from Mr. Robert Patton, of Fredericksburg. If there had been any little defect in the title to this land, which can be removed, and I had been notified

failure of title or defective title sustain bill for injunction. French v. Howard, 3 Bibb, 301.

Where it does not appear that the vendor knew of, and fraudulently suppressed, the defect in the title, and no suit is prosecuted or threatened against vendee, and the latter is in possession under covenants of warranty, no injunction will be granted. Peters v. Bowman, 8 Otto, 98 U. S. 56; Noonan v. Lee, 2 Black, 499; Campbell v. Medbury, 5 Biss. 33; Beale v. Selvely, 8 Leigh, 658; Truly v. Wanser, 5 How. 141; Hile v. Davison, 5 C. E. Green, 228; 6 N. Y. 84; 6 Ohio, 217.

Where possession has not been given, relief in equity may be allowed against enforced payment of purchase money, particularly where no conveyance has been made. Hilleary v. Crow, 1 Harr. & J. 542; Nelson v. Owen, 3 Ired. Eq. 175.

Outstanding incumbrances, or outstanding equitable title, or fears that title will prove defective, will not warrant a court of equity in enjoining the collection of purchase money, where purchaser is in peaceable possession under covenants of warranty. Refield v. Woodfolk, 22 How. 318; Elliott v. Thompson, 4 Humph. 99; Seuter v. Hill, 5 Sneed, 505; Wilkins v. Hogue, 2 Jones Eq. 479; French v. Howard, 3 Bibb, 301; Truly v. Wanser, 5 How. 141.

Yet where action of ejectment has been commenced, and the bill charges that such action is founded upon a valid paramount title, the recovery of the purchase money may be restrained. Johnson v. Gere, 2 Johns. Ch. 546.

But a mere claim of paramount title, by third person, and action commenced on such title against the vendee, will not authorise injunction against vendor who has warranted the title, to prevent collection of purchase money. Gayle v. Fattle, 14 Md. 69.

But where vendee has no possession, or surrenders it, and has no conveyance, bill for such injunction may be sustained. Brannum v. Ellison, 5

of it and had it explained, I should not have been disposed to throw difficulties in the way, if there was a prospect to have any difficulty removed. When I go up, I shall have the records examined, and, if no chain of title can be found, I shall refuse to pay any more money till these difficulties are removed. I am sure you cannot think I am acting incorrectly in the course I am about to pursue. I am, Sir, your obedient servant, James Taylor.

"Robert Patton, Esq."

On the 20th of February, 1820, Taylor addressed to Patton the following letter:

"Washington City, February 29, 1820.

"Robert Patton, Esq.:

"Sir,—I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land sold me by you, lying in Hopkins County, on the waters of Pogue's Creek, and which I understood you purchased of Thos. Southcombe, to which letter I am without an answer, and at which I confess I am much sur- 137*] prised. I examined *the records at Frankfort, Ky., and it appears to me the conveyances are regular down to Southcombe; and, if you have a proper conveyance from him (Southcombe), all will be right, I think. I assure you I wish you and myself to arrange our business in the most amicable manner; but you must be sensible into what difficulties I was thrown by not receiving the wished-for information, which was promised me by your son and agent, Hugh M. Patton, Esq., and then requested of you in my letter aforesaid, addressed to you specially on the subject, and particularly when I was compelled to take up your said son's bill for 300 and odd dollars, which I had, at the request of your said son, guaranteed should be paid by you, which you failed to do, and which I had to pay, to exonerate Theo. F Talbott, in the F and M Bank of Lexington. The true state of this business I did not understand till after I had paid the bill, and I do not think said Talbott treated either yourself or myself with fairness; as he afterwards informed me he was authorized to redraw, but which he told me he had no idea of doing, to make himself responsible. Under all these embarrassments, I informed you I could not think of selling the land, until I was assured the legal title was in you before you sold to me. Will you be good enough to give my agent, Philip H. Jones, the necessary information, and, if you have them, the proper conveyance from Thos. Southcombe to you for the said tract of land; and, if not, to send me the document, or an authenticated copy of it, under which you claim the said tract of land. I am, very respectfully, Sir, your obedient servant,

"James Taylor"

On the 20th of June, 1820, Patton addressed the following letter to Taylor, which closed the correspondence:

"Fredericksburg, 20th June, 1820.

"Gen. James Taylor:

"Dear Sir,—Hearing of your being in Washington in the spring, and calculating on a certainty of seeing you in this place, I was greatly disappointed at not having had some conversation with you during your stay, or previous to your departure from the city. By a letter just received from Mr. Talbott, covering a duplicate of one of yours to him of the 1st instant, wherein you say you will resist the payment of the bonds assigned Talbott by my son, when in Kentucky. This information has surprised and astonished me much. And surely, my dear sir, you will not persist in this course, but, on mature consideration, pay the amount. When I sold you these 2,000 acres of land, Southcombe had long been dead; hence, as his agent, which you know I was, I could not make a deed *as such, but I did what you required. [*138 I made you a deed in my own name, with a general warranty, and no objectioon was made to this conveyance until the money was required. I sent you the original patents by Murdock Cooper, of your State, and I now subjoin a short history of this land. Your 2,000 acres, together with 1,500 more, were granted Col. Gaskins for military services, by him, sold to William Forbes, by Forbes sold to Robert Campbell, of Richmond (once Hicks & Campbell), and by Robert Campbell and Ann, his wife, conveyed to Thomas Southcombe; which last deed is in my possession. All Southcombe's matters have been settled long ago, when this land was rated at $2, and paid for by me. And there is not a human being has a shadow of claim to this land but myself; and I have secured it to you by my conveyance. We have long been acquainted; we have long been friends. You have acted as my agent much to my satisfaction; and I ever reposed the fullest confidence in your honor and integrity. Under these circumstances, it would give me great pain if any misunderstanding should arise between us; and I cannot help thinking that, on

Jones, Eq. 435; Brittain v. McLean, 6 Ired. Eq. 165.

Nor where vendee has been in possession so long as to have acquired title by adverse possession. Amick v. Bowyer, 3 West Va. 7.

Nor where purchaser has accepted conveyance without warranty of title, in the absence of fraud or concealment on part of vendor. Price's Ex'rs v. Ayres, 10 Grat. 575; Keyton v. Brawford, 5 Leigh, 39; Carrico v. Froman, 2 Lit. 178; Sutton v. Sutton, 7 Grat. 234; Lucas v. Chapeze, 2 Lit 31.

Nor in case of sale of land in gross, will equity interfere on account of deficiency in amount of land conveyed. Keyton v. Brawford, 5 Leigh, 39; except whose purchase was made relying entirely on vendor's representations as to amount, which representations prove false. Lee v. Vaughan, Ky. Dec. 288.

In the latter case purchase money may be enjoined to the extent of the deficiency in the land. *Stroder v. Patton*, 1 Marsh. Dec. 228.

But where land is sold with covenants of warranty, and deed of trust given to secure payment of purchase money, discovery of adverse claim to the land has been held sufficient to warrant a court of equity in enjoining a sale under the trust deed until the cloud resting on the title is removed. Gay v. Hancock, 1 Rand. 72; Miller v. Argyle's Ex'rs, 5 Leigh, 460; Galloway v. Finley, 12 Pet. 264.

Nor, is the right to an injunction for defective title impaired by the vendor's seeking to collect the unpaid purchase money from a third person on a collateral security assigned to such person by the purchaser. Clarke v. Hardgrove, 7 Grat. 399; Ingram v. Morgan, 4 Humph. 66.

Where vendor is without title, and in no condition to convey, equitable relief has been allowed, and judgment for purchase money enjoined. Galloway v. Finley, 12 Pet. 264; Buchanan v. Lorman, 3 Gill, 51; Dorsey v. Hobbs, 10 Md. 412.

Or, where purchaser was kept in ignorance of

due consideration, you will change your course, and pay the bonds assigned Talbott, which was done under very peculiar circumstances, and may have placed that gentleman in a very disagreeable situation respecting them. I am, dear Sir, your most obedient servant,

"Robert Patton."

On the 7th of July, 1820, Patton brought a suit against Taylor upon the bonds in the Circuit Court of the United States for Kentucky, and at November Term, 1820, obtained judgment by default.

At the same term, viz., November, 1820, Taylor filed his bill on the equity side of the court, reciting the purchase and continuing thus:

"And at the time of the purchase aforesaid, and the execution of the said promissory notes, your orator entertained no doubt that the said Patton had a good title to the said land, and was enabled to convey the same to your orator; but now, so it is, may it please your honors, your orator has since discovered that the said Patton has no title for the said land from the said Southcombe, who is dead, and whose heirs are unknown to your orator. That the said Patton has nevertheless commenced actions on the said notes, on the common law side of this court. And your orator, being unable to make defense at law, the said Patton has recovered judgments on the said notes. Your orator annexes hereto, as a part of this bill, a letter from the said Patton, acknowledging his 139*] defective title to *the said land. That your orator has already made sundry payments on account of said notes. And he apprehends that the said Patton will proceed to enforce payment of the residue, unless prevented by the interposition of this honorable court, which would be contrary to equity. In tender consideration whereof," etc., etc.

The bill then prayed for an injunction, which was granted.

In December, 1822, Patton filed his answer, admitting he had no legal title to the land, but insisting that he had bought it from Southcombe, and paid him for it on a final settlement of their affairs; that he had a power of attorney from Southcombe to sell it, which he did not act upon, owing to Southcombe's death; that he took possession of the land more than twenty years past, paid the taxes regularly, till he sold to Taylor, who entered and has held the possession ever since, and has sold part of the land; that Taylor was for years his agent to pay taxes on his lands, in Kentucky, knew his titles generally, and particularly the defect of the title to this land, and bought relying upon his warranty; and that the possession under him prevented any reasonable apprehension from adverse claims. The answer further alleged, that having received a payment of part of the first note on the 1st of July, 1819, the defendant thereupon, with the consent and in the presence of Taylor, assigned the notes to T. F. Talbott, to be applied in payment of a debt held by Witherspoon, and relies that the assignment prevents a cancelment of the notes.

At the May Term, 1823, Taylor filed an amended bill, charging that the purchase was by letter; that Patton had become insolvent, having been at the time of sale a man of wealth; and exhibiting copies of three letters, addressed by him to Patton of the 30th of January, 1818, 23d October, 1819, and 29th February, 1820, and calling upon Patton to produce the originals or to admit the copies to be correct, and to show what evidence he had of a conveyance from Southcombe.

Robert Patton having died, Taylor, in November, 1829, filed a bill of revivor against Hugh M. Patton and others, his children and heirs at law, alleging that their ancestor died insolvent and intestate, and that no administration had been granted upon his estate.

The heirs of Robert Patton answered in July, 1844, and stated that they knew nothing of the contract between Taylor and their father; and that they adopted the answer of the latter. Hugh M. Patton stated, that, as the agent of his father, he went to Kentucky to pay off a decree, which had been obtained by Bledsoe's heirs, and assigned to Talbott, an attorney at law, in satisfaction of a debt to Witherspoon and Muirhead; *that he re- [*140 ceived from Taylor $600 on the first note, and then drew upon him, in favor of Talbott, a draft, which he would not accept; and that he afterwards assigned the notes to Talbott, without having heard of any objection by Taylor to the title of the land. And, in conclusion, the heirs all say that they cannot exhibit the originals of the letters shown by Taylor; nor have they any testimony, written or other, to show in what manner their father derived his title from Southcombe, other than he states in his answer.

In November, 1844, Hugh M. Patton appeared in the suit as administrator of his father, and adopted the answer already filed as his response in that character.

In May, 1845, the cause came on for hearing, a general replication having been filed.

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the defective title, by vendor's false and fraudulent representations, until after judgment was obtained for the purchase money. Fitch v. Polke, 7 Blackf. 564.

Relief by injunction may be extended to enforced sales under judicial process in cases of defective title. Bartlett v. London, 7 J. J. Marsh. 641.

In such case confirmation of sale should be resisted in the proceedings at law, wherein such sale was ordered. Threlkelds v. Campbell, 2 Grat. 198.

So, injunction allowed, where vendor agreed not to sue for purchase price until after quantity of land shall be definitely ascertained, and brought suit before. Bullitt's Ex'rs. v. Songster's Adm'rs, 3 Munf. 55.

So, where possession is merely under covenant to convey, without deed, and title prove defective. Buchanan v. Alwell, 8 Humph. 516.

Or where vendor has failed to comply with his agreement to procure relinquishment of other outstanding titles, or of rights of dower. McKoy v. Chiles, 5 Mon. 259; Jaynes v. Brock, 10 Grat. 211.

Perpetual injunction will seldom be granted; and only until the defective title is cured, or until purchaser can prosecute at law on his covenants of warranty or has the benefit of his purchase. Galloway v. Finley, 12 Pet. 264; Mordock v. Williams, 1 Overt. 325; Moore v. Cook, 2 Hayw. Tenn. 84; Lovell v. Clinton, 2 West Va. 410; Swain v. Burnley, 1 Mo. 286; 2d. ed.; Grantland v. Wight, 2 Munf. 179; Markham v. Todd, 2 J. J. Marsh. 364; Edwards v. Strode, 2 J. J. Marsh. 506.

Injunction not granted where purchaser knew title was doubtful or defective. Williamson v. Runey, Freem. Ch. 112; Merritt v. Hunt, 4 Ired. Eq. 406; Jackson v. Norton, 6 Cal. 187. See, also, High on Injunctions, secs. 149, 150, 278–308.

As to the defense of a failure of title to a note given for purchase money, see note to Greenleaf v. Cook, 2 Wheat. 13.

As to lien for purchase money, see note to Bailey v Greenleaf, 7 Wheat. 46.

On the opening of the cause, the complainant moved the court to reject and suppress the deposition of Theodore F. Talbott, taken and filed on the part of the defendants, and when it was offered on their part for proof, objected to its being read, on the ground that the witness was, when he deposed, interested in the event of the suit against him, the complainant, and with the defendants, and, for proof of his ground of objection, relied on the matter stated by the witness himself, in his deposition, and read the bond of the witness as the surety of the defendants' intestate and ancestor for costs, in his action at law against the complainant, wherein the judgment herein enjoined was recovered by default; and also read the assignment to the witness of one of the promissory notes of the complainant, the one payable on the 30th of January, 1820, on which the judgment enjoined was rendered in these words:

"For value received, I assign the within note to Theodore F. Talbott.

"Robert Patton,
"By Hugh M. Patton,
"His Attorney in fact.

"July 1st, 1819."

But the decision of the matter not having been insisted on, it was reserved for discussion with the merits of the cause. Whereupon, the complainant read the depositions of Matthew T. Scott, Patterson Bayne, and James E. Davis, for proof that the witness was not credible, in case of the decision of the court that he is competent to testify. Whereupon the cause progressed, and this matter having been therein fully discussed, and the court now sufficiently advised thereof, it seems to the court that the deposition of Talbott, on the grounds of objections by the complainant, and because the matters stated as facts by the witness, neither 141*] of themselves, nor in connection *with the other proofs, are in any way material in the cause, ought to be rejected and disregarded. But in order that, on any revision of the decree which shall be rendered, the defendants may have the benefit of the matters stated in the deposition, if worth to them anything, and the witness is competent, whilst the complainant has the benefit of his objections to the competency of the witness, or of his proofs to establish that he is not credible, the depositions are all allowed and read, subject to the above objections, and so retained in the record, to be respectively good for what they are worth, or held for naught, according to the law of the case.

On the 13th of May, 1845, the Circuit Court decreed a perpetual injunction against Patton, rescinded the sale and conveyance of the land, and gave directions for placing the parties in the condition they were in at the time of the contract.

From this decree the heirs of Patton appealed to this court.

The cause was argued by Mr. A. H. Lawrence and C. S. Morehead, with whom was Mr. Badger, for the appellants, and by Mr. Loughborough and Mr. Underwood, with whom was Mr. Ewing, for the appellees.

The argument on the part of the appellants was as follows:

This is a bill for the rescission of an executed 142

contract for the sale of land, on the ground of defect of title and the insolvency of the vendor. No mistake, no fraud, no misrepresentation being set forth as the grounds of equitable interference; but the facts that the complainant had received a defective title with warranty, not knowing of the defect, and that the warrantor had since become insolvent, are relied on as the reasons for the interposition of a court of equity.

I. The first position which the counsel for the plaintiffs in error take is, that there are not set forth in the original and amended bill sufficient legal grounds to rescind an executed contract; and that, if every allegation therein had been admitted by the defendant, the court could not properly have decreed according to the prayer of the complainant.

II. The second position is, that the important allegations in the bill, though they should in themselves be deemed sufficient in law, have neither been admitted nor sustained by proof.

The first proposition, then, is, that there are not sufficient grounds set forth in the bill and its amendment for the rescission of an executed contract, even if all the allegations had been admitted in the answer.

What are those allegations? Why, that the complainant, Taylor, purchased from Patton, the defendant, 2,000 acres of *land for [*142 $5,000, for which he gave two several promissory notes. That Patton executed a conveyance to complainant for said land, with a covenant of general warranty. That at the time of said purchase, complainant "entertained no doubt that the said Patton had a good title to the said land." That complainant has since discovered that the said Patton has no title to the said land, and that defendant has nevertheless commenced actions on the said notes; and that, at the time of said purchase, defendant was supposed to be a man of opulence, but has since become insolvent. This embraces every material averment of the bill and amendment. A purchase, conveyance with general warranty, defect of title, ignorance on the part of the vendee of such defect, and the insolvency of the vendor, compose the gravamen of the complainant's allegations. There is no charge, either technically or substantially, of fraud, artifice, misrepresentation, or circumvention of any sort, actual or constructive.

In discussing the legal sufficiency of this bill, we leave out of view all of the cases cited in the printed brief on the other side, in which misrepresentation, or fraudulent concealment, or fraud of any kind, formed an element. For the present we take the bill as it is.

The decisions (and we quote, more especially, those in Kentucky) may be reduced to the following heads, as to the rescission of contracts in the absence of fraud.

1st. Where the contract is executory, the vendee may, under circumstances, obtain a rescission, if the vendor has no title. Miller v. Long, 3 Marsh. 326; Cummins v. Boyle, 1 J. J. Marsh. 481; Gale v. Conn. 3 J. J. Marsh 540; Payne v. Cabell, 7 Mon. 202; Waggener v. Waggener, 3 Mon. 556.

2d. Where the contract is executed by conveyance, with warranty of title, there can be no rescission in any case that has not been tainted by fraud. Simpson v. Hawkins, 1 Howard 7.

Dana, 395; 1 J. J. Marsh. 481; Gale v. Conn, 3 J. J. Marsh. 504; Wiley v. Fitzpatrick, 3 J. J. Marsh. 583; Campbell v. Whittingham, 5 J. J. Marsh. 100; 7 Mon. 292; Thompson v. Jackson, 3 Rand. 504.

3d. There is no relief in equity, by injunction or otherwise, where the contract has been executed by conveyance with warranty, and the vendee let into possession, unless the warranty has been broken, and an eviction taken place. Simpson v. Hawkins, 1 Dana, 305, 328; Rawlins v. Timberlake, 6 Mon. 232; Taylor v. Lyon, 2 Dana, 278; Luckett v. Triplett's Ad'mr, 2 B. Mon. 40; Bumpus v. Platner, 1 Johns. Ch. 218; Abbot v. Allen, 2 Johns. Ch. 523; Edwards v. Morris, 1 Ohio, 532.

143*] *4th. There may be relief in equity of some sort, as by arresting the payment of the purchase money, or a part thereof, in case of eviction and the insolvency of the warrantor, or the appropriation of the purchase money to remove an incumbrance, where the warrantor is insolvent and unable to remove it, but not a rescission of the contract. Morrison's Adm'r v. Beckwith, 4 Mon. 75; Rawlins v. Timberlake, 6 Mon. 232; Simpson v. Hawkins, 1 Dana, 305; 2 Dana, 278, 279; 2 B. Mon. 40.

5th Possession taken generally amounts to a waiver of the ordinary equitable right of objection to the title. Calcraft v. Roebuck, 1 Ves. Jun. 226; Burrough v. Oakley, 3 Swanst. 168; Fleetwood v. Green, 15 Ves. Jun. 594; Margravine v. Noel, 1 Madd. 316; Burnell v. Brown, 1 Jac. & Walk. 173; Fluyder v. Cocker, 12 Ves. Jun. 26.

II. But suppose we are wrong in this view of the case, still it is contended that the essential allegations in the bill have neither been admitted nor proved; or, in other words, that, upon the pleadings and proof, the complainant was not entitled to the relief sought.

A preliminary inquiry of importance arises as to the admissibility and effect of the letters contained in the record.

The only letters alleged to have passed between Patton and Taylor, which have been so proved as to make them legal evidence against the defendant, are those marked A and B, on pages 32 and 33 of the record. The letter in Patton's name, which is made an exhibit in the case, and is found on page 4 of the record, is not proved to have been written by Patton; and the letters from Taylor, alleged copies of which are filed as exhibits with the amended bill, and are found on pages 8, 9, 10, and 11 of the record, are not proved either to have been written or received. They are, consequently, not evidence in the case. They are not admitted in the answer to the amended bill, and are consequently denied, and are no proof against the defendant, though (being allegations of the complainant) they are evidence in his favor. 2 Dan. Ch. Pr. 974–976; Young v. Grundy, 6 Cranch. 51.

If we are right in this, then the complainant's case is stripped of every vestige of support from evidence as to the essential allegations of the bill.

But we go further, and assert, that if these letters were all proved, as alleged, the case of the complainant would not be materially changed.

How would the case then stand upon the pleadings and proof? The vital allegation in the bill is, that, at the time of the purchase, complainant "entertained no doubt that Patton *had a good title to said land," but [*144 has since discovered that he had none, etc. Record, p. 3.

The answer (p. 6) denies the allegation of ignorance of the defect on the part of the complainant, and avers, on the contrary, that he was his (Patton's) agent for many years; well knew the nature of his titles in general, and well knew the title to these 2,000 acres in particular; and was well apprised of the defective link in the chain of title thereto; and accepted a deed with general warranty, relying on the warranty, etc.

Here, then, the parties are at issue. The complainant alleges that he was ignorant of any defect in the defendant's title, and the defendant positively denies that allegation. Has the complaint proved it, even admitting all the letters in the record to be properly in the case? We think that not only has he failed to prove the allegation, but that the evidence in the case fully sustains the denial.

There is not one scintilla of direct evidence that the complainant made this purchase in ignorance of the title. And the only indirect or circumstantial evidence of that fact is, the general presumption that a man would not buy a defective title, knowing it to be so, and the literal construction of a letter of the 13th July, 1818. Record, p. 32.

That letter is not (like the others) an exhibit in the case, but is introduced on proof of handwriting. It is relied on in the brief on the other side as the main prop of the complainant's case. An interpretation is given to it entirely different from that which we shall hereafter show properly belongs to it; but take it as the other side understand it, and does it support the allegation in the bill, that Taylor was ignorant of the state of Patton's title? What is their interpretation of it? Why, they make it amount to a misrepresentation by Patton to Taylor respecting the title; they make it amount to an assertion that he (Patton) had a conveyance of the land to himself. Now, suppose the letter does amount to a misrepresentation of the title (which we deny), does that prove Taylor's ignorance of the real state of the title at the time of the purchase? We think not, for two reasons:

1st. That there is no logical or legal connection between the falsehood of one party and the belief of the other party in that falsehood. It is a non sequitur, as well in law as in morals, that a man must be ignorant of the truth because another man has uttered an untruth in his presence.

2d. Because this letter was written six months after the time when the bargain was concluded by the acceptance of Patton's previous offer.

The amended bill alleges (Record, p. 8) that the complainant *agreed to the pur- [*145 chase by a letter dated 30th January, 1818, and exhibits a copy of the letter; and yet the brief on the other side asserts that it was the letter of the 13th of July, 1818, which induced Taylor to make the purchase, which Taylor himself says he had made by letter the January previous, and produces the letter to prove it.

It is manifest, then, that the complainant has utterly failed to prove the most important allegation in his bill.

Having thus shown that the complainant's case, as set forth in his bill, is not sufficient in law for the rescission of an executed contract, and that, if it were, it is not supported by requisite proof, we would now ask the attention of the court to a position taken by the other side, in the printed brief, though not disclosed by the pleadings.

It is, that the proof presents a clear case of actual fraud, such as courts of equity have always recognized as sufficient in itself for the setting aside of any contract.

To this view of the case we have several answers, either of which in itself would be sufficient:

1st. Fraud is not alleged in the bill, either formally or in substance; and, consequently, if it should be proved, cannot be made the ground of a decree. It should have been put in issue by the pleadings. Vattier v. Hinde, 7 Pet. 282; Boone v. Chiles, 10 Pet. 177; Bein v. Heath, 6 How. 241; also, 3 Rand. 507, 5 Johns. Ch. 82, 83; 11 Ves. 239.

2d. There is nothing proved which is a sufficient ground for the canceling of an executed contract, even admitting all the letters to be properly in the case.

We take the law as it is laid down by this court in Smith v. Richards, 3 Pet. 36, adopting the views of Justice Story in 1 Eq. Jur. secs. 200, 202. That a misrepresentation, in order to constitute a fraud relievable in equity, must be of something material, constituting an inducement or motive to the act or omission of the other, and by which he is actually misled to his injury; and it must be of something in which the other party places a known trust and confidence in the other, and not equally open to both parties for examination and inquiry.

Let us apply this doctrine to the facts in this case.

The only representation of any sort, as to title on the part of Patton, to be found in the whole record, is the letter of July 13th, 1818.

In this letter Patton says: "The land patents are in the name of Thos. Gaskins, for whose services the land was rendered, were by him ——— to Wm. Forbes, and by him to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty, as soon as you reply to this letter."

146*] *On this letter Mr. Loughborough relies to make out his proof of fraud; and in it (if anywhere) resides all the misrepresentation to be found in the case.

With regard to this letter, we would first remark, that the character and relation of the parties, and the circumstances of the case, go strongly to show that it never was intended by the writer, and was never understood by him to whom it was written, to convey the idea which a casual reading of it might convey to a stranger. There were relations between these parties which rendered an indistinct allusion as intelligible as a labored explanation. Taylor was the agent of Patton, who, in regard to these lands, was himself the agent of Southcombe, in whose name these lands had for years stood and been taxed, and in whose name *Taylor himself* had for years paid those taxes. *Patton knew that* Taylor was aware of Southcombe's title, and yet he sets down and writes to Taylor a letter, which, if it meant what the other side suppose, he well knew Taylor would at once perceive to be false. If the expression "to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty," means that Hicks & Campbell had conveyed this land to him in his own name, why, it was not only a falsehood, but the most idle of all falsehoods, because told to a man who he knew was perfectly aware of the intermediate title of Southcombe. The parties to this transaction were no higglers for a bargain; they were men of character and standing; they were men of sense. The construction, then, which would make a single expression in a hasty letter the ground of so serious an accusation against such a person should be an unavoidable construction. Such is not the case here. There is a plain and fair construction of this expression, which is consistent with the truth and the good faith of Patton. It is the literal meaning of the language. He did receive a deed from Hicks & Campbell, not in his own name, but in the name of his principal, Southcombe; and he means exactly what he means in the letter found on the 4th page of the record, where he says, "and by Robert Campbell and Anne, his wife, conveyed to Thomas Southcombe; which last deed is in my possession."

If, then, it had been his intention to deceive Taylor, would he not have said that he had a deed from Southcombe, rather than from Hicks & Campbell? How, then, was the matter to be explained? Why, Patton was Southcombe's agent, and Taylor knew it, with a full power of attorney to sell lands. As such agent he had received a deed for Southcombe; and, as such agent, he then had the power to give a deed. Had Southcombe lived, there would never have been any difficulty. But Southcombe having died, and of course the power of attorney *having died with him, Patton, who [*147 had in the meantime bought the lands, and acquired an equitable title thereto, had not procured a legal title.

There can no doubt that this is the true explanation, from the character of the men and their relation to each other; and there can be no doubt that it was so understood by them at the time, and afterwards, inasmuch as Taylor never once alludes to any misrepresentation in this letter; never speaks of any inconsistency between the letter and Patton's statement of the chain of title in his letter of June 20th, 1820; takes no notice of any misrepresentation, either in his original or amended bill; does not even make this letter an exhibit in the case; and always speaks afterwards of Southcombe's title as a matter well known to him. We think, therefore, that we are justified in asserting that the construction now put by counsel upon that letter was not that which the parties put upon it.

But if an unfavorable construction of this letter is insisted on (as it doubtless will be), then we say that Taylor was not misled or deceived by it. It stated what he knew to be false. It gave a chain of title without embracing Southcombe's title at all, and yet Taylor had the best reason in the world for knowing that Southcombe had until recently, and for years, been the owner of the land in controversy.

Taylor, in his letter dated October 23d, 1819, says: "The land is listed on the auditor's books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you"

Also, in his letter of February 29th, 1820, he says: "I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land sold me by you, etc., and which I understood you purchased of Thomas Southcombe," etc.

And the deposition of Winston says that, in 1815, "I was requested to visit said lands by General James Taylor, who acted as agent for Robert Patton, of Fredericksburg, Virginia, who was agent for Thomas Southcombe."

Taylor then knew that Patton had not, in his own name, received a deed from Hicks & Campbell, but that, if he had any valid conveyance at all, it must have been from Southcombe.

And further, if the letter of July 13th, 1818, contained a downright misrepresentation, still it did not lead to, nor form any inducement to, the contract sought to be cancelled.

We have already referred to the allegation in the amended bill, commencing as follows: "Your orator further shows that the contract for the purchase of the land from the defend-
148*] ant *was made between the parties by letters; your orator agreeing to the purchase by a letter, under date of January 30th, 1818, addressed to the defendant at Fredericksburg." Here, then, the complainant himself avers that he had agreed to the contract six months prior to this letter of July 13th, 1818. Admitting, then, that this letter of July 13th contained a downright falsehood, and admitting that at the time Taylor believed it, still it did not lead to the contract; it did not form an inducement on Taylor's part to that contract, and can therefore have no weight with the court upon the question of rescinding that contract.

But it is further maintained, that Taylor has an indefeasible title by twenty years' adverse possession.

Taylor received legal possession of the land with his deed, which bears date September 3d, 1818, and has never been disturbed in his possession up to the day of trial.

In an analogous case Jarboe v. McAfee's Heirs, 7 B. Mon. 282, the following language is used: "In the duration of the possession, it ought to be brought up to the time of trial, and not to be made stop at the commencement of the suit." The possession of the vendee up to that period inures to the benefit of, and goes to strengthen, his vendor's title. See Voorhies v. White's Heirs, 2 A. K. Marsh. 28; Coussmaker v. Sewall, 2 Sug. App. 336.

The sale of a portion of the land, for the direct tax, and the marshal's deed to McLean, can present no difficulty in the case. It shows on its face that the land was sold as the property of Gaskins, the patentee, when all parties agree, and the record shows that it was then the property of Southcombe, entered in his name, and the taxes paid for him by Taylor himself.

If this were not the case, it is not shown that the requisitions of the law were complied with by the marshal, and the law is well settled that no presumption is indulged in favor of such a deed. See Taylor's Heirs v. Whiting, 2 B. Mon. 269–272; 9 Cranch, 69; 3 Cond. Rep. 271–274; Ib. 395.

In the case of lands sold for the nonpayment of taxes, the marshal's deed is not even prima facie evidence that the prerequisites of the law have been complied with; but the party claiming under it must show positively that they have been complied with. Williams v. Peyton, 4 Wheat. 77.

The case thus far has been discussed without reference to the assignment of the notes upon which the judgments enjoined was obtained, or to the controverted deposition of Talbott.

The deposition of Talbott states that the notes were transferred to him for the benefit of Witherspoon and Muirhead, and that Taylor had notice of, and assented to, the assignment

*Is Talbott a competent witness? [*149

1st. He held the notes of Taylor as a mere trustee, to be applied, when collected, to the extinguishment of a debt due Witherspoon and Muirhead. They were assigned to him for that purpose only. That a trustee is a competent witness, see 1 Starkie on Ev. 168; 6 Binney, 481; 1 Rand. 219; 2 Ib. 563; Doug. 139; 4 Burr. 2254; 1 P. Wms. 287; 3 Atk. 604; 13 Mass. 61.

2d. Without any contract whatever, he states that he expected to charge five per cent. commission whenever he should collect the debt of his clients. This has never been held a disqualification of itself alone. An agreement for a sum contingent on success might perhaps affect his competency.

3d. Talbott executed a bond, as surety for Patton, to pay the costs in the action at law against Taylor. The condition of that bond was, that it was to be void if Patton or Talbott should pay "all cost that may be incurred in said suit, or with which he may become legally chargeable."

The common law suit having been decided in favor of Patton, Talbott did not become legally chargeable with any costs to Taylor; and the result of the present suit, cannot, in any manner, change his liability. The costs against Taylor of the action at law may be perpetually enjoined, yet Talbott would be no further bound than if the injunction were dissolved. In either case, his liability on his bond would be precisely the same. It is not perceived, therefore, how his having executed this bond can affect his competency as a witness.

But Talbott's credibility has been assailed by depositions of three witnesses.

Objection might be taken to the kind of evidence given to impeach the character of Talbott. But, allowing its admissibility for that purpose we say that the testimony of Talbott is corroborated in its material statements. The answer of Hugh M. Patton, so far as it goes, corroborates Talbott's deposition.

Talbott's statement, also, that a receipt for $1,500 was written on the wrong note, which note was afterwards destroyed, and a new one written and dated on that day, is corroborated by the fact that one of the notes in the record is dated as he says.

The case, as the counsel for the appellants conceive, stands thus: The complainant in the

court below files a bill in which he alleges that he had purchased from the defendant 2,000 acres of land, and that he had received a deed, with a warranty, supposing the title of his vendor to be good. He alleges the subsequent insolvency of the vendor, the failure of the title, and prays that the contract may be annulled. 150*] The defendant *denies the allegation of the complainant's ignorance of the state of the title, which puts the complainant to the proof of the fact. For proof he offers copies of letters from himself to the defendant, which are not admitted by the answer, nor shown to have been ever received, and are therefore not evidence in the case. He also offers, upon proof of handwriting, a letter written and dated six months after the time when he himself alleges the contract to have been concluded, in proof of his ignorance of the state of the title at the conclusion of the contract, and of fraudulent misrepresentation on the part of the defendant. This constitutes the substance of the complainant's case.

For the appellants it is insisted, that whatever equity there is in the bill is sworn away by the answer; that the evidence offered, so far as it is admissible, is not pertinent to the point in issue, namely, the ignorance of complainant of the defect in title, or, if pertinent, does not establish that fact; and that as to the alleged fraudulent misrepresentation (even if it amounted to such), inasmuch as it was not put in issue by the pleadings, did not mislead the complainant to his injury, was long subsequent to the date of the contract, and therefore formed no inducement to it, and was upon a subject equally open to both parties, it was consequently not sufficient in law or equity to establish that fraud upon which an executed contract will be rescinded.

The argument on the part of the appellees was as follows:

I. Before noticing the principal questions in the cause, the counsel for Taylor will ask the attention of the court to the objections, sustained by the Circuit Court, to the competency of Talbott as a witness.

1. His deposition states, that, as attorney for Witherspoon and Muirhead, he had obtained judgments against West, who assigned to him eight tenths of a decree of Bledsoe's heirs against Patton, which he took as a security, and for the use of Witherspoon and Muirhead. That H. M. Patton, on his visit to Kentucky, in 1819, drew bills on his father, by which the means were raised to obtain the remaining two tenths of the decree; and assigned to him, and placed in his hands, the two notes of Taylor, to be collected and applied in payment of the decree.

Talbott, then, was the agent and attorney of Witherspoon and Muirhead for the collection of their claim against Patton on the decree, and he was the trustee of Patton to collect the amount due from Taylor, and apply it in discharge of the decree. He says the notes were assigned to him. They were assignable by the law of Kentucky, and the assignee has the 151*] *legal right of action. The assignment of one of the notes appears in the record.

Assuming his statement to be true, had he not such an interest in the subject as disqualified him. He holds and legally owns the debts which Taylor seeks to enjoin. He should have sued at law in his own name as assignee; and his use of the name of Patton as plaintiff was in some sense a fraud, to give the Circuit Court jurisdiction, or perhaps designed to enable him to be a witness. Had Taylor appeared in the action at law, he might have successfully pleaded the assignment to Talbott in bar. Neyfong v. Wells, Hardin, 562.

May an assignee, by suing in the name of his assignor, make himself a competent witness? That he cannot was decided in Gallagher v. Milligan, 3 Penn. 178; McKinley v. McGregor, 3 Whart. 399. Talbott, the assignee, suing in the name of Patton, might have been attached for the costs. Ontario Bank v. Worthington, 12 Wendell, 597.

2. But Talbott was not a trustee merely. He had a material interest to be promoted by the success of the party in whose behalf he testified. He says Patton and West are insolvent. Then the debt due to Witherspoon and Muirhead can only be made out of Taylor. True, the witness says he has no interest in the suit or its event, other than the compensation he may be entitled to for his services; and that he has no conditional or contingent fee depending on the recovery. Yet, on cross-examination, it appears that, if he had received the money, he would have charged a commission on it of five per cent., and he yet expects to charge it when the money is collected. Such commission is not unreasonable; and doubtless, if Talbott had received the money, he would have been permitted to retain it. Neither West nor Patton himself could interpose between him and Taylor, or the marshall, and prevent his receiving the debt, nor would there be any necessity for a prior engagement to enable Talbott to retain the commission. Then, does not the witness testify in the view that, if the party producing him succeeds, he will get a fund out of which to retain a commission, and that, if he fails, it will be lost? A witness so situated was held incompetent, in Maryland v. Jefferson, 2 Pick. 240; New York Slate Co. v. Osgood, 11 Mass. 60.

3. Talbott gave bond, as the surety of Patton, to pay the costs of the action at law against Taylor. He was thereby rendered incompetent in that case. Chadwick v. Upton, 3 Pick. 442; Jones v. Savage, 6 Wendell, 658; Miller v. Henshaw, 4 Dana, 333; Jack v. Carneal, 2 A K. Marsh. 518; Brandigee v. Hale, 13 Johns 125.

*The ultimate liability for these costs [*152 depends upon the result of this suit. If Taylor fails, he will have to pay all the costs at law. If he succeeds, Talbott will have to pay all that portion of them provided for in the bond. He has therefore the same disqualifying interest in this cause that he would have had in the action at law. He will gain or lose by the direct operation of the decree.

II. But if Talbott can be heard as a witness, the attention of the court is asked to the depositions of Davis, Bayne, and Scott, which discredit him.

III. The equity of Taylor cannot be affected by a transfer made without his knowledge.

IV. But suppose Taylor was present at, or assented to, the assignment, is he thereby precluded from asserting his equity?

V. The copies of Patton's letters are evidence.

[The argument upon these preliminary points is omitted.]

VI. We will now proceed to the questions arising upon the merits.

In the first place, it will be observed that the treaty for the sale, and the sale itself, were wholly by letters between Taylor, at Newport, Kentucky, and Patton, in Fredericksburg, Virginia. That between these parties there existed friendship, and an honorable confidence, and that Taylor was the agent to pay taxes on Patton's land in Kentucky.

The land which was the subject of the sale is in Hopkins County, Ky. 200 miles from Taylor's residence. Taylor had never seen it prior to the purchase, nor has he since, so far as appears in the case.

The sale was first proposed by Patton.

[The argument here reviewed the letters.]

The tenor of these letters leaves no room to doubt that Taylor was not hunting for objections to get clear of the contract, but the contrary; though he had lost sales by not getting the title, he still desired to complete the bargain, and to perform it on his part.

At last, on the 20th of June, 1820, Patton by letter confessed that he had no title, and falsified the representation in his letter of July 13th, 1818. He stated that Southcombe was the proprietor of the land by regular deeds from the grantee, that he was Southcombe's agent, and had power of attorney to sell the land, which died with Southcombe, and that he had settled Southcombe's matters, and allowed him $2 per acre for the land.

The letter does not make a case upon which Patton could in equity obtain the title. It does not state, nor does it anywhere appear in the cause, that he had any writing from South-
153*] combe, *or that he had in fact paid him for the land. There is no proof on this point, neither has Patton or his heirs endeavored to get the title from Southcombe.

VII. There is, then, in this case every fact necessary to entitle Taylor to the relief which the Circuit Court gave to him. He placed confidence in the statements of Patton. Patton knew that Taylor was about to purchase trusting to his assurance, and the most material point—of fact, not opinion—inducing the purchase, the title of the vendor, was falsely represented by Patton. Taylor had no means of knowing the truth, and Patton knew he had not, and knew also that, if he had, the confidence reposed in him would prevent a pursuit of them. It does seem that if there can be such a misrepresentation as will avoid a sale of land, it is the one in this case, and, however honest in his intent Patton may have been, from the belief (if he cherished it) that the heirs of Southcombe would not claim the land, his representation to Taylor that he had the title, being untrue, and necessarily known by him to be so, amounts to that actual fraud which all the authorities concur in stating to be sufficient to avoid the sale. 1 Story's Equity, secs. 200–202; Neville v. Wilkinson, 1 Bro. Ch. 546; Fulton v. Roosevelt, 5 Johns. Ch. 174.

This court has rescinded sales of land made upon misrepresentation of title by the vendor. In Boyce's Ex'r v. Grundy, 3 Pet. 210, a sale of land was set aside, at the instance of the vendee, on the ground of misrepresentation of title and quality, leading to the purchase; and the court overruled the objection, too, that the powers of the Circuit Court sitting in chancery were, under the sixteenth section of the Judiciary Act, incompetent to afford relief to the vendee, after judgment at law against him for the purchase money.

The case of the gold mine (Smith v. Richards, 13 Pet. 26), applies and enforces the principle, that a misrepresentation, whether fraudulent or by mistake, is a sufficient ground in equity to set aside any conveyance.

VIII. This is the case of a purchase by a vendee who confided in a material and fraudulent misrepresentation of his title by the vendor, and who did not discover the fraud until after the conveyance had been made, and after the vendor had become insolvent; and who, on these grounds, asks that he shall not be compelled to pay for what he has not obtained, and cannot obtain.

Shall he be told that he must rely solely on the insolvent vendor's warranty?

If the purchaser has dealt with his eyes open, and with a knowledge of the facts—has obtained and yet peaceably enjoys *the [*154 possession—he may have no right to anticipate his legal remedy upon the warranty to which he has fairly trusted. But it would be unjust to throw a party upon a warranty in a case where, from the fraud of the other party, he did not think he should ever have need to rest upon it. To hold him bound in such a case would be to make, not to enforce, a contract. The simple principle is, that the vendor shall not object to the claim of the vendee that which would not have existed but for his own fraud. Accordingly, it is held that, where there was fraud in the sale of land, the vendee may have relief in chancery, before eviction or disturbance. Butler's note [332] to Co. Litt. 384; Edwards v. McLeay, Cooper's Cas. 308.

In Kentucky it has always been held that a fraudulent misrepresentation or concealment by the vendor respecting his title will entitle the vendee to relief in chancery, though he has a warranty.

In Breckinridge v. Moore, 3 B. Mon. 635, the purchaser was relieved, on the ground of a misrepresentation by the vendor of his title. The rule laid down was, that the vendor was bound to disclose the defects in his title.

In the late case of Vance v. House's Heirs, 5 B. Mon., the settled doctrine of the court is stated to be, that the vendee in possession, and with a warranty, may have relief upon either of the grounds of fraud, insolvency, or non-residence of the vendor. No rescission was made in that case, because neither of these facts existed, and the vendee did not appear to be in any danger of losing the land.

So in Simpson v. Hawkins, 1 Dana, 303, the court recognized the rule, that for fraud the vendee may claim a rescission. The majority of the court in that case refused to rescind, because there was no fraud; and the defect in the title was merely technical—such as might never injure the vendee, and such as, from the facts of that case, he was presumed to have known.

In this case, Taylor did not live in the county in which the land was, nor had he ever been

there. The taxes had been paid on the land at the seat of government, as Southcombe's. Patton assured him he had a chain of title and conveyances complete to himself. He had no opportunity of knowing that this was untrue. Patton knew this, and that as to the title Taylor would, as he did, repose upon his statements. Patton's title, if he had one, would not necessarily appear upon record in the county in which the land was, even if Taylor had visited it. The record of a deed is not necessary to its operation; the title passes by the delivery of the instrument, though creditors and purchasers 155*] may assail it, if not recorded. All *that Patton said in his letter of July, 1818, to Taylor may have been true, and yet no traces of the deed to him have been found on record in the county; and so, on the other hand, if Taylor had searched the records and found no deed to Patton, it would not thence follow that the latter had stated an untruth. He was the agent of Patton, and between persons standing in the relation of principal and agent, the rules of equity require in their dealings the utmost degree of good faith. Story's Eq. Jur. 224, and the cases there cited. It is obvious from the correspondence, that Patton knew the full extent of the confidence which Taylor yielded to his assertions.

But Taylor agreed to take the deed with the chain of Patton's title. He expected both. The letters prove beyond doubt that Taylor looked to receive the chain of title with the deed. It was not sent, nor was Taylor informed where he could find it on record. But the deed which was sent contained a covenant that Patton would do anything further necessary to confirm the land to Taylor—that he would furnish the conveyances under which he held and sold. Taylor applied for these repeatedly by letters, and through H. M. Patton. They were never furnished, and neither Patton nor his heirs ever took any steps to get the title from the heirs of Southcombe.

But it would not be a sufficient answer, even if true in fact, that Taylor might, by inquiry, have discovered the misrepresentation. Equity will not tolerate a party to say to his vendee, though I have told you a falsehood as to the title, believing which, you bought the land, still you ought not to have believed me; you should have suspected, not confided." It would be a strange rule of equity that would permit fraud to escape on such a ground. True it is said, in some cases, that the assertion of a falsehood as to the quality of a thing which is present at the sale, and which the vendee sees or may see is false, shall give him no claim. And this because the law justly supposes he trusted to his own senses rather than to the statements of the other. But the principle does not apply where the thing sold is at a distance, and much less does it apply to statements about title.

And a misrepresentation of the title, though it be on record, is a fraud that will entitle the vendee to a rescission, even if he has a warranty, and is in possession. Young v. Hopkins, 6 Mon. 23. In this case the court said: "It is in effect assumed by the court below that, the title deeds being matter of record, Young *was bound* to look into them, and must be presumed to have seen them, as he took a deed for the lot. If this is to excuse from the effect of false representations with *regard to [*156 title, it would obviate the consequences of fraud in nearly all landed controversies, as all our titles are matters of record. Indeed, men prudent and cautious will examine them before they purchase, as the title papers are the safest guide. But we know that, in many cases, the credulous and confiding dealers do not do so, but act on seeing how the possession is held, and the representations of the vendor. If these representations are false, the maker of them is, in such case, responsible."

And in Campbell v. Whittingham, 5 J. J. Marsh. 100, the court said: "Had the nature of Campbell's title to the lot purchased by Whittingham and Peters been fraudulently concealed, or had he made fraudulent representations on that subject, by which the purchasers were seduced into the contract, and induced to accept an insufficient title, it would have presented a clear case for rescission, notwithstanding the title and the incumbrances on the lot might have been matters of record; for it does not present a satisfactory defense to an allegation of fraud in the sale of land as to the title, to show that the conveyance had been recorded, whereby the vendee might, with proper diligence, have discovered the defect complained of, and respecting which the fraud was practiced." In this case, the vendee was in possession under a deed with covenants of seisin and of warranty, and the rescission was because of the failure of the vendor to disclose an incumbrance existing by matter of record, in the county in which the parties and the land were. These are the principles of the law applicable to sales of land, in the State from which this cause came.

The principle of equity is happily expressed by the late Chief Justice of this court, in the case of Garnett v. Macon, 2 Brock. 250, in these words: "Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser in making a contract may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement.

IX. It is shown on all sides that Patton, who was esteemed wealthy when the sale was made, became hopelessly insolvent, and so died. This fact has always been held sufficient to enjoin the collection of the purchase money where there is a defect of title, even in cases free from fraud. The purchaser who is in danger of losing his land shall not be thrown upon the warranty of an insolvent vendor. Simpson v. Hawkins, 1 *Dana, 303. The attention of [*157 the court is asked to the remark upon this point of Judge Nicholas, at page 318.

In Morrison's Adm'r v. Beckwith, 4 Mon. 73, the vendor's insolvency was made the ground of an injunction.

And where relief by injunction has been refused to the vendee (as in the cases in 7 Mon. 198; 3 J. J. Marsh. 584; 2 B. Mon. 40), it was upon the ground that insolvency was not

proved as alleged, not in fact existing. In all these and other cases, the rule in case of insolvency was recognized.

[The rest of the argument is omitted.]

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States held in and for the District of Kentucky, by the district judge.

Taylor, the complainant below, filed a bill against Robert Patton, the intestate and ancestor of the defendants, praying relief against two judgments recovered against him at law, upon securities given for the purchase money of two thousand acres of land situate in the State of Kentucky, and sold and conveyed by the latter to the former. The bill was filed at the November Term, in the year 1820; and the suit has been pending ever since. The sale and conveyance of the land took place September 3d, 1818, the consideration being $5,000, payable one half on the 30th of January, 1819, and the other in one year thereafter. The deed contained covenants for further assurance, and of warranty, and the grantee entered into possession of the premises, and has held it ever since.

The only allegations in the bill upon which the complainant relied for staying the collection of the judgments, and setting aside the sale and conveyance, are, that the said Patton had no title to the land at the time of the purchase, nor since; and that he had become insolvent, and possessed no personal responsibility.

The defendant admits, in his answer, that he had no legal title, and that it was, at the time, in the heirs of one Thomas Southcombe, but insists that he had purchased the land of Southcombe, had paid for it, and had been in the peaceable possession of the same, and paid the taxes thereon, for more than twenty years, and until the time of the sale; and that the complainant well knew the nature and condition of the title at the time of the purchase, and the taking of the deed.

The answer also sets up an assignment of the securities taken for the purchase money, from the defendant to Witherspoon and Muirhead, in payment of a decree in chancery which they held against him; that it was made in the presence, and with the knowledge and consent, of 158*] the complainant, and that *the suits were brought, and the judgments in question recovered, by them and for their benefit.

On the death of Robert Patton, the complainant revived the suit against his heirs and personal representatives, on the 13th of November, 1829. The answer to this bill, which relies mainly upon the facts set forth in the previous answer of Patton, was put in and filed in July, 1844.

The cause was heard on the pleadings and proofs on the 13th of May, 1845, and thereupon it was adjudged and decreed by the court, that the contract entered into between the complainant and Robert Patton, for the purchase and sale of the land for the sum of $5,000, as set forth in the bill and admitted in the answer, be rescinded and annulled; that the judgments recovered at law for the purchase money be perpetually enjoined; and that the deed of the 3d of September, 1818, be cancelled and held for naught.

The decree then provides for the payment by the heirs of Patton of such portions of the purchase money as had been paid by Taylor, after deducting the rents and profits which he may have received from the premises, over and above expenditures for necessary repairs and improvements; and on such repayment, the possession is ordered to be delivered up to the heirs, and a reconveyance to be made by the complainant to them, with a covenant against his own acts affecting the title; and also providing that the heirs shall hold the lands in trust for the benefit of Witherspoon and Muirhead, the assignees and owners of the judgments at law.

The cause is then referred to the master, to take and state an account of the rents and profits, improvements, etc., upon the principles settled, and to report to the court.

There is some evidence in the case tending to prove that the defendant, Robert Patton, represented to the complainant during the negotiation between them for the sale and purchase of the lands in question, that he held at the time the legal title; and that the complainant had reason to believe that he would be invested with it by the conveyance of the 3d of September, 1818.

The circumstances, however, that Taylor was, at the time, and for several years before had been, the general agent of Patton in Kentucky to take charge of his lands in that State, including the premises in question, to pay the taxes, and negotiate sales to purchasers, lead to the conclusion that he must himself have had some knowledge of the title, and that he was willing to risk it, on receiving a warranty deed from Patton, who was supposed to be a man of wealth. Where the truth of this matter lies, it is not material to inquire; for no such question *is made on the pleadings, or was [*159 involved at the hearing. It is not surprising, therefore, that the proofs in respect to it to be found on the record, are vague and unsatisfactory; as, probably, the attention of neither party was particularly drawn to it. Indeed, it could not consistently have been, as the charge of fraud or misrepresentation is not to be found in the bill as originally drawn, nor in the amended bill filed some two years and a half afterwards. Nor is it made in the bill of revivor, which was filed as late as November, 1829.

The relief prayed for is put, both in the original and amended bills, entirely upon the defect of legal title in Patton at the time of the conveyance, and in connection with this, his subsequent insolvency; and unless this ground alone is sufficient to sustain it, the decree of the court below cannot be upheld. And that it is not, we need only refer to the authorities on the subject. Bumpus v. Platner, 1 Johns. Ch. 213–218; Abbot v. Allen, 2 Ib. 519; Gouverneur v. Elmendorf, 5 Ib. 79; Simpson v. Hawkins, 1 Dana, 305, 308, 312; James v. McKernon, 6 Johns. 543.

These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and

that, in such a case, he must seek his remedy at law on the covenants in his deed. That if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed. And further, that relief will not be afforded, even on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.

It follows that the court below erred, and that the decree should be reversed, and the bill dismissed.

There is another point in the case in respect to which we think the court also erred, and which we will for a moment notice, namely, the rejection of the deposition of Talbott offered in evidence by the defendants below. The deposition tended to prove that the notes given for the purchase money had been assigned and transferred by Patton to Witherspoon and Muirhead, his creditors, with the knowledge and assent of Taylor, in consideration of which the creditors agreed to postpone the payments of the demand against Patton. Talbott was rejected on the ground of interest, as it appeared upon the face of his own deposition, 1, as surety for Patton in the suit at law; and 2, as assignee of the notes for the benefit of Witherspoon and Muirhead.

In answer to the first ground, it is sufficient 160*] to say that *judgments had been recovered by default in the suits at law in favor of Patton. And to the second, that, according to the deposition, Talbott had no interest whatever in the result of the suits. He held the notes as a naked trustee, the proceeds of which, when collected, were to be applied to the payment of the debt of Witherspoon and Muirhead, his clients. He had no charge upon the fund, by any agreement or understanding with Patton, or his clients, for costs or commissions, as attorney or otherwise, that would make him an interested witness. There was no foundation, therefore, for the exclusion of his evidence. But it is unnecessary to pursue this inquiry, as the ground already stated sufficiently disposes of the cases.

Decree below reversed, and bill dismissed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of complainant, with costs.

EDWARD P. FOURNIQUET and Harriet Jane Fourniquet, his Wife, Appellants,
v.
JOHN PERKINS.

Jurisdiction of District Court— case of malad*ministration* of a succession.

The jurisdiction of courts of probate in Louisiana is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over cases of alleged fraud or waste, or embezzlement of the estate.

The district courts are courts of general civil jurisdiction.

Hence, where a petition was filed in the Court of Probate against an administrator, praying that he might account and also be held liable for maladministration and spoliation, it was proper to transfer the case for trial to the District Court.

The judgment in the District Court, being generally for the defendant, must be supposed to cover the whole case, and not to have rested upon only a branch of it, viz., a release which was pleaded by the defendant.

Therefore, where a bill was filed in the Circuit Court by the same petitioners against the same defendant, it was correct for that court to consider the question as res judicata.

The Louisiana decisions upon the jurisdiction of the probate and district courts examined.

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

In the year 1818, Mary Bynum, the widow of Benjamin Bynum, deceased, was living in the parish of Concordia, State of Louisiana, with four children, of whom Harriet, the wife of the appellant, was one.

*In August, 1818, Mrs. Bynum in- [*161 termarried with John Perkins, the present appellee.

In August, 1824, Mrs. Perkins died.

In March, 1827, Perkins filed two inventories and appraisements in the Parish Court; one, of the estate of Benjamin Bynum, deceased, amounting to $26,055, and the other of Mrs. Mary Perkins, deceased, amounting to $6,575. About the same time, Perkins was appointed administrator of the estate of Benjamin Bynum, and guardian of the infant children.

In May, 1827, he filed an account, showing an administration of the estate as far back as 1817. The account was filed by him as curator ad bona and tutor to the minor heirs.

In 1834, after the marriage of Harriet with Fourniquet (the present appellants), Perkins stated his account as guardian of Harriet Bynum separately, bringing her in debt to him $550.81, which sum Fourniquet paid by a check on the Planters' Bank. The following receipt was also subsequently given to Perkins by Fourniquet and wife:

"Received, Natchez, May 27th, 1834, of John Perkins, in settlement of an account, debts due, and demands, whatsoever, to the present day, one hundred dollars in full; having, on a previous occasion, received from him, as guardian of my wife, Mrs. Harriet Fourniquet, late Miss Bynum, all the estate, portion, and share she inherited by the death of her late father, Benjamin Bynum, late of Concordia, Louisiana, deceased, or her mother, Mrs. Mary Perkins, of the County of Adams and State of Mississippi, and brothers, Benjamin S. Bynum, of the County of Claiborne, State last aforesaid, deceased, and do, by these presents, jointly with my said wife, release, and forever discharge, the said Perkins, either as guardian or otherwise, growing out of the estate aforesaid, or in any other manner or shape whatsoever, and forever exonerate him, by these presents, his heirs, executors, and administrators therefrom.

"In witness whereof, we have hereunto set

our hands and seals, the day and year first above written, to wit, in the year of our Lord one thousand eight hundred and thirty-four, in the presence of Elijah Bell and John E. Maddox, whose names are hereunto subscribed as witnesses thereto, the said John Perkins being also personally present, and by these presents accepting.

"Signed, sealed, and delivered.

(Signed) "E. P. Fourniquet, [Seal.]
"Harriet J. Fourniquet, [Seal.]
"John Perkins. [Seal.]

"Witness present:
"Elijah Bell,
"John E. Maddux."

162*] *"State of Mississippi, Adams County:

"Personally before me, Woodson Wren, a justice of the peace for the County of Adams, appeared E. P. Fourniquet and Harriet J. Fourniquet, his wife, and John Perkins, whose names are subscribed to the foregoing instrument, and acknowledged that they signed, sealed, and delivered the same, as their act and deed, on the day and for the uses and purposes therein mentioned.

"Given under my hand and seal, the 28th May, 1834.

(Signed) "Woodson Wren, [Seal.]"

In 1837, the parties mutually confirmed the above instrument by the following acknowledgment:

"State of Louisiana, Parish of Concordia:

"I, George W. Keeton, judge of the said parish, duly commissioned and qualified, do hereby certify and attest, unto all whom it doth or may concern, that Harriet J. Bynum, wife of Edward P. Fourniquet, and Edward P. Fourniquet, and John Perkins, personally appeared before me, and acknowledged that they had signed and sealed the foregoing instrument of writing as and for their proper act and deed. To the due execution thereof, an act being requested, the same under my seal of office to serve as occasion may require.

"Done and passed at my office, in the town of Vidalia, on the thirteenth day of
[seal.] January, A. D. eighteen hundred and thirty-seven.

(Signed) J. W. Keeton, P. Judge."

In December, 1838, Fourniquet and wife, then residing in the State of Mississippi, filed their petition in the Court of Probates for the parish of Concordia, in the State of Louisiana, preferring their claim against Perkins for a large amount of property alleged by them to have come to his hands, and alleging that the receipt obtained from them had been given through ignorance and error, and in direct contravention of a provision of the law, and was therefore void. They charged upon Perkins, both as administrator and curator ad bona of the children of Mrs. Perkins, spoliations to a large amount, and prayed that he might render a full account of his transactions with respect to the successions of Benjamin Bynum and Mrs. Perkins, and with respect to his guardianship, and be compelled to make full compensation to the petitioners. In February, 1839, Perkins filed his answer, first interposing three exceptions to the prayer of the petition. The two first of these exceptions it is not material here to notice; the third was in effect a plea in bar, insisting on the receipt and release above set forth. The *answer followed the al- [*163
legations of the petition, and controverted them all, alleging that the respondent had discharged his duty with fidelity.

A supplemental petition and answer were afterwards filed, which it is not necessary to state particularly.

On the 10th of December, 1840, the case was transferred, by consent, to the Ninth District Court, in the parish of Concordia.

On the 24th of December, 1840, the cause came on for trial in the District Court, when the jury found a verdict for the defendant, and the court thereupon pronounced judgment in his favor.

In June, 1844, Fourniquet and wife filed a bill on the equity side of the Circuit Court of the United States in and for the District of Louisiana. It claimed in right of the wife, part of her inheritable portion of the estates of her father and mother, and prayed for a full account of the use and profits thereof from August, 1824, to May, 1827. It averred that Benjamin Bynum, the father of Harriet, left a large unencumbered estate at his death; that it was out of debt, and had a large amount of money on hand and debts due to it at the time when Mrs. Bynum intermarried with Perkins; that Perkins took possession of all the property, maladministered and used it as his own; that he presented false and fraudulent accounts to the Court of Probate. The bill admitted the execution of the receipt and release, but charged them to have been obtained by false representations; it stated that a suit had been brought in the Probate Court by the complainants, and that it had been transferred by consent of all the parties to the District Court, but protested that the District Court had no jurisdiction of the subject matter thereof, and therefore its judgment could be no bar to the complainants' present suit. The bill then prayed for an account and general relief.

To this bill Perkins pleaded in bar the record, proceedings and judgment of the District Court, averring that these embraced and concluded the whole matter set forth and complained of in the bill. The plea was supported by an answer, which denied all the allegations of the bill.

On the 10th of April, 1845, the Circuit Court pronounced the following decree:

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz.: That the plea of the said defendant, by him pleaded in bar to the bill of the said complainants' be sustained and judged a good and sufficient bar to the said plaintiff's action as set forth in his bill, and that the said complainants' bill be dismissed, with costs."

An appeal from this decree brought the case up to this court.

*It was argued by Mr. Fendall and [*164
Mr. Henderson for the appellants, and Mr. Coxe and Mr. Downs, with whom was Mr. Mayer, for the appellee.

That part of the argument for the appellants which related to the point upon which the decision of this court turned was as follows:

3d. But as matter of law, the jurisdiction of the court which pronounced the judgment pleaded in bar was a naked usurpation. It had no authority whatever ratione materiæ. Its decision was therefore wholly void, and required not to be excepted to by plea. Louisiana Code of Practice, art. 333.

And consent could not aid or give jurisdiction in such case. Ibid. art. 92; 1 Martin, N. S. 704; 14 La. Rep. 179.

Such adjudication is void. 1 Pet. 340; 2 Pet. 169; 13 Pet. 511; 12 Pet. 719; 3 How. 762.

The Code of Practice was adopted on the 2d of September, 1825, and in force throughout the State on the 2d of October, 1825. 11 La. Rep. 515.

Before this code the probate powers were somewhat distributed among the courts, and not well regulated or defined. The reported cases, therefore, before the year 1825, furnish no rule as to the jurisdiction involved in the present inquiry. See Tabor v. Johnson, 3 Martin, N. S. 674. Art. 924 of the Code of Practice provides, that "Courts of probate have the exclusive power, 2. To appoint tutors and curators for minors, etc. 4. To appoint curators to vacant estates. 5. To make inventories and sales of the property of successions which are administered by curators, etc. 9. To compel such administrators (all such) to render an account when required," etc.

And by the Act of the Legislature of March 25th, 1828, sec. 14, it is enacted, "That all suits brought against curators and other administrators during the time of their administration or curatorship shall, after the expiration of said time, and even after said curators and administrators have rendered their accounts to the heirs, be and remain in the Court of Probates," there to be continued and tried, etc. See the act in Code of Practice, ed. 1839, pp. 194–198, or Bullard and Curry's Digest.

So stands the State law, as to the exclusive jurisdiction in the Probate Court of the matters in the suit pleaded in bar, as adjudged in the District Court. The jurisdiction of district courts is shown in art. 126 of the Code of Practice, and that of the Parish Court in art. 128.

In the case from the District Court, 6 Martin, N. S. 212, it was adjudged by the Supreme Court of Louisiana, in 1827 (after the Code of Practice was in operation), that the 165*] Probate Court *had the exclusive jurisdiction to compel the defendant, whose office of tutor had expired, to account and pay over money in his hands. And that the District Court was without such authority, and thereupon dismissed the case.

But the case in 7 Martin, N. S. pp. 105–107, decided in 1828, is precisely the case pleaded in bar. The suit was instituted in the Probate Court against the curator of a minor. The judge recused himself, and the suit, by consent of parties, was transferred for trial to the District Court. Held, that under the old code, where such consent was given, the adjudication was not void; but by the Code of Practice the Probate Court alone had power to try such cases, and consent of parties could not confer the power on the District Court. Judgment *therefore annulled.*

663

To like effect is the case in 4 La. Rep. 539, and 10 La. Rep. 219, and many more could be cited.

The case in 5 La. Rep. 355, which might seem to conflict with the previous decisions, refers in its judgment to an adjudication by the District Court made before the Code of Practice.

Mr. Coxe, for the appellee, argued the case orally, and Mr. Mayer filed an elaborate brief. The reporter selects the following, however, from the brief of Mr. Downs, because it enables him to state the points upon that side rather more succinctly.

The following points are submitted against the bill, and to sustain the plea and answer:

1. The District Court of Louisiana has jurisdiction, and was competent in law to decide such a case, with the consent of the parties, and the judgment so rendered was valid. That court was one of general jurisdiction, extending to "all civil" cases above a certain amount. The language is clear and unequivocal: "The jurisdiction of district courts, excepting the court of the first district, extends over all civil cases where the amount in dispute exceeds fifty dollars." Code of Practice, art. 125, note 1, and the cases there referred to; Tabor v. Johnson, 3 Martin, N. S. 675; Foucher v. Caraby, 6 Ib. 550; Dangerfield v. Thruston, 8 Ib. 241; Donalson v. Rust, 6 Martin, 261; 12 Ib. 235.

The reasoning of the Supreme Court of Louisiana in these cases is much strengthened by a paragraph in the 924th article, defining the jurisdiction of the courts of probate, which, it is contended, have exclusive jurisdiction of such cases. This paragraph, the fifteenth, provides that whenever the parish judge who is judge of the Court of Probate, is in any way disqualified from trying such cases, "the District Court or parish judge of the adjoining parish shall have jurisdiction thereof."

*It may well be doubted whether [*166 courts of probate have jurisdiction on questions of tort, contract, or fraud and dangers, as in this case. McDonough v. Spraggins, 1 La. Rep. 64; Hurst v. Hyde, 6 Ib. 451.

2. The case was in fact tried by the judge of the Court of Probate, who was called into the District Court for that purpose; the process, depositions, and all the proceedings were in the Court of Probate up to the moment of trial, when it was by consent of parties transferred to the District Court for the purpose of a trial by a jury.

This case, then, was in fact rather a reference of an intricate and long account to experts or arbitrators, under the provisions of the laws of Louisiana, and their award or finding or report could be objected to or set aside only in the way pointed out by law. Code of Practice, art. 442, 443, 456.

But even if the judgment was invalid, and the complainants have a right to demand its nullity, they have no right to demand it in the Circuit Court of the United States. This is not left in our system of jurisprudence to general principles or authorities at home or abroad, but in this, as in many other cases, our Legislature has provided a specific and an appropriate remedy, and declared the tribunals in which alone it may be sought. Before the promulgation of the Code of Practice, in 1825, there was some doubt and uncertainty in the laws of Lou-

isiana on that subject, but it was entirely removed by the admirable provisions of that code on this subject, under the title of "Nullity of Judgment." Art. 604–613, inclusive, McCombs v. Dunbar, 1 La. Rep. 21; Melancton v. Broussard, 2 Ib. 15.

It seems clear, then, when we apply the principles of these articles and decisions to the case before the court—

1. That the judgment in this case is invalidated by none of the nullities which authorize its being set aside.

The third paragraph of the 606th article does not weaken this position. The judge of the District Court was not incompetent, either from the amount in dispute or from the nature of the cause, as shown in the authorities previously cited under the first head. If a court of probate had rendered judgment on a question of title, or contract, or fraud, or tort, being a court of special and limited jurisdiction, its nullity might have been demanded; but not so with the District Court, to which the law expressly gives jurisdiction in "all civil cases."

2. But even if there was nullity in the judgment, it might have been demanded in the same court by motion for a new trial or action of nullity, or by appeal to the Supreme Court under the restrictions and within the time pro-
167*] vided by law, but *could not be demanded in any other court, especially a court of the United States.

3. That the complainants cannot maintain this action of nullity, because they acquiesced in the execution of the judgment for nearly four years before this action was brought, not even asking a new trial, or taking any appeal. Art. 612.

Mr. Justice Daniel delivered the opinion of the court:

Although the decree of the Circuit Court is accompanied by no opinion or argument setting out in extenso the grounds on which the bill of the appellants (the plaintiffs below) was dismissed, yet the foundation of this decree is plainly disclosed by reference to the plea of the defendant below, referred to and sustained by the Circuit Court in its fullest extent. This plea assumes the position that the matters drawn into controversy by the bill had been previously litigated between these parties, and by a court of competent jurisdiction adjudged and settled against the complainants. The insertion of this plea here is deemed proper, as the character of the proceedings which enter into its averments, and constitute the bar set up thereby, will furnish the readiest key to the exceptions urged against the decree of the Circuit Court. The plea is in the following words: "In the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

"E. P. Fourniquet and Wife v. John Perkins.

"The plea and answer of the defendant, John Perkins, to the bill of complaint and discovery of the said complainants.

"This respondent, saving and reserving all benefit, etc. etc. shows that on or about the 15th day of December, 1838, the said complainants did institute a suit in the Court of Probates in and for the parish of Concordia, in the State of Louisiana, against this respondent, for the same cause of action as is set forth in the said complainants' bill. That the said suit was duly and regularly transferred for trial and judgment upon all matters in issue therein to the District Court of the ninth judicial district of the State of Louisiana, held in and for the said parish of Concordia, when and where such proceedings and pleadings were had, and such issue joined, as embraced the whole matters set forth and complained of in and by the said complainants' bill in this behalf filed and exhibited; and that in the further due and lawful proceedings in said suit, and upon final hearing thereof, judgment was rendered in favor of this defendant, upon all the matters in issue therein; all which will appear by a transcript of the record of the proceedings in the *said suit, duly authenticated, which is [*168 hereto annexed and exhibited, and made part hereof; which said judgment is final and conclusive between the said parties, as to all the matters of the said complainants' bill; and this respondent pleads and sets up the same as a full and complete bar to the said bill, and prays that he may have the benefit thereof as such."

If this plea be correct in form and true in substance, there can be no doubt that, the subject now in controversy having become res adjudicata, the decision of the Circuit Court dismissing the bill of the complainants is vindicated from just exception. But exception is urged to that decision upon alleged legal grounds, said to be disclosed on the face of the plea and of the record adduced in its support, and that these being inadequate to sustain the decision, the latter cannot be supported. This is the material point in this cause, requiring, therefore, particular examination.

It is insisted for the appellants, that the proceedings instituted by them in the Probate Court of Concordia against Perkins, for an account of his administration of the successions of Benjamin Bynum and of Mrs. Perkins (formerly Bynum), and for an account of his guardianship of the wife of Fourniquet, as well as to render him liable for lands, slaves, crops, and moneys belonging to those successions and to the children of Bynum, were the proper proceedings for attaining the object sought thereby, and that no other tribunal in the State of Louisiana than the Probate Court could legally take cognizance of those proceedings; and that the transfer, therefore, of the case in question from the Probate Court to the District Court of the State, though by the consent expressly given of all the parties, could not confer jurisdiction on the latter, whose decision, consequently, would be void, and could not be pleaded in bar of this suit. Again it is said, that, conceding the power of the District Court to take cognizance of a case like the present, still the proceedings before this latter court and its decision did not embrace the rights and interests of the parties as set forth in the petition to the Probate Court, but were limited to the single question of the validity of the release executed by the complainants to the defendant on the 27th of May, 1834. With regard to this second ground of exception, it may be remarked, that there is some want of precision in the

record of the District Court, as to the subjects embraced within the issue which seems to have been submitted to the jury by the court; but there is no more reason for supposing that issue to have been limited to the mere fact of the validity of the release mentioned, than there is for extending it to the whole matter in controversy. The petition brought up before the court 169*] *was the same presented to the Court of Probate—covered the whole gravamen of the complainants' case. All their alleged rights and wrongs were embraced within its statements and prayers. This is not understood to have been a suit in equity, nor to have been one not cognizable by a jury. The fair presumption is, that the jury had the entire case before them. No exception to their cognizance of the whole case seems to have been interposed or thought of, and they rendered a general verdict for the defendant, to which verdict no exception was taken. On other grounds it seems inadmissible to suppose that the case submitted to the jury was limited to some specific fact or inquiry, or that the judgment of the court was necessarily founded upon any such fact alone. By the consent order, transferring the cause from the Probate to the District Court, we find a very comprehensive arrangement as to the procurement and the forms of the testimony to be used; and in the entry of the judgment upon the record of the District Court we find the language, "By reason of the law and the evidence, and the verdict being in favor of the defendant, it is therefore ordered, adjudged and decreed, that judgment be rendered in favor of the defendant." Thus it appears that the mind of the court was directed to the entire case before it, and not merely to an isolated question; that its judgment has embraced the whole cause as presented upon the petition, the exceptions, and the answer of the defendant, and although the proceedings which led to the decision may seem to be irregular and anomalous, that decision must stand as a judgment, binding between the parties thereto, unless shown to be void for want of jurisdiction in the tribunal which pronounced it, or that it has been reversed and annulled by some competent supervisory authority. This brings us back to the inquiry into the competency of the District Court of the State to take cognizance of the subject on which its decision was made.

By art. 126 of the Code of Practice it is declared that the jurisdiction of the district courts extends over all civil causes where the amount in dispute exceeds fifty dollars. The natural import of this provision is to render the district courts of Louisiana courts of general jurisdiction in all civil causes not embraced within the above exception. But their powers have not been left to be now deduced for the first time from the language of the article above cited. They appear to have been defined and established by the supreme judicial authority of the State, and plainly distinguished from the functions of the probate courts with reference to subjects like those involved in the present case. The jurisdiction of the courts of probate appears to be confined to cases which seek a set- 170*] tlement *and an accounting for effects presumed to be in the possession of the representative of a succession, holding those effects in his representative character. Where the purpose is to charge the executor or curator personally for fraud, maladministration, waste, or embezzlement of the succession, the Court of Probate has not jurisdiction, but in such cases jurisdiction is vested in district courts. The law appears to have been so ruled in many cases by the Supreme Court of Louisiana. A few of these will be adverted to. Thus, in the case of McDonough v. Spraggins, 1 La. Rep. 63, on an appeal from the Court of Probates, the point is thus succinctly stated by Mathews, Justice, in delivering the opinion of the court: "This suit was commenced against the defendant in his capacity of curator, to obtain a judgment rendering the succession which he represents liable to pay and satisfy the plaintiffs' demand, and also to obtain a decree against him personally, on the event of the property being insufficient to pay all just claims against it, as having illegally administered the succession of the intestate." The Court of Probates decided against the application, and the Supreme Court, in passing upon that decision, lay down the law in these words: "As an administrator de son tort, or as an intermeddler, he may be answerable to creditors for waste; but those pursuits against him must take place in a court of ordinary jurisdiction." The next case on this point is that of Boquette's Guardian v. Donnet, 2 La. Rep. 193. There Porter, Justice, pronouncing the decision, says: "It appears to us this is a demand against the executor in his personal capacity for the value of the property sold by him contrary to law. In other words, for a tort done by him. We think the Probate Court had no jurisdiction of the case, and that the petition must be dismissed, with costs in both courts." In 6 La. Rep. 449, is the case of Hurst v. Hyde, Executor, in which it is ruled, that "the Court of Probates has no jurisdiction in an action for damages occasioned by an act of the executor not legally done in relation to the administration of the succession." The last authority which will be cited to this point is one of later date. It is the decision of the Supreme Court of Louisiana in the case of Hemken v. Ludwig, Curatrix, a decision made in 1845, and reported in 12 Robinson's Reports, 188, upon an appeal from the Court of Probates of Ouachita. This was a petition brought to subject the curatrix for what, in the legal language of Louisiana, is called a maladministration of the succession, corresponding with the term "waste" at the common law. At page 191 of the volume, Judge Simon, in delivering the opinion of the court, thus states the law: "It is clear, the Court of Probates was without jurisdiction to decide on the *matters set out in the plaintiff's [*171 petition in relation to the defendant's personal liability. It is true she is sued as curatrix, but one of the principal grounds alleged against her from which she is said to have incurred personal responsibility is, that she has concealed property belonging to the estate and has converted it to her own use, whereby she has lost the benefit of her renunciation, and has become liable, personally, to pay the debts of her husband. The main object of the suit is to obtain judgment against her individually and

such was virtually the judgment appealed from. It is not pretended that the property which she failed to include in the inventory is in her possession as curatrix; but that she claims the same as her own, and refuses to give it up. It is well settled that courts of probate have no jurisdiction of a claim against an administrator personally for maladministration."

That the petition of Fourniquet and wife presented to the Probate Court, and subsequently transferred to the District Court, contained charges of maladministration cannot be denied. Indeed, with respect to the successions of Mary Bynum, the mother, and Benjamin Bynum, the father, of the petitioner, Harriet, and with respect to the release charged to have been fraudulently abstracted from both the petitioners, it alleged, not merely acts of maladministration, but instances of dishonesty and spoliation extraordinary in character and extent, and claimed of the defendant, in consequence thereof, a heavy personal liability for lands, slaves, and money, unjustly appropriated to his own purposes. From art. 126 of the Code of Practice, we have seen that the jurisdiction of the district courts of Louisiana extends over all civil cases where the amount in dispute is over fifty dollars; in other words, that these courts are courts of general civil jurisdiction. By the authorities cited from the Supreme Court of Louisiana, it is equally apparent that the probate courts are not courts of general, but of special limited jurisdiction; and that from their cognizance are excluded cases of fraud, torts, waste, or maladministration generally, committed by executors and administrators; and that these cases belong peculiarly to the cognizance of the district courts. Such being the conclusions warranted by a review of the law, and the facts of this case being of a character to fall directly and regularly within its operation, it may well be asked what just exception can be taken to the jurisdiction of the District Court in this case? It was not a jurisdiction depending at all upon consent, which, it is said, cannot invest a court with power not belonging to it by its constitution. It was a transfer of a litigation, by consent, from a tribunal confessedly without authority to decide it, to a tribunal in every respect competent to 172*] *take cognizane of the subject matter—whose peculiar province and duty it was to take cognizance of it. The exception, at the utmost, resolves itself into matter of form, which the parties were competent to waive and which they did waive; for it is expressly stated upon the record, that the removal of the cause from the Court of Probate into the District Court was by the consent of all concerned. It cannot be pretended that the forms of pleading may not be dispensed with by suitors; as it is certain that the benefit of matters both of substance and form may be lost by mere neglect or omission, where no intention of the renunciation of either is apparent or ever existed. We must conclude that the District Court had rightfully jurisdiction of the cause removed into it from the Probate Court; that its judgment is and must be binding upon the parties to it, until it shall be annulled or reversed by a competent authority. The parties to that judgment, the subject matter thereof, and embraced within the proceedings on which it was founded, being identical with those comprised in the bill in the Circuit Court of the United States for the Ninth Circuit, now under review, the judgment was well pleaded in bar of the claims set up by the bill, and the decree of the Circuit Court sustaining this plea we hold to be correct, and the same is therefore hereby affirmed.

Order.

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

JAMES ERWIN, Plaintiff in Error,
v.
ALFRED J. LOWRY, Curator of Alexander McNeill, Deceased.

Jurisdiction—title under marshal's sale not attacked collaterally by proof of falsity of jurisdictional statements in record—foreclosure of mortgage in U. S. court—administration in Louisiana—erroneous ruling below no ground for reversal if judgment can be supported on other grounds adjudged—when debtor estopped from questioning marshal's authority—appeal, when not waived.

Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed, in the Circuit Court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee, and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a State court against a purchaser at the sale, and attempt to prove that the Circuit court had no jurisdiction over the case, because the executor was not a citizen of Louisiana. Evidence dehors the record cannot be introduced to disprove it.

Where a lien existed on property by a special mortgage before the debtor's death, and *the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. [*173

The Circuit Court of the United States, having jurisdiction over the parties and subject matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts.

Although the marshal did not give the notice required by law to the executor against whom the petition was filed, yet, if the executor was served with process on the spot where the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards im-

NOTE.—Jurisdiction of U. S. circuit courts depending on parties and residence. See notes to 1 L. ed. U. S. 640; 2 L. ed. U. S. 435; 36 L. ed. U. S. 579.

General answer waives objections to residence. See notes to 8 L. ed. U. S. 36; 27 L. ed. U. S. 87.

reach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate.

Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error.

THIS case was brought up from the Supreme Court for the Western District of Louisiana, by a writ of error issued under the 25th section of the Judiciary Act.

In the beginning of the year 1835, Dawson and Nutt were the owners of some land situated in the parish of Carroll, in the State of Louisiana, on the waters of the Walnut Bayou, amounting to 640 acres, and also of a number of slaves. On the 8th of January, 1835, they sold the land and slaves to Alexander McNeill, of the State of Mississippi, for one hundred and five thousand dollars, payable in five payments; the first four of twenty-five thousand dollars each, and the last of five thousand. McNeill gave a mortgage upon the land and slaves to secure the last four payments.

Whether notes were given for all these payments, and when they were to be made, the record did not show. But by an indorsement upon the mortgage under date of January 15th, 1838, it appeared that all the payments had been made except the fourth.

About the 28th of May, 1839, Alexander McNeill died, in Mississippi.

By his will, which contains several legacies of small value, he bequeathed the mass of his estate to Hector McNeill, also a resident and citizen of Mississippi, whom he appointed his testamentary executor. On the 6th of June, 1839, this executor, stating himself to be a citizen of Coahoma County, in Mississippi, presented a petition to the judge of probates of the parish of Madison, in which, after stating that his testator had died on the date above stated, in Mississippi, and left a will, in which he was appointed sole executor and principal legatee, an authenticated copy of which was annexed 174*] to the petition, he proceeds *to say, that two large estates were in the possession of his testator, situated in this parish.

He says further, that, by the laws of Mississippi, as executor of the will, he was bound to present it for probate in Warren County in that State, without delay; but as the court would not sit for some weeks, he could not then have the will proved and recorded, nor could he then present a duly certified copy of it to be recorded in the said Probate Court of Madison. He says he is "desirous of taking on himself the succession of his deceased brother's estate, according to the terms of his last will and testament, and the laws of the State; he therefore prays that an inventory of all the property in the parish, belonging to the estate of said Alexander McNeill, deceased, be taken." And he prays the judge to grant him the succession of the deceased Alexander McNeill, according to the terms of the will and the laws of the State; and that he will grant any other and whatever order may be necessary to entitle him (Hector) to the possession and succession of the property left by the deceased. Upon *this* petition no order or judgment was given *by the probate judge*; but on the 2d of July following, he proceeded to make an inventory of the property composing Alexander McNeill's succession, which is signed by Hector McNeill, as executor. The will was probated in Warren County, Mississippi, on the 24th of June, 1839, and a copy of it, and the proceedings in the aforesaid court, recorded in the Probate Court of Madison on the 1st of July, 1839, one day before the taking of the inventory, but no order taken on it, further than to record it.

By the inventory and appraisement, the whole property of the deceased in that parish amounted to $245,317.

On the 1st of November, 1839, Hector McNeill presented the following petition:

"To the Honorable Richard Charles Downes, Parish Judge in and for the Parish of Madison, State of Louisiana.

"Hector McNeill, heretofore a resident of Warren County, State of Mississippi, respectfully represents to your honor, that he is the owner of large possessions in this parish, consisting of plantations, negroes, etc. etc.; that he is desirous of acquiring residence, and to be entitled to the privileges, etc. etc. of a resident of this parish; that he is aged thirty-one years; that he is from the State of Mississippi, as aforesaid, and that he desires to pursue planting in this parish, and to reside and make his permanent domicil and home on the Walnut Bayou, parish of Madison, Louisiana. Wherefore, he prays this notice may be duly filed and recorded.

(Signed) "H. McNeill.

"Walnut Bayou, La. Nov. 1st, 1839."

*On the 23d of May, 1840, Andrew [*175 Erwin filed the following petition in the Circuit Court of the United States:

"To the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit of Louisiana.

"The petition of Andrew Erwin, a citizen of the State of Tennessee, therein residing, respectfully shows: That Hector McNeill, testamentary executor of Alexander McNeill, a citizen of the State of Louisiana, residing in the parish of Madison, within the jurisdiction of this honorable court, is justly indebted to your petitioner in the sum of seventeen thousand five hundred dollars, besides interest on the promissory notes hereto annexed for reference and greater certainty, drawn on the 8th of January, 1835, and payable four years after date, and duly protested when due for want of payment, as will further appear from the protests thereof hereunto annexed for reference; one of which notes was payable to the order of Conway R. Nutt, a citizen of the State of Mississippi, and by him duly indorsed to your petitioner; and the other to Henry S. Dawson, also a citizen of the State of Mississippi, and by him duly indorsed to your petitioner; who avers that the assignors of said notes could have maintained an action in your honorable court on the said notes, against the said Alexander McNeill, previously to the assignment thereof; that on the balance of one of said notes, seven thousand five hundred dollars, interest is due at the rate of ten per cent. per annum, from the 11th of January, 1839, until paid; and on the balance of the other, five thousand dollars, interest is due from the same

date, 11th of January, 1339, until paid, and which, though amicably requested, the said Alexander McNeill, as well as his testamentary executor, has neglected to pay.

"Your petitioner further shows, that said notes were given in purchase of a plantation situated in the parish of Madison aforesaid, and certain slaves; and for securing the payment thereof, the said plantation and slaves were duly mortgaged, as will further appear from a certified copy thereof, hereto annexed to make part and parcel of this present petition, and to which, for greater certainty, your petitioner refers; and thence your petitioner is entitled to an order of seizure and sale for the payment of the balance aforesaid of seventeen thousand five hundred dollars, with the interest from the 11th of January, 1839, of ten per cent. on the sum of seven thousand five hundred dollars, and on ten thousand dollars interest at the rate of five per cent. until paid, and the costs of the protests of said notes, ten dollars and fifty cents. Wherefore your petitioner prays that an order of seizure and sale 176*] may issue *against the said plantation, and the negroes mentioned and described in the act of sale and mortgage aforesaid, hereunto annexed, to pay and satisfy said sum of seventeen thousand five hundred dollars, with interest as aforesaid, from the 11th of January, 1839, until paid, with $10.50 costs of protest, and the costs of suit. And your petitioner prays for all such other and further relief as the nature of the case may require, and to equity and justice may appertain; and as in duty bound will ever pray your petitioner. (Seventeen thousand and five hundred dollars, besides interest and costs, claimed.)

(Signed) "Alfred Hennen,
"Attorney for Petitioner."

On the day of the filing of the petition, the following order was issued, viz.:

"Inasmuch as the mortgage within mentioned imports a confession of judgment, let an order of seizure and sale issue for the sale of the property mortgaged, if the sum within claimed is not paid after legal notice.

(Signed) "P. K. Lawrence, U. S. Judge.
"New Orleans, 23d May, 1840."

Afterwards, to wit, on the 23d of May, 1840, the following writ of seizure and sale was issued:

"United States of America:

"The President of the United States to the Marshal of the Eastern District of Louisiana, or his lawful deputy, greeting:

"You are hereby commanded to seize and sell, after legal demand, for cash, the following described property, to wit." (Then followed a list of the property, namely, land and slaves.)

The return of the marshal was as follows:

"Received this order of seizure and sale on the 25th of May, 1840, and on the 29th of May I delivered the order of court and copy of mortgage issued by the clerk of this court to the defendant; also a copy of a notice of demand, which notice is herewith returned (marked A). On the 1st day of June, I seized the land and fifty-seven slaves, mentioned in this order of seizure and sale, and delivered to said defendant a copy of notice of said seizure, which is also herewith returned (marked B). On the 4th day of June, 1840, I affixed copies of an advertisement (marked C), and herewith filed, to the door of the court-house, the door of the parish judge's office, and at other places, in the parish of Madison and State of Louisiana, in which the said *property is situated, [*177 announcing that the said property would be offered for sale on the said premises, to the highest bidder for cash, on Monday, the 6th day of July, 1840, being full thirty days, exclusive of the day on which the advertisements were posted up, viz. the 4th of June, 1840, and the day of sale. On the said 6th day of July, 1840, I repaired to the premises aforesaid, and after the appraisers, James Brooks and Jesse Couch, duly qualified citizens of Louisiana, selected by the plaintiff and defendant in this case for that purpose, were duly sworn, they proceeded to appraise the said land and forty-four of the negroes in this order of seizure and sale, and the same conveyed by deed from the marshal to the purchaser, bearing date the 7th of July, 1840, and of record of this court. Thirteen of the said fifty-seven negroes which were seized by me, proving to be others than those named in this process, were not appraised, neither could the said thirteen be found, as reported by the said appraisers in their report, now filed in the court, and marked D. The said land was appraised at $13 per acre; the 640 acres at $13, amount $8,320. The said forty-four negroes were appraised separately and in families, and the amount of the whole when added was $15,525, making the aggregate amount for the land and negroes $23,845. After said appraisement was completed, and between the hours of 12 A. M. and 1 P. M. I offered the said land and forty-four negroes for sale, after making all the declarations required by law, in relation to the nature and description of the same, and after exhibiting and reading, in an audible voice, a certificate of the recorder of mortgages of the said parish of Madison; and after repeatedly crying the said property, James Erwin, Esq., bid the sum of $16,000, which being the highest and last bid, and more than two thirds of the appraisement thereof, the said land and negroes were adjudged to him, and on the 7th of July, 1840, were conveyed by deed, now of record in this court."

On the 7th of July, 1840, the marshal executed a deed of the above property to James Erwin, reciting the circumstances attending the public sale.

On the 23d of March, 1841, the Court of Probate in the parish of Madison, appointed Alfred J. Lowry curator of the vacant succession of Alexander McNeill.

On the 16th of August, 1841, Lowry, the curator, filed a petition in the ninth judicial District Court in and for the parish of Madison (State court). It represented that McNeill, at his death, was the owner of the estate, and that James Erwin had illegally, and by fraud and collusion, taken possession of it. It then prayed for a restoration of the property, and an account of the rents and profits.

*On the 5th of May 1842, Erwin [*178 filed his answer, reciting the above facts and claiming title under the sale.

Evidence having been taken, the District Court, at December Term 1842, pronounced a

judgment in favor of the petitioner, the curator.

An appeal was taken by Erwin from this judgment to the Supreme Court of the State, which, in October, 1843, affirmed the judgment of the court below. A writ of error, sued out under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

It was argued by Mr. Brent and Mr. Badger for the plaintiff in error, and Mr. Bradley and Mr. Jones for the defendant in error.

The points made by the counsel for the appellant were the following, viz.:

Upon the whole record, it will be contended by the appellant, that the judgment must be reversed.

1. Because the proceedings of the Circuit Court of the United States, under which the appellant claims title, disclose a proper case for the jurisdiction of that court, and therefore the regularity or validity of said proceedings cannot be collaterally impeached.

2. Because the judgment under which the appellant claims, even if rendered upon a record defective as to the averments proper to give jurisdiction, cannot be thus collaterally impeached.

3. Because the proceedings under which the appellant derives title were all regular and bona fide; but if they were otherwise they cannot be inquired into by the courts of Louisiana.

4. Because the judgment of the Supreme Court of Louisiana was otherwise erroneous and illegal, and more particularly in decreeing the appellant to be a possessor in bad faith.

The Reporter was necessarily absent during the argument, and has no notes of it.

Mr. Justice Catron delivered the opinion of the court:

Alfred J. Lowry sued James Erwin in the District Court for the ninth district of Louisiana, for a tract of land of about six hundred acres, and forty-four slaves, who were employed in cultivating the land by growing cotton thereon. The property was situate in the parish of Madison, in that State. The suit was commenced in 1841, by petition, which alleges that about July, 1840, one James Erwin, illegally, and by fraud and collusion, and without any legal title thereto, took possession of 179*] *all the above described property, and is still in possession of the same, has appropriated and wrongfully converted to his own use all the fruits and revenues of said property, and pretends to be the owner thereof, and refuses to deliver to the petitioner the possession. The property was not claimed by Lowry in his own right, but as curator of the estate of Alexander McNeill.

To this petition Erwin answered, among other things not within the cognizance of this court, that on the 6th day of July, 1840, he became the purchaser of the property at public auction, at a sale made thereof by the marshal of the United States, who sold the same under a judgment, and on a writ of seizure and sale, issued from the Circuit Court of the United States for the Eastern District of Louisiana, in a case wherein Andrew Erwin was plaintiff, and Hector McNeill, testamentary executor of *Alexander McNeill*, deceased, was defendant; and that he paid the sum of sixteen thousand dollars in cash therefor, which was applied to the payment of a debt due by mortgage by the succession of Alexander McNeill; and he exhibited a copy of the proceedings on which the sale was founded, and his bill of sale made by the marshal for the land and negroes. These proceedings and the marshal's deed were given in evidence by the defendant on the trial before the State District Court. A judgment was there given against Erwin, and the property decreed to Lowry as curator; from which Erwin appealed to the Supreme Court of Louisiana, where the judgment of the District Court was affirmed; and to this judgment Erwin prosecuted a writ of error out of this court, under the twenty-fifth section of the Judiciary Act of 1789, on the ground that there was drawn in question the validity of an authority exercised under the United States, and that the decision of the Supreme Court of Louisiana was against its validity. That such was the fact, and that this court has jurisdiction, is not and cannot be controverted. The judgment ordering the seizure and sale was declared void, for several reasons. Such of them as are subject to our cognizance we will proceed to consider.

The whole proceeding, commencing with the petition of Andrew Erwin demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground—that is to say, whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment, or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. If void on any one ground, it would be altogether useless to reverse *the judgment because [*180 an error had been committed on some other ground; as, on the cause being remanded, the State court would pronounce the deed void a second time on the true ground. This court was compelled so to hold in Collier v. Stanbrough, 6 How. 14.

The deed, in the case before us, was held void by the Supreme Court of Louisiana: First, because Hector McNeill was not a citizen of that State when Andrew Erwin's petition was filed. This fact the court ascertained by proof dehors the record. The petition alleges that Andrew Erwin was a citizen of the State of Tennessee, therein residing; and that Hector McNeill was a citizen of the State of Louisiana, residing in the parish of Madison, and within the jurisdiction of the court. On being served with process, Hector McNeill did not dispute the fact, nor make any defense; the purchaser found the fact established by the record, nor could it be called in question in a collateral action and disproved, and the purchaser's title defeated by inferior evidence. On this question the case of McCormick v. Sullivan, 10 Wheaton, 192, is entitled to great weight. There neither party was averred to be a citizen of any State; and the attempt was made by a second suit to treat the purchaser's title as a nullity, because of this defect in the proceeding on which the purchase was founded; but it was held that the purchaser took a good title. In the case before us, the record on its face was perfect, and evidence was let in to contradict

and to overthrow it, which we deem to be wholly inadmissible in any collateral proceeding. Hector McNeill was estopped to deny the fact and so is the present party, his successor.

The next question decided below was, that the property when it was seized and sold was part of a succession, and, being in the course of administration in the Probate Court, could not be seized and sold by an execution founded on a proceeding in another court. This question we declined to decide in the case of Collier v. Stanbrough, and ruled that cause on another ground. That a special mortgage, where no succession has occurred, may be foreclosed by this mode of proceeding—that is, by an order of seizure and sale in the Circuit Court of the United States held in Louisiana—we have no doubt. But the question here is, whether jurisdiction could be exercised over mortgaged property whilst it was in a course of administration. That no jurisdiction existed in the United States Circuit Court was held in the case before us; and so it had been held by the Supreme Court of Louisiana in previous cases. But in 1847 that court reviewed its previous decisions, in the case of Dupuy v. Bemiss. In the 181*] opinion there given, *the jurisdiction of the federal court held in Louisiana is so accurately and cogently set forth, and the relative powers and duties of the State and federal judiciaries are so justly appreciated, as to relieve us from all further anxiety and embarrassment on the delicate question of conflict arising in the case of Collier v. Stanbrough and again in this cause. It was held in the case of Dupuy v. Bemiss, that, where a lien existed on property by a special mortgage before the debtor's death, and the property passed by death and succession, with the lien attached, into the hands of a curator, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, and to enforce the creditor's lien, and to decree a sale of the property, and that such sale was valid. We accord to this adjudication our decided approbation; but take occasion to say, that, had we unfortunately been compelled to decide the question without this aid, our judgment would have been, that the decision of the Supreme Court of Louisiana in the cause under consideration was erroneous. It was also assumed by the Supreme Court of Louisiana, "that no explanation was given how the notes secured by the mortgage got into Andrew Erwin's hands in Tennessee, and that no transfer of the mortgage was proved to have been made to him; without which, no State judge could have granted an order of seizure and sale without a violation of law." We hold that wherever a judgment is given by a court having jurisdiction of the parties and of the subject matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. It was so held by this court in the case of Grignon's Lessee v. Astor, 2 How. 319, and to the principles there laid down we refer for the true rule. The Circuit Court may have erred in granting the order of seizure and sale, but this does not affect the purchaser's title.

The Supreme Court of Louisiana next held, that "it is well settled in our jurisprudence, that, in forced alienations of property, there must be a reasonable diligence in, and compliance with, the forms of the law, under a penalty of nullity. When a party resorts to the summary and more severe remedies allowed by law, he is then held to a stricter compliance with every legal formality, and the executory process of seizure and sale may be considered as one of severity. It is obtained ex parte, and all the proceedings under it are to be scrutinized closely. It necessarily follows, that, if the law has not been complied with, the property is not transferred, and the purchaser acquires no title." This was the doctrine adopted by *us in the case of Collier v. Stan- [*182 brough, and is no more open to question in the Circuit Court of Louisiana than it is in the State courts of that State; and the question is, how far the marshal complied with the legal formalities in conducting the seizure and sale. He was bound to give three days' notice to the debtor before the seizure, if he resided on the spot, and if he did not, to count in addition a day for every twenty miles between the residence of the debtor and the residence of the judge to whom the petition was presented. Code of Practice, 735. The notice was given to Hector McNeill on the 29th day of May, 1840, requiring him to pay within three days; the property was seized on the 1st day of June; the advertisements were posted up on the 4th of June, and the property sold on the 6th day of July following. The notice was given in the parish of Carroll, about four hundred miles from New Orleans, where the judge resided, so that more than twenty days less than the due time required by law was allowed to the defendant, Hector McNeill, to appear before the judge, obtain an injunction, and make opposition to the proceeding instituted by Andrew Erwin; and for this reason the sale would be void, if the defendant, McNeill, had not acted in the matter. But the marshal's returns are required by the practice in Louisiana to show the various steps in the proceedings, and are part of the record on which James Erwin's title depends; these returns show that McNeill was served with process on the spot where the property was, and where the advertisements were posted. When the sale came on, the marshal returns, that, "by agreement of the plaintiff and defendant in the suit, that is, Andrew Erwin and Hector McNeill, the following individuals were selected as appraisers, to wit: James Brooks was selected by the plaintiff, and Jesse Couch was selected by the defendant; who, being duly sworn, proceeded to appraise all the property mentioned in the order of seizure and sale; that they appraised the negroes and the land; that is, each slave separately, and the land separately." Both land and slaves being immovable property, if two thirds of the appraised value had not been bid at the sale, a second was necessary by the laws of Louisiana. Code of Practice, 670, 671, etc. And by art. 676, "Slaves seized must be appraised, either by the head or by families; and the other effects must be appraised with such minuteness, that they may be sold together or separately, to the best advantage of the debtor, and as he may direct."

The marshal's deed to James Erwin recites in general terms all the necessary steps required to be taken previous to the sale; and, after describing in detail all the property, the deed says, that "the marshal proceeded to cry the 183*] aforesaid land and *negroes to go together, at the request of the defendant, Hector McNeill; and that James Erwin became the purchaser, for the sum of sixteen thousand dollars; being more than two thirds the appraised value of the land and negroes." The general principle as respects third persons is, that where one having title stands by and knowingly permits another to purchase and expend money on land, under the erroneous impression that he is acquiring a good title, and the one who stands by does not make his title known, he shall not afterwards be allowed to set it up against the purchaser. We understand the decisions in Louisiana, to conform to this principle, and that it is applicable there in cases of execution sales; and, as lands and slaves stand on the same footing in Louisiana, the rule applies equally to both.

Testing the sale by this principle, how does it stand? The purchaser saw the debtor and the marshal select the appraisers, and saw the appraised value, so that bidders could regulate their bids by it; he heard the debtor order the marshal to sell the plantation and slaves together, and they were so sold. Nor did the debtor make any objection to the sale, but by his acts and presence sanctioned it; and therefore it cannot be impeached because formal steps were not strictly complied with.

In our opinion, the order of seizure and sale, and the steps taken in its execution, were such as to support the sale adjudicated to James Erwin by the marshal; but we only adjudge the force and effect of the legal proceeding. As to any other questions involved in the cause (if there be any), this court has no jurisdiction, and consequently leaves them with the State courts.

At October Term, 1843, the curator, Lowry, had judgment, but the court below ordered, "that no writ of possession issue in this case to put the plaintiff in possession of the plantation and slaves until he pay the defendant, or deposit in the hands of the sheriff of the parish to the credit of the defendant, $436.55 with interest thereon, at the rate of five per cent. per annum, from the 18th day of March in the year 1843, until the day of payment or deposit."

In August, 1844, Lowry paid over the money to the sheriff of the parish of Madison; and the sheriff paid it over to Erwin in November, 1844. The writ of error was sued out in May, 1845; and there accompanied the record an assignment of errors. The defendant in error now comes forward, and asks to have the writ of error dismissed on production of a copy of Erwin's receipt to the sheriff, on the ground that, by receiving the money, Erwin released the errors complained of.

In the first place, we think the motion comes 184*]too late to be *heard; but that if it could be heard, it is no bar. The proceeding was of a mixed character, partaking more of the nature of a proceeding in equity than one at law; and although it can only come here by writ of error, yet this does not change its character. A writ of error in equity proceedings is not peculiar. The twenty-second section of the Judiciary Act of 1789 gave a writ of error in chancery cases, and so the law continued until 1803. Ch. 40. And we take the rule to be, that although a decree in equity is fully executed, at the instance of the successful party, he cannot complain of his own voluntary acts, if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party drives a benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no supersedeas; and here there was none.

Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights.

For the reasons above stated, we order the judgment of the Supreme Court of Louisiana to be reversed.

Mr. Justice Wayne and Mr. Justice Daniel dissented.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court for the Western District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court, with directions to proceed therein in conformity to the opinion of this court.

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*THE UNITED STATES, Complainants, [*185

v.

THE CITY OF CHICAGO.

Sale of land reversed for U. S. fort in Chicago—power of city to open streets on—jurisdiction of this court upon division of opinion of circuit court judges on appeal to their discretion.

Although the motion under argument in the Circuit Court was addressed to its discretion, yet if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions.

So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point.

NOTE.—Definiteness of question to be certified. See note to 31 L.R.A. 802.

The corporate powers of the city of Chicago have no right to open streets through property belonging to the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government.

Their right was limited to that part which, by a sale of the government, had become private property.

The fact that streets had been laid out by an agent of the government, did not amount to a dedication of them to public use, so as to vest the control over them in the city.

The United States, having been the proprietor of all the land and reserved a part for military purposes, hold this part by a different title than where land is purchased by them in a State.

THIS case came up on a certificate of division in opinion from the Circuit Court of the United States for the District of Illinois.

In 1839, soon after the decision of the Supreme Court in Wilcox v. Jackson, 13 Pet. 498, deciding that southwest fractional quarter-section ten, township thirty-nine north, range fourteen east, in the Chicago land district, having been selected and used for military purposes, was not subject to pre-emption, the Secretary of War, in virtue of the authority vested in him, directed the sale of a portion thereof.

The act under which the Secretary of War derived this authority is the Act of the 3d of March, 1819, entitled "An Act authorizing the sale of certain military sites," which enacts, "that the Secretary of War be, and he is hereby authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become, useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for into the treasury of the United States, to make, execute, and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction which had been specially ceded for military purposes to the United States by a State over such site or sites shall thereafter cease."

Mr. Birchard, then Solicitor of the Treasury, was appointed by the Secretary of War to make the sale, and to cause the land to be surveyed and platted, as an addition to Chicago. A plat was accordingly made, dividing the land into blocks and lots, with intersecting streets. This 186*] plat, together with a description *of the same, was recorded in the office of the recorder of Cook County, under the title of "Fort Dearborn addition to Chicago."

By this plat, several streets then existing in Chicago were prolonged, and laid out through all the property which belonged to the government. Lots were also laid off upon both sides of the projected streets. But a portion of the property was expressly reserved from sale, and marked by dotted lines lettered "Line of reservation.' Within the reserved line, there were many public buildings belonging to the United States.

On the 11th of April, 1845, the following proceedings were had by the Common Council of the city of Chicago:

"Alderman Ogden, from committee on the judiciary, reported in favor of the petition of E. Bowen and others, for the removal of obstructions at the north end of Michigan Avenue. Received and laid on the table. And,

"On motion of Alderman Scammon, it was ordered that the street commissioner be directed forthwith to open the street (Michigan Avenue), and remove the obstructions therefrom; and that the city attorney be directed to prosecute all persons offering any resistance to the street commissioner whilst opening said street."

The city of Chicago was incorporated by an act of the Legislature of Illinois of the 4th of March, 1837. See Session Laws, 1836-37, p. 50. By the first section it is enacted, "That the district of country in the County of Cook, in the State aforesaid, known as the east half of the southeast quarter of section thirty-three, in township forty, etc.,.....and fractional section ten, excepting the southwest fractional quarter of section ten, occupied as a military post, until the same shall become private property, etc.,.....in township thirty-nine north, range number fourteen east, on the third principal meridian, in the State aforesaid, shall hereafter be known by the name of the city of Chicago."

The inhabitants are incorporated by the name of the city of Chicago, and the corporation is authorized to take, hold, purchase, and convey such real and personal estate as the purposes of the corporation may require.

The twenty-fourth section prescribes the duties of the street commissioner—"to superintend the making of all public improvements ordered by the Common Council, and to make contracts for the work and materials which may be necessary for the same, and shall be the executive officer to carry into effect the ordinances of the Common Council relative thereto," etc.

The powers of the Common Council over streets are conferred by the thirty-seventh, thirty-eighth, fortieth, and forty-third *sec-[*187 tions. The thirty-seventh enacts, that "the said Common Council shall have the exclusive power to regulate, repair, amend, and clear the streets and alleys of said city, bridges, side and cross walks, and of opening said streets, and of putting drains and sewers therein, and to prevent the encumbering of the same in any manner, and to protect the same from encroachments and injury," etc.

The thirty-eighth enacts, that "the Common Council shall have power to lay out, make, and assess streets, alleys, lanes, highways, in the said city, and make wharves and slips at the end of streets on property belonging to said city, and to alter, widen, contract, straighten, and discontinue the same; but no building exceeding the value of one thousand five hundred dollars shall be removed in whole or in part without the consent of the owner. They shall cause all streets, alleys, lanes, or highways laid out by them to be surveyed, described, and recorded in a book to be kept by the clerk, and the same, when opened and made, shall be public highways." The remainder of the section prescribes the manner in which the damages shall be assessed to the owners of land taken.

The fortieth enacts, that "the Common Council shall have power to cause any street, alley, lane, or highway in said city to be graded, leveled, paved, repaired, macadamized, or graveled," etc.

And the forty-third enacts, that "the land required to be taken for the making, opening,

or widening of any street, alley, lane, or highway, shall not be so taken and appropriated until the damages assessed therefor shall be paid or tendered to the owner or his agent."

A few days after the passage of the ordinance by the Common Council, directing the street commissioners to open Michigan Avenue, the United States filed their bill of complaint in the Circuit Court, setting their case fully forth, and praying for a writ of injunction against the city of Chicago, its officers, agents, servants, counselors, and solicitors, to restrain them from entering upon the unsold and reserved portion of the southwest fractional quarter-section ten aforesaid, embraced within the dotted lines of the small map, marked "Line of reservation," for the purpose of opening "Michigan Avenue," or the other proposed streets, or from committing any waste or spoil upon said land, buildings, or inclosures.

The district judge granted the injunction, and on hearing a motion for its continuance in the Circuit Court, the opinions of the judges were opposed upon the following points:

1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

188*] *2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of the government, has become private property.

3d. Whether the streets laid out and dedicated to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets "private property," so as to authorize said city of Chicago to keep said streets open.

The cause was argued by Mr. Toucey (Attorney-General) on behalf of the United States, no counsel appearing for the city of Chicago.

Mr. Toucey presented the following points:

1st. The city of Chicago has no jurisdiction within Fort Dearborn.

2d. There was no dedication of any street within the fort.

3d. The fort being reserved, there was no power to dedicate a street within it.

4th. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there.

I. The city has no jurisdiction within the fort. The part sold became private property. The lots were sold by their numbers, and were, in fact, bounded on the streets. The title passed to the centre of the streets, subject to the easement. The adjoining proprietors own to the centre, subject to the way, as if it had been laid out by public authority. This is the legal presumption, liable to be rebutted. English authorities: Goodtitle v. Alker, 1 Burr. 143; Pring v. Pearsey, 7 Barn. & Cress. 306; Stevens v. Whistler, 11 East, 51; Cook v. Green, 11 Price, 136. Maine: Howard v. Hutchinson, 1 Fairfield, 335. New Hampshire: Makepeace v. Worden, 1 N. Hamp. R. 16. Massachusetts: United States v. Harris, 1 Sumner, 21; Adams v. Emerson, 6 Pick. 57. Connecticut: Peck v. Smith, 1 Conn. R. 103; Watrous v. Southworth, 5 Ib. 305; Hart v. Chalker, 5 Ib. 311; Chatham v. Brainard, 11 Ib. 60. New York: Cortelyou v. Van Brundt, 2 Johns. 357; Gedney v. Earl, 12 Wend. 98; Willoughby v. Jencks, 20 Ib. 96. Virginia: Bolling v. Mayor, 3 Rand. 563. South Carolina: Witler v. Harvey, 1 McCord, 67.

When the highway is dedicated, the title of the land remains in him who dedicates, and will pass to his grantee. The public take an easement only. Lade v. Shepherd, 2 Str. 1044; Cincinnati v. White, 6 Pet. 437; Barclay v. Howell's Lessee, *Ib. 513; Hobbs v. [*189 Lowell, 19 Pick. 408, Shaw, C. J.; Pearsall v. Post, 20 Wend. 126, 131, 132, Cowen, J.

The jurisdiction of the city extends as far as the line of private property, which is the line of reservation on the plat, the present boundary line of the fort. It has none beyond. See the act incorporating the city of Chicago, Illinois Session Laws, 1836–37, p. 50. The streets outside the fort were effectually dedicated when the lands were sold, the streets opened, accepted by the public, and used as public streets. Cincinnati v. White, 6 Pet. 431; Barclay v. Howell's Lessee, Ib. 498; New Orleans v. United States, 10 Pet. 662.

II. There was no dedicatien of any street within the fort. The present fort is the part not sold. It was expressly reserved by the United States when the sales commenced. The whole interest is in the United States. The proposed streets within the fort or line of reservation have not been opened, nor dedicated, nor lots sold on them. They are covered in part by the necessary buildings of the fort. The United States own them, and the land on both sides; and the Executive Department retained to the line of reservation for the purposes of the government, before any of the land beyond that line had been disposed of. The first act of dedication or disposition had not taken place. The map recorded, without any other act done, would be immaterial. If the sale had been entirely countermanded, the recorded survey would have been a dead letter; it is so now within the line where they were countermanded. or not authorized. The plan of Birchard was disallowed to the extent of the present fort. That order was effective, and is to be taken as the order of the President. A dedication is founded upon user. Dedication is the act of giving up land to the public. It must be enjoyed in pursuance of the gift. An enjoyment for a less period than that described by the statute of limitations may suffice, if accompanied by other decisive acts. Maps, plans, declarations, are evidence. Dedication is applicable only to the creation of public rights. Private rights are measured by the grant. Mercer Street, 4 Cow. 542.

III. The fort being reserved there was no power to dedicate a street within it. This was a military post, and under the control of the War Department. By the Act of Congress of the 3d of March, 1819 (3 Statutes at Large, 520), the secretary had power to sell a military site, become useless for military purposes, and give a deed in fee. But the act does not authorize the secretary to lay a road through a fort reserved from sale. It does not authorize him to encumber it, when retained as useful for military purposes, or to divert it from those purposes. It must be condemned as useless for military purposes *before it can be sold. [*190

Here is executive responsibility; and when

upon that responsibility the site is retained, and not sold, there can be no conveyance. None is authorized. But if that were otherwise, before any sale he ordered the fort, block-house, powder magazine, mess hall, shops, and other necessary buildings, with the land where they stood to be reserved. The subordinate had no authority to come with his sales within the line of reservation. It is to be presumed that he conformed to his instructions, in the absence of proof to the contrary. It is, indeed, admitted that the fort was reserved from sale to the line of reservation.

IV. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there. The site of Fort Dearborn, in the judgment of the Executive, is wanted as a military post. The reservation is conclusive on this point. If private property, it could be taken under the Constitution, upon making compensation, and applied to this use. But the United States already own the land, and have applied it to this use. The road having never been opened, the State cannot now condemn the land to any other public use than that to which it is applied by the government, thereby causing an interference or collision. A State cannot open a convenient highway through a powder magazine, or into the intrenchments of a fort, which exist by order of a government supreme within its sphere.

If, then, the city has no jurisdiction within the limits of Fort Dearborn; or if this street was never dedicated to the public by the Secretary of War, or his subordinate; or if neither had authority to dedicate it; or if the State of Illinois has no authority to open a road in this fort in either case, the injunction must be sustained, to restrain the city from demolishing the buildings of the fort to open a road there; and corresponding answers must be given to the questions submitted by the court below.

Mr. Justice Woodbury delivered the opinion of the court:

This cause comes before us on a certificate of a division of opinion between the judges of the Circuit Court in the District of Illinois.

A preliminary question has arisen as to our jurisdiction, which first deserves attention.

The proceedings in the court below were a bill, filed on the 19th of April, 1845, by the United States against the city of Chicago, to obtain an injunction not to lay out certain streets through land belonging to the United States, which the city was preparing to open.

191*] *Before the return day a temporary injunction was issued, and when the term arrived, a motion was made to continue that injunction till the merits of the bill were decided. No answer had been put in to the merits, but a hearing was had on affidavits as to the motion, and in that hearing the division of opinion occurred which is now before us.

Two leading objections have been suggested to our jurisdiction over the matter. One is, that the division arose, not in a hearing of the merits, but of a preliminary motion, resting in the discretion of the court; and the other is, that several questions are certified, covering the whole case rather than a single point.

In respect to the first objection, we do not propose to decide whether the grant of a preliminary and temporary injunction is a matter of discretion merely, rather than of right. Because, whichever it may be, the questions of division presented here are not those on matters of mere discretion in the court below, but involve the right of the United States in the land proposed to be laid out as a street by the city. The adjudged cases, where a certificate has not been sustained on account of some discretion connected with the subject, are chiefly those where the question presented involved merely a matter of discretion, rather than arising in the consideration of a motion or point, which was one of discretion. Smith v. Vaughan, 10 Peters, 366; Packer v. Nixon, 10 Peters, 411. It must be obvious, that, in deciding a matter of discretion, a point may arise which is one of right, and very material. Other cases not sustained were decided on the ground that they occurred after the merits of the cause were decided, and in proceedings subsequent thereto, whether discretionary or not. Bank of United States v. Green, 6 Peters, 28; United States v. Daniel, 6 Wheat. 548; Devereaux v. Marr, 12 Wheat. 212; 5 Cranch, 11, 187; 4 Wash. C. C. 333. The act of Congress seems to reach only matter arising in the progress of the cause, and not afterwards, because the proviso is, "that nothing herein contained shall prevent the cause from proceeding," etc. and hence implies it must be in the progress of the cause. See Act of Congress, April 29th, 1802, 2 Stat. at Large, 159, 160; 6 Wheat. 548. But the present question, occurring before a final decision, comes expressly within the words of the law—"that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point" of disagreement shall be certified, etc. 2 Stat. at Large, 159. And this provision, manifestly, is broad enough to cover any material question of right thus arising, whether the subject on hearing was one of discretion or of right.

*The second ground of objection, [*192 that these questions are several in number, and so material as to decide the whole cause, might prevail, if they had not arisen at one time, at one stage in the cause, and involved little beyond one point. Because, if they are several in number and apply to different stages of the trial, and relate to independent points, they are generally not proper. United States v. Bally, 9 Peters, 267; Nesmith v. Sheldon, 6 How. 43; White v. Turk, 12 Peters, 238; United States v. Stone, 14 Peters, 524; Saunders v. Gould, 4 Peters, 392; Grant v. Raymond, 6 Peters, 218.

That these three questions require an opinion virtually on only one point, namely, the right of the United States to the place proposed to be opened as a street, is manifest, when we see that the decision of this one way disposes of them all, and of the whole case. And the principle embraced in the other branch of this objection, to acting on several points which dispose of the whole case is, not that the whole case may not properly be disposed of by our decision on what is certified, but that the decision must in substance be, not on several questions arising in various stages of the cause, and some of them anticipated and presented, so as to cover the whole case. Leland v. Wilkinson, 10 Peters, 294.

There has justly been a leaning in this court to decline jurisdiction in cases of decisions below where it is doubtful, because the power vested here in such cases, it is believed, was meant to be much more restricted than is often practiced, and is in the most favorable view rather an anomaly. But by considering questions, if certified here, only when real divisions of opinion occur on them, and at one and the same time, no danger exists of extending this branch of our jurisdiction beyond what Congress intended. On the contrary, it is divisions of opinions pro forma, and from courtesy to counsel, and on a variety of points, and at times, some not then having actually arisen, but being anticipated, which appear to transcend the original design of vesting such a power here.

We have, therefore, for several years, declined to consider a certificate of such a variety of points so arising. See cases before cited. And although an indulgence has sometimes been given to certificates, where, in important cases, a division was certified pro forma, Jones v. Van Zandt, 5 How. 224, yet we do not feel justified in repeating it.

To proceed to a consideration of the principal matter involved in these questions, it will be necessary first to advert briefly to some of the admitted facts in the case.

The United States became the owners of the land occupied by Fort Dearborn, near Chicago, in the State of Illinois, under the 193*] *original cession of the Northwest Territory. It was occasionally a station for troops from 1804 to 1824, when the whole fractional quarter-section on which the fort stood was reserved by the general land office for military purposes, on the application of the Secretary of War. See Wilcox v. Jackson, 13 Peters, 502. In that case, which is better known as the Beaubean claim, this court decided that this was a legal appropriation of that quarter-section of land to a public purpose, and exempted it from the rules as to the mass of public lands and their usual liabilities.

From that time till A. D. 1839 it was occasionally occupied as a fort by the United States, and a light-house was erected on it under the authority of Congress, when the Secretary of War, thinking that a portion of the same might be sold without injury to the public interests, proceeded, with the approbation of the President, to make such a sale, under the Act of Congress of March 3d, 1819. 3 Stat. at Large, 520.

He did this by an agent, who first made a plan of the whole quarter-section, calling it "Fort Dearborn addition to Chicago," and laying it down in lots, without exhibiting on it any buildings or reservations. But he did not sell the whole, the government not then concluding to part with the fort, or land and buildings immediately contiguous. On that plan certain streets were also laid down running into the whole quarter-section. The sales, however, being made of only the lots and land outside of what was reserved, the United States allowed the proposed streets only so far as there laid down to be opened by the city of Chicago, and used by the adjoining owners, in conformity to the plan. And when the city undertook to open the streets within the line of reserva-

664

tion, and where no sales of land had been made, and where opening them would prostrate some of the public buildings, and materially injure and impair the public uses of the station, the United States applied for the injunction before named.

On the motion to continue the temporary injunction till the bill was answered and heard, the judges being opposed in opinion on the right of the city to open streets on the public land of the United States situated like this, the three questions certified were in form:

"1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

"2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of the government, has become private property.

*"3d. Whether the streets laid out [*194 and dedicated to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets 'private property,' so as to authorize said city of Chicago to keep said streets open."

But, as has been explained, the whole of them in substance depend upon the extent and character of the rights of the United States in the place where the new streets were proposed to be opened. What, then, were those rights? 1st. The place was where the title of the government had never been parted with, after the original cession. 2d. It was where the land had been appropriated and legally set apart for a special public use. 3d. It was where the opening of these streets would essentially impair, if not destroy, that public use. 4th. It was where streets had never been opened and used, or actually dedicated in that way to purchasers of land there, or to the community in that neighborhood. 5th. It was where the city charter, by its act of incorporation, did not extend, as the charter expressly excepted from its limits "the southwest fractional quarter of section ten, occupied as a military post, till the same shall become private property."

Now, though this court possesses a strong disposition to sustain the rights of the States, and local authorities claiming under them, when clearly not ceded, or when clearly reserved, yet it is equally our duty to support the general government in the exercise of all which is plainly granted to it and is necessary for the efficient discharge of the great powers intrusted to it by the people and the States. The erection of forts belongs to one of those powers, and the building and employment of light-houses belongs to another.

Under the circumstances of this case just recited, then, very clear facts or principles must exist, which impair the rights of the United States, before streets can be opened upon their soil, when situated, reserved, and used as this is.

It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of

other proprietors, under the rights of eminent domain.

But that was not the condition of this quarter-section, being a part of the land originally ceded to the United States as the Northwest Territory, and afterwards specially set apart for their use for military purposes. Here the opening of these streets would, also, injure, if 195*] not destroy, the great objects of *the reservation. Nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon. It seems, too, that, though land purchased within a State for ordinary purposes by the general government must yield to the local public demands, yet land, when held like this, at first by an original cession to that government, and afterwards appropriated for a specific public object, cannot easily be shown liable to be taken away for an ordinary local object, though public, and especially one under another government and by mere implication. United States v. Ames, 1 Wood. & M. 88.

It must be for a public object, clearly superior or paramount, or to which preference is expressly given by law or the Constitution, in order to make the right clear to seize and condemn land so situated. West River Bridge v. Dix, 6 Howard, 543, 544, and cases there cited; 4 Gill & Johns. 108, 150.

But the correctness of this proposition, being open to some debate, is not further explained, nor is it decided here, because not necessary to a disposition of the case.

On other grounds, the idea seems entirely untenable which is entertained by the city and presented in one of the questions, that, because streets had been laid down on the plan by the agent, parts of which extended into the land not sold, those parts had, by this alone, become dedicated as highways, and the United States had become estopped to object.

Persons who looked only at this plan, and did not know that all of the quarter-section was not then to be sold, might be misled in their opinion or expectation how far some of the streets might extend. And if becoming purchasers, such persons might have given something more, under an impression that their lots were on a street which would be longer and more important.

But the bill avers that the agent, at the time of the sale, gave notice that the lots within the line of reservation were not to be sold. How, then, could a right to open streets there, pass, or purchasers be misled? The streets could not pass as an appurtenant to the side lots there; because they were not sold. The streets did not pass by any deed of them, or of any easement or servitude in them, as none was made. There had been, also, no condemnation for them for public ways.

It is said, however, and justly, that land may be dedicated by the owner to highways, and without deed or much formality. Thus, if one allows his land long to be occupied by the public as a highway, such a dedication may be presumed. McConnel v. The Trustees of Lexington, 12 Wheat. 582. So if the actual user has not been long, but clearly acquiesced in. 196*] Jarvis v. *Dean, 3 Bingham, 447; 1 Camp. 202; City of Cincinnati v. White, 6 Pet. 431. So if one makes a map of land proposed to be sold, with streets contiguous, and for the accommodation of side owners, and sells accordingly, it may generally be presumed that he thus dedicates the land contiguous for the streets. See Matter of Thirty-second Street, 19 Wend. 128; Wyman v. Mayor of New York, 11 Wend. 486; Lewis Street, 2 Wend. 473; 8 Wend. 85. And certainly if he allows them afterwards to be so occupied. 6 Pet. 431.

But here, as before shown, no such occupation had been allowed within the reserved line, nor any such sale made there of the contiguous lots. On the contrary, all the streets so laid down on the plan, where the lots contiguous were sold, have been allowed to be opened without opposition by the United States. And it is entirely unsupported by principle or precedent, that an agent, merely by protracting on the plan those streets into the reserved line and amidst lands not sold, nor meant then to be sold, but expressly reserved, could deprive the United States of its title to its real estate, and to its important public works. Nor, under such circumstances, have the purchasers of land elsewhere, or the city, any equitable ground of complaint, that the streets, thus protracted on paper are not opened.

Let the opinion of this court, then, be certified in conformity to these views, which will be, as applied to the questions formally, in the negative as to the first and third, and in the affirmative as to the second.

Mr. Justice Catron, dissenting:

On a bill in equity being presented by the United States to the district judge, he granted an injunction against the city of Chicago, to restrain the corporation from running a street through the public property attached to a military post within the corporate limits. By the Act of February 1st, 1807, injunctions granted by district judges in vacation only remain in force until the next term of the Circuit Court. Accordingly, at the next term a motion was made to continue the injunction granted by the district judge, and the judges were opposed in opinion whether an injunction should or should not be granted. The entire matters of law and fact arising on the face of the bill, and on affidavits and documents introduced by the defendant to resist the motion, were sent up to this court, covered by three points, on which the judges assume to have been opposed. And the motion to renew the injunction is presented to us, as it was to the Circuit Court. And the question is, Have we any power to grant the injunction? By the Constitution, *the [*197 judicial power is vested in the Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish. In cases affecting public ministers and consuls of other countries, and in cases where States are the parties, this court has original jurisdiction. In all other cases, the Constitution provides, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. That is to say, with such exceptions to the exercise of appellate jurisdiction as Congress shall interpose; as that no cause shall come up, unless the matter in controversy exceeds the sum or value of two thousand dollars nor shall a writ of error lie in a

criminal cause, nor from a district court, etc. That the original jurisdiction of the Supreme Court is limited to the two classes of cases above referred to was held by this court in Marbury v. Madison, 1 Cranch, 174. Is, then, the granting an injunction an exercise of original jurisdiction? It may be done out of court by the circuit judge; and so an expired injunction may be renewed at any time by him, the courts of equity being always open for such purpose by our present rules. This bill and affidavits are placed before us as they were before the Circuit Court, and for the same purpose, of founding an original motion on them, thereby to procure an order for the restraining writ to issue. We are asked to take an original incipient step, as the court below was, before any answer is filed, and before anything could be adjudged between the parties by the Circuit Court, so as to bind their rights.

What is appellate jurisdiction in the sense of the Constitution? Our practice under the thirteenth section of the Judiciary Act of 1789 has settled the meaning of the term. It is to re-examine, and to reverse or affirm, the judgment, sentence, order or decree of an inferior court—to pass on that which has been adjudged. Here, nothing was adjudged in the court below.

From the threatening nature of this precedent, it is deemed improper to pass over it unnoticed, as I have done in other cases. If a division can be certified in this instance, so there may be in every other where an injunction is applied for in open court, and the judges see proper to send us the cause— for as to real divisions, they hardly exist at present. The cases are sent here by agreement of counsel, with the assent of the Circuit Court, usually without any examination below.

I, therefore, am of opinion that we have no jurisdiction, and that the matter before us should be dismissed.

Order.

This cause came on to be heard on the tran-198*] script of the record *of the Circuit Court of the United States for the District of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, 1st. That the corporate powers of the city of Chicago have no right to open the streets through that part of the ground laid out into lots and streets, but not sold by the government. 2d. That the corporate powers of the city are limited to that part of the plat which, by sale of the government, has become private property. And 3d. That the streets laid out and dedicated to public use by Birchard, by his surveying the land into lots and streets, and making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby make the ground embraced by said streets "private property," so as to authorize said city of Chicago to keep said streets open. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

666

JENNET SMITH, Calvin S. Powe, and Thomas A. Powe, Plaintiffs in Error,
v.
JOSEPH KERNOCHEN.

Mortgage sold and assigned so as to give Circuit Court jurisdiction in suit for foreclosure —when decree in chancery on trial of validity of mortgage binds parties and privies in action of ejectment.

When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the purpose of throwing the case into the Circuit Court, it is necessary, in order to devest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then he must be considered an innocent purchaser without notice.

If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction.

The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late.

A former suit in chancery between the original parties to the mortgage involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee, claiming to recover by virtue of the same mortgage. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it.

There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined.

The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State.

THE Reporter finds the following statement of the case, prepared by Mr. Justice Nelson, and prefixed to the opinion of the court:

*This is a writ of error to the Circuit [*199 Court of the United States for the Southern District of the State of Alabama.

The plaintiff below, Kernochen, a citizen of New York, brought an action of ejectment against the defendants to recover the possession of eleven hundred and sixty acres of land, situate in that State, and to which he claimed title.

On the trial it appeared that Archibald K. Smith, being the owner in fee of the premises, executed a mortgage of the same, on the 9th of April, 1839, to the Alabama Life Insurance and Trust Company, a corporation duly incorporated by the Legislature of the State of Alabama, to secure the sum of seven thousand five hundred dollars, payable in five equal annual payments with interest. And, further, that the mortgage had been duly assigned and transferred by that company to Kernochen, the

NOTE.—Jurisdiction of U. S. circuit courts depending on parties and residence. See notes to 1 L. ed. U. S. 640; 2 L. ed. U. S. 435; 36 L. ed. U. S. 579.

Colorable conveyances to enable suit to be brought, when motive of transfer no objection. See note to 7 L. ed. U. S. 287.

General answer waives objection to residence. See note to 3 L. ed. U. S. 36; 27 L. ed. U. S. 87.

Res adjudicata—conclusiveness of judgment. See notes to 11 L. ed. U. S. 76; 38 L. ed. U. S. 429, 42 L. ed. U. S. 355.

Estoppel by judgment. See note to 11 L. ed. U. S. 1059.

Howard 7.

plaintiff, in consideration of the sum of one thousand dollars, on the 26th of August, 1844. Possession being admitted by the defendants, the plaintiff rested.

It appeared, on the part of the defense, that the mortgage and bond accompanying it, with other securities belonging to the Life and Trust Company, were placed in the hands of Hunt, an agent of the company, to procure a loan of money in New York; and that one thousand dollars was loaned, at his instance and request, by the plaintiff to the company, for the security of which the assignment of the above mortgage was made. That the motive of the company in making the assignment was to obtain a decision of the federal courts upon the questions decided in the court below, but that Kernochen was not advised of the motive at the time of the advance of the money, nor was he in any way privy to it.

It further appeared, that a bill of foreclosure of the mortgage had been filed in the Court of Chancery of Wilcox County, State of Alabama, by the company, against Smith, the mortgagor, which was defended by him. In the answer he admitted the execution of the bond and mortgage, but denied their validity, setting out the consideration, which consisted of bonds and obligations of the company made and delivered to him for the like sum of seven thousand five hundred dollars, payable at a future day, with six per cent. interest. The mortgage in question bore eight per cent.

The proofs taken in the case sustained the answer, and showed that the transaction between the company and the mortgagor consisted simply in an exchange of securities with each other, with an advantage to the former of two per cent. profit.

The Chancellor decreed that the contract was valid, and the bond and mortgage binding [*200] upon the defendant, and that, unless *the principal and interest were paid within thirty days, the mortgage be foreclosed.

Upon an appeal to the Supreme Court of the State, this decree was reversed, and a decree entered dismissing the bill. That court held that the charter of the Life and Trust Company conferred no authority upon it, to lend its credit, or issue the bonds for which the mortgage in question was given, and that the bond and mortgage taken therefor were inoperative and void.

The charter of the company, together with several amendments of the same, were given in evidence.

When the evidence closed, the defendants prayed the court to charge the jury, that, if they believed that the transfer of the mortgage to the plaintiff was made for the purpose of giving jurisdiction to the federal courts, and to enable the company to prosecute its claim therein, and that the plaintiff was privy to the same, the deed was void, and did not pass any title to the plaintiff which the court would enforce.

The defendants further prayed the court to charge, that the judgment and decree of the Supreme Court of Alabama between the company and Smith, the mortgagor, was conclusive upon the parties in this suit; and that neither the mortgagees, nor those claiming under them, since the rendition of the decree, could recover the lands embraced in the mortgage at law or in equity.

The court refused to charge according to the above prayers, and charged as follows:

1. That any matters which might abate the suit should have been pleaded in abatement, and that, after the plea of the general issue, the facts proved by the defendants, as set forth in the bill of exceptions, could be of no avail, and were insufficient to abate the suit. And,

2. That the defendants, claiming title under Smith, the mortgagor, were estopped from denying the consideration of the mortgage as set forth in that instrument, and that the consideration as there stated was good, and valid, according to the charter of the company, and sufficient to sustain the validity of the mortgage and title of the plaintiff.

The jury found a verdict for the plaintiff.

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

It was argued by Mr. Dargan for the plaintiffs in error, and Mr. Sergeant for the defendant in error.

Mr. Dargan, for the plaintiffs in error:

The facts of this case may be thus stated. The Alabama *Life Insurance and Trust [*201 Company held the bond and mortgage of Archibald R. Smith, executed and delivered to said company. They filed a bill in equity in the State of Alabama to foreclose the mortgage. Smith resisted a decree and set up a defense, that the consideration of the bond and mortgage was illegal, in this, that the consideration of the company to him was the bonds of the company to an amount equal to his bond, payable in New York, which bonds of the company bore interest, payable semi-annually, and were in the form described in the bill of exceptions. That said company had no power or capacity to deal by way of exchanging credits. The Supreme Court of the State of Alabama dismissed the bill of the company, declared the consideration illegal, and the bond and mortgage void.

This is shown by the record of the case, reported in 4 Alabama Reports, 558, which case, as reported, is made part of the bill of exceptions. It was also shown by the secretary of the company, that the consideration of the bond and mortgage was stated correctly in the report of said case. After this decision was rendered, the company transferred the bond and mortgage to Kernochen by an assignment on the back of the mortgage, marked exhibit B in the bill of exceptions.

Tisdale, the secretary of the company, testified that the transfer of the bond and mortgage to Kernochen was for $1,000. That the object of the transfer was to obtain a decision of the question in the courts of the United States. That he did not know whether Kernochen was informed of the motive of the transfer, that the company had never had any other transaction with him, and that this was done through J. Hunt, their agent.

The defendant in the court below showed, also, that Smith had resisted the mortgage in his lifetime, and denied its validity; of this the company was apprised; also, that since the death of Smith, the land had been sold under execution, and bought by Powe, one of the defendants. The defendants requested the court

to charge the jury, that if the transfer of the mortgage was for the purpose of giving jurisdiction to the federal courts, and to enable the Alabama Life Insurance and Trust Company to prosecute its claim in this court, and that the lessor of the plaintiff was privy to this intention, that the deed was void, and could give the lessor of the plaintiff no title which this court would enforce. This charge was refused. The defendant also requested the court to charge the jury, that the consideration of said mortgage was illegal, and therefore the mortgage was void, and the plaintiff could not recover; which was refused.

202*] *Also, that the judgment and decree of the Supreme Court of Alabama, as delivered in the case of Smith v. The Alabama Life Insurance and Trust Company, was conclusive, and that neither the mortgagors nor those claiming under the mortgage, since the rendition of said decree, could recover the land described in the mortgage; which was refused. Also, that if the jury believed that, at the time of the transfer to the lessor of the plaintiff, the defendants held the land, denying the validity of the mortgage, the transfer was void as to them, and that the plaintiff could not recover; which was refused.

And the court charged, that any matter in abatement should have been pleaded in abatement, and that the facts proved by the defendant on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit.

The court also charged, that the defendants and Archibald R. Smith were estopped from denying the consideration as set forth in the mortgage, and that the consideration, as expressed therein, was sufficient according to the laws regulating the Alabama Life Insurance and Trust Company, to sustain the contract set forth in the mortgage.

Also, that the judgment and decree of the Supreme Court of Alabama was not conclusive, and could not bar the plaintiff in this suit.

It will be seen by the bill of exceptions, that the case, as reported in 4 Alabama Reports, as well as the acts of the Legislature incorporating the company, and altering and amending the charter, are part of the bill of exceptions.

I intend to present the following questions:

1st. The court erred in refusing to charge the jury, that, if they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce.

The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given.

The Constitution did not intend to confer on the federal tribunals jurisdiction to determine on the rights of citizens residing in the same State, unless the subject matter was of admiralty jurisdiction, and where citizens of the same State held grants to the same land from *different States.*

A deed, therefore, which is merely intended to give jurisdiction to this court, and is not for the purpose of transferring the *right [*203 to the thing to the vendee, but as between vendor and vendee the interest and right is still with the vendor, contravenes the spirit and intention of the Constitution: shall it be effectual for this purpose? If so, it appears to me that the framers of the Constitution ought to have added, or rather that we now add to the Constitution, after the words, "between citizens of different States" "and between citizens of the same State where one of the parties has transferred his right to a citizen of another State, with the view to give jurisdiction to the federal courts."

Justice Washington, in 1 Washington's Circuit Court Reports, 82, decided, that a deed for such a purpose was void, and could not effect its object. I think that this court came to the same conclusion in the case of McDonald v. Smalley, 1 Peters, 558; in concluding the opinion, Chief Justice Marshall uses this language; "The case, we think, depends on the question, whether the transaction between McArthur and McDonald was real or fictitious; but there being nothing in the record from which the court could pronounce it was fictitious, the deed was maintained. But suppose the evidence had shown that the deed was fictitious, that McDonald was suing merely for McArthur, what would have been the decision? It seems to me, from the whole case, that the deed would have been pronounced void—a fiction merely; and therefore it could not have given title so as to effectuate the very fictitious design for which it was intended; that is, to coerce the adjudication of the title in the federal courts."

The District Court seemed to think it was matter in abatement. Now, Kernochen was a citizen of the State of New York, the plaintiff in error, of Alabama; the Circuit Court, therefore, had jurisdiction so far as the parties on the record are concerned. And the only question was, Had the plaintiff the better title? He had the title the mortgage gave him, if the transfer was valid in law; if it was not valid in law, he had no title, and the question was therefore properly raised in bar. True it is, that in 1 Peters the question seems to have arisen on a question of jurisdiction to the court; but the court will perceive that the question still must have been, Did the deed from McArthur to McDonald give title to McDonald? If it did give title, as McDonald resided in Alabama, the jurisdiction was perfect; if it gave no title, McDonald could not recover; therefore the question was, did the transfer of the mortgage for the purpose of prosecuting the suit for the Alabama Life Insurance and Trust Company, being intended to give fraudulent jurisdiction to the court, convey to him any title, or such a title as this court would enforce?

*Deeds given for illegal purposes are [*204 void, and courts will not execute the purpose. This transfer was made to enable the Alabama Life Insurance and Trust Company, a corporation of Alabama, to litigate its rights with citizens of Alabama in the federal courts.

The company was prevented by the Constitution from doing this. They try by this deed to do it, and for this purpose they make it; will

the court execute the purpose, or declare the deed void? If void, no title passed, none at least that this court would enforce; for, if it did, it would be carrying out, or permitting the Alabama Life Insurance and Trust Company to carry out, their illegal purpose.

The whole testimony fully authorized the request asked. A decision had been rendered on the case in the Supreme Court of the State, pronouncing the mortgage void. The company never had had any transaction with the plaintiff. The secretary admitted that the object was to enable the company to try the question in the federal courts; only a thousand dollars was received. It might well have been left to the jury to say, Is this not all a fiction, a design and trick between Kernochen and the company? And if so, I think this court will establish the rule, that such a transaction will not convey such a title as this court will enforce.

2d. The consideration of the mortgage is illegal. The Supreme Court of the State of Alabama has decided on this very same mortgage, that the consideration was illegal, and not authorized by the charter of the company; and this decision was made directly, when the validity of the mortgage was put in issue, and the decision depended on the construction of the charter and its amendments.

The rule is fully recognized in this court, that the decision of the State courts, construing a statute of their own State, is conclusive on this court. That is, whether the construction be right or not, it will be adopted as a rule of decision. So strongly has this court adhered to this rule, that, in a case from Tennessee, where the Supreme Court of Tennessee had reversed a former decision on the construction of the statute of limitations, this court adopted the last decision as conclusive, although they believed the former decision was correct. See, also, Greever v. Neal, 6 Peters, 291. It may be well to inquire why this court has adopted this rule of decision. The answer is, that the jurisdiction or sovereignty, as it may be called, has an unquestionable right to construe its own statutes, and that its own courts and its own people understand its own laws, and that no other people or government can or ought of right to construe those laws for them. Now, 205*] *I would submit that, in construing an act of the Legislature creating a corporation, we could not adopt a different rule; if so, every charter granted by the States must come before this court for its final construction, and we should deny to the sovereignty that created the being, the right to judge of its powers and capacities.

But, if I am wrong in this view, the decision of the Supreme Court, as delivered by Justice Ormond, will clearly show, I think, that the company had no right to issue their bonds, and thus deal in an exchange of credits. If they had the right to issue the bonds described in the bill of exceptions, their contracts to the same purport would have been valid without their seal, and their obligations could have as well been payable on demand as at a future day; as well in the shape of a bank note, as in any form; and thus, by construction, they would have fairly been entitled to banking privileges, which was certainly never designed or contemplated by the charter. Whether, therefore, this court will construe the charter, or adopt the construction of the Supreme Court of Alabama as correct, the result will be the same, that the consideration of the mortgage is illegal.

Then comes the question, Can we show by parol proof that the consideration is illegal, when the consideration expressed in the mortgage is legal, and different from the consideration shown by the proof, which is recited to be seven thousand four hundred dollars in cash? To hold that this recital precludes proof of the illegality of consideration would set the whole law at defiance, so far as contracts are concerned, and would be saying, however immoral or vicious the consideration of a contract may be, you may preclude an inquiry into it by stating a legal consideration on its face.

The rule of evidence is, that parol evidence shall not be received to vary or contradict a deed or other written evidence. This rule, however, can only apply when the evidence seeks to contradict or vary the terms or legal effect of a deed; not seeking, however, to destroy the deed altogether as a legal instrument or contract; for the rule is well settled, that fraud or illegality of consideration may be given in evidence to defeat a deed, that is, to show the deed is a nullity.

This is the doctrine laid down in 4 Kent, 465, 466; Greenleaf on Ev., sec. 284; 1 Smith's Leading Cases, 154; 2 Wilson, 347; 9 East, 408; 5 Mass. Rep. 61. Indeed, a different rule would destroy all law by the form of the contract.

I therefore submit, that the language of the deed cannot preclude the plaintiffs in error from showing that the consideration was illegal; and being illegal, the mortgage is void; and *therefore the court erred in refusing [*206 the charge asked, and in charging as it did as to the validity of the deed.

Another question is, Could the Alabama Life Insurance and Trust Company transfer a title, after Smith had denied the validity of the mortgage, and held the possession adverse to the company? Could the company make a deed that would be valid as against the adverse possessor? At common law he could not, for livery of seisin could not be given. See 2 Co. Litt. by Thomas, 409, and note Y. And this is the rule recognized by the Supreme Court of Alabama. See Allen and Dexter v. Nelson, 6 Ala. Rep. 68. True it is that the mortgagor cannot deny the title of the mortgagee, and he is considered as the tenant of the mortgagee. But the principle of this doctrine is, that where there is a valid mortgage, the mortgagor shall not set up a paramount title to the mortgage; but here the validity of the mortgage was denied.

The possession was adverse to the mortgage. Does not the rule of the common law apply?

Mr. Sergeant, for the defendant in error:

The facts of this case appear in the record, as fully, and at the same time as succinctly, as they could be presented here. To the record the court is respectfully referred for the general view of them, and the questions they give rise to, saving the right of stating particular facts, as they may become material in the

course of the discussion of the matters of law involved in the case.

From the printed argument submitted by the learned counsel of the plaintiffs in error, it appears that they rely upon two principal objections to the judgment below, and one that is subordinate, and, seemingly, not much confided in. These are all the assigned errors, therefore, before the court, and to these answers will now be given, without further introduction.

I. "The court erred in refusing to charge the jury, that, if they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce. The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given."

The first of these differs, in one particular, from the printed argument, namely, in requir-
207*] ing the judge to leave to the *jury whether the lessor of the plaintiff was "privy to his intention."

The second differs, it is thought, materially from the charge actually given, as will be presently seen.

To this error, thus assigned, there are several answers.

1. There was no evidence whatever of any privity of the lessor of the plaintiff. The only witness examined on the point said, "He did not know whether Kernochen was informed of the motive; that he never had any intercourse with him on the subject, nor had the company ever had any other transaction with him." As a matter of fact, it thus stood without any proof. It is respectfully submitted, that the court cannot be required to give a charge upon what is not in evidence. If a fact is important to the party, it is for him to substantiate it by proof; but where there is absolutely no proof at all, he cannot require the judge to charge the jury as to its effect, and there is no error in the judge declining to do so. The learned counsel for the plaintiffs in error seems to be of the same opinion, for in his argument, as has been seen, he omits the matter of privity altogether. By and by it will be seen whether the fact itself, if proved, would have been of any consequence. It is submitted that it would not.

2. The judge was required to charge the jury, that, upon the hypothesis presented, without any color of support form the evidence, the assignment of the mortgage was void, and could give the lessor of the plaintiff no title which the court would enforce. The grounds in law upon which the judge could be asked to declare the deed void, and to decide that it could give no title which the court could enforce, are nowhere exhibited in the argument, unless they are supposed to be somehow involved in the general question of jurisdiction, which will be considered presently. The prayer is simply that the court will charge the *jury that* the assignment is void, and therefore *that one link is wanting* in the derivation of title of the lessor of the plaintiff. The proper termination of the objection is not to the jurisdiction at all, but to the right to recover, equally fatal in all jurisdictions, State or federal.

It is nowhere denied that the assignment was duly signed, sealed, and delivered, was upon a sufficient consideration, and, between the parties, a good and valid transfer, sufficient in law to pass the right of the mortgagee, whatever it was, to the transferee. How it can be said that such a deed is void is altogether inconceivable. Probably the explanation of what is meant is to be sought in the words which follow—that it "could give no title which this court" (the Circuit Court) "would enforce." The reasoning, then, would be, it is good elsewhere, *but it is void here; and the [*208 ground must be, that it is so void because it was made to give this court jurisdiction. This position is answered authoritatively by one of the decisions of this high court, quoted in the printed argument of the plaintiff in error. In McDonald v. Smalley, 1 Peters, 620, A. D. 1828, Chief Justice Marshall, in page 624, declares the motive to be of no consequence. The case is very similar to the present, and what is there said is now considered to be the settled doctrine of this court. The reasons of it will be found very fully stated in an opinion of the late Judge Story, in his circuit, which will be again referred to in a later stage of the argument. Briggs v. French, 2 Sumner, 251. The motive, therefore, is not an unlawful one to entertain or to act upon, and cannot affect the validity of the deed, if in other respects valid and good. "This court" (the Circuit Court) would enforce it as fully as any other court. It would have been error to decline the jurisdiction.

3. The judge is charged with error in deciding, as alleged, that this, if true, was matter in abatement, that it ought to have been pleaded, and could have no influence after the general issue pleaded.

What the judge really did say is in the bill of exceptions, and is as follows "And the court charged, that any matter in abatement should have been pleaded in abatement; and that the facts proved by the defendant, on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit."

If the facts proved by the defendant could be of no avail, either upon a plea in abatement or upon the general issue, then the decision of the judge, as imputed to him, would be wholly immaterial, and therefore it is not error to reverse the judgment. Authority (which is abundant) need not be quoted for this obvious conclusion of common sense. If it could not be made available in either way, the case was against the defendant, and the decision must be against him, so that what was said by the judge could neither help nor hurt him. This point was thus immaterial.

But the charge of the judge must be understood with reference to all that had previously occurred in the case, and in fairness must be interpreted as intended to express, in a concise way, his opinion upon the several points the case presented upon the evidence or upon the requirement of counsel. It must be remem-

bered, therefore, in the first place, that there was not the least pretense of evidence to affect the lessor of the plaintiff, or to impugn the in- [*209*] tegrity of his conduct. All that *was before the court was the evidence as to the motive of the mortgagee, which, as already stated, was of no manner of consequence. In his charge, he begins with stating the law—"that any matter which abates the suit should have been pleaded in abatement," which, undoubtedly, is true—universally true, unless this be an exception. The remainder of the sentence must be understood to say, that, if so pleaded, they would be insufficient, under the circumstances proved, "to abate the suit."

It is not worth while, however, to occupy the time and attention of the court with an effort to bring this question to the most exact precision. Interpreted in either way, the charge is right, and there is no error in it. If the court should be of opinion that the learned judge below meant to say that the matter alleged could be of no avail to the defendant, after pleading the general issue, we contend that he was right, and there was no error.

The plaintiff's argument, it will be seen, embraces two propositions in law, namely, that, upon the trial of the general issue, the evidence in the case was competent and was sufficient to oust the jurisdiction, and also that no plea in abatement was necessary to entitle the evidence to be heard, and to produce this legal effect.

To maintain these propositions, but one case is cited, namely, Maxfield's Lessee v. Levy, reported in 2 Dallas, 381, and more at large in 4 Dallas, 330. Reference is also made to two dicta of a later period, which will be noticed hereafter.

What Maxfield's Lessee v. Levy decided, it seems to have been difficult to express in legal language. In the first of the reports, the purpose of the deed, and that there was no consideration, are stated as the grounds of the decision. In the index to the second, it is thus stated: "A fictitious conveyance of land, to give jurisdiction to the federal court, detected, and the suit dismissed." The word "fictitious" here used will be found to be adopted afterwards, but what it means is nowhere stated or defined. The word is an ambiguous one, as here applied, and the two cases where it is subsequently found did not require attention to its meaning, because the objection founded upon it was answered decisively by other matter. All that need be said is, that if the "purpose" or "motive" is held to make it "fictitious" and unlawful, it is contrary to what has been decided by this court in the case already referred to.

The decision of the Circuit Court, however, is not authority here. It is entitled to respect so far only as it is reasonable and consistent with law; and to that respect it is entitled only in cases where the facts and circumstances are [*210*] the same. *Now, they are not so, in the present case, as must be most obvious.

In Maxfield's Lessee v. Levy there was no question of the competency of the evidence upon the general issue, nor of its sufficieny to oust the jurisdiction. It does not appear that the general issue had been pleaded, or any other plea, nor, of course, that the defendant, by pleading, had waived his right to except to the jurisdiction. The case was decided upon a rule to show cause why the ejectment should not be dismissed from the record.

Again, in Maxfield's Lessee v. Levy the grantor and the grantee were both parties to the purpose which the learned judge denounced as vitiating the deed. That is not the case here. There is no evidence at all that the assignee was privy to it.

Further, there was no consideration in Maxfield's Lessee v. Levy. This was clearly and distinctly proved, and much stress is laid upon it by the learned judge, as may be seen in 4 Dallas, 334. It was, indeed, the chief ground of his decision. In the present case, there was a valuable consideration paid.

Not admitting that, under the circumstances, the decision in Maxfield's Lessee v. Levy can be supported, yet there are such differences between that case and the present, as fully justify us in concluding that the learned judge who decided Maxfield's Lessee v. Levy would not have decided Kernochen v. Smith otherwise than Judge Crawford has done.

Independently of those considerations—which, it is submitted, are sufficient here—could Maxfield's Lessee v. Levy be maintained at the present day, if it were now to present itself with the same facts and circumstances, precisely, as were before the late Judge Iredell? The case occurred, it will be remembered, as early as the year 1797, when the Constitution had been very recently made, its institutions were new and untried, and they were both regarded with jealousy, as likely to encroach upon and swallow up the States. The judiciary, of course, had its full share of the effects of this feeling. Experience has shown that it was groundless. The courts of the United States have carefully kept themselves within the narnowest limits. They have settled, in the first place, that they can occupy no more of the ground belonging to the United States by the Constitution than is assigned to them by acts of Congress. They have, in the next place, settled that their jurisdiction is limited, though they are not inferior courts. And, finally, that their jurisdiction must appear upon the record. The neglect, in this last particular, may be taken advantage *of at any time, even in er- [*211 ror. But they have never gone the length of saying that the want of jurisdiction from matters out of the record may be alleged at any time, in any form, or in total disregard of all rule. Still less have they countenanced the position, that a deed, good and real by the laws of the State, and which would be so held in any State tribunal, becomes void by being offered in evidence in a court of the United States, and is to be regarded as fictitious.

The case of Maxfield's Lessee v. Levy has received no countenance or support in this court. It has never been followed, as far as known, by any judge. In the two cases referred to on the other side, there is a reference merely to the subject of "fictitious conveyances," but in both the jurisdiction was supported, without any examination of the doctrine.

It is unnecessary to examine the argument in Maxfield's Lessee v. Levy, because this has already been done by the late Judge Story, in the case of Briggs v. French, 2 Sumner, 252. With the force of ability, learning, and experience,

and the high judicial authority, which that eminent and lamented judge could bring to the discussion, it would be a work of supererogation, if not of presumption, especially in this court, where he was so well known as a judge and a jurist, to attempt to add a word to what he has said. This decision was in the year 1835, with the light of nearly half a century upon the law and practice of the courts of the United States.

Two things, however, irresistibly force themselves upon the mind of anyone who reads that case. The one is, how it can be that a court of the United States, constituted to administer, in certain cases, the laws of the States, can declare a deed void which is good by the State law, or hold it fictitious when by the same law it is real. The other, how can a court constituted a court of law or equity deem itself at liberty to reject a rule of pleading of universal adoption, and conducive to order and justice, to replace it by a mode of proceeding which leads only to confusion, surprise and wrong?

But it is believed, also, that the decisions of this court have established the contrary. One remark only will be made before referring to them. The jurisdiction in question is founded exclusively upon the character of the parties, and not at all upon the subject matter. It is not perceived how the latter can affect the former. The one exception made by Congress, with perfect accuracy, in the Act of 1789, is founded upon the subject matter, namely, assignable instruments. No matter, who sues upon them, or who is sued, if there was not jurisdiction between the original parties, there is none, in the excepted case, where an assignee is plaintiff. This is plain and practicable. The 212*] *purpose or motive is not regarded, and the simple fact, as to the subject matter, is the determining test. The exception only proves the rule. In all other cases, the character of the parties decides the jurisdiction, whatever may be the subject matter. Congress could have gone further, if they had thought fit to do so. They can do so still, if they so incline. Probably Congress and the people are by this time convinced that the jurisdiction is a beneficial one, and ought not to be cavilled at or curtailed.

But now for the decisions of this court, leaving to it, without particular suggestions, to discern how they contradict and overthrow the doctrine of Maxfield's Lessee v. Levy.

Instances of pleas to the jurisdiction will be found in Sere v. Pitot, 6 Cranch, 332; Mollan v. Torrance, 9 Wheat. 537; Shelton v. Tiffin, 6 How. 163. Doubtless, there are many others.

In De Wolf v. Rabaud, 1 Pet. 498, A. D. 1828, it was decided that the question of citizenship must be pleaded in abatement. Said to have been so recently decided, on full consideration.

In Evans v. Gee, 11 Pet. 80—see page 83, opinion of Judge Wayne—A. D. 1837, the same point was decided. In Sims v. Hundley, 6 How. 1, A. D. 1848, that, upon the plea of non assumpsit, evidence cannot be received relating to the residence of the party, bearing upon the jurisdiction of the court. So, in Bailey *v. Dozier*, 6 How. 23, same year; see, also, *Briggs v. French*, 2 Sumner, 251.

In Bonifee v. Williams, 3 How. 574—see page 577—A. D. 1845, this court decided as follows: "Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue, at law, in the federal courts, without reference to the citizenship of those who may have the equitable interest."—McLean, J.

Putting these decisions together, it is most clear that the opinion of the learned judge below (Judge Crawford), even in its most extreme construction, was right, and that there is no error in it.

II. The error alleged under this head (except a subordinate matter hinted at in the conclusion of the printed argument, which will be noticed hereafter) is founded upon the second and third of the charges of the learned judge, to be considered with the instructions asked for by the defendant below.

To begin with the third. No authority has been shown to establish that a decree in chancery is a bar at law, or a judgment *at [*213 law a bar in equity. The contrary is well settled. Lessee of Wright v. Deklyne, 1 Peters, C. C. 199, 202.

For the same reason, the arguments of a chancery court must be deemed inapplicable, except to the very case before the court; for, in equity, the decision itself may depend (and does so in this case) upon which party it is that applies for relief. A decree is not a bar even in chancery, when the position of the parties is changed. It is lawful and equitable for a party to use the means he has at law to force his adversary into a condition to oblige him to go into chancery, and thus free himself from obstructions which lie in the way of administering what is plain and substantial justice. What that justice here is must be very apparent.

The defense attempted is a very ungracious one. There is no denial that the company fulfilled its agreement, gave the bonds, and in due time paid them, and that the party who received converted them, in such way as seemed best to him, to his own use. The defense now is, simply, that the company were not authorized to issue the bonds. It is not said, even, that there was a prohibition by law. It was, therefore, at most, a common mistake, and one party, having obtained the full benefit of the contract, now seeks to turn the mistake to the wrong of the other party, by stripping him of the equivalent he received. No court, either of law or equity, will favor him. If he come into equity, he must do equity.

The statutes of usury, for example, declare the usurious contract void. But wherever the case is in the power of a court, either of law or equity, they require the payment of principal and interest. The cases are collected by counsel in Bank of United States v. Waggener, 9 Peters, 390. Among them is the case of one suing for a pledge or security.

The question now is, and the only one, What are the rights of this mortgagee at law against the mortgagor, and those deriving under him? What are his legal rights? This is a question which was not, and could not be, before the Court of Chancery, as the case was

there presented. The decree of that court did not touch it, nor intend to touch it. It only refused its aid to foreclose the mortgage. But the court neither condemned the mortgage, nor enjoined the plaintiff from proceeding at law, nor meddled with or affected his legal rights. They remain exactly as they were before.

What are his rights at law? This is the only question at present. If he should attempt to use them inequitably, the mortgagor may apply to equity for relief. Difference between application by mortgagor and mortgagee, 1 Powell on Mortgages, 336.

214*] *At law, a mortgage is a conveyance of land. The statute of Alabama executes the use, and the courts of Alabama have decided that the mortgagee is entitled to possession as soon as the deed is made. Duval's Heirs v. McCloskey, 1 Ala. Rep. N. S. 708. The contract is executed by force of the deed and the statute. Aik. Dig. 94, sec. 37; Clay's Dig. 156, sec. 35. The contract is executed, and no longer executory. The consideration is not to be inquired into.

The doctrine of the court of Alabama above quoted is the universal doctrine. Hughes v. Edwards, 9 Wheat. 389. "The mortgagor, after forfeiture" (which is the case here), "has no title at law, and none in equity, but to redeem upon terms of paying the debt and interest." (p. 499). The mortgagee may proceed at law and in equity at the same time. A real action may be brought upon a mortgage in fee. Dexier v. Harris, 2 Mason, 531. See also the opinion of this court in Conard v. The Atlantic Ins. Co. 1 Peters, 441; and, still later, in Bronson v. Kinzie, 1 How. 318, where the nature of the estate of the mortgagee is very distinctly stated, and his rights at law. It is good against the priority of the United States. United States v. Hooe, 3 Cranch, 73; Thelusson v. Smith, 2 Wheat. 396. "In contemplation of law, the mortgagee was a perfect stranger as to any legal estate." Cheetham v. Williamson, 1 Smith's Rep. 278, per Lord Ellenborough.

The mortgagor cannot dispute the title of the mortgagee, because no man is permitted to dispute his own solemn deed. 1 Powell on Mortgages, 166; Coote, 347, 348. Payment is good at law only by Stat. 7 Geo. II, ch. 20, and that strictly taken. 1 Powell, 168, note 2.

The right at law, equity will not interfere with. Cholmondeley v. Clinton, 2 Mer. 359; Williams v. Medlicott, 6 Price, 496, note at the end of the case. They will not prevent him from assuming possession.

At law the mortgagor and those claiming to derive under him cannot dispute the right. 1 Powell, ut sup. It is to be observed here, that the alleged purchaser has never been in possession. The family of the mortgagor have remained in possession. See Record, p. 7, sixth paragraph from the top, the last sentence. If he had been, however, this would make no difference. They cannot at law dispute the deed. Doe, d. Roberts, v. Roberts, 2 Barn. & Ald. 367, 370; James v. Bird's Adm'r, 8 Leigh, 510; Pownal v. Taylor, 10 Leigh, 172; Newman v. Chapman, 2 Rand. 93; Thomaston Bank v. Stimpson, 21 Maine, 195; Smith v. Hubbs' Adm'r, 1 Fairfield, 71; Reed v. Moore, 3 Ired. 310; Logan v. Simmons, 1 Dev. & Batt. 16; see, also, 7 Johns. 160; 4 Mass. 355; 4 Hill, 424; 3 Ves. 612; Cro. Jac. 270; 1 Johns. 189.

*All the questions in this case, how- [*215
ever, have been deliberately considered and decided by the Supreme Court of Ohio. They are reported in the seventh volume of Ohio Report. Raguet v. Roll, and Doe, d. Raguet, v. Roll. The first was a proceeding by scire facias to sell, a remedy of an equitable nature for the mortgagee; and the second, an ejectment at law. They presented, of course, the very same questions as are now before the court, and nothing need be said to recommend their reasonableness, and their conformity to law. The printed volume has not been within our reach. We are obliged to submit a manuscript copy, which is herewith.

There remains nothing further to trouble the court with, but the one subordinate point before referred to, which will be easily disposed of. This point is, that the deed of transfer was void on account of adverse possession. There was no adverse possession. In Chapman v. Armistead, 4 Munf. 382, the court decided as follows: "The possession of the mortgagor, continuing with the permission of the mortgagee, is to be considered as the possession of mortgagee, so that when the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner."

Further references for the court.—Elliott v. Peirsol, 1 Pet. 340; Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904.

Mr. Justice Nelson, after reading the statement of the case prefixed to this report, proceeded to deliver the opinion of the court:

We are of opinion that the charge of the court below upon the question of jurisdiction was substantially correct.

It might have been placed upon ground less open to objection. The case admits that Kernochen, the plaintiff, was not chargeable with notice of the motive of the company in assigning the mortgage to a citizen of another State; he was not chargeable, therefore, with the legal consequences that might result from the existence of such knowledge. He advanced his money, and took the security in good faith, and became thereby possessed of all the title that belonged to the mortgagees; and had a right to enforce it in any court having cognizance of the same.

The most that can be claimed is, that the company intended a fraud upon the eleventh section of the Judiciary Act, in seeking to obtain a decision of the federal courts upon the validity of the mortgage between themselves and the defendants, both parties residents and citizens of the same State, using the name of the plaintiff as a cover for that purpose. But admitting this to be so, still, upon general principles, the rights of the plaintiff under the assignment could not be affected by the fraud, *unless notice was brought home to [*216
him. Till then, he stands on the footing of a bona fide purchaser without notice.

But the charge, we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been

properly executed and founded upon a valuable consideration, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in McDonald v. Smalley, 1 Peters, 620.

The suit would be free from objection in the States courts. And the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage.

The question, therefore, is one of proper parties to give jurisdiction to the federal courts; not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted.

The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. 1 Peters, 625; 2 Dallas, 381; 4 Ib. 330; 1 Wash. C. C. 70, 80; 2 Sumner, 251.

Assuming, therefore, everything imputed to the assignment of the mortgage from the company to the plaintiff, the charge of the court was correct. The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits. D'Wolf v. Rabaud, 1 Peters, 417; Evans v. Gee, 11 Ib. 80; Sims v. Hundley, 6 How. 1.

But we are of opinion the court erred in giving the second instruction, which denied the conclusiveness of the decree in the bill of foreclosure against the right of the plaintiff to recover in this action.

The suit in chancery was between the original parties to the mortgage, and involved directly the validity of that instrument; it was the only question put in issue by the bill and answer, and the only one decided by the court. The mortgage was held to be void, on the ground that the bonds of the company which were given in exchange for it were illegal, and 217*] created no debt or liability for which a mortgage security could be taken or upheld; that every part of the transaction was beyond any of the powers conferred upon the company by its charter, and therefore wholly unauthorized and void. On these grounds, the court decreed that the bill be dismissed. The present is an action of ejectment, brought by the assignee of the complainants in that suit against defendants representing the interest of the mortgagor, and in which the right to recover depends upon the force and validity of the same instrument.

A mortgagee, or anyone holding under him, may recover possession of the mortgaged premises, after default, on this action, unless it appears that the debt has been paid, or is extinguished, or the mortgage security for good cause held ineffectual to pass the title. Here *it has been shown to* have been declared null and void by a court of competent jurisdiction, in a suit between parties under whom the present derive title, and in which, as we have seen, the question of its validity was put directly in issue. The case, therefore, falls within the general rule, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters, when directly in question in another court.

It is suggested on the brief submitted on the part of the plaintiff below, that a decree in equity between the same parties is not a bar to an action at law; and hence, that the decree in the bill of foreclosure in this case is no bar to the action of ejectment; and the case of The Lessee of Wright v. Deklyne, 1 Peters, C. C. 199, is referred to as sustaining that position. On looking into the case, it will be seen that the decree dismissing the bill, which was set up as a bar to the action of ejectment, was placed upon the ground that the complainant had a complete remedy at law, and did not, therefore, involve the legal title to the property in question. The court say, that, if a complainant seeks in a court of equity to enforce a strictly legal title, when his remedy at law is plain and adequate, the dismissal of his bill amounts to a declaration that he has no equity, and the court no jurisdiction; but it casts no reflection whatever upon his legal title; it decides nothing in relation to it, and consequently can conclude nothing against it. It was admitted that the decision of a court of competent jurisdiction directly upon the point was conclusive where it came again in controversy.

The case of Hopkins v. Lee, 6 Wheat. 109, illustrates and applies the principle which governs this case. There Hopkins purchased of Lee an estate, for which he agreed to pay *$18,000; $10,000 in military lands at [*218 fixed prices, and to give his bond for the residue. The estate was mortgaged for a large sum, which incumbrance Lee agreed to raise. The whole agreement rested in contract. Hopkins filed a bill against Lee, charging that he had been obliged to remove the incumbrance, and claiming the repayment of the money, or, in default thereof, that he be permitted to sell the military lands which he considered as a pledge remaining in his hands for the money. Lee put in an answer denying the allegations in the bill, whereupon the cause was referred to a master, who reported that the funds with which Hopkins had lifted the mortgage belonged to Lee, upon which report a decree was entered accordingly. The suit in 6 Wheaton, was an action of covenant brought by Lee against Hopkins, to recover damages for not conveying the military lands which he had agreed to convey upon the aforesaid incumbrance being removed. The defense was, that the incumbrance had not been removed. And upon the trial Lee relied upon the suit and the decree in chancery as conclusive evidence of the fact that he had complied with the condition, which was admitted by the court below, and the decision sustained here on error.

The court, after referring to the general rule, observed, that a verdict and judgment of a court of record, or a decree in chancery, although not binding upon strangers, puts an end

to all further controversy concerning the points thus decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise.

If any further illustration of the principle were necessary, we might refer to the case of Adams v. Barnes, 17 Mass. 365, where it appeared that a mortgagee had brought an action to recover possession of the mortgaged premises in which the mortgagor had defended on the ground of usury, but, failing in the defense, the mortgagee had judgment. The mortgagor afterwards conveyed his interest to a third person, who brought a writ of entry against the mortgagee to recover the possession, relying upon the usury in the mortgage as invalidating that instrument, and rendering it null and void. But the court held the parties concluded by the previous judgment, the same point having been there raised and decided in favor of the mortgagee.

The same principle will be found in Betts v. Starr, 5 Conn. 550, where it was held, that a 219*] judgment recovered upon a *note secured by the mortgage, notwithstanding the plea of usury, precluded the mortgagor from setting up that defense again, in an action of ejectment by the mortgagee to recover the possession of the mortgaged premises.

Further illustrations of the principle will be found by referring to Cowen & Hill's Notes to Phillips on Ev. p. 804, note 558; and 2 Greenleaf on Ev. secs. 528–531.

The case of Henry Raguet v. Peter Roll, 7 Ohio, 76, has been referred to as maintaining a different doctrine. That was a scire facias on a mortgage to charge the lands in execution. The defense set up was, that the mortgage had been given to secure the payment of a note of five hundred dollars, which was made to the mortgagee to compound a felony. There had been a suit between the same parties on the note, in which the same defense was set up and prevailed. The case is reported in 4 Ohio Reports, 400. But this former suit was not interposed or relied on in the scire facias on the mortgage, and the question here, therefore, was not involved in that case, and, probably, could not have been. For, on looking into the report of the suit upon the note, it appears to have been brought, originally, in the Common Pleas, where the plaintiff recovered. This judgment was afterwards reversed by the Supreme Court on error, without any further order in the case. This left the parties and the note as they stood before the judgment in the Common Pleas. Cowen & Hill's Notes, p. 826, note 587.

There is another principle that would, probably, be decisive of this case, over and above the ground here stated, upon a second trial, arising out of the thirty-fourth section of the Judiciary Act, which provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply.

The highest court of the State of Alabama has given a construction to the act of the Legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the State courts to expound their own statutes; and when thus expounded the decision is the rule of this court in all cases depending upon the local laws of the State. 7 Wheat. 361; 6 Peters, 291.

It is unnecessary, however, to pursue this inquiry, as the grounds already mentioned are, in our judgment, conclusive upon the rights of the parties.

In every view we have been able to take of the case, we think the court erred in the second instruction given to the jury, and that the judgment below must be reversed.

Order.

*This cause came on to be heard on [*220 the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

BRIDGET McLAUGHLIN, Appellant,
v.
THE BANK OF POTOMAC et al.

This court cannot notice, on appeal, points not considered by court below—issue may be directed on question of fraud involving matter in law—holder of note is creditor of indorser—judgment against administrator evidence against surety and fraudulent grantee of intestate—bill against, sufficiency of.

Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the Court of Equity and there decided, in order to give this court cognizance of them when the case is brought up for appeal.

A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law.

A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards.

Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to pursue and exhaust that trust property before proceeding against the indorser and his property. A judgment had been obtained against the administrator of the indorser, which fixed his liability.

This judgment against the administrator in which a devastavit had been suggested, and a re-

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NOTE.—Appeal, exceptions, what particularity in is necessary in order to review in appellate court. When general exception or exception not sufficient. See notes to 10 L. ed. U. S. 172; 14 L. ed. U. S. 643; 39 L. ed. U. S. 856.

turn of nulla bona to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate.

Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate.

Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit, and the personal property was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable.

In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of chancery.

The bill was filed in the Circuit Court by the President, Directors and Company of the Bank of Potomac, Elijah Dallett, and Elijah Dallett, Jr., trading under the firm of Elijah 221*] Dallett *& Co., William H. Miller, and A. C. Cazenove & Co., who sue in behalf of themselves and such other creditors of the estate of Edward McLaughlin, deceased, as will make themselves parties and contribute to the expense of this suit, against Edward Sheehy in his own right and as administrator of Edward McLaughlin, and Ann Sheehy, wife of said Edward and one of the children and heirs at law of said Edward McLaughlin, Bridget, otherwise called Biddy McLaughlin, another of the children and heirs at law of said Edward McLaughlin, and surety for said Edward Sheey's administration on said estate, and Edmund I. Lee, trustee under a deed of trust from the said Edward Sheehy.

The narrative of the case is as follows:

Edward Sheehy's notes, indorsed by Edward McLaughlin, were discounted at the Bank of Potomac as follows, viz:

1828.—Dec.	12,	1 note	for.....	$2,000
1830.—Jan.	15,	1 "	"	2,000
Feb.	5,	1 "	"	2,000

And they were curtailed and renewed from time to time, until they all became due the 20th January, 1832, viz.:

1	note	for	$1,375
1	"	"	1,900
1	"	"	1,975
		Amounting to	$5,250

when they were amalgamated, and one note substituted for the three, which note was renewed from time to time until 15–18 April, 1834, when it became due and was protested.

Whilst these notes were running on, namely, on the 27th of September, 1830, one James Robinson conveyed certain property in Alexandria to Bridget McLaughlin, who was the daughter of Edward McLaughlin, the indorser of the above notes. Sheehy, the maker, was married to another daughter. One of the allegations in the bill was, that this property was secretly paid for by Edward McLaughlin, who, it was *alleged, procured it to* be conveyed to his daughter for the purpose of placing it out of the reach of his creditors.

On the 24th of November, 1830, Sheehy conveyed a lot of ground in the town of Alexandria to Edmund I. Lee, in trust, to secure McLaughlin against his indorsements in the bank, as far as the sum of $3,950. Lee was to sell it whenever McLaughlin requested him in writing to do so.

On the 6th of November, 1832, Edward McLaughlin conveyed to his daughter Bridget four lots in Alexandria, in fee-simple, reserving to himself a life estate.

*On the 15th of March, 1833, Sheehy [*222 and wife conveyed to McLaughlin certain other real property and slaves, and other personal property. It was an indemnity against loss from the indorsement of McLaughlin upon the notes in question and other notes.

On the 9th of November, 1833, McLaughlin executed another deed in fee-simple of certain property to his daughter Bridget.

In April, 1834, the note mentioned in the beginning of this narrative became due and was protested. Its amount was $5,250.

In May, 1824, the Bank of Potomac brought suit upon the note, and in August, 1834, obtained judgment by default, against Edward McLaughlin.

On the 15th of September, 1834, McLaughlin executed another deed for certain other property in fee-simple to his daughter Bridget.

In September, 1834, after the execution of the above deed, McLaughlin died.

On the 12th of November, 1834, Sheehy took out letters of administration upon his estate, and Bridget McLaughlin became the security upon his bond. It is not necessary to state the appraisement, or the measures pursued by other creditors than the Bank of Potomac. No administration account was filed.

In June, 1835, the judgment which the bank had obtained against McLaughlin in his lifetime was revived, by scire facias, against his administrator, upon which an execution was issued. The return was, that no effects of the said McLaughlin, in the hands of his administrator, were to be found whereon to levy the said execution.

In April, 1836, the bank brought an action against Sheehy, suggesting a devastavit, and in June, 1837, obtained a judgment against him de bonis propriis. Execution was also issued upon this, the return of which was, that no goods and chattels of the said Sheehy were to be found.

In January, 1838, the bank filed its bill on the equity side of the court, suing for itself and such other creditors of the estate of Edward McLaughlin as chose to make themselves parties and contribute to the expense of the suit. The bill recited the above facts; averred that a large amount of personal property came into the hands of the administrator; that the said administrator, and his said surety, combining together to defraud the creditors of the said McLaughlin, caused his personal estate to be appraised at prices greatly below its value, and then sent off the said slaves to distant parts for sale, where they *were actually sold for [*223 sums greatly exceeding the said appraisement; that no account of the sales of the said McLaughlin's personal estate had ever been re-

turned to the said Orphans' Court, nor had the said administrator ever made any settlement of his administration accounts; that large sums of money of the said estate yet remain unaccounted for, and misapplied to their own use by the said administrator and his surety; that McLaughlin had combined and confederated with his daughter Bridget fraudulently to convey and transfer his property to her, with a view to protect it from liability for his debts; that all the said deeds were fraudulent and void; that the deceased left no real estate, having thus conveyed it all fraudulently away; that his personal estate had been made away with and misapplied by the administrator and his surety, the said Bridget; that the bank had a right to be substituted to the benefit of the trust deeds. The bill then prayed a discovery and account of the personal estate; that the fraudulent deeds might be set aside and annulled, and the property mentioned in them be applied to the payment of the debts of the estate, and for general relief.

A supplemental bill and answer were filed in the course of the proceedings, which did not essentially vary the state of the case.

In May, 1838, Bridget filed her answer, which was afterwards withdrawn, and another filed in May, 1842. Sheehy and wife filed their answer in May, 1839. The answer of Bridget denied all the allegations in the bill, and especially a legal recovery against Sheehy for said debt, but, if proved, contested that she was bound for the same, being no party thereto. She further admitted giving the bond as surety for Sheehy, but denied that it was binding on her or that personal property of more value than $1,653.28 came to his hands, as shown in the inventory thereof. She denied any combination to defraud the creditors of Edward McLaughlin, by undervaluing his personal estate, or selling it higher than the appraisement, or not having it accounted for. She denied the existence of any indebtedness now by Edward McLaughlin, or at his death, as indorser for Sheehy, which existed in September, 1830, and averred that notice of protest was necessary to make him so liable, which had never taken place, and that the deed then given to her was not fraudulent as to the bank. She further averred that the deeds were not void, because Sheehy was the principal debtor, and possessed sufficient real estate then to saitsfy the debt. She further alleged, that the real estate of her father was liable in the hands of his heirs only for specialty debts, which this was not. She proceeded to deny fraud in the various 224*] other *deeds to her, and to allege a moneyed consideration therefor. She admitted the conveyances in trust by Sheehy, and averred that the bank had never requested the land held in trust to be conveyed and applied to the discharge of this debt, or it would have been done, and that it ought now to be done before a resort to the personal estate. She denied the validity of the judgments against Sheehy as affecting her, and proceeded to answer the special interrogatories addressed to her.

Sheehy and wife, in their answer, denied all fraud in the inventory or management of the estate; admitted that no account of his administration had been rendered by Sheehy, but averred his readiness to do so; that although he was the nominal administrator, yet Bridget McLaughlin transacted all the business, and denied all combination with Bridget, or with any other person, to defraud the creditors of Edward McLaughlin.

In April, 1839, the court passed a decree for the sale of the property mentioned in the two deeds of Sheehy to Lee, of the 24th of November, 1839, and Sheehy and wife to Edward McLaughlin, of the 15th of March, 1833. The reports of sale need not be further adverted to.

In May, 1843, the cause standing under a general replication and issue, the court ordered it to be tried at law, for the purpose of ascertaining—

1st. Whether any, and what, valuable consideration was paid or given, and by whom, to James Robinson, for the property conveyed by him to the said Bridget McLaughlin in the bill mentioned; and whether the said property, in the said deed mentioned, was purchased bona fide by the said Bridget, with her own funds.

2d. Whether the deeds of the 6th of November, 1832, and the 9th of November, 1833, in the bill mentioned, from the said Edward McLaughlin and the said Bridget McLaughlin, or either, and which of said deeds were or was made with intent to hinder, delay, or defraud the complainants of their just and lawful actions as creditors of the said Edward McLaughlin, or whether the said deeds were made for valuable consideration, and bona fide.

3d. Whether the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder or delay the said complainants, or bona fide, and for valuable consideration.

The jury, being unable to agree, were discharged, and the record transferred to Washington County, where the cause was tried at March Term, 1844. The certificate was as follows:

"Upon the first issue joined the jury say, that the valuable consideration expressed in the deed, referred to in the said issue, *was paid by Bridget McLaughlin to [*225 said James Robertson, and that the said property mentioned in the said deed was purchased bona fide by the said Bridget, with her own funds.

"And we find, as to the second of said issues, that the said deeds of the 6th of November, 1832, and the 9th of November, 1833, in the said bill mentioned, from said Edward McLaughlin to said Bridget McLaughlin, where, and both and each of them were made by the said Edward with intent to hinder, delay, and defraud the said complainants of their just and lawful action as creditors of the said Edward McLaughlin, and that the said Bridget had notice of said intent, and that they were not, nor were either of them, made for an adequate valuable consideration, nor were either of them made bona fide between the said parties.

"And as to the third of the said issues, we find that the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder and delay the said complainants, and was not bona fide; and the same was not made for a valuable consideration.

"And we find upon the second and third issues for the complainants."

In the course of this trial, sundry bills of exceptions were taken, which it is unnecessary to specify, because the points made were not brought before the court which sent the issue to be tried at law, and therefore it was held that they should not come before this court for review.

In June, 1845, the Circuit Court of Alexandria passed the following final decree:

"The court, on consideration of the above matters, do now here, this 10th day of June, 1845, order, adjudge and decree, that the aforesaid deed from James Robertson to Bridget McLaughlin, dated the 27th day of September, 1830, in the bill of the complaints mentioned, was not made with intent to hinder or defraud the creditors of the said Edward McLaughlin, and is not fraudulent and void. And they do further adjudge and decree, that the several deeds dated the 6th of November, 1832, and the 9th of November, 1833, and the 15th of September, 1834, from the said Edward McLaughlin to his daughter, the said Bridget McLaughlin, were made without valuable consideration, and were made with intent to delay, hinder, and defraud the creditors of the said Edward McLaughlin, and are therefore fraudulent and void as against them, and that the said deeds be set aside and annulled.

"And the court, proceeding to grant to the complainants such relief as they are entitled to, and as sought in their said bills, do further adjudge, order and decree, that the real estate [*226 described *and mentioned in the above last mentioned deeds, from the said Edward to the said Bridget McLaughlin, and by this decree declared fraudulent and void, be subjected to the payment of the debts of the complainants, in the manner hereinafter directed; and that the commissioners hereinafter named do proceed to make out of the said property, by a sale of the same, or so much thereof as may be requisite, and in such lots as to the said commissioners shall seem best, at public auction, to the highest bidder, after giving thirty days' notice of the time, place, and terms of sale, by publication in the Alexandria Gazette, the following several sums, that is to say" (proceeding then to distribute the fund amongst the creditors).

An appeal from this decree brought the case up to this court.

It was argued by Mr. Francis L. Smith and Mr. Brent for the appellant, and Mr. Bradley and Mr. Davis for the appellees.

The points raised by the counsel for the appellants were the following, viz.:

1st. That so far as regards the claim of the Bank of Potomac, the principal plaintiff, the property conveyed by Sheehy to Lee and McLaughlin in the deeds of trust should first have been exhausted, and appropriated to the payment of the debt. 15 Wend. 588; 5 Wend. 661.

2d. The bank might have made its debt by pursuing properly its remedy at common law. The suit against Sheehy as drawer of the note was brought to May Term, 1834, and an office judgment was confirmed at November Term, 1834. No execution was issued on this judgment, although the person of Sheehy, by the *laws then* in force, might have been taken in execution, and his lands sold under a fi. fa., and although it appears from the record that he held the lands.

3d. The personal property of McLaughlin is the fund primarily liable for the payment of his debts; and before a sale of the realty could properly have been decreed, the administration account of Sheehy on his estate should have been settled, in order to ascertain the exact amount for which the realty was liable. 1 Story, Eq. ed. 1846, sec. 548; 4 Johns. Ch. 619.

4th. The real estate of McLaughlin could not be sold as long as there was any personalty. Act of Congress, 24th of June, 1812, putting real estate in the County of Alexandria on the same footing with that in the County of Washington. For laws of Maryland, see 1 Harr. & Johns. 469; 4 Gill & Johns. 296; 8 Peters, 128.

5th. The complainants rely alone on judgments against the administrator, which we contend are no evidence against Bridget *McLaughlin as grantee in the posses- [*227 sion of the property. 1 Mass. 445; 8 Peters, 528; 5 Gill & Johns. 433; 4 Harr. & Johns. 126, 270; 6 Johns. Ch. 360; 11 Leigh, 38; 4 Phil. Ev. ed. 1843, note 639, page 921, where the authorities are collected.

6th. The liability of Bridget McLaughlin, if any, was on the administration bond as surety for Sheehy, which could not be enforced by the creditors at large. The doctrine is well settled, in equity, that a suit to set aside a deed of real estate for fraud cannot be maintained until there is a judgment at law. 2 Leigh, 84; 1 Story, Eq. secs. 375, 376.

7th. There is no averment in the bill that the indorser, McLaughlin, was ever notified of the nonpayment of the note on which the bank has sued. 6 Wheat. 146, 572–574.

Some other points were made relating to the instructions given in the court of law, to which an issue was sent to be tried; but the decision of this court being that those instructions were not properly before it, it is not deemed necessary to insert them.

These points were severally resisted by the counsel for the appellees.

Mr. Justice Woodbury delivered the opinion of the court:

He first gave a synopsis of the bill and answers, and then, after some reference to the evidence, proceeded as follows:

A preliminary point to be considered in this case is in respect to the exceptions made at the trial by a jury of the issue at law, sent from the Court of Chancery, or the equity side of the Circuit Court of the United States. On the return of that issue to the equity side of the court, exceptions to the rulings were not made, or renewed against the correctness of the finding of the verdict, and consequently no opinion on them has ever been rendered by the court sitting in chancery. It is quite clear, then, that they are not before us on this appeal, which is only from a decree on the equity side of that court.

We wish it to be distinctly understood, as a matter of practice in like cases, that this court cannot express any opinion on matters ruled in any other court, or side of the court, than that appealed from; and if it be necessary to go into

other courts to get verdicts or decisions on any portion of the case in its progress below, any objections to rulings on the points arising in those trials or decisions must be presented for revision to the court which orders the issue, and be acted upon there, if we are expected to take cognizance of them here. Brockett v. Brockett, 3 How. 691; Van Ness v. Van Ness, 6 How. 62; Mayhew v. Soper, 10 Gill & Johns. 228*] 372. Such, too, is substantially *the doctrine in England. 2 Daniell, Ch. Pr. 746; Bootle v. Blundell, 19 Ves. 500.

It is next objected, that there was an error in the court in ordering such an issue to be tried by a jury, as it did in the present case. But we are not satisfied that, in referring the question of fraud in the conveyances to a jury for their verdict to aid the court in its inquiries, anything improper was submitted. It did not, as has been contended, refer a question of law only. Fraud is often, as here, a mixed question of law and fact. Seward v. Jackson, 8 Cow. 406, 439; Brogden v. Walker's Executor, 2 Harr. & Johns. 291. And it might be very useful to have the views of a jury on it, taking care to instruct them concerning the law, and leaving to their exclusive consideration, as was probably done here, merely the facts as connected with that law. Such feigned issues are not for the assistance of parties so much as of the court. 2 Daniell, Ch. Pr. 730. And though they may not always be well made up, yet, as the court are influenced by the finding or not, as seems to it proper (19 Ves. 500; Allen v. Blunt, 3 Story, 746), it is very rare that ordering such an issue can be deemed a ground of error. It may, however, be conceded, that, if such an issue be one of mere law, or idle, or impertinent, it is erroneous. 2 Daniell, Ch. Pr. 315, 420, 730; Nicol v. Vaughan, 5 Bligh. 540–545; 3 Ves. & Beam. 43. Disregarding, then, those exceptions made in the trial of this feigned issue, as not being legally before us, and overruling the objection to the propriety of the issue itself, the finding of the jury, and the opinion of the court sitting in chancery on that part of the case relating to the fraudulent conveyances, would seem to be correct. At least, this court appears bound to consider it so, prima facie; and we see nothing in the evidence itself, if reconsidered here, which would show the weight of it not to accord with their results. 2 Rand. 398; Hoye v. Penn, 1 Bland. Ch. 28; Kipp v. Hanna, 2 Bland. 26; 2 Harr. & Johns. 292.

Those results are, that all the deeds except the first one were fraudulent against creditors. The next inquiry is, whether the plaintiffs can legally be considered creditors at the time these deeds were excuted. It is true, there must usually be a debt pre-existing. Sexton v. Wheaton, 8 Wheat. 229. In our view, a pre-existing debt by a note, which was only renewed afterwards, with the same indorser, continued to be the same pre-existing debt for this purpose as it stood originally, both as to the maker and indorser. They both regarded it virtually as the same, as no new consideration ever arose between the parties. Especially on the equity side of this court, and of the Circuit Court below where the question arises, such 229*] a case *ought to be regarded as much within the mischief of the statutes against

fraudulent conveyances as if the action leading to judgment against the administrator had been on the original indorsement of the original note.

But further, it is objected that the debt here, at the time of the conveyances, was not absolute, as it should be in order to predicate fraud concerning it. But a contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principle and precedent, enough to furnish a motive to make a fraudulent conveyance to hinder or avoid its eventual payment. And this may be presumed to have been done here, provided circumstances exist indicative of fraud. King v. Thompson, 9 Pet. 220; Heighe v. Farmers' Bank, 5 Harr. & Johns. 68. Such circumstances must exist; and when the liability is contingent, like that of a warrantor or indorser, the conveyance cannot be considered as per se fraudulent. Seward v. Jackson, 8 Cow. 406, 439. But all the attendant facts here were scrutinized, and the inference of fraud seems to have been fairly deduced from the whole. 5 Gill & Johns. 533.

There is another objection to a recovery by this bill in equity, because the original debtor, Sheehy, had made a conveyance in trust to Lee for the indemnity of Edward McLaughlin, and it is argued that the plaintiffs should have resorted to that rather than to a suit against the administrator of Edward McLaughlin. But where the maker and indorser have both had their liability fixed on a note, an action will lie against either. Here both had become liable, else the indorser had not, for the latter is never liable unless the maker is also; and that the indorser had here become liable is to be presumed strongly from the actual recovery against his administrator.

The next objection is, that the judgment against the administrator of the indorser, the only evidence of a debt offered here, is no evidence against the surety of the administrator, or against a fraudulent grantee of the intestate debtor, as is Bridget McLaughlin. But we think otherwise. The administrator and his intestate are privies, and the former is liable after one recovery against the goods in his hands, and another against himself, suggesting a devastavit on a return of nulla bona. 2 Brock. 213, 214.

If the administrator, then, in such case, be estopped, as he is, to deny the indebtedness of the debtor whom he represents, so must be his surety, prima facie at least. 1 Brock. 135, 268; 4 Johns. Ch. 620; 2 Rand. 398. So in a bill in chancery, charging, like this, fraud in the administrator and a grantee, we think that such a judgment, till impeached, is good against the fraudulent grantee. Birely v. Staley, 5 Gill & Johns. 433; *Alston v. Munford, [*230 1 Brock. 279; 2 Rand. 398. As to the heir, the question is different, and the force of the recovery may be much less. 2 Leigh, 84; Bank of United States v. Ritchie, 8 Peters, 128; 4 Harr. & Johns. 270, 271; 1 Munf. 437, 455. Not being a privy in estate or deed with the administrator, it may not be res judicata or even prima facie valid, so as to bind either the heir or a devisee. 1 Brock. 145, 247; 1 Munf. 1, 437, 445; 5 Gill & Johns. 433. But a fraudulent grantee stands in a different relation, and his rights are in several unlike theirs.

The form of proceeding which has been adopted here against the surety is also excepted to. There is another mode, to be sure, of proceeding against the surety, which is on the administration bond. But in that case, a judgment like this against the administrator would be presumptive evidence against the surety, though open, perhaps, to proof, if any existed, of collusion or fraud in the judgment. In this way, also, though the creditor has a double remedy, if the surety has combined to commit a fraud and waste of the estate, and may proceed against him for that in a bill, or proceed on the administration bond, yet this double remedy is not unusual, nor exceptionable; and bills like these may well include all who have colluded with the administrator, or improperly intermeddled with the property, like executors de son tort. Holland v. Orion, 1 Mylne & Keen, 240; 1 Ves. Sen. 105; 2 Keen. 534; Story, Eq Pl. sec. 178; Chamberlayne v. Temple, 2 Rand. 398. But whether fraud is charged or not, such bills should usually include all persons who may be affected by being interested in the estate. Story, Eq. Pl. sec. 178; Bowsher v. Watkins, 1 Russ. & Mylne, 277. This is expedient in order to settle all the liabilities and exceptions in one proceeding, and to ascertain how much ought to be charged on real, and how much on the personal estate. Story, Eq. Pl. secs. 172–176. Here the collusion and waste are imputed to both the administrator and surety, and the same surety is charged with fraud in the purchase of the land, and this proceeding against them, whatever other remedy may exist, must therefore be deemed proper. Story, Pl. sec. 178; 1 Mylne & Keen, 237, 240; 1 Russ. & Mylne, 281, note; 5 Gill & Johns. 432, 453; 2 Rand. 398, 399; 10 Gill & Johns. 65, 100.

The next objection is, that, by the laws prevailing in Alexandria, the first resort for payment of such a debt should be to the personal estate, before going to the real. There seems to be not much doubt of this, as a general principle, under the laws of Maryland, by 5 Geo. II. c. 7, before the cession of the northern portion of the District of Columbia. Those laws were adopted in that District, February 27th, 1801 (2 Stat. at Large, 103, 756; 1 Harr & Johns. 469; 2 Harr. & McH. 12; and her laws in this respect appear to have been extended to Alexandria, June 24th, 1812. Davis's Laws of District of Columbia, 264. The laws of Virginia prevailing there before do not seem on this point to have been materially different. 2 Leigh, 84; 2 Lomax, Ex. 512. There the real estate was made liable for certain debts, under an act of Parliament, as early as 1732, extending in terms to the colonies. Tessier v. Wyse, 3 Bland. 44; 2 Bland Ch. 325. But still, "in a creditor's suit" or bill, the personal estate should first appear on the hearing to be insufficient. 1 Brock 79; 2 Bland. 317, 347; Wyse v. Smith, 4 Gill & Johns. 302; 2 Harr. & McH. 12. It does so appear here in substance. Here it is alleged, and not denied, that the personal estate has never been accounted for by the administrator or surety. It would seem on the evidence to have been left chiefly in charge of *the surety*, and to have been improperly applied to her own use. The objection, therefore, comes with a very ill grace from her. The administrator has also been found guilty of a devastavit in respect to it, and it is manifest there never was enough, either as sold or appraised, to defray the debt of the bank alone. Under these circumstances, then, a resort was proper to the real estate. Gordon's Adm'r v. Frederick, 1 Munf. 1; 2 Bland. 347.

It is further objected, that such a resort cannot be had, unless it is averred in the bill, as well as proved, that the personal estate has been all exhausted in the payment of debts. The fact of the personal estate being exhausted in some way before the real is taken from the heir, as heir, and applied, may, as before remarked, be proper to be first proved. But the necessity to aver it in so many words, even in the bill to charge an heir, is questionable. 1 Brock. 79; 2 Lomax Ex. 250; 2 Story Eq. Pl. secs. 174, 176; see forms in 2 Grattan, 532, and 3 Grattan, 371; Equity, Draftsman, 157, 161, 180; Tessier v. Wyse, 3 Bland. 44. Such an averment does not affect the merits, because, whether averred or not, the court will not generally charge the land till satisfied that the personal estate has been wasted or is insufficient. Stevens v. Gregg, 10 Gill & Johns. 143. And it is usual, also, to have the prayer of the bill state, in some way, that the personal assets are insufficient. Such is the form in Beall v. Taylor, 2 Grattan, 532. But this deficiency need not be alleged to have arisen from the actual payment of debts. Some seem to consider it enough to aver that waste has been committed of the personal estate. 2 Bland, Ch. 347. Others, that it will suffice to state and to show judgment against it and execution unsatisfied. Rhodes v. Cousins, 6 Rand. 100; Liggat v. Morgan, 2 Leigh, 84. The English practice is, not to require any averment that the personal estate is [*233 exhausted, but merely to ask the land to be charged, if the personal estate be not enough. 3 Bland. 43; Davy v. Pepys, Plowden, 439; 3 P. Wms. 92, 333. So is it in New York. Thompson v. Bruce, 4 Johns. Ch. 620. It would seem, also, to be permissible in Virginia, where the heir or devisee for such debts as are chargeable on the land is joined in a creditor's bill with the executor or administrator, to examine into the condition of the personal estate, irrespective of any averment about its sufficiency, and, if found to be enough, to dismiss the bill as to the heir (1 Brock. 79); and if not enough, to sustain the bill against the heir for the deficiency. Such seems to be the practice, also, in some other places. 4 Johns. Ch. 621; Story Eq. Pl. secs. 172, 174, 176; Hammond v. Hammond, 2 Bland. Ch. 306, 359; Tessier v. Wyse, 3 Bland, 59; Gibson v. McCormick, 10 Gill & Johns. 65.

Many of the cases in Maryland, looking to the propriety of a fuller and direct averment that a deficiency has happened from the payment of debts, arise under laws passed since 1801, and after her prior laws had been adopted in this District, and relate to heirs or devisees, rather than fraudulent grantees. Gibson v. McCormick, 10 Gill & Johns. 102. The following cases were those of heirs who were infants or lunatics, and hence requiring the aid and vigilance of chancery to protect them, by having debts clearly proved, and the per-

sonal estate first exhausted. 3 Bland. 49, 84; United States Bank v. Ritchie, 8 Peters, 128; Wyse v. Smith, 4 Gill & Johns. 302.

Considering, then, that in Maryland and Virginia, no less than elsewhere, something is permissible short of a direct averment as to the exhaustion of the personal estate in the payment of debts in a bill against an ordinary heir as such, certainly the reason does not apply in a proceeding against a fraudulent grantee for anything fuller or more direct, if so full. 5 Gill & Johns. 433. Such a grantee has no protection, like the heir, from want of privity or misconduct, and though he may be, in fact, the heir, as in this case, yet he takes by his deed, prior in tempore, and holds any surplus after paying debts as a voluntary and good grantee in respect to that surplus, and not as heir.

When, therefore, in a bill against such a fraudulent grantee, the fraud is averred, as here, and a waste of the personal estate, and the clause is stated to be made on that account, all is alleged which seems necessary for full notice, and for a decree against such grantee, if at the hearing the fraud is substantiated, and the personal assets are proved to be wasted or insufficient.

To show that the averments in this bill come quite up to the usual standard in this re-[*233 spect, we need only cite from it *the following, as to Edward McLaughlin: "That he left no real estate, having fraudulently conveyed and disposed of the whole of it in favor of the said Bridget McLaughlin, as before stated. That his personal estate has been made away with, and misapplied by his administrator, and the surety of said administrator, as before charged. Your orators are advised, that the personal estate of the said McLaughlin is, in the first place, liable to the payment of their debts, if he left sufficient for that purpose, and that the said administrator and his surety are bound to render an account thereof. That if the said personal estate be insufficient, then that the real estate, fraudulently conveyed by him as aforesaid, is liable to make good any deficiency."

Our conclusions, then, on this point, are, that these allegations must be considered ample and explicit enough for a proceeding against a fraudulent administrator and surety and fraudulent donee, whether looking to the Maryland, Virginia, or English practice as prevailing in Alexandria. Being also a proceeding in chancery, if in some respect argumentative, the averment is clear enough not to be mistaken, and opens for consideration the whole merits. Because, as regards the defendants, if on principle they are answerable for personal estate squandered and misapplied by themselves, and land fraudulently conveyed to one of them is not to be shielded from liability in consequence of the waste of personal estate by herself, then the allegations here are the proper ones, and, being the true ones also, need no amendment. The facts established under them fully justify the decree below.

So far from the principal defendant insisting or showing, at the hearing in this case, that the personal assets were large enough to pay this debt, or have been so applied, and the land in her possession has been thus relieved from the charge, she contended that they were less in amount than the plaintiffs did; and the latter prove clearly that she joined the administrator in committing waste of what did exist, that is, consumed the very property she urges the creditors should resort to before calling on her. And though she is an heir of Edward McLaughlin, the proceeding here is against her, not as heir, but as surety to a defaulting administrator of the personal estate, and as fraudulent grantee of the real estate.

There is no heir to this land, claiming it as heir, in any part of these proceedings, but a grantee of it, claiming by a deed, and which, if fraudulent, still entitles the grantee to hold it as grantee against the heirs of the grantor, of whom there is one other not here, and places the heirs as such entirely out of the case—hors de combat.

*As no other question arises on the [*234 appeal which is material and has not been arranged in submitting to a sale of the trust property, it is only necessary to add that the judgment below must be affirmed.

Mr. Justice McKinley dissented.

Order.

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

PETER K. WAGNER and Sidonia Pierce Wagner, his Wife, John Lawson Lewis, Louisa Maria Lewis, Theodore Lewis, Eliza Cornelia Lewis, Alfred J. Lewis, John Hampden Lewis, Algernon Sidney Lewis, George Washington Lewis, and Benjamin Franklin Lewis, all Residents and Citizens of the City of New Orleans and State of Louisiana, and John Bowman, and Mary Pierce Bowman, his Wife, late Mary Pierce Lawson, Residents and Citizens of the State of Tennessee, and George C. Thompson, a Resident and Citizen of the State of Kentucky, Complainants and Appellants,

v.

JOHN BAIRD et al., Respondents.

Claim under post-nuptial settlement declared stale—court of equity will not enforce.

There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the

NOTE.—Marriage settlement or conveyances for benefit of wife or child, when good or void as to creditors. See note to 5 L. ed. U. S. 604.

claim, where no statute of limitations directly governs the case. In such cases, the court often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights.

The rule upon this subject, originally laid down by Lord Camden, in Smith v. Clay (3 Brown's Chancery Reports, page 640, note), and adopted by this court in 1 Howard, 189, again asserted.

Long acquiescence and laches by parties out of possession are productive of much hardship, and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor.

The party guilty of such laches cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or disability.

The facts in this case bring it within the operation of the above principles, and the bill must, therefore, be dismissed.

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

235*] *The case, as set forth by the complainants, is contained in the following extract from the brief of Mr. Ewing, one of their solicitors:

The bill, which was filed on the 18th day of November, 1840, charges, that on or about the 21st of November, 1783, Brigadier-General Robert Lawson obtained of the State of Virginia a military land warrant, No. 1921, for 10,000 acres of land due him for military services in the Revolutionary War, in the Virginia line on Continental establishment.

That prior to the 12th of January, 1788, said warrant was lodged in the office of Richard C. Anderson, then principal surveyor of the Virginia military lands, and that prior to the 4th of June, 1794, divers entries had been made on said warrant, to wit: entries, Nos. 1704, 1705, 1706, 1707, 1714, 1715, 1716, 1717, 1718, and 1719, of 1,000 acres each; and that Nos. 1704, 1705, and 1706 had been withdrawn and reentered, so as to leave Nos. 1707 and 1714 the first subsisting entries made for the said Robert Lawson on the surveyor's book.

That on the 4th day of June, 1794, the said Robert Lawson, by deed of indenture of three parts, between him, the said Robert Lawson, of the first part, his wife Sarah Lawson, of the second part, and James Speed, George Thompson, Joseph Crocket, and George Nicholas, of the third part, for the consideration therein expressed, conveyed to the said Thompson, Crocket, and Nicholas, for the uses and purposes therein specified, 2,000 acres of land, described as situate on White Oak Creek, on the northwest side of the Ohio River, being the land mentioned in the first entry made for said Robert on the surveyor's books; which said 2,000 acres of land is averred to be the land embraced, not in a single entry, but in entries Nos. 1707 and 1714, made January 12th and February 11th, 1788.

That the said Robert Lawson, by the same deed, conveyed to the said trustees five other tracts of land of 1,000 acres each, described as being the last entries made on said warrant in the name of said Robert Lawson; which, it is averred, embrace the land contained in entries *Nos. 1718 and* 1719, made the 11th of February, *1788; entry No.* 1704, made February 11th, 1793; and entries Nos. 1705 and 1706, made the 21st of January, 1793.

Complainants file a certified copy of said deed, aver that the same was duly recorded in Fayette County, Kentucky, and on the 26th of February, 1798, a certified copy, from the records in Fayette County, Kentucky, was recorded in the recorder's office of Hamilton County, in the Northwestern Territory, in which county the lands in controversy lay. The original deed of trust is lost; due search has been made for it, and the complainants *ver- [*236 ily believe that the original was consumed by fire in the recorder's office in Kentucky.

That on the 16th of August, 1796, John O'Bannon procured of Lawson an assignment of 3,333⅓ acres of said warrant. That Lawson, at the time he made this assignment, was habitually intemperate, and mentally incapable of transacting business. O'Bannon well knew this —knew of the deed of trust—and procured the assignment by fraud, and on the false pretenses that he was the locator of the whole tract of 10,000 acres.

That afterwards, on the 25th of August, 1796, O'Bannon, knowing that entry No. 1707 had been conveyed to the trustees aforesaid, fraudulently withdrew so much of said warrant 1921 as was entered in said No. 1707, and caused the same to be entered on the lands in controversy; and, on the 29th of August, 1796, surveyed the same, and returned the plat to the surveyor-general's office.

That prior to the 12th of February, 1799, O'Bannon applied for a patent in his own name for said survey; and that on said day the trustees, in the deed of trust aforesaid, by Joshua Lewis, their agent, filed a caveat against the issuing of patents to the assignees on said warrant 1921, and with it a copy of the deed of trust.

That O'Bannon continued to urge the department to issue patents on his claims under said assignment; which was for a long time postponed, and, on the 9th of May, 1811, refused or suspended, because said assignment was in violation of the deed of trust aforesaid. That said deed of trust, among other things, directed the trustees aforesaid to convey the 2,000 acres of land first above mentioned to either of the sons of said Robert and Sarah Lawson that the said Sarah might direct, unless it should be necessary to dispose of the same for the use of the family; that the last named 5,000 acres should be conveyed, 1,000 to America Lawson, 2,000 to John P. Lawson, and 2,000 to Columbus Lawson.

That the said Sarah did not, in her lifetime, direct the conveyance of the said 2,000 acres; and the said trustees did not convey the same, nor any part of the 5,000 acres. That all the trustees are dead, and that the last survivor of them, George Thompson, died on the 22d of March, 1834, leaving the complainant George C. Thompson his only child and heir at law.

That America Lawson intermarried with Joshua Lewis, December 23d, 1797. General Lawson died March 1, 1805, leaving three children, John Pierce Lawson, America Lewis, and Columbus Lawson, his heirs at law. That on the 10th of *June, 1809, said Sarah [*237 Lawson died. That on the 7th of January, 1807, John Pierce Lawson conveyed to Joshua

Lewis all his interest in said lands. That on the 1st of June, 1809, John P. Lawson died, leaving Mary P. Lawson, now Mary P. Bowman, his only child and heir at law, who intermarried with complainant John Bowman. That on the 8th of January, 1815, Columbus Lawson died unmarried and intestate, leaving said America Lewis and Mary P. Bowman his heirs at law.

That about the 1st of January, 1813, John O'Bannon died, leaving Robert Alexander and George T. Cotton executors of his last will and testament. That Cotton, who qualified, applied to the general land office for a patent on survey No. 1707, of 965 acres, as executor of said O'Bannon, but the patent was withheld, and the record thereof cancelled.

That, about the 21st of December, 1816, the said Cotton deposited in the general land office a paper, purporting to be a certificate of, and signed by, Robert Lawson, dated the 27th of November, 1802, and purporting to be witnessed by J. Bootwright and C. McCallister. Said certificate was false and forged; but by means thereof the patent was procured to be issued.

That Cotton died testate; complainants exhibit a copy of the will of O'Bannon, and of Cotton. The devisees of said John O'Bannon and George T. Cotton are not residents of the district of Ohio; prays process of subpœna against them, or such of them as may be found in the said district; and that they, and such others as will voluntarily appear, be made defendants.

That on the 1st of October, 1830, America Lewis died; on the 20th of June, 1833, Joshua Lewis died, and left complainants their only surviving children and heirs at law. Aver that the remaining 3,000 acres of land, of warrant 1921, not included in the deed of trust, vested in them as heirs of Robert Lawson, through America Lewis.

That America Lawson, afterwards Lewis, was under the disability of infancy or coverture during her whole natural life; and that at the time of issuing the patent to George T. Cotton, and from that time till her death, she was under the disability of coverture. That Columbus Lawson was an infant at the time of the death of his brother, John P. Lawson, and that he was killed at the battle of New Orleans, on the 8th of January, 1815; and that neither of the trustees in the deed of trust, nor either of the persons under whom complainants claim title, was ever resident in the State of Ohio.

That John Baird, James W. Campbell, Thomas Jennings, Isaac E. Day, Duncan Evans, William King, Victor King, Absalom King, William More, and Christian Snedecher 238*] (who are *made defendants), are in possession of, and claim to have derived title to, portions of said tract No. 1707, of 965 acres, mediately or immediately from George T. Cotton, executor of John O'Bannon, deceased. Call upon defendants to exhibit their title. Aver that they had full notice of the title of complainants and the fraud of O'Bannon; pray subpœna, etc.

An affidavit of search for the deed of trust, and belief that it is lost or consumed, is attached to the amended bill.

12 L. ed.

The defendants, terre-tenants, severally plead that they are bona fide purchasers, without notice of complainants' title. They answer jointly, putting in issue the material allegations of the bill; set forth specifically their own derivation of title; aver that the claim of complainants is stale, and that a part of the persons named as trustees have been in the State of Ohio since the execution of the deed of trust, and before the issuing of the patent. That the caveat was filed by Joshua Lewis without authority from the trustees, and that the patent was wrongfully suspended at the general land office. They refer to the certificate of Lawson, November 27th, 1802; the affidavit of James Speed, November 20th, 1803; and the certificate of James Morrisson, December 9th, 1816.

To these answers there is a replication.

The above statement of the case is taken, as was before remarked, from the brief of Mr. Ewing, and presents it in as strong a point of view, for the complainants and appellants, as can be given to it.

In the progress of the cause in the court below, a great mass of evidence was taken, and many exhibits were filed, which it is unnecessary to set forth.

In December, 1842, the Circuit Court dismissed the bill with costs, an appeal from which decree brought it up to this court.

It was argued at the preceding term, by Mr. Ewing and Mr. Scott (in a printed argument) for the appellants, and Mr. Stanberry for the appellees.

It is unnecessary to give any of the arguments of counsel, except upon the point of lapse of time, as the decision of the court turned upon that point.

Mr. Ewing, for the appellants:

And lastly, the defendants rely on the lapse of time.

The statute of limitations of Ohio, January 25th, 1810, bears directly upon this case. 1 Chase, 656, sec. 2. By the second section of this statute, all actions or suits for the recovery of possession, title, or claims to land are barred in twenty-one years; with a proviso, in these words: "That if any person *or per- [*239 sons who are, or shall be, entitled to have, sue, or bring any suits, action or actions, as aforesaid, shall be within the age of twenty-one years, insane, feme covert, imprisoned, or beyond sea at the time when any such suit, action or actions, may or shall have accrued, then every such person or persons shall have a right to have, sue, or bring any action or actions aforesaid within the time hereby before limited in this act after such disability shall have been removed."

Unlike this, the statute of 21 James I, c. 16 (4 British Stat. 751), enumerates several forms of real actions, and bars or saves them; and there is nothing which can, in general terms, include a case in equity.

But we here come within the direct operation of the statute, and also within the direct action of the proviso. The law gives us twenty-one years, after disability removed, to bring this suit. It is subject to no discretion; we have a right to it.

And so are the decisions. Larrowe v. Beam, 10 Ohio, 502; Tuttle v. Wilson, Ib. 25; Fales v. Taylor, Ib. 107; Elmendorf v. Taylor, 10

Wheat. 168–177; Carey v. Robinson, 13 Ohio, 181; Lockwood v. Wildman, Ib. 452; Ludlow v. Cooper, Ib. 582, foot of page.

The complainants are within the saving in the proviso. The trustees all resided out of the State until the death of Thompson, March 22, 1834. All of the cestuis que trust were absent from the State until their deaths. America Lewis died in 1830; Joshua Lewis, 1813.

In this state of things, there is no principle of equity which warrants the court in holding the complainants barred by time, until time would constitute a bar by the direct application of the statute of limitations.

Mr. Scott, on the same side:

The defendants cannot successfully repel the claim, here asserted by the complainants, on the ground assumed, that these claims are barred by the statute of limitations, which took effect June 1st, 1810 (see ch. 18, Vol. VIII. p. 63). That statute does not commence running against land claims in this district until patent emanates. See Lessee of Wallace v. Miner, 6 Ohio, 366, and 7 Ib. 249. The words "beyond sea," in the statute, are construed to mean out of the State. Richardson v. Richardson, 6 Ohio, 125; Wirt v. Homer, 7 Ohio, 235; Whitney v. Webb, 10 Ohio, 513. When the action accrued under the Act of 1810, it is not barred by the subsequent act. Putnam v. Reese, 12 Ohio, 21.

The right of action in those under whom the complainants have derived title accrued, under 240*] the Act of 1810, in December, *1816, when the patent to Cotton was obtained; but as they were, and continued to be, non-residents, the statute of limitations never commenced running, against the claims now asserted by the complainants, until 1830, on the death of their mother, America Lewis, and in 1833, on the death of their father, Joshua Lewis. The statute commenced running against three sixths parts of the lands now claimed in the bill on the death of Mrs. Lewis; and as respects two sixths parts thereof, it commenced running on the death of Mr. Lewis. But the statute has never commenced running against the remaining sixth part, which is claimed by Mrs. Bowman. After the statute begins to run, it requires twenty-one years to complete the bar. And the Supreme Court of Ohio, sitting in bank, in the case of Carey's Administrators v. Robinson's Administrators (13 Ohio, 181), has recently decided, that, where non-residents are within the saving clause of the Act of Limitations of 1810, the statute does not begin to run until their death; and that their heirs may commence suit within the period of twenty-one years, limited in the statute, after the death of such ancestor. And, in accordance with this decision, the same court, at the same term, in the case of Lockwood and others v. Wildman and others decided that under the Act of 1810, persons residing out of the State at the commencement of adverse possession are not barred under twenty-one years after the disability is removed. These decisions have overruled the decision made by the same court, at a previous term, in the case of Whitney v. Webb (10 Ohio, 513), and demonstrate that the claims here asserted by the complainants are *not barred by the* statute of limitations.

The complainants are not barred on the ground that their demand is stale by reason of the lapse of time. The rules in equity, which allow lapse of time to be interposed as a bar to equitable relief, have been adopted in analogy to the statute of limitations in cases at law, and are governed by precisely the same principles. And here it is worthy of remark, that the statute of limitations of Ohio, in one important particular, is essentially different from any of the statutes of limitations of the British Parliament which have come under our notice. In the British statutes the particular suits are named to which a limitation, as to the time of bringing them, is fixed, but as no suits in equity are named in those statutes, the courts have adjudged that those statutes, in direct terms, did not apply to suits in equity. The statutes of Ohio limit the time for bringing "actions of ejectment, or any other action for the recovery of the title or possession of lands," etc., to twenty-one years. In Ohio, there is no other action or *suit known to the law for the recov- [*241 ery of the title to land, except an action or suit in equity. And we, therefore, insist that this is an action or suit, and the only one the law authorized us to bring, for the recovery of the title and possession of the lands in question, and consequently it falls within the letter and spirit of our statutes of limitations. And if our construction of the statute be correct, it consequently results that the plea of the lapse of time has no application to this case, as the statute itself furnishes the rule, and the only rule, by which we can be barred. But suppose we are mistaken, in the construction we have contended for, will the condition of the defendants be improved? We think not; because the courts of equity, in England and in this country, have adopted the statute of limitations as furnishing reasonable equitable rules for the limitation of suits in equity.

His Honor, Mr. Justice McLean, in delivering his opinion in this case, in the Circuit Court, said: "Had the statute of limitations remained open for our contemplation, and we construed it as above intimated, which would not bar the complainants' rights, still I should have been clearly of the opinion that they were barred by the lapse of time." The position here assumed by the learned judge will, I trust, be deemed a sufficient apology on my part for dwelling a little longer on this branch of the case than I originally intended. The Supreme Court of this State, in the case of Amelia Fahr, Administrator of Casper Fahr, v. James Taylor and others (10 Ohio, 106), decided that chancery will not set up lapse of time against a claim, when an action of debt for its recovery would not be barred by the statute of limitations. In the case of Ridley and others v. Holtman and others (10 Ohio, 521), the court decided that equity ordinarily acts in analogy to the law, giving effect to the statute of limitations, and therefore, where the owner of an older entry and junior patent, who was never in the State, died, with an adverse possession, under a junior entry and older patent, against him, equity, after the lapse of twenty-one years from his death, will allow the act of limitations to be set up, as a bar against his heirs, seeking to get in the legal title under the older entry. And in the case of Larrowe v. Beam (10 Ohio, 498), the court said: "We do not

know that there is any case in which the defense has been distinctly placed upon this ground (lapse of time), where there was a statute of limitations in force applicable to the case. If the party be guilty of such laches in prosecuting his title as would bar him if his title were solely at law, he should be barred in equity."

Mortgages are held not to be within the 242*] words of the statute *of limitations; and no positive rule hath, as yet, been fixed upon which shall be an absolute bar to redemption. But the making up of accounts, after long periods of time, being very difficult, and attended with great hardship on the mortgagee, it hath been thought reasonable to establish in equity, in analogy to the statute, a period at which, prima facie, the right of redemption shall be presumed to be deserted by the mortgager, unless he be capable of producing circumstances to account for his neglect, such as imprisonment, infancy, coverture, or by having been beyond seas, and not by having absconded, which is an avoiding or retarding of justice. See Knowles v. Spence, Mos. 225; 1 Eq. Cas. Abr. 315; Ord v. Smith, Sel. Ch. Cas. 9, 10; Ib. 56; Jenner v. Tracy, 3 P. Wms. 287, note; Velch v. Harvey, Ib.; 3 Sugden on Vend. App. note 15; Saunders v. Hoard, 1 Ch. R. 184; Clapham v. Bowyer, Ib. 206; 3 Atkins, 313; Bony v. Ridgard, 1 Cox, Ch. Cas. 149; Hever v. Livingston, 1 P. Wms. 263; Trash v. White, 3 Bro. Ch. Cas. 289; Leman v. Newnham, 1 Ves. 51; and Shipbrook v. Hinchingbrook, 13 Ves. 387. And to preserve uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time and the mortgagor laboring under none of the disabilities enumerated in the statute of limitations, hath been fixed upon as the period beyond which a right of redemption shall not be favored. See 3 Johns. Ch. 134; and Lamer v. Jones, 3 Harr. & McH. 328; and Doe v. Calvert, 5 Taunt. 170.

It has been said that this rule is not founded on the presumption of an absolute conveyance, but is merely a positive rule, introduced for the sake of quieting the title after so long a neglect to redeem. Per Eyre, C. B., in Corbet v. Barker, 1 Anstr. 143. The rule was first hinted at in Winchcomb v. Hall, 1 Ch. R. 40, and Porter v. Emery, 1637, Ib. 97, then in Saunders v. Hoard, 1 Ch. R. 184, and Clapham v. Bowyer, Ib. 206; and afterwards adopted as a rule of court, by Lord Keeper Bridgman and the Master of the Rools, in Pearson v. Pulley, 1 Ch. Cas. 102; and followed by Lord King, in White v. Ewer, 2 Vent. 340. But the rule seems not to have been permanently settled until about the middle of the last century. So late as the year 1722, an appeal came on in the House of Lords, wherein the doctrine was but imperfectly acknowledged. It was, however, there held that a mortgagee in possession for seventy years, under legal title, should not be redeemed or disturbed; for so long an acquiescence should be taken as an implied waiver of the right to redeem, especially when the rents were insufficient to keep down 243*] the interest for more than *fifty years. Stone v. Byrne, 2 Bro. P. C. 399; S. P. 3 Johns. Ch. 129.

The rule, however, may now be considered as permanently established; and the principles on which it is founded are perfectly understood and clearly developed. It is true, courts of equity, by their own rules, independently of any statute of limitations, give great effect to length of time; but it is equally true, that they refer frequently to the statute of limitations, for the purpose of furnishing a convenient measure for the limitation of time, which might operate as a bar, in equity, to any particular demand. See Beckford v. Wade. 17 Ves. 87.

In Kane v. Bloodgood (7 Johns. Ch. 9, affirmed in 8 Cowen, 360), Chancellor Kent remarked, in substance, that the limitation of suits, being founded in public convenience, and attended with so much utility, the courts of equity have adopted principles analogous to those established by the statutes of limitations, as positive rules for their conduct.

Lord Camden, in Smith v. Clay (3 Bro. Ch. R. 639, note), said that laches and neglect were always discountenanced in equity; and therefore, from the beginning of that jurisdiction, there was always a limitation to suits. Expedit reipublicæ ut sit finis litium was a maxim that had prevailed in chancery at all times, without the help of an act of Parliament. As, however, the court had no legislative authority, it could not define the bar by a positive rule. It was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery had adopted that rule, and applied it to similar cases in equity; for when the Legislature had fixed the time at law, it would have been preposterous for equity to continue laches beyond the period to which they had been confined by Parliament; and therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar.

Lord Redesdale, in Hovenden v. Annesley (2 Sch. & Lefr. 607), said: "I think the statute of limitations must be taken, virtually, to include courts of equity; for when the Legislature limited the proceedings at law, in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law; and therefore it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also."

In the case of The Marquis of Cholmondely v. Lord Clinton (see 2 Meriv. 171, and 2 Jac. & Walk. 190), upon appeal to the House of Peers, Lord Eldon said he could not agree to, and had never heard of, such a rule, as that adverse possession *however long, [*244 would not avail against an equitable estate; and he concluded by stating his opinion to be, that an adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement or intrusion, with respect to legal estates; and that, for the quiet and piece of titles, and of the world, it ought to have the same effect. During that whole period of twenty years, in which Lord Clinton had held adverse possession of the premises in question, the Marquis of Cholmondely, or those under whom he claimed,

was not laboring under any of the disabilities enumerated in the statute. So that the bar in chancery, in analogy to the statute of limitations, was complete. Lord Redesdale was clearly of the opinion that the plaintiffs were barred by the effect of the statute of limitations, and that the bill, therefore, should be dismissed. He wished it to be understood that his decision rested, principally, on that ground. He remarked that it had been argued that the Marquis of Cholmondely might, at law, have had a writ of right—that was, a writ to which peculiar privileges were allowed; but courts of equity had never regarded that writ or writs of formedon, or others of the same nature. They had always considered the provision in the statute of James which related to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound, and it was that upon which they had constantly acted. He considered that the statute was a positive law, which ought to bind courts of equity, and that the Legislature must have supposed that they would regulate their proceedings accordingly, by it. The decree of Sir Thomas Plumer was confirmed. The following clauses in Sir Thomas Plumer's opinion have a direct bearing on this question, viz.: "Mrs. Damer, the devisee, is, on all sides, admitted to be the only person who could have had any claim of title under Horace, Earl of Orford, to this estate; and the full period of twenty years having elapsed since the death of George, Earl of Orford, when that title, if at all, first accrued, the remedy would have been taken away by the statute, in consequence of the laches and non-claim. The lapse of twenty years affords a substantive, insuperable plea in bar. It is the fixed limit to the remedy—the tempus constitutum; one day beyond is as much too late as one hundred years. This is the peremptory, inflexible rule of law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud. No plea of poverty, ignorance, or mistake can be of any avail. However clear and indisputable the title, if the merits could be inquired into," etc.

245*] *Lord Chancellor Manners, in Medlicott v. O'Donnell (1 Ball & Beat. 164), thus expressed himself: "I think, then, I stand well supported by principle and authority in saying that the court is bound to regulate its proceedings by analogy, or in obedience to the statute of limitations. Upon a uniform concurrence of a long train of the highest authorities, I can entertain no doubt in the present case. It is clear that, had it been the claim of a legal estate, in a court of law, the remedy must, by analogy, be equally barred in a court of equity." On the same ground, another case, between the same parties, has since been decided; the Lord Chancellor observing, that, where there has been adverse possession for twenty years, not accounted for by some disability, as coverture, etc., a court of equity ought not to interfere. 1 Turn. 107.

In New York, the analogy between the right to redeem in equity and the right of entry at law is complete and entire throughout. Demarest v. Wynkoop, 3 Johns. Ch. 134.

Lord Manners, in the case of Medlicott v. O'Donnell, *to which* reference is had above, said: "*It has been suggested* that I lay too much stress upon length of time, and that I attach more credit to it than Lord Redesdale or any of my predecessors have done. I confess, I think the statute of limitations is founded upon the soundest principles and the wisest policy, and that this court, for the peace of families and to quiet titles, is bound to adopt it, in cases where the equitable and legal title so far correspond, that the only difference between them is that the one must be enforced in this court, and the other in a court of law."

In Cook v. Arnham (3 P. Wms. 287), the rule was put on this footing, that where length of time will not bar the right to bring an ejectment, then it shall not bar the right to file a bill in equity; and Sir Joseph Jekyll, in Toyer v. Larington (1 P. Wms. 270), placed the rule on the same footing; and, in that shape, it was approved by Lord Redesdale in the cases above cited.

In Nelson v. Carrington (4 Munf. 332) and Lamar v. Jones, the court decided that lapse of time is permitted, in equity, to defeat an acknowledged right, on the ground only of its affording evidence of presumption that such right has been abandoned; and it never prevails where the presumption is outweighed by opposing facts and circumstances.

From the cases of Topliss v. Baker, 2 Cox, Ch. Cas. 122, in the Exchequer; Turnstall v. McLelland, Hard. 519; Hele v. Hele, 2 Ch. Cas. 28; Sibson v. Fletcher, 1 Ch. R. 59; Leman v. Newnham, 1 Ves. 51; Trash v. White 3 Bro. Ch. Cas. 291; Hatcher v. Fineaux, 1 Ld. Raym. 740; and Blewitt v. Thomas, 2 *Ves. Jun. 669, we deduce these [*246 points: that no rule exists, in equity, for presuming a release or satisfaction of a mortgage, after the lapse of twenty years, or any other particular period of time, on the ground that no notice has been taken of the debt, either by payment of the interest on one side, or demand of principal and interest on the other; and that if a jury should on that ground presume the bond to be satisfied, yet the mortgagee will not thereby be prevented from showing the truth of the case to the court; and the court will, on proof that the money is due, or in the absence of proof that it has been paid, decree in favor of the mortgagee, notwithstanding a period of more than twenty years may have elapsed between the making of the mortgage and the last demand of principal and interest. But it will be incumbent on the mortgagee and his representatives to define, particularly, the period and essence of the acknowledgments which he avers to have taken place, and to show with accuracy the commencement and continuance of every disability which he suggests as the cause of forbearance.

Lord Chancellor Erskine, in the case of Hillary v. Waller (12 Ves. 239), said: "The presumption in courts of law, from length of time, stands upon a clear principle, built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him; that is the whole principle. Then, as to presumptions of title: 1st. As to bond taken, and no interest paid for twenty years, nay, within twenty years, as Lord Mansfield has said; but upon twenty years the presumption is that it has been paid, and the pre-

sumption will hold unless it can be repelled; unless insolvency, or a state approaching it, can be shown; or that the party was a near relative; or the absence of the party having the right to the money; or something that repels the presumption that a man is always ready to enjoy what is his own." In that case, a definite period was fixed, in analogy to the time at which courts of law raised similar presumptions, namely, "not less than twenty years;" implying that, prima facie, after twenty years, a court of equity will raise the presumption of a reconveyance from the mortgagee or his heirs; the period wherein the presumption of payment of the mortgage money will arise. But all these presumptions may be repelled by evidence. The lapse of twenty years is only a circumstance on which to found a presumption of payment, and is not, of itself, a legal bar. Jackson v. Pierce, 10 Johns. 414; Ross v. Norvell, 1 Wash. 14.

In the case of Chalmer v. Bradley (1 Jac. & Walk. 63), the plaintiffs stated that they were ignorant of the facts. It was possible, said Sir 247*] *Thomas Plumer, they might be so. But was there not anything that might lead them to that knowledge? Nothing appearing in the case, his honor directed an inquiry whether the plaintiffs had any notice of these circumstances, implied or otherwise; observing, that the reason why he directed this inquiry was, that, though he was impressed with the impolicy of permitting stale demands to be brought forward, though he knew that, on the principle stated in Smith v. Clay, Amb. 645, and 3 Bro. C. C. 639, note, a court of equity was not to be called into action by those who were not vigilant in support of their rights, and was aware of the monstrous inconvenience that would result at some period if the door was not shut to litigation, yet he fell in entirely with the opinion expressed by Lord Alvanley in Pickering v. Stamford, 2 Ves. Jun. 272. There the suit was commenced, after a lapse of thirty-five years, by persons who declared themselves ignorant of their rights. Lord Alvanley, under the circumstances of that case, could not be sure they were not ignorant, and therefore, stating strongly his opinion in favor of the general principle, that a party ought to be barred by length of time, and lamenting that he could not, in that instance, follow it, he directed similar inquiries; stating, at the same time, that if he (Lord Alvanley) were then to decide the case before him, he would decide it against the plaintiffs; and that, by the inquiries, he did not decide one way or the other; and would afterwards consider whether there was sufficient equity in the bill or not. It was, therefore, because there was not before him any direct and positive evidence to totally exclude all doubt upon it, that Sir Thomas Plumer directed the inquiries in Chalmer v. Bradley, to obtain some light on the circumstances under which the disputed enjoyment of the property had gone, reserving to himself to judge what should be the effect of the facts which might be found by the master, or what, even without that result, he might think right to be done.

The observations of Lord Camden, in Smith v. Clay, 3 Bro. C. C. 640, on which his honor, Mr. Justice McLean, in deciding this case, seemed to place so much reliance, do not, we respectfully submit, when rightly understood, conflict with the principles of the preceding cases. The words of Lord Camden are: "A court of equity, which is never active in a relief against conscience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence."

A demand in equity is never stale during that period in which, were it a legal demand, it would not be barred by the *statute of [*248 limitations. The complainants have been basely defrauded of their rights, and do not, therefore, defile their consciences by the prosecution of this suit. The complainants never acted in bad faith towards the defendants. They have never slept upon their rights. They were constantly active in asserting their claims, by caveat, until Cotton obtained his patent, which gave him a right of entry. At that time, those under whom the complainants claim were laboring under disabilities, and this suit was commenced in less than twenty-one years after those disabilities were removed. The law has defined what reasonable diligence is, namely, the institution of a suit within the period limited in the law.

We are unable to perceive the bearing which the case of Piatt v. Vattier, 9 Peters, 413, can have on the present case. In that case, Piatt merely set out the claim which he had procured by assignment, and asked the court to decree a conveyance of a doubtful equity where there had been an adverse possession of more than thirty years; yet he did not, in his bill, charge that he, or those under whom he claimed, had been during the whole period in which such adverse possession had been held, laboring under any of the disabilities enumerated in the statute of limitations; nor did he charge a single fact or circumstance to excuse the delay in bringing his suit, so as to shield his claim against the operation of the bar in analogy to the statute of limitations. Of what avail, then, was his proof—as neither proof without allegation, nor allegation without proof, will warrant a decree? The complainants in this suit have averred and proved, not only that their claim, if a legal one, would not be barred by the statute of limitations, but they have also charged and proved such facts and circumstances as, independent of the statute, relieve their claim from the operations of the bar adopted in equity in that class of cases in which a bar in analogy to the statute would be applied.

A legacy given out of real property is only recoverable in a court of equity, and therefore is not within the express words of the statute of limitations. And it follows, that length of time alone will not bar it, but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive. See 1 Vern. 256; 2 Ib. 21; and 2 Ves. Jun. 11.

Time will not run against pure technical trusts, nor will it commence running in cases of fraud until the fraud has been discovered. See Bicknell v. Gough, 3 Atk. 558; Alden v. Gregory, 2 Eden, 280; 2 Vern. 503; 1 Ridg. Rep. 337; 2 Ves. Jun. 280; Cas.

Temp. Talb. 63; 2 Sch. & Lefr. 101; and Ib. 474.

249*] *The presumptions drawn by courts, against stale demands, are founded in justice and policy. Those presumptions are matters of evidence, and not, in most cases, proprio jure, matters of plea in bar; and a court of equity, equally with a court of law or jury, may draw the conclusion, if the lapse of time be put in issue by the pleadings, and the lapse of time be not satisfactorily accounted for.

Lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby the plaintiff was disabled from obtaining full information of his rights (Muncy v. Palmer, 2 Sch. & Lefr. 487), and equity will relieve against the mere lapse of time unaccounted for without misconduct in the lessee, or where the lessee has lost his right by the fraud of the lessor (Lamar v. Napper, 2 Sch. & Lefr. 682 689.) These authorities need no comment, as they clearly demonstrate, when applied to the facts of this case, that the complainants' claim is not barred by lapse of time in analogy to the statute of limitations, nor by lapse of time independent of that statute, or by any other cause.

There is, however, one class of cases, in which a court of law will, in furtherance of justice, presume a conveyance in less than twenty years. This rule, however, only applies to cases of pure technical trusts, where the trustee is bound to convey to his cestui que trust at a particular period, or on the happening of a particular event, after the period has arrived, or the event has happened, on which the estate was to be conveyed, if the cestui que trust convey the estate to another, and an action or suit be brought by the bargainee against a person in possession. The court will not permit the plaintiff to be prevented from recovering, on the ground that the legal title is outstanding in the trustee but will leave it to the jury to presume a conveyance from the trustee; upon these grounds namely that the court will presume that the trustee has done his duty and that what had been done by the cestui que trust was rightfully done. See England v. Slade, 4 T. R. 682, and Doe v. Lyburn, 7 T. R. 2. It will at once be perceived that this class of cases has no application to the case at bar.

There is no particular hardship in this case which ought to weigh with the court, and incline the scale in favor of the defendants. Should a decree be pronounced eventually in favor of the complainants, the defendants will, in reality, sustain no loss. The complainants must pay them for all their lasting and valuable improvements, and moneys expended in payment of taxes, less the rents and profits; and their warrantors must refund to them the expenses of this suit, ordinary and extraordinary, and the consideration paid, if any were

250*] *paid, and interest. This will throw the loss back upon those who originally perpetrated the fraud, to be relieved from which the complainants have been compelled to resort to this court. And we respectfully submit, that they are entitled to the relief which they ask. In extending relief to the complainants, we also *submit*, that no portion of the land ought to be *decreed to the defendants*, on the ground that *the lands in question* had been located and surveyed by O'Bannon; because, first, said location and survey were not made in pursuance of any contract; and if they were, the defendants do not show such a connection with O'Bannon as would justify this court in substituting them in his place. This court cannot make a contract for the parties, and then decree its specific execution.

Mr. Stanberry, for the appellees, in reply to Mr. Scott:

Lastly, if all other defense fails us, we rely upon the lapse of time and the staleness of the claim; and this is, under all the circumstances, a sure reliance. It is difficult to imagine a case to which this wholesome doctrine would better apply.

Whether the complainants trace their claim to the deed of trust; or by descent from Lawson, they come at too late a day into a court of equity to assert it From the 16th of August, 1796, a claim adverse to theirs has been set up, and for twenty-seven years prior to the filing of the bill undisturbed possession of the land accompanied that adverse claim. However it may have been in the beginning, no single circumstance of fraud or notice attaches to this adverse title during this long possession.

Look now to the change of circumstances in this great lapse of time. All the parties to the transactions dead, and the subject matter of the claim, worth only a few cents per acre in the beginning—worth only $2.50 per acre when the possession commenced, and then a wilderness—now turned into highly cultivated farms, and worth $30 per acre.

Now, what sort of a case do these complainants make to overcome such a defense?

Let us take the title as claimed under the deed of trust in the first place. I have shown already that this land was not covered by that deed; but, if it be held to pass, though obscurely, by that deed, then what sort of a deed was that?

A voluntary post-nuptial settlement, a sort of conveyance barely tolerated, requiring the most favorable circumstances for its support, and of little avail against present creditors and subsequent purchasers.

The counsel for complainants, in his printed brief, takes quite a new view of this kind of conveyance. He says, that *"each of [*251 the three considerations named in the deed is valuable, and sufficient to sustain it against creditors and subsequent purchasers."

In answer to this, it is only necessary to refer to Cathcart v. Robinson, 5 Peters, 264, which establishes, or more properly recognizes, the doctrine, that a subsequent sale by the husband to an innocent purchaser is presumptive evidence of fraud in the settlement.

The great object of this conveyance was a reconciliation between Lawson and his wife, which soon fell through. Very shortly after the making of the settlement, we find Mr. and Mrs. Lawson making a joint application to one of the trustees for the sale of a part of the lands to meet their current expenses, but nothing is ever done by the trustees in the administration of the trust.

Between the date of the deed of trust and the year 1800, Lawson disposed of the entire 10,000 acres to various persons. The fact was known to the trustees and the cestuis que trust.

All parties seem to have abandoned it, for not a single item of the property, real or personal, mentioned in it was ever administered, under its provisions. Lawson and his family separated forever. The complainants allege, that, for years before his death, he was reduced to a miserable wreck, both in body and mind, wholly unable to take care of himself. Strange that, under such circumstances, he should have been left altogether to the care of strangers.

He died between 1802 and 1805, and his wife and three surviving children, the youngest of whom (Columbus) was then sixteen, the other two considerably past their majority, were left to look after their property.

Mrs. Lawson died in 1809, her three children, then all of full age, surviving her.

Long before this date, all these parties were advised that this land was claimed by assignments from General Lawson, and as early as February 12th, 1799, a caveat against patents to the assignees was filed in the general land office by Joshua Lewis, who had married the daughter of General Lawson. Although under that caveat the patent for this 965 acres was suspended for sixteen years, not a step farther seems to have been taken to sustain it or make any proof.

Mrs. Lawson and her children continued to reside in Kentucky, just where, if there were any proof to invalidate the claims set up under Lawson, it could be had.

On the 9th of January, 1807, one of the three children, John P. Lawson, conveys all his interest in the 7,000 acres embraced in the deed of trust to his brother-in-law, Lewis. This 252*] deed *contains the recital that the 7,000 acres, since the date of the deed of trust, had been conveyed by Robert Lawson to divers persons, and carefully provides that John P. Lawson should not be held to warrant against the claims of such purchasers.

John P. Lawson died about the 1st of June, 1809, leaving the complainant, Mary Pierce Bowman, his only child and heir at law.

Columbus Lawson died unmarried, about the 8th of January, 1815, leaving his sister, Mrs. Lewis, and his niece, Mrs. Bowman, his heirs at law.

Mrs. Lewis died about the 1st of October, 1830, and her husband about the 20th of June, 1833.

Ten years after the death of the last of Lawson's children, she having lived to the age of fifty-two, the grandchildren of Lawson, eleven in number, and all of full age, bring this suit.

Here, then, is a case of full notice of the adverse claim, brought home to the ancestors of these complainants more than half a century ago. They take but one step in all that time towards the assertion of their claim, and that step was taken before the present century commenced, and was never afterwards followed up. Perhaps they did not consider the property worth the cost and trouble of its pursuit. Now, after they are all gone, and all the parties to the fraud, if there was any, have also disappeared—now, when the land is in hands very remote from the original owners, improved and subdivided into a cluster of farms, and made valuable by the labor of the occupants, at this late day, this long abandoned claim is set up, and a court of equity is asked to dispossess these defendants.

If we look at the claim by descent, and not through the deed of trust, it is, if possible, still worse. Then it assumes the aspect of a bill brought to impeach an equitable title older than the one set up by the complainants—a bill to set aside an assignment apparently good by matter in pais, exhibited just forty-four years after the voidable assignment was made.

But it is said, in answer to this great lapse of time, that it goes for nothing, for the reason that the statute of limitations, in consequence of non-residence, etc., would not bar the complainants if they had a legal title.

Very clearly it would bar them, if a legal title had descended to the children of Lawson instead of an equity, unless we pile one disability upon another. But there is no question of any statute of limitations as to the complainants. They never had the right to bring an action at law, for they have never had a legal title. No such cause of action has ever accrued to them. The legal title, as has been shown, was first vested in Cotton, and nothing appears in the case to prevent the operation of the statute *upon that title, the only [*253 one upon which it could operate. But if the case were otherwise, it is quite too late to contend that a court of equity will never refuse relief if the statute does not cover the case.

Piatt v. Vattier, 9 Peters, 405, is a leading case to the contrary. The court in that case act independently of the statute, and adopt the language of Lord Camden, as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing: laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In Bowman v. Wathen, 1 How. 189, the same doctrine is fully recognized, and the principle upon which a court of equity denies relief to stale claims is strongly enforced and illustrated. The language of Sir William Grant is adopted, and quoted with approbation: "Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular demand."

So, also, the language of Lord Redesdale, that "it never can be a sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, were persons embarrassed by the fraud of others, yet the court cannot act upon such circumstances."

And, again, what is said by the same Chancellor, that "every new right of action in equity that accrues to a party, whatever it may be,

must be acted upon, at the utmost, within twenty years."

If such is the doctrine in England, and has been found necessary there, it should find peculiar favor in this country; especially in reference to stale claims against real estate—a species of property so much the subject of traffic among our people, and constantly undergoing such changes in value.

Mr. Stanberry, in reply to Mr. Ewing:

Mr. Ewing, in answer to lapse of time, relies upon the act for limitation of actions (which he [*254] says must govern this case), *passed January 25th, 1810, 1 Chase, 656. He claims that the second section provides the rule of limitation for all suits in equity, and that the proviso saves this case.

This is a novel construction of this act. It is entitled "An Act for the limitation of actions," which carries the idea of common law proceedings.

The first section specially names all the personal actions, and affixes their respective bars.

The second section provides for the other description of actions, mixed and real, by enumerating the writ of ejectment or other action for the recovery of the possession, title, or claim of, to, or for any land, tenements, or hereditaments, and limits the time of bringing them within twenty-one years next after the right to such action or suit shall have accrued.

The proviso then saves the rights of persons entitled to any such actions, if under the disability of nonage, coverture, insanity, or absence from the State, until the full time of limitation has passed after the removal of the disability.

We say the language, "or other action for the recovery of the possession, title, or claim of, to, or for any land, tenements, or hereditaments," is intended to bar all forms of real actions. Such has been its uniform construction in Ohio. Holt v. Hemphill, 3 Ohio, 239.

Similar language has been used in all the Ohio acts of limitations. The act now in force, of June 1st, 1831, Swan, 553, uses this language: "Actions of ejectment, or other action for the recovery of the title or possession of lands," etc.

Larrowe v. Beam, 10 Ohio, 498, applies the statute of 1810 to a petition for dower. Grimke, J., says (p. 503), "that, at the time the right of the petitioner accrued, the mode of proceeding was by writ of dower, and so continued until 1824, when the petition in chancery was substituted."

Tuttle v. Wilson, 10 Ohio, 502, also a petition for dower, and held to be barred by the statute. Wood, J., says (p. 26): "The petition for dower is substantially, when prosecuted, a possessory action."

The actions at common law for the recovery of dower were classed under the form of real actions. They were either the writ of right of dower, or more commonly the writ of dower unde nihil habet. Booth on Real Actions, 118, 166.

The right to dower is strictly a legal right for the recovery of a legal estate. It is only for convenience that a remedy by petition in equity is given in Ohio. The courts of Ohio *have not* said that the statute of limitations *applies directly to* any other proceeding in *equity.*

The complainants are not, therefore, within the bar of the *savings of the statute. [*255 It neither binds them nor precludes them. No cause of action, such as the statute contemplates, ever vested in them, for they never had a legal title or any right to sue in a court of law. For nearly half a century their claim has stood upon a voluntary settlement conveying only an equity. The case shows it was in effect abandoned, before the present century began, by all parties interested in it. But one step was ever taken to assert it, and that was as long ago as February, 1799, at the instance of Joshua Lewis. The caveat then filed did not so much as name O'Bannon, or caution anyone against his assignment.

Besides this presumptive abandonment, the other facts shown by the complainants themselves would be sufficient, without this lapse of time, to protect the subsequent purchasers.

In Cathcart v. Robinson, 5 Peters, 264, this court, in reference to a post-nuptial settlement, refer to the subsequent control over the property by the husband; his notoriously offering it for sale, the trustee not intervening to prevent it; the letter of the wife to the trustee requesting him to assign part of the property to pay the husband's debts—as evidence of fraud upon subsequent purchasers.

This case presents a similar state of facts even to the interference of the wife.

Now, after the death of all the parties to this family arrangement, made chiefly for their own accommodation, and soon abandoned by them—after the death of all their children, this long forgotten claim is set up by the grandchildren of the original parties, eleven in number, not one of whom was in being at the time of the settlement—the youngest now thirty, and the oldest fifty, years of age!

We see who make this claim, and now what do they ask? In this case, property worth $30,000. But if they are entitled to this, there is nothing to save from their claim the other 6,000 acres, of equal value; altogether, a property worth more than $200,000, which, at the date of the deed, was not worth $1,000.

And then from whom is this property to be taken? Honest purchasers, who paid a full value, and who have been in the undisturbed possession for thirty-five years.

Mr. Justice Grier delivered the opinion of the court:

The appellants in this case filed their bill in the Circuit Court of the United States for the District of Ohio, claiming a certain tract of land in possession of the defendants, and praying a decree for the title and possession of the same.

The bill sets forth that Robert Lawson, under whom complainants *claim, had re- [*256 ceived for his services as an officer in the Revolutionary War a military warrant (No. 192) for ten thousand acres of land, which before the 4th of June, 1794, was located in the Virginia military district, in tracts of one thousand acres each, under the following numbers of entries: 1704, 1705, 1706, 1707, 1714, 1715, 1716, 1717, 1718, 1719.

On the 4th of June, 1794, an indenture tripartite was executed between Robert Lawson, of the first part, Sarah, his wife, of the second

part, and James Speed, George Thompson, Joseph Crocket, and George Nicholas, of the third part, by which, for the consideration therein expressed, Robert Lawson conveyed to the parties of the third part, among other things, "two thousand acres of military land, situated on White Oak Creek, on the north side of the Ohio, being the land mentioned in the first entry made for the said Lawson on the surveyor's books," in special trust, that they will "permit said Lawson and his wife, and the survivor, and the said Sarah, if she should again separate from her husband, to use, occupy, possess, and enjoy, during their natural lives and the life of the survivor, the lands on Fayette County, Kentucky," etc. And also that they will convey the two thousand acres of land on White Oak Creek to either of the sons of the marriage to whom the said Sarah shall direct, etc. And the said Lawson covenanted with the trustees that he would at no future time "offer any personal violence or injury to his wife, and that he would abstain from the intemperate use of every kind of spirituous liquors, and that, if he should at any time thereafter again offer any personal violence or injury to his wife," the trustees were authorized to dispossess him of the hundred and fifty acres of land, etc.

The complainants aver, also, that the two entries numbered 1707 and 1714 covered the two thousand acres conveyed by this deed.

The bill further states, that on the 16th of August, 1796, Lawson made an assignment to one John O'Bannon of three thousand three hundred and thirty-three acres of his warrant which had not been surveyed; and charges that, at the time of making said assignment, Robert Lawson was, as O'Bannon well knew, habitually intemperate, and had been so for a long time previous; that the faculties of his mind were much impaired, and that he was wholly incapable of making any valid contract; that the said assignment was without consideration, and procured by O'Bannon under false and fraudulent pretenses.

That O'Bannon, well knowing that the aforesaid entry of 1707 had been conveyed by the 257*] trust deed, on the 25th of August, *1796, fraudulently withdrew it, and re-entered in his own name nine hundred and sixty-five acres under the same number on the waters of Straight Creek—the tract in controversy in the present suit. That O'Bannon, having obtained the plat and certificate, deposited them, before the 12th of February, 1799, in the Department of State, and applied for a patent; and Joshua Lewis, the son-in-law of Lawson, as agent for the trustees, entered on that day a caveat against the issuing of a patent to O'Bannon.

Lawson and his wife lived together but a short time after the execution of the trust deed. Mrs. Lawson went to Virginia, where she died in 1809, never having appointed as provided by the trust deed, to whom conveyance should be made. Lawson died in Virginia, in 1805, the victim of intemperance. They left three children; America, intermarried with Joshua Lewis, in 1797, and two sons, under whom complainants claim. In 1800 George Nicholas, one of the trustees, died, and some time afterwards James Speed and Joseph Crocket; *and the trust thus became vested in* George Thompson, the survivor. In 1834 George Thompson died, leaving George C. Thompson, one of the complainants, his son and heir at law, in whom the trust vested.

John O'Bannon died in January, 1812, having made a will and appointed Robert Alexander and George T. Cotton, his son-in-law, his executors. Alexander never qualified as executor. Cotton, as acting executor, on the 16th of July, 1813, executed a deed of the nine hundred and sixty-five acres to William Lytle, under whom the defendants claim. The deed of Cotton recites a patent to John O'Bannon in his lifetime, and warrants the title. Afterwards, on the 21st of December, 1816, a patent issued from the United States to Cotton, "as executor of the last will and testament of John O'Bannon, in trust for the uses and purposes mentioned in his will."

The defendants plead in bar, that they are purchasers from Lytle, and those claiming under him, without notice, and exhibit their deeds. They also file an answer in support of their plea, in which the fraud alleged in the bill, and all facts going to show equity in the claim of complainants, are denied. And in an amended answer they set up the plea of the statute of limitations, and insist "that the deed of trust, under which complainants claim, is a stale claim, not attended with any circumstances to relieve it from such staleness, and that the bill should be dismissed on that account."

Various questions have been made before us, as to the nature and character of this deed of trust: whether its loss is sufficiently accounted for; whether, as a settlement of family difficulties, *it was not abandoned by all the [*258 parties concerned in it; whether it described the land in controversy; whether O'Bannon purchased with notice of it; whether he paid any consideration; whether the assignment to him by Lawson was fraudulently obtained; whether the legal title was vested in defendants by virtue of the patent to Cotton and his warranty; and whether the statute of limitations operated as a bar to complainants' claim.

On these and other questions, which were argued with so much ability by the learned counsel, it is not the intention of the court to express an opinion; because, in our view of the case, they are not necessary to a correct decision of it.

The important question is, whether the complainants are barred by the length of time.

In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes, than by analogy. In many other cases they act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate.

But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace

of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. 2 Story, Eq. sec. 1520.

A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. "Nothing," says Lord Camden, (4 Bro. Ch. R. 640), "can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive, and does nothing." Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title [*259] *from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability.

This doctrine has been so often asserted by this court, that it is unnecessary to vindicate it by argument. It will be sufficient to refer to Piatt v. Vattier, 9 Peters, 405, a case much resembling the present, and Bowman v. Wathen, 1 Howard, 189.

Can the complainants' case stand the test of this reasonable and well established rule of equity?

The bill does not assert that either the trustees or the cestuis que trust were ignorant of the transaction between Lawson and O'Bannon, or of the fraud practiced on Lawson, if any there was. Yet, with the exception of the caveat filed in Washington, in 1799, they show no assertion of claim under this voluntary post-nuptial settlement, from its date (June 1794) till the filing of this bill in 1840. John O'Bannon lived till 1812; yet in all this time (sixteen years) no bill is filed to set aside his assignment from Lawson for the fraud now alleged, while the circumstances were fresh and capable of proof or explanation.

In 1813 (perhaps in 1811) the defendants, or those under whom they claim, entered upon these lands; they paid large and valuable considerations for their respective portions, without any knowledge of this lost deed of family settlement, or reason to suspect fraud in the transfer to O'Bannon. And whether the patent obtained by Cotton, and his warranty, had the effect of conferring on them the legal title or not, they reposed in confidence on it. By their industry and expenditure of their capital upon the land for a space of twenty-seven years, they have made it valuable; and what was a wilderness scarce worthy fifty cents an acre, is now enhanced by their labor a hundred fold.

No bad faith, concealment, or fraud can be imputed to them. If the trustees or cestuis que trust chose to reside in Kentucky and not look after these lands for near half a century, they *can have no equity* from a disability that was *voluntary and self-imposed*. The residence of *the trustees in Kentucky* was not considered as an obstacle or objection, in the minds of those who executed the deed, to their assuming the trust and care of lands in Ohio. There was no greater impediment to the prosecution of their claim in a court of equity at any time within forty years than there is now. They have shown nothing to mitigate the effect of their laches and long acquiescence, or which can entitle them to call upon a court of equity to investigate the fairness of transactions after all the parties to them have been so long in their graves, or grope after the truth of facts involved in the mist and obscurity consequent on the lapse of nearly half a century.

*We are all of opinion, therefore, [*260] that the lapse of time in the present case is a complete bar to the relief sought, and that the decree of the Circuit Court dismissing the bill should be affirmed with costs.

Order.

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

Mr. Justice McKinley did not sit in this cause.

MARIA MATHESON, John Darrington, Robert D. James, Billups Gayle, John Gayle, and Edward M. Ware, Plaintiffs in Error,

v.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA at Mobile, Defendants.

Jurisdiction—constitutional question.

Where the highest court of a State affirmed the judgment of a court below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act.

The intention of the parties to raise a constitutional question is not enough. It must be actually raised and decided in the highest court of the State.

THIS case was brought up from the Supreme Court of the State of Alabama by a writ of error issued under the twenty-fifth section of the Judiciary Act.

In 1845, the Branch Bank of Mobile obtained a judgment in the Circuit Court of Mobile County (State court) against Maria Matheson, John Darrington, and Robert D. James, for the sum of ten thousand five hundred and seventy-three dollars and eighty-two cents.

On the 29th of May, 1846, the defendants sued out a writ of error, returnable to December Term, 1846, of the Supreme Court of the State of Alabama. Billups Gayle, John Gayle, and Edward M. Ware became their securities upon the appeal bond.

On the 22d of January, 1847, being a day of

the December term, the counsel of the Branch Bank filed a certificate of the clerk of the court below, stating the judgment and writ of error; when it appearing that no transcript of the record was filed, the Supreme Court of the 261*] State of Alabama *affirmed the judgment of the court below, and also entered up judgment against the securities in the appeal bond.

In April, 1847, the defendants sued out a writ of error, and brought the case up to this court.

Mr. Inge, counsel for the defendants in error, moved to dismiss the case for want of jurisdiction, apparent upon the record, which motion was resisted by Mr. Gayle, counsel for the plaintiffs in error.

Mr. Chief Justice Taney delivered the opinion of the court:

The record in this case is a very brief one. It states that a certificate was filed in the clerk's office of the Supreme Court of the State of Alabama, from the clerk of the Circuit Court for Mobile County, setting forth that a judgment had been obtained in that court by the bank against the plaintiffs in error for the sum of $10,573.82 and costs, from which judgment they had presented a writ of error to the Supreme Court; and that this certificate having been produced in the Supreme Court by the attorney for the bank, and the transcript of the record in the Circuit Court not having been filed, the writ of error was thereupon dismissed, and the judgment of the Circuit Court affirmed. It is upon this judgment that the writ of error has been presented to this court.

It appears from the argument against the motion, that the question intended to be raised here is whether the acts of the State of Alabama creating a bank and branches are not in violation of the tenth section of the first article of the Constitution of the United States, which declares that "no State shall emit bills of credit."

But in order to bring that question before this court, it should have been raised in the Supreme court of the State, and have been there decided. There are many cases in the reports in which this court have so ruled. In this case the Supreme Court of the State dismissed the writ of error to the Circuit Court, and affirmed its judgment, because the plaintiffs in error had not filed a transcript of the record; and no question as to any matter of right in contest in the suit was raised or decided. There is nothing, therefore, in the record which this court is authorized to review, and the writ of error must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, and it appearing to the court upon an inspection of the 262*] said transcript that *there is nothing in the record which this court is authorized to review, it is thereupon now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed for want of jurisdiction.

12 L. ed.

DUNCAN McARTHUR'S HEIRS, Complainants,

v.

WALTER DUN'S HEIRS.

Virginia military land warrants—location and survey void—conflicting entry.

The proviso in the second section of the Act passed on the 1st of March, 1823 (3 Statutes at Large, 773), entitled, "An Act for extending the time for locating Virginia military land warrants and returning surveys thereon to the general land office"—which proviso is as follows, viz.: "Provided, that no locations, as aforesaid, in virtue of this or the preceding section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act shall be considered null and void"— protected an entry which had been made in the name of a dead man in 1822. And a subsequent conflicting entry came within the prohibition of the statute, and was therefore void.

The cases of Galt v. Galloway, 4 Peters, 345; McDonald's Heirs v. Smalley, 6 Peters, 261; Jackson v. Clarke, 1 Peters, 628; Taylor's Lessee v. Myers, 7 Wheat. 23, and Galloway v. Finley, 12 Peters, 264, reviewed.

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

It was before this court at January Term, 1842, and was then remanded to the Circuit Court, upon the ground that a material error had been committed by the clerk in stating the point intended to be certified. It now came back with the error corrected.

It was, originally, a bill filed on the equity side of the Circuit Court by Dun against McArthur, in which the same matters of controversy were involved as in the present case. Dun obtained a decree against McArthur in 1836.

In 1838, McArthur filed the present bill of review. The following table presents a view of their conflicting titles to the land in question:

McArthur's Title.	Dun's Title.
1822, Nov. 23. Entry in the name of Means, who was dead.	
1823, March 1. Act of Congress passed.	
1823, March 18. Survey.	
1824, Dec. 10.....	Entry by Galloway.
1824, Dec. 15.....	Survey.
1825, Jan. 3. Patent.	
1825, April 4.....	Patent.

*All the facts in the case are stated [*263 in the certificate of division in opinion, which was as follows, viz.:

"This cause having been remanded from the Supreme Court of the United States to this court, for a further order touching the point upon which the opinions of the judges of this court upon the hearing thereof were opposed, in compliance with said mandate of said Supreme Court, the said point of disagreement of said judges is now ordered to be restated more specially and at large. The said point of disagreement arose out of the following facts, stated and set forth in the original bill of said Walter Dun, and admitted to be true by the demurrer of said Duncan McArthur thereto,

who was the respondent to said original bill, viz.: That said McArthur, on the 3d of January, A. D. 1825, obtained a patent for the tract of land in controversy, which is situate in the Virginia military reservation, in the State of Ohio, on an entry made on a Virginia military land warrant in the name of Robert Means, assignee, on the 23d of November, A. D. 1822, followed by a survey of said entry made in the name of the said Robert Means, assignee, on the 18th of March A. D. 1823; which said Robert Means before said entry, and as early as the year A. D. 1808, had departed this life. And that on the 4th day of April, 1825, another patent for the same tract of land was issued to one James Galloway, on an entry thereof made in the name of said Galloway, on the 10th of December, A. D. 1824, on another Virginia military land warrant, and which was duly surveyed in his (said Galloway's) name, on the 15th of the same month of December, A. D. 1824, and which tract of land was subsequently conveyed by said Galloway to said Walter Dun. Upon which said state of facts, touching the titles of the said parties to said tract of land, this point was raised by the counsel for the complainant in said bill of review, upon the hearing and argument thereof, viz.: Whether the said location and survey of said tract of land in the name of said Galloway, and the patent issued to him for the same, are not null and void, as being made and done in contravention of the proviso to the second section of the Act of Congress of the 1st of March, A. D. 1823, entitled 'An Act extending the time for locating Virginia military land warrants, and returning surveys thereon to the general land office.'

"And upon the point so as aforesaid raised by the counsel for the complainants in review, the opinions of the judges of this court being opposed, the said point of disagreement is, on motion of said complainants' counsel, stated as above, under the direction of said judges, and is hereby ordered to be certified to the Supreme Court of the United States at its next session to be hereafter holden, for its final decision upon said point of disagreement."

264*] *The proviso referred to was in these words (3 Stat. at Large, 773): "Provided, that no locations as aforesaid, in virtue of this or the preceding section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this act, shall be considered null and void."

The cause was argued by Mr. Vinton on behalf of the complainants, and Mr. Ewing and Mr. Thurman for Dun's heirs.

Mr. Vinton for the complainants, reviewed and commented upon the following cases:

12 Peters, 297, and also referred to the Act of 20th May, 1836 (5 Stat. at Large, 31).

7 Wheaton, 23; 1 Peters, 638; 4 Peters, 332; 6 Peters, 261, 666; 7 Ohio Rep. 177, which last case, he contended, misconstrued the judgment of this court in 6 Peters.

The brief filed by Mr. Thurman, and enlarged upon by Mr. Ewing, was as follows:

I. An entry in the name of a dead man is, on general principles, void. Galt v. Galloway, 4 Peters, 345; McDonald's Heirs v. Smalley, 6 Peters, 261; Lessee of Wallace v. Saunders, 7 Ohio Rep. Part 1, 173.

II. Being void, it is not protected by the proviso in question. Lindsey v. Miller's Lessee, 6 Peters, 666; Lessee of Wallace v. Saunders, above cited.

III. There is no difference, in this respect, between a survey in the name of a dead man made after, and one made before, the passage of the Act of 1807. The terms of the proviso apply to the one as much as to the other. And no reason can be given why the proviso should protect a survey made after its enactment and not protect one made prior thereto, and to the land covered by which no right of a third party had intervened. It protects neither.

IV. Galloway v. Finley, 12 Peters, 264, is not, I respectfully submit, decisive of the present case. Because—

1. The point now under consideration did not necessarily arise in that case. The court held, that Galloway could not, while standing in the relation of a purchaser, be permitted to avail himself of the defect he relied on in his vendors' title, to defeat his agreement to purchase. Whether he could do so was the main and only necessary question in that case.

2. The entry in that case was made on patented lands. In this case, it was on lands not patented. The difference is material; for the court, in deciding that case, said: "It is difficult *to conceive how an irregular [*265 patent could exist, unless it passed no title. We will not perplex the decision with supposed cases of irregular surveys, but examine the act of Congress, and ascertain its effect as regards the grant in the name of Charles Bradford." p. 298.

And again: "Congress had the power, in 1807, to withhold from location any portion of the military lands; and having done so in regard to that previously patented in the name of Charles Bradford, the complainant, Galloway, had no right to enter the same." p. 299.

It would seem, from these extracts, that the court did not intend that its decision should extend beyond what was required by the facts of the case then under consideration, and that, consequently, it is not decided that a void unpatented survey is protected by the Act of 1807.

So, in Hoofnagle v. Anderson, 7 Wheat. 212; S. C. 5 Cond. R. 271, a broad distinction was made between patented and unpatented surveys. A patent for a survey made on a "State line" warrant was held to appropriate the land. The survey before patent issued, was a nullity, and the land was subject to entry. Miller v. Kerr, 7 Wheat. 1; S. C. 5 Con. R. 202, Lindsey v. Miller, and Galloway v. Finley, above cited.

3. The court distinguished the case of Galloway v. Finley from the case of Lindsey v. Miller by the fact that the survey in the former case was on a proper warrant, and in the latter on a State line warrant, wherefore there was an equity in the former that did not exist in the latter case.

But in Hoofnagle v. Anderson the court seemed to think there was very little difference in the equities. Both were equities of which a court could not take cognizance, and both claims were of an equally meritorious character.

The court (in deciding that the patent for the survey made on the State line warrant appropriated the land, and prevented its subsequent location) said: "The equity of the one cannot be so inferior to that of the other as to justify the court in considering the patent of the one as an absolute nullity in favor of the other who has attempted to appropriate the same land after such patent had been issued." 5 Cond. R. 273.

4. The court, in Galloway v. Finley, say: "Congress had the power, in 1807, to withhold from location any portion of the military lands."

But ought it to be supposed that Congress intended to withhold a portion to which no person had acquired any title?

V. The case under consideration is not affected by the Act of May 20th, 1836, entitled, 266*] "An Act to give effect to patents *for public lands issued in the names of deceased persons." 5 Peters's Laws, 31. Because—

1. It could not have been the intention of Congress in passing that act, to interfere with the rights of third persons.

2. If such were the intention, the act is, to that extent, void; Congress having no power to give the lands of A to B, without consideration and against the will of A.

3. The point certified does not include the question whether the rights of the parties are affected by the Act of 1836, and consequently that question cannot be considered in this court. Wayman v. Southard, 10 Wheat. 1; S. C. 5 Cond. R. 1.

If the above propositions are sound, it follows that the judgment of the court must be for Dun's heirs, the entry and survey in the name of Means (under which the complainants claim) having both been made after his death.

Mr. Justice Daniel delivered the opinion of the court:

This case comes before this court upon a certificate of division of opinion between the judges of the Circuit Court of the United States for the District of Ohio, upon a bill of review exhibited in that court. The character of the cause as made upon the pleadings and evidence, and the question on which the judges were divided in opinion, are so succinctly and at the same time so clearly disclosed in the statement of the judges, that they will be best presented by a simple repetition of that statement in these words:

"This cause having been remanded from the Supreme Court of the United States to this court, for a further order touching the point upon which the opinions of the judges of this court upon the hearing thereof were opposed, in compliance with said mandate of said Supreme Court, the said point of disagreement of said judges is now ordered to be restated more specially and at large. The said point of disagreement arose out of the following facts, stated and set forth in the original bill of said Walter Dun, and admitted to be true by the demurrer of said Duncan McArthur thereto, who was the respondent to said original bill, viz.: That said McArthur, on the 3d of January, A. D. 1825, obtained a patent for the tract of land in controversy, which is situate in the Virginia military reservation, in the State of Ohio, on an entry made on a Virginia military land warrant, in the name of Robert Means, assignee, on the 23d of November, A. D. 1822, followed by a survey of said entry, made in the name of the said Robert Means, assignee, on the 18th of March, A. D. 1823; which said Robert Means before said entry, and as early as the year A. D. 1808, had departed this life. And that, on the 4th day of April, 1825, another patent *for the [*267 same tract of land was issued to one James Galloway, on an entry thereof made in the name of said Galloway, on the 10th of December, A. D. 1824, on another Virginia military land warrant, and which was duly surveyed in his (said Galloway's) name, on the 15th of the same month of December, A. D. 1824, and which tract of land was subsequently conveyed by said Galloway to said Walter Dun. Upon which said state of facts, touching the titles of the said parties to said tract of land, this point was raised by the counsel for the complainant in said bill of review, upon the hearing and argument thereof, viz.: Whether the said location and survey of said tract of land in the name of said Galloway, and the patent issued to him for the same, are not null and void, as being made and done in contravention of the proviso to the second section of the Act of Congress of the 1st of March, A. D. 1823, entitled 'An Act extending the time for locating Virginia military land warrants and returning surveys thereon to the general land office.'"

Thus it will appear that the only question for consideration here arises on the proper construction of the proviso contained in the second section of the act of Congress above mentioned. This act—after providing in the first section that the officers and soldiers of the Virginia line or Continental establishment, their heirs or assigns, entitled to bounty lands within the country reserved by the State of Virginia, between the Little Miami and Scioto rivers, shall be allowed a further time of two years from the 4th day of January, 1823, to obtain warrants and complete their locations, and the further time of four years from the same period to return their surveys and warrants to the general land office to obtain patents—contains in the second section a proviso in the following words: "Provided, that no locations as aforesaid in virtue of this or the preceding section of this act shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act shall be considered null and void. 3 Stat. at Large, 773. Upon this proviso, which appears to be a literal transcript of the proviso contained in the first section of the Act of 1807, the question for our consideration, as has been already remarked, is presented.

On behalf of the complainants in the bill of review (the heirs of Duncan McArthur) and the holders of the elder patent, it is insisted, that, not only is their title under the prior entry and survey in the name of Means, and the patent issued in pursuance thereof, protected by the operation of the proviso just *mentioned, but that the effect of that [*268

proviso, nay, its express language, renders absolutely void the claim of title set up by the heirs of the junior patentee, Dun; denying to it, and to all similar clauses, any foundation on which legally or equitably such claims can be founded. The heirs of Dun contend that the patent to McArthur having been granted upon a location and survey made in the name of Means, when in fact Means had been dead fourteen years anterior to the entry, and thirteen years previously to the survey in his name, this entry and survey, and the patent issued to McArthur thereon, were of no legal efficacy, and should be superseded by the patent to James Galloway, upon an entry made by said Galloway in 1824, under which patent the heirs of Dun derive title by purchase. In support of this position, it is said that an entry in the name of a dead man is, on general principles, void, as was ruled by the cases of Galt v. Galloway, 4 Peters, 345, and of McDonald's Heirs v. Smalley, 6 Peters, 261. These cases, though express to the single point for which they have been cited, are nevertheless by no means decisive of the question certified, if indeed they are at all applicable thereto; that question not involving simply the validity of an entry made in the name of a dead man, but embracing the legality of locations made since the enactment of the proviso, upon lands previously patented or surveyed, without reference to the circumstance of the death or life of those in whose names such previous patents may have been granted or surveys made.

The language of the proviso is broad and comprehensive enough to comprise patents and surveys in the names of persons either living or dead, and it expressly declares to be null all patents posterior in time to those surveys and patents thus generally described and protected by that language. The proviso, then, if the natural and common meaning of its terms be adopted, must extend to and protect alike patents, entries, and surveys of either description, so far as this end is accomplished by preventing the possibility of conflict with locations and patents coming into existence after its date. Its operation and effect must be thus comprehensive, unless they can be understood to have been limited and controlled by some clear and authoritative exposition. Have they been so limited? It cannot be necessary here to discuss the competency of Congress in reference either to the power of imposing a limitation upon the time within which locations upon the ceded lands should be made, or as to the conditions on which further time might be extended to persons who had been excluded by the limitation first laid on locations. These subjects have been treated with clearness by Chief Justice Marshall, in the 269*] case of *Jackson v. Clarke, 1 Peters, 628, and the power of Congress with respect to them placed beyond objection.

In the next place, in the interpretation of the proviso contained in the laws of 1807 and 1823, the case of Jackson v. Clarke, we think, effectually overrules the distinction attempted in the argument of this cause between a patent and a survey in the operation of either proviso, a distinction, as we have already remarked, not taken by the language of the statute. Speaking of the survey in the case just quoted, Chief Justice Marshall says: "The survey, having every appearance of fairness and validity given to it by the officers of the government is sold as early as 1796 to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the act of Congress apply to it? The words taken literally, certainly apply to it. Does the language of the clause furnish any distinction between the patent and the survey? Lands surveyed are as completely withdrawn as lands patented from subsequent location." Again, it is said, in the same case, that "a survey made by the the proper officer, professing to be made on real warrants, and bearing on its face every mark of regularity and validity, presented a barrier to the locator which he was not permitted to approach, which he was not at liberty to examine." The case of Jackson v. Clarke may be appealed to for another illustration, which is very apposite to the present controversy. In support of the junior location and patent of Dun the court has been referred to the case of Taylor's Lessee v. Myers, 7 Wheat. 23, as an instance in which a location on land previously surveyed had been permitted subsequently to the proviso of 1807. But in the case of Taylor's Lessee v. Myers the owner had openly abandoned his location and survey, and had placed his warrant upon other land. "In such a case," say the court, "the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation; therefore in Taylor's Lessee v. Myers, the court said, the proviso which annuls all locations made on lands previously surveyed applies to subsisting surveys, to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest. This survey has not been abandoned by any person having an interest in it." No force, then, is perceived in the instance adduced, and no strength can be imparted by it to the position occupied by the defendants in this case; because by the abandonment the previous location and survey to every legal and operative purpose were annihilated, and there might be said in effect to have been none such, the original locator could not be compelled to hold *or continue them; it having been [*270 expressly ruled by this court that the owner of a survey or a patent may abandon either at his pleasure.

But it is contended for the defendants, that the entry and survey made in the name of Means, being by reason of his death at the date of that entry and survey absolutely void, under the authority of the decisions of Galt v. Galloway, 4 Peters, 345, and McDonald v. Smalley, 6 Peters, 261, the proviso in the act of Congress did not revive them or give them validity. That, according to the interpretation of the act of Congress in the case of Jackson v. Clarke, the proviso is extended no farther than to irregular patents. The language of the decision just mentioned does not literally apply to surveys pronounced absolutely void, by the death of the locator, or by any other cause; but it is equally true, that neither the terms nor the spirit of the reasoning of the court, nor of the decision, declare or imply anything against the justice of such claims. The

reasoning of the court in that case would apply as strongly to the justice of cases which were not perfected by reason of death, as it possibly could do to such as were not perfected in consequence of the neglect or omission of the persons interested; and surely the intrinsic character of the claim could not be affected by the former cause; its justice as against the government would remain precisely the same. The government would not have fulfilled its acknowledged obligation to the owner of the warrant or survey. There can be no question as to the power of the government to revive or confirm surveys or patents made or granted to persons not actually in life when such surveys or patents were made; there is an obvious propriety in a fulfillment of its undertakings by the government, and in its forbearance to enforce a forfeiture founded on no delinquency in those who would be affected thereby; and there is nothing in the act of Congress or in any judicial constitution thereof requiring or indicating an opposite conclusion. Indeed, the utmost which it has been attempted to deduce from the statute, or from any interpretation of the statute, is the absence of an authoritative declaration, that surveys and patents made or issued in the names of persons not living at the periods of their respective dates have not in fact been reserved and confirmed. But is not this deduction directly at war with the unequivocal authority of this court, in open conflict with the decision of Galloway v. Finley, reported in 12 Peters, 264? We hold that it is. In order to escape from this decision, it has been argued that the case last mentioned ruled nothing beyond this, that Galloway, as the vendee of Finley, should 271*] not be permitted to avail *himself of information derived from his vendor, and use it with the view to impeach the vendor's title, and as a means to obtain a better title in himself, in opposition to the title of that vendor It is true that the point here stated was ruled in the case, but the decision was by no means limited to that single point. Under the pleadings and proofs in that case, the title of Finley was necessarily brought into review; its character and the effect of the act of Congress with respect to it were discussed and decided upon. In that case, as in the present, it was contended that the statute operated upon titles merely irregular or defective, and did not embrace such as were void. In refutation of this interpretation the court proceed thus: "It is insisted that the section had reference to imperfect, and not to void titles. The Legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent issued, the government would not have had any title remaining, and a second grant would have been void of course. Something more, undoubtedly, was intended than the protection of defective, yet valid, surveys and patents." Again the court say: "The death of the grantee is an extrinsic fact, not impairing the equity of the claim as against the government. The defects of all others most common in the military districts of Kentucky, Tennessee, and Ohio were where the soldier had died, and the entry, survey, and grant had been made in the name of the deceased. In his name the warrant almost uniformly issued; who the heirs were, was usually unknown to the locator, and disregarded by the officers of the government when perfecting the titles. In Tennessee and Kentucky, provision was made at an early day that the heir should take by the grant; and why should we presume that Congress did not provide for the protection of his claim to the lands purporting to have been granted, when the legislation of the federal government was of necessity controlled in this respect by the experience of members coming from States where there were military lands? The statute is general, including by name all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require that the courts should not introduce an exception, the Legislature having made none. Congress had power in 1807 to withhold from location any portion of the military lands, and, having done so in regard to the lands of C. Bradford, the complainant Galloway had no right to enter the same.

Authority so directly in point leaves little room for comment; indeed, it may be said that, mutate nomine, the case of Galloway v. Finley is the case of McArthur's Heirs against The Heirs of Dun. Upon the plain and natural import of the *proviso in the statutes of [*272 1807 and of 1823, upon the reasoning of this court in the case of Jackson v. Clarke, 1 Peters, 628, but chiefly upon the very pointed authority of the case of Galloway v. Finley, we are of the opinion that the location and survey of the land in question in the name of James Galloway, and the patent issued to him for the same, as mentioned in the certificate of division, are null and void, as being made and done in contravention of the proviso to the second section of the Act of Congress of the 1st of March, A. D. 1823, entitled "An Act extending the time for locating Virginia military land warrants, and returning surveys thereon to the general land office," and we do order this opinion to be certified to the Circuit Court of the United States for the District of Ohio.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the Act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the location and survey of the land in question in the name of James Galloway, and the patent issued to him for the same, as mentioned in the certificate of division, are null and void, as being made and done in contravention of the proviso to the second section of the Act of Congress of the 1st of March, A. D. 1823, entitled "An Act extending the time for locating Virginia military land warrants, and returning surveys thereon to the general land office." Whereupon it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

TIMOTHY L. MACE, Plaintiff in Error,
v.
JARED WELLS.

Bankruptcy—surety for debt payable in futuro could prove claim at time of decree—discharge releases bankrupt from future payments made by surety.

By the fifth section of the United States Bankrupt Act, 5 Stat. at Large, 444, the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act. Therefore, where the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it.

THIS case was brought up from the Supreme Court of Judicature of the State of Vermont, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

273*] *The following statement of facts was argued upon by the counsel in the court where the cause was originally tried:

Orange County Court, December Term, 1844.

Jared Wells v. Timothy L. Mace and Trustees.

Action of Assumpsit for money paid.

The parties agree to the following facts in this case: That the plaintiff signed two notes with the defendant, of the dates and tenor following:

"$35.00. Wells River, July 9, 1840.

"For value received, I promise to pay Hiram Tracy, or order, thirty-five dollars, in four months, with interest annually.

"Timothy L. Mace,
"Jared Wells."

"$157.48. Wells River, August 14, 1840.

"For value received, we jointly and severally promise to pay Hutchins & Buchanan, or order, one hundred and fifty-seven dollars and forty-eight cents, in one year, with interest annually.

Timothy L. Mace,
"Jared Wells."

Said first note was paid by said Wells to said Tracy on the 12th day of July, A. D. 1841. Said note was given for the sole and proper debt of said Mace, and Wells signed only as surety; and the whole was a mere matter of accommodation on the part of Wells.

Said second note was given also for the proper debt of said Mace, and was his to pay. Wells was only surety for said Mace, although the note was "jointly and severally," and had no interest or part in the debt. Said note was paid by said Wells on the 6th day of March, A. D. 1844, being, at that date, the sum of one hundred and ninety-four dollars and eleven cents. Said Wells has kept both said notes since they were so taken up by him, and they are now in his custody.

That after their signing of said last note, and before the payment of the same, but subsequent to the payment of the first by said Wells, said Mace duly obtained a discharge of his debts as a bankrupt, in pursuance of the provisions of the act of Congress passed August 19th, 1841, commonly called the "bankrupt law." Said *Mace's certificate* is dated March 22d, 1843, a copy of which is annexed, and made a part of the case.

It is agreed the court shall give the same effect to said discharge as if the same were specially pleaded.

Now, if the court shall be of the opinion that the plaintiff is entitled to recover on the foregoing facts, judgment is to be rendered for him to recover of the defendant the [*274 amount of said notes, or either of them, as the court shall adjudge, and his cost; if for both notes, the sum of $248.93; if for the small note, $45.12; if for the large note, only $203.81; if for neither, then defendant to recover his cost.

A. Underwood, Defendant's Attorney.
J. W. D. Parker, Plaintiff's Attorney.

At December Term, 1844, on the foregoing case stated, the court rendered judgment for the plaintiff to recover of the defendant $203.81 damages, and his costs. The defendant excepted to the opinion, and the case was carried to the Supreme Court of Judicature, where the judgment of the court below was affirmed.

A writ of error, issued under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

Mr. Collamer, for the plaintiff in error:

As Wells, the plaintiff below, did not pay the last note until after the bankruptcy, and as it did not, until paid by him, become a debt in his favor, the court held that it was not discharged by the previous bankruptcy of Mace, the defendant below. Mace claimed that, by a right construction of the United States statute of bankruptcy, he, by his discharge, was entitled to the privilege and exemption from this debt; and the construction of that statute being thus drawn in question, and the decision being against this privilege and exemption, the case comes clearly within the jurisdiction of this court, by virtue of the twenty-fifth section of the Judiciary Act.

I. The plaintiff in error insists, that a discharge in bankruptcy released from all debts and other engagements which are provable under the act. Bankrupt Law, sec. 4; 5 Statutes at Large, 444. The claim of Wells at the time Mace became bankrupt and was discharged was a note outstanding in the hands of a creditor, overdue, signed by Wells as surety for Mace; and even if it were regarded as to Wells a contingent claim, still it was provable under the act. Our statute is much more general and extensive than the English statute on this point. All those cases particularly provided for in sections 51, 52, 53, 54, 55 of the 6th Geo. IV. c. 16, are included in our statute generally by name, as debts due at a future day, annuitants, bottomry and respondentia bonds, policies of insurance, sureties, indorsers, and bail. But it is insisted that the remainder of our statute, as to contingent claims, is much more extensive and comprehensive than the remaining 56th section of the English law. By the words of that law, and by the decisions of their courts, no contingent claim can [*275 be proved under the commission, unless it be at the time of the bankruptcy an existing debt, payable on a contingency; not such a claim as was to become a debt on a contingency. 6

Geo. IV. c. 16, sec. 56; Law v. Burghart, 42 Com. Law Rep. 313. Our statute includes all "uncertain and contingent demands."

II. Even if our statute be construed as of the same extent as the English, and no broader, still this was and would be a provable claim. It was an existing debt actually due, and might have been presented and proved against Mace by the creditor; and whatever can be proved by the creditor may be by the surety, and he cannot permit it to lay unpaid and unproved until after the discharge, and then by payment revive it in his own favor. Jackson v. Magee, 3 Adol. & Ell. 47; 43 Com. Law Rep. 625; Wescott v. Hodges, 6 Barn. & Ald. 12.

III. Indeed, the case is within the very words of our statute. It gives the power of proving claims to sureties. Now, who is a surety? It is he who is holden for another. It cannot mean him who has already actually paid a debt, for then he has ceased to be a surety, and has become a creditor; and so the court below regarded this defendant in error, for they declined giving him judgment for the note which he had, as surety, paid before bankruptcy.

It would be an extraordinary construction of this statute, which discharges the bankrupt from his creditors, and expressly reserves the claim of the creditor against the joint debtor and surety, to hold that, when enforced against such surety, the debtor is revived against the bankrupt. Little, indeed, would its relief be to the great body of merchants and business men, on most of whose paper are other names than their own.

Mr. Justice McLean delivered the opinion of the court:

This case is brought before the court by a writ of error to the Supreme Court of the State of Vermont, under the twenty-fifth section of the Judiciary Act of 1789.

Wells, as the surety of Mace, became bound in two joint and several notes, both of which were due before the passage of the bankrupt law, in August, 1841. In July, 1841, Wells paid one of these notes. Mace was discharged, under the bankrupt law, on the 22d of March, 1843. In March, 1844, Wells paid the other note, and then sued Mace for the recovery of the money on both notes. The facts being submitted to the County Court, judgment was entered for the plaintiff for the amount of the note last paid; which judgment was affirmed by the Supreme Court of the State.

The fourth section of the bankrupt law pro-
276*] vides that a "discharge *and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," etc.

By the fifth section of the act, it is provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them," etc.

Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it, as surety, and that gave him a right to prove the claim under the fifth section. And the fourth section declares, that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt.

The judgment of the State court is reversed.

Order.

This cause came on to be heard on the transcript of the record of the Supreme Court of Judicature of the State of Vermont, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Vermont in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court of Vermont, for further proceedings to be had therein in conformity to the opinion of this court.

WILLIAM S. BODLEY and Thomas E. Robbins, Appellants,
v.
WILLIAM M. GOODRICH.

Assignment in trust for creditors, postponing payment, void.

The Commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly, rendered it proper that a general assignment should be made for the benefit of its creditors and completion of the railroad;" it therefore assigned all its property, real, personal, and mixed, to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding $250,000, to allow claims against the bank of a certain description, and out of the proceeds collected first to pay the principal and interest of the above *loan; after the completion [*277 of the said road, dividends were to be made pro rata amongst the creditors of the bank who had filed their claims, should there not be a sufficient amount to pay all the claims; the trustees to receive eight thousand dollars each per annum for their services.

This deed was fraudulent and void as to all creditors of the bank who did not become parties to it by filing their claims.

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

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

It was argued by Mr. Samuel C. Reid, Jun., and Messrs. Stockton and Steele, in a printed argument, for the defendant in error, no counsel appearing for the appellants.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the decree of the

Circuit Court of the United States for the District of Louisiana.

The complainants represent that they and William Frazer are the legal owners of a tract of land in East Ouachita land district, containing four thousand one hundred and twenty-six acres, as the assignees of the president, directors and company of the Commercial and Railroad Bank of Vicksburg, a banking and railroad institution, duly incorporated, in the State of Mississippi. And they charge the defendant with setting up a claim to the land by a purchase made by him at sheriff's sale. And they pray that the defendant may be decreed to release to them his title.

The defendant denies, in his answer, that the complainants have either the equitable or legal title to the above land by virtue of the above assignment, on the ground, among others, that the president and directors of the bank and railroad company had no power to assign the property of the bank, and thereby change the trust committed to them. And the defendant alleges that he purchased the land for a valuable consideration, bona fide, at sheriff's sale, and that the proceedings of such sale were regular and according to law.

The deed of assignment, under which the complainants claim, is dated February 13th, 1840. As a reason for the assignment, the deed states "the embarrassed situation of the president, directors and company of the Commercial and Railroad Bank, and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly;" and they come to the conclusion "that an assignment of the property, debts, and effects of the said corporation should at once be made for the benefit of its creditors, as will most effectually promote the interest of the creditors of the institution, and protect its debtors from loss 278*] *and sacrifice; and at the same time furnish means to finish and complete the railroad immediately, and to protect and secure to the stockholders of the road the franchise granted by the charter."

And the president, directors and company of the bank, in consideration of the premises, etc., "granted, bargained, sold, assigned, and transferred, and set over, etc., to William Frazer, Thomas E. Robbins, and William S. Bodley, and to the survivor of them, and to their heirs, executors, administrators and assigns, etc., all the property, real, personal, and mixed, which, either in law or equity, belongs to the bank and its branches, wherever such property shall be found."

And the assignees were authorized to sell the effects assigned, to collect all debts due the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding two hundred and fifty thousand dollars, to allow claims against the bank of a certain description, etc., and out of the proceeds collected first to pay the principal and interest of the above loan. After the completion of the railroad, dividends were to be made pro rata among the creditors of the bank who had filed their claims, should there not be a *sufficient* amount to pay all the claims. The *trustees were to receive* "out of the proceeds, as *a full compensation* for their labor, trouble, and responsibility in the premises, at the rate of eight thousand dollars each per annum."

It appears from the deed of assignment, that the creditors of the bank were designed to be parties to it on filing their claims, etc. But the creditor who obtained the judgment on which the property was sold never became a party to the deed. The loan authorized was effected, but no dividend has ever been made among the creditors.

Upon its face this deed shows an intention by the bank to postpone its creditors, use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects were accomplished. This was proposed to be done with the consent of creditors, and if that consent had been given, there could be no objection to the arrangement. The motive avowed, to complete the railroad, the greater part of which had been made, and by which an income would be secured for the benefit of the creditors and stockholders of the bank, would have been legal, and perhaps wise, had the creditors consented. But the plaintiff in the judgment under which the property claimed by the plaintiffs was sold did not consent; consequently he was not bound by the deed of assignment. It was fraudulent as against him and all other creditors of the bank who did not become parties to the deed.

*This view is so clearly sustained on [*279 general principles, that it is unnecessary to consider the other questions raised in the case. The Supreme Court of Mississippi in the case of Arthur v. The Bank, 9 Smedes & Marshall, 394, held this deed to be fraudulent against creditors; and also the Supreme Court of Louisiana, in Fellows v. The Commercial and Railroad Bank of Vicksburg, 6 Rob. 246.

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

Order.

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

WILLIAM CRAWFORD and David Files, Plaintiffs in Error,

v.

THE BRANCH BANK OF ALABAMA at Mobile.

Retrospective law enabling banks to sue in their own name, on notes payable to their cashiers, constitutional.

A statute of the State of Alabama, directing that promissory notes given to the cashier of a bank

NOTE.—Constitutionality of ex post facto laws—see note to 1 L. ed. U. S. 654.

What laws are void as impairing the obligation of contracts—see note to 4 L. ed. U. S. 529.

may be sued and collected in the name of the bank, is a law which affects the remedy only, and, although passed after the note was executed, does not impair the obligation of the contract.

Besides, the record does not show that the question of the consistency of the statute with the Constitution of the United States, was raised in the State court; and therefore a writ of error issued under the twenty-fifth section of the Judiciary Act must be dismissed on motion.

THIS was a writ of error sued out under the twenty-fifth section of the Judiciary Act, and directed to the Supreme Court of Alabama.

In May, 1841, the following promissory note was executed:

"$3,817.50,

"Two hundred and fifteen days after date, we jointly and severally promise to pay to B. Gayle, cashier, or order, three thousand eight hundred and seventeen 50/100 dollars, negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile, for value received, this 31st day of May, 1841.

"William Crawford,
"David Files,
"R. G. Gordon."

On the 4th of December, 1841, the Legislature passed an act, from which the following is *280*] an extract: "All notes, bills, *bonds, or other evidences of debt, held by the State Bank or branch banks, payable to the cashier or to the person who has filled the office of cashier of said bank or branch banks, may be sued and collected in the name of the several banks, in the same manner as if they had been made payable directly to said bank or branch banks by which the paper has been taken or discounted." "No notice, writ, declaration, or judgment which has been issued, filed, or rendred on such papers, shall be abated, set aside, or reversed, on account of the want of assignment, transfer, or indorsement of said papers by the officer or person acting as cashier to whom it was so made payable. But the legal title to such paper for all purposes of collection shall be deemed to have been in said bank or branch bank by whom the paper was discounted. See Clay's Digest, p. 112, secs. 47, 48.

In May, 1844, judgment was entered upon the above note in a summary manner, upon motion and thirty days' notice, according to the law of that State. A jury was sworn, who assessed the damages at $4,537.20.

The defendants took the following bill of exceptions, viz.:

"Upon the trial of this cause, the plaintiff produced the original papers hereto attached, marked A, being the notice, the certificates and returns, the note and protest, and moved for judgment without further proof of the same. The defendants objected to the court taking cognizance of the case or allowing judgment, which was overruled and judgment entered; to which the defendants object, and pray the court to sign and seal this bill, which is done.

"Samuel Chapman, Judge. [seal.]"

Upon this bill of exceptions the case was carried to the Supreme Court of the State of Alabama, and the following errors assigned:

Assignment of Errors.

And the said William Crawford comes, when, etc., and says, that there is error in the record and proceedings of the court below, in this, to wit:

1. That it appears from the record and the note upon which the suit is founded, and which is made a part of it by the bill of exceptions, that the said promissory note was made payable to B. Gayle, cashier, and that the said note has not been assigned to the said branch bank, nor was it alleged or proved, as the judgment entry shows, that the said note was made or given to the said branch bank by the name of B. Gayle, nor that B. Gayle acted as the agent of the said bank in taking *said note; [*281 and that it doth not appear, from the record, that the said branch bank has any interest in the said note.

2. That there is error in this, that it was not proved to the court below that Jacob J. Marsh, who returned the notice executed, styling himself agent for the said branch bank, nor that his handwriting was proved; but, on the contrary, it is stated in the bill of exceptions that there was no proof to that effect.

William Crawford, for himself.

The Supreme Court of Alabama affirmed the judgment of the court below, and a writ of error brought the case up to this court.

Mr. Inge moved to dismiss the case for want of jurisdiction. After stating the case, he argued that no question was shown by the record to have been raised in the Supreme Court of Alabama, which could give this court jurisdiction. The validity of the statute did not appear to have been drawn in question on account of its incompatibility with the Constitution of the United States; and if it had been, it must appear that it only affected the remedy, without at all impairing the obligation of the contract.

Mr. Crawford filed a printed argument, in order to show that the validity of the statute must necessarily have been passed upon by the Supreme Court of Alabama, and that the statute changed altogether the terms of the contract. The plaintiffs in error had made a contract with one person, and by virtue of the statute they were declared to have made this contract with another person, namely, the bank. The passage of the act by the State of Alabama, and its application in favor of a bank owned by it, are admissions by those interested, and in fact by the plaintiffs below in this cause, under another name, that the contract was not with the Bank of the State of Alabama, but with B. Gayle.

Mr. Justice McLean delivered the opinion of the court:

A summary mode of proceeding, authorized by its charter, was instituted by the Branch Bank of Alabama, in the Circuit Court of the State, against the defendants below, on a promissory note for three thousand eight hundred and seventeen dollars fifty cents, dated 31st of May, 1841, payable to B. Gayle, cashier or order, two hundred and fifteen days after date.

A jury being called and sworn, found a verdict for the plaintiffs, on which judgment was

entered. On the trial the defendant excepted to the opinion of the court, admitting as evidence the note, protest, etc. A writ of error 282*] being prosecuted *to the Supreme Court of Alabama, the judgment of the Circuit Court was affirmed.

In the Supreme Court the following assignment of errors was made:

"1. That it appears from the record and the note upon which the suit is founded, and which is made a part of it by the bill of exceptions, that the said promissory note was made payable to B. Gayle, cashier, and that the said note has not been assigned to the said branch bank, nor was it alleged or proved, as the judgment entry shows, that the said note was made or given to the said branch bank by the name of B. Gayle, nor that B. Gayle acted as the agent of the said bank in taking said note; and that it doth not appear, from the record, that the said branch bank has any interest in the said note.

"2. That there is error in this, that it was not proved to the court below that Jacob J. Marsh, who returned the notice executed, styling himself agent for the said branch bank, nor that his handwriting was proved; but, on the contrary, it is stated in the bill of exceptions that there was no proof to that effect."

A motion is made to dismiss this cause for want of jurisdiction, and on looking into the record it is clear there is no ground on which this court can revise the judgment of the Supreme Court of Alabama. No question was made under the twenty-fifth section of the Judiciary Act of 1789; nor does it appear that any law of Alabama, which impaired the obligation of the contract, influenced the judgment of the Supreme Court.

The note was made payable to B. Gayle, cashier. And this designation as cashier was not made, it is presumed, as matter of description, but to show that the note was given to the agent of the bank, and for its use. A law was passed in Alabama authorizing suits to be brought on such notes in the name of the bank; and it is contended that this law impairs the obligation of the contract, especially as regards contracts made prior to its passage.

The law is strictly remedial. It in no respect affects the obligation of the contract. Neither the manner nor the time of payment is changed. The bank, being the holder of the note, having the beneficial interest in it, is authorized by the statute to sue in its own name. This is nothing more than carrying out the contract according to its original intendment.

The cause is dismissed.

Order.

This cause came on to be heard on the transcript of the record of the Supreme Court of 283*] the State of Alabama, and on the *motion of Mr. Inge, of counsel for the defendants in error, to dismiss this writ of error for the want of jurisdiction; on consideration whereof, it is now here ordered and adjudged by this *court, that this* cause be, and the same is here*by dismissed for* the want of jurisdiction.

702

GEORGE SMITH, Plaintiff in Error,
v.
WILLIAM TURNER, Health Commissioner of the Port of New York.

JAMES NORRIS, Plaintiff in Error,
v.
THE CITY OF BOSTON.

State law imposing tax on alien passengers landed at State ports, unconstitutional.

Statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, declared to be contrary to the Constitution and laws of the United States, and therefore null and void.

Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States.

THESE were kindred cases, and were argued together. They were both brought up to this court by writs of error issued under the twenty-fifth section of the Judiciary Act; the case of Smith v. Turner being brought from the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and the case of Norris v. The City of Boston from the Supreme Judicial Court of Massachusetts. The opinions of the justices of this court connect the two cases so closely, that the same course will be pursued in reporting them which was adopted in the License Cases. Many of the arguments of counsel relate indiscriminately to both. A statement of each case will, therefore, be made separately, and the arguments and opinions be placed in their appropriate class as far as practicable.

Smith v. Turner.

In the first volume of the Revised Statutes of New York, pages 445, 446, title 4, will be found the law of the State whose constitutionality was brought into question in this case. The law relates to the marine hospital, then established upon Staten Island, and under the superintendence of a physician and certain commissioners of health.

The seventh section provides, that "the health commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, *the following sums [*284 from the master of every vessel that shall arrive in the port of New York, viz.:

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

NOTE.—Power of Congress to regulate commerce, State licenses. Power of State to tax commerce—see note to 6 L. ed. U. S. 23, 678; 29 L. ed. U. S. 158; 32 L. ed. U. S. 229; 37 L. ed. U. S. 216; 38 L. ed. U. S. 1041.

The eighth section provides that the money so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys a right to demand and recover from each person the sum paid on his account." The tenth section declares any master who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port shall forfeit the sum of one hundred dollars. By the eleventh section the commissioners of health are required to account annually to the Comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall in any one year exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the City of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

Smith was master of the British ship Henry Bliss, which arrived at New York in June, 1841, and landed two hundred and ninety-five steerage passengers. Turner, the health commissioner, brought an action against him for the sum of $295. To this the following demurrer was filed, viz.:

"And the said George Smith, defendant in this suit, by M. R. Zabriskie, his attorney, comes and defends the wrong and injury, when, etc., and says that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same; for that the statute of this State, in said declaration referred to, in pursuance of which the said plaintiff claims to be entitled to demand and receive from the said defendant the sum of money in said declaration named, is contrary to the Constitution of the United States, and void, and this he is ready to verify."

The plaintiff joined in demurrer, and the 285*] Supreme Court *of Judicature of the People of the State of New York overruled the demurrer, and gave judgment for the plaintiff on the 28th of September, 1842. The cause was carried, by writ of error, to the Court for the Trial of Impeachments and Correction of Errors, which affirmed the judgment of the court below in October, 1843. A writ of error, issued under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

Norris v. City of Boston.

Norris was an inhabitant of St. Johns, in the Province of New Brunswick and kingdom of Great Britain. He was the master of a vessel, and arrived in the port of Boston in June, 1837, in command of a schooner belonging to the port of St. Johns, having on board nineteen alien passengers. Prior to landing, he was compelled, by virtue of a law of Massachusetts which is set forth in the special verdict of the jury, to pay the sum of two dollars for each passenger to the city of Boston.

At the October Term, 1837, of the Court of Common Pleas, Norris brought a suit against the city of Boston, to recover this money, and was nonsuited. The cause was carried up to the Supreme Judicial Court, where it was tried in November, 1842.

The jury found a special verdict as follows:

"The jury find, that at a session of the Legislature of the Commonwealth of Massachusetts, holden at the city of Boston, on the 20th of April, 1837, the following law was passed and enacted, to wit, 'An Act relating to alien passengers.'

"'Sec 1st. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"'Sec. 2d. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"Sec. 3d. No alien passenger, [*286 other than those spoken of in the preceding section, shall be permitted to land until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers.

"'Sec. 4th. The officer or officers required in the first section of this act to be appointed by the mayor and aldermen, or the selectmen, respectively, shall, from time to time, notify the pilots of the port of said city or town of the place or places where the said examination is made, and the said pilots shall be required to anchor all such vessels at the place so appointed, and require said vessels there to remain till such examination shall be made; and any pilot who shall refuse or neglect to perform the duty imposed upon him by this section, or who shall through negligence or design permit any alien passengers to land before such examination shall be had, shall forfeit to the city or town a sum not less than fifty nor more than two thousand dollars.

"'Sec. 5th. The provisions of this act shall not apply to any vessel coming on shore in distress, or to any alien passengers taken from any wreck when life is in danger.

"'Sec. 6th. The twenty-seventh section of the forty-sixth chapter of the Revised Statutes is hereby repealed, and the twenty-eighth and twenty-ninth sections of the said chapter shall relate to the provisions of this act in the

same manner as they now relate to the section hereby repealed.

"'Sec. 7th. This act shall take effect from and after the passage of the same, April 20th, 1837.'

"And the jury further find, that the twenty-eighth and twenty-ninth sections, above referred to, are in the words following, to wit:

"'Sec. 28th. If any master or commanding officer of any vessel shall land, or permit to be landed, any alien passengers, contrary to the provisions of the preceding section, the master or commanding officer of such vessel, and the owner or consignee thereof, shall forfeit the sum of two hundred dollars for every alien passenger so landed; provided always, that the provisions aforesaid shall not be construed to extend to seamen sent from foreign places by consuls or vice-consuls of the United States.

"'Sec. 29th. If any master or commanding officer of any vessel shall land any alien passenger at any place within this State other than that to which such vessel shall be destined, 287*] *with intention to avoid the requirements aforesaid, such master or commanding officer shall forfeit the sum of one hundred dollars for every alien passenger so landed.'

"And the jury further find, that the plaintiff in the above acton is an inhabitant of St. Johns, in the province of New Brunswick and kingdom of Great Britain; that he arrived in the port of Boston on or about the twenty-sixth day of June, A. D. 1837, in command of a certain schooner called the Union Jack, of and belonging to said port of St. Johns; there was on board said schooner at the time of her arrival in said port of Boston, nineteen persons, who were passengers in said Union Jack, aliens to each and every of the States of the United States, but none of them were lunatics, idiots, maimed, aged, or infirm.

"That prior to the landing of said passengers the sum of two dollars for each and every passenger was demanded of the plaintiff by Calvin Bailey in the name of the city of Boston, and said sum, amounting to thirty-eight dollars, was paid by the plaintiff to said Bailey, for permission to land said alien passengers in said Boston; said sum being paid by the plaintiff under a protest that the exacting the same was illegal.

"That said Calvin Bailey was the regularly appointed boarding officer for said city of Boston, chosen by the City Council (consisting of the mayor and aldermen) in pursuance of said act, entitled 'An Act relating to alien passengers'; that as such, said Bailey demanded and received said sum of thirty-eight dollars.

But whether upon the aforesaid facts the defendant did promise, the jury are ignorant.

"If the court shall be of opinion that the aforesaid facts are sufficient to sustain the plaintiff's claim, then the jury find that the defendant did promise, in manner and form as the plaintiff hath alleged, and assess damages in the sum of thirty-eight dollars.

"But if the court are of opinion that the aforesaid facts are not sufficient to sustain the plaintiff's claim, then the jury find that the defendant did not promise in manner and form as the plaintiff hath alleged."

Upon this special verdict the court gave judgment for the defendant, from which judg-

ment a writ of error brought the case up to this court

The case of Smith v. Turner was argued at December Term, 1845, by Mr. Webster and Mr. D. B. Ogden for the plaintiff in error, and by Mr. Willis Hall and Mr. John Van Buren for the defendant in error; at December Term, 1847, by *the same counsel upon each [*288 side; and at December Term, 1848, by Mr. John Van Buren, for the defendant in error.

The case of Norris v. The City of Boston was argued at December Term, 1846, by Mr. Webster and Mr. Choate for the plaintiff in error, and by Mr. Davis for the defendant in error; at December Term, 1847, by Mr. Choate for the plaintiff in error; and at December Term, 1848, by Mr. Webster and Mr. J. Prescott Hall for the plaintiff in error, and by Mr. Davis and Mr. Ashmun for the defendant in error.

It is impossible to report all these arguments. If it were done, these cases alone would require a volume. The Reporter selects such sketches of the arguments as have been kindly furnished to him by the counsel themselves, and omits those for which he would have to rely upon his own notes.

The arguments reported are those of Mr. D. B. Ogden and Mr. J. Prescott Hall for the plaintiff in error, and Mr. Davis, and Mr. Willis Hall, and Mr. Van Buren, for the defendant in error. Mr. Ogden argued the New York, and Mr. J. Prescott Hall the Boston case. On the other side, the New York case was argued by Mr. Willis Hall and Mr. Van Buren, and the Boston case by Mr. Davis. Although the arguments are placed in the usual order, namely, one for the plaintiff in the first place, then those for the defendant in error, and then a concluding argument for the plaintiff in error, yet it is certain that some of these counsel never heard the arguments to which, from this collocation they might be supposed to reply, arising from the different terms at which the arguments were made. The Reporter has observed the order of time in arranging them as he has done. He knows that some injustice is done to the counsel, but it is impossible to avoid it.

The points stated upon both sides were as follows:

Norris v. City of Boston.

On the part of the plaintiff in error it will be contended:

1. That the act in question is a regulation of commerce of the strictest and most important class, and that Congress possesses the exclusive power of making such a regulation.

And hereunder will be cited 11 Pet. 102; 4 Wash. C. C. 379; 3 How. 212; 14 Pet. 541; 4 Met. 285; 2 Pet. 245; 9 Wheat. 1; 12 Wheat. 436; Federalist, No. 42; 3 Cow. 473; 1 Kent. 5th ed.; 2 Story's Com. on Const. 506; 15 Pet. 506; 3 N. H. 499.

2. That the act is an impost or duty on imports, and so expressly prohibited by the Constitution, or is in fraud of that prohibition.

*And hereunder will be cited 4 Met. [*289 285; 12 Wheat. 436; Dig. lib. 1, tit. 3, De Leg. et Senat. Cons. sec. 29, 3 Cow. 738; 14 Pet. 570.

3. That it is repugnant to the actual regulations and illegally manifested will of Congress.

9 Wheat. 210; 4 Met. 295; 11 Pet. 137; 12 Wheat. 446; 5 Wheat. 22; 6 Pet. 515; 15 Pet. 509; 14 Pet. 576; Laws U. S. 1799, c. 128, sec. 46; 1 Story's Laws, 612, 1819, c. 170; 3 Story's Laws, 1722, Laws of Naturalization, 1802, c. 28; 1816, c. 32; 1824, c. 186.

D. Webster,
R. Choate,
For Plaintiff in error.

Smith v. Turner.

The points on behalf of the defendant in error were thus stated by Mr. Willis Hall and Mr. Van Buren:

I. This case involves precisely the same question that was submitted to this court in the case of The City of New York v. Miln, 11 Peters, 102, which, after two discussions, was decided, on full consideration, in favor of the State power.

II. The Constitution of the United States is a specific grant of certain enumerated powers, made to the Union by existing State sovereignties, coupled with prohibitions upon the States. If a given power is not granted to the Union or prohibited to the States, it is a demonstration that it belongs to the States.

III. The quarantine laws of the State of New York have been sanctioned and adopted by Congress, and frequently adverted to by this court with approbation.

IV. The quarantine charges are merely a common law toll, granted by the State to the Board of Health of the city of New York, in the exercise of an undoubted right, which the State has never, directly or indirectly, given up or abandoned.

V. An historical examination of the earlier laws of the State will authorize the three following conclusions, to wit:

1. The people of the State of New York have acted in good faith. They have not, under color of quarantine or health laws, attempted to regulate commerce. They have had no object in view but protection from infectious diseases.

2. The people of the State of New York, when they adopted the federal Constitution, did not understand it as depriving them of this right. They did not suppose their harbors were to be taken from them, but only that they were to allow the Union to use them for purposes of war and commerce. Had they understood it as now claimed, there is no hazard in saying it never would have been adopted.

3. The construction of the federal Constitu- 290*] tion on this *point contended for by the defendant in error is contemporaneous with its formation, and has been continued without objection for half a century.

The rule in Stewart's case therefore applies, "that a contemporary exposition of the Constitution of the United States, adopted in practice, and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it."

VI. If the law in question is deemed to be in the nature of an inspection law, it lays no "duty on imports or exports," and therefore comes not within the prohibitions or provisions of the tenth section of the first article, or in any manner within the cognizance of the federal Constitution.

But if, on the other hand, the court think the tenth section applicable to this law, then the section itself prescribes the only redress.

VII. It is not a regulation of commerce, because not so intended in fact nor by presumption of law; all the physical instruments or agents on which a regulation of commerce can act are merely means, and as such common to the States, unless expressly prohibited to them.

VIII. It is not "an impost or duty upon imports," because passengers voluntarily immigrating into the country by sea or land can in no sense be called "imports."

IX. The law in question, so far from being an infringement of federal power, is exclusively within the State power. The end is the health of the city of New York, and of those who enter it, which is an object not committed to Congress. The means, a tax upon passengers equally removed from federal jurisdiction.

Mr. D. B. Ogden, for the plaintiff in error:

This is a second argument in this case, which has been ordered by the court, it must be presumed, in consequence of a difference of opinion upon the case among the members of the court by whom the former argument was heard.

This admonishes me, that, however confident I may heretofore have felt that the judgment of the Court for the Correction of Errors in New York ought to be reversed, there must be great and serious doubts upon the subject. I therefore enter upon this second argument with a confidence certainly much lessened, but with a hope of success by no means extinguished.

By the Constitution of the United States, the people of the United States have vested certain powers in Congress, and the people of the several States have vested in their respective State Legislatures other powers.

*It is to be expected, that, in this [*291 complex system, composed of two governments, difficulties will arise as to the true line of distinction between the powers of the one government and the other.

To ascertain and point out with precision where that line is, and to say, both to the general and to the State governments, thus far shalt thou go and no farther, is the high and exalted duty of this honorable court. It is a duty imposed upon it by the people of the United States, who have declared in their Constitution that the judicial power of the government shall extend to all cases in law or equity arising under the Constitution. No court ever held so exalted a station. It represents the sovereignty of the people of a great nation. Its decrees are the decrees of the people, and it is intended to secure to the people the benfits of their Constitution by keeping within their proper constitutional bounds all the other departments of both the general and State governments.

You are now called upon by the plaintiff in error in this case to examine and decide upon the constitutionality and validity of a law passed by one of the State Legislatures. I feel and acknowledge, not only the importance, but the great delicacy, of the question before me.

I know, to use the language of the late Chief Justice in the great case of Fletcher v. Peck,

that "this court will not declare a law of a State to be unconstitutional, unless the opposition between the Constitution and the law be clear and plain." The duty of deciding upon the constitutionality of this law, you must perform. You will decide it cautiously, not rashly—with great care and deliberation, but at the same time with that fearlessness which the people of the United States, and my clients, who consider their constitutional rights violated by this law, have a right to expect at your hands.

Before I proceed to the argument of the particular points which arise in this case, I hope I may be pardoned in making one or two preliminary remarks. They are made with perfect respect for the court, and for every member of it; and they are made because, in my humble opinion, they ought never to be lost sight of by the court when considering a constitutional question.

In all our courts the judges are bound to decide according to the law of the land; not according to what they think the law ought to be, but according to the manner in which they find it settled by adjudged cases. The judges are bound by the most solemn obligations to decide according to the law as they find it. In cases where, perhaps, it was originally a question of great doubt what the law was, but [*292] it has now been rendered certain by a variety of judicial decisions, no judge would, in ordinary cases, although he might think the law should have been settled otherwise, feel himself at liberty to decide contrary to a series of adjudged cases upon the subject, but would feel himself bound to yield his opinion to the authority of such cases.

This court have always, in ordinary cases between man and man, adhered to this rule.

If this were not so, it will at once be perceived that the law would remain forever unsettled, which would be one of the greatest misfortunes in a community like ours, who are governed by fixed laws, and not by the whims and caprices of judges, or of any other set of men. Lord Mansfield, in delivering one of his opinions, said that it was not so much matter what the law in the case was, as that it should be settled and known.

Now if, in questions originally doubtful, the good of the community requires that they should be considered as settled by adjudged cases, and what was doubtful before should be considered so no longer, I ask the court whether adjudged cases upon points of doubtful construction of the Constitution are not peculiarly within the good sense and principle of the rule. If, in ordinary questions, it is the interest of the public that there should be an end of litigation as to what the law is, is it not emphatically the interest of the public that their great organic law should be fixed and settled?—that, in points upon which the construction of the Constitution is doubtful (and it could only be when that construction is doubtful that the case could come before this court), the construction given by adjudged cases should be adhered to?

If in ordinary cases between man and man it is important that the law should be settled, *it seems to* me that it is infinitely more important to the community that the construction of the Constitution should be settled. It is all-important to every citizen of the United States that he should know what his constitutional rights and duties are. This, in many cases, can only be learned by the decisions of this court. And if those decisions are to be changed with every change of judges, what are our constitutional rights worth? To-day they are one thing, to-morrow another.

Instead of being fixed and stable, they change with the opinions of every new judge, they become unstable as the wind, and our boasted constitutional rights may be said no longer to depend upon law, but we hold them according to the whims and caprice of the judges who may happen to be on the bench of this court.

[*293] I press this point no further. I repeat it, the observations which I have made upon it are submitted most respectfully to the court. I hope I have not pressed them in an offensive manner. I certainly mean not to do so. I feel their importance to my clients and to the people at large, and I hope the court will excuse any undue earnestness in my manner.

My clients feel that their constitutional rights, as settled by former adjudications of this court, have been violated by the law of New York, and they claim the benefit of the construction of the Constitution as settled by those former adjudications.

There is one other point to which I wish to call the attention of the court prior to entering upon the argument of the case. The rights of the State governments were urged with great vehemence by the counsel for the defendant in error upon the former argument. And in every argument which I have ever heard in this court, in which the validity of State laws came in question, the same argument has been urged, and pressed with equal vehemence. I have views upon this subject which I wish briefly to submit to the consideration of the court.

We talk a great deal of the sovereignty of the United States and of the sovereignty of the several States. I hold that the only sovereignty in this country is in the people. From them, humanly speaking, proceed all the powers possessed by those who govern them. I know and acknowledge no other sovereign than the people. Whatever powers the general government possess are given to them by the people. Whatever powers the State governments possess are given by the people in the several States. The whole sovereignty of the country being in the people, they have the right to parcel it out, and to place it in the hands of such agents as they, in their wisdom, think proper.

The people of the United States, and the people of every State in the Union, having by their conventions, adopted the Constitution of the United States, and thus become parties to it, have given and vested certain powers in the government of the United States; and in the strongest terms have declared that all those powers are to be exercised independent of all authority of the local State governments, because they have made it incumbent upon the members of the several State Legislatures to take an oath to support this Constitution, thus making the government of the United States, and intending to make it, supreme so far as the powers vested in it are granted by the people.

I apprehend, therefore, that the questions 294*] arising under this *Constitution are, and must be, decided by the Constitution itself, without reference to State rights or to State legislation, or to State constitutions. This Constitution, as far as it goes, is paramount to them all

This Constitution is a most solemn instrument, to which all the people of the United States are parties. In construing it, we must look at its words Where they are plain, and their meaning certain, there can be no doubt that in construing it we must give the words their full effect The great object is to find out and ascertain the intent and meaning of the people in adopting the Constitution, and where the words express that meaning clearly. there can be no room for cavil or doubt.

Where the words used are such as may bear two constructions, and it is a matter of doubt what construction they ought to receive, then we must resort to other means of construing it. We must examine, first, the reasons and objects for which the Constitution was formed and adopted, and take care that in giving a construction to it we do not thwart the object and intention of those who framed and adopted it.

In order to assist us in ascertaining what was the intention of any particular clause of the Constitution, we may refer to the proceedings of the convention by whom it was formed, and we may there discover what was their intention when they inserted the clause under consideration. And we may refer to early and contemporaneous constructions given to it by those who were called upon to act under it, because the persons who lived and acted at the time the Constitution was formed are more likely to know what was its intention than we are at this day; and it is upon this principle that contemporaneous constructions of any law are always resorted to, and deemed of great weight.

There is one other observation upon this point which I deem worthy of consideration upon this subject of State rights. The argument resorted to upon the other side is, and always has been, that the State governments were in existence anterior to the formation of the federal government, that the State governments were perfectly free and independent governments, and that the Constitution of the United States is one of limited powers, and that all the powers not expressly given to it, and not expressly taken away from the State governments, remain in the State governments. Let us examine this argument a little.

It is true that, when the government of the United States was first organized under the Constitution, there were existing in the Union thirteen separate independent States, all having constitutions formed and established, or rec- 295*] ognized, by the people. *These governments were organized by the people in the several States with such powers as the people chose to give them, but with no other powers. When the national government was formed, the powers of the State governments were, to a certain extent, taken away, and vested in the national government.

Since the establishment of the present government of the United States, the people, in many of the States, have done away with their old constitutions, and adopted new ones. This is the case in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Virginia. Whether it be so in any other of the old States I am not sure. In Maine and Vermont in the east, and in all the new States in the west and southwest, the State governments came into existence subsequent to the formation of the Constitution of the United States. And it is worthy of remark, that, in every one of these new constitutions, without, as I believe, a single exception, there is a provision that the members of the State Legislatures and the judicial and executive officers shall take an oath to support the Constitution of the United States.

What is the meaning and effect of this provision? Does it not amount to a declaration by the people to the bodies constituted by the Constitution—Remember, while we have given you certain powers, we apprise you that we have already given powers to the general government, and you hold the powers now given to you upon condition that you support the Constitution of the United States, and you shall take an oath to do so, before you shall exercise any of the powers with which we have intrusted you? This amounts to an acknowledgment of the supremacy of the government of the United States, and of the Constitution of the United States, so far as, by a fair construction of it, it goes. And what that construction is, this court are to decide. And, in my view of the Constitution, it is idle to talk of an invasion of State rights as a reason for not giving a fair and just construction to it.

The very thing the people intended when they adopted the Constitution of the United States was, that it should be the supreme law of the land, and that this court should have the power of construing it in all doubtful cases.

One of the wisest things ever said by Mr. Madison will be found in his account of the proceedings of the convention who formed the Constitution, at page 923, Vol. II., of the Madison Papers, where he says, "There was less danger of encroachment from the general government than from the State governments, and that the mischiefs from encroachments would be less fatal if made by the former than if made by the latter." And in page *924 he [*293 says, "Guards were more necessary against encroachments of the State governments on the general government, than of the latter on the former."

Having made these preliminary observations, which I think the case called for, and which I hope the court will not think out of place, I propose now to argue the case presented to the court by this record for its consideration. I shall confine my remarks entirely to the case from New York. I have purposely kept myself in total ignorance as to the facts and points in the Boston case. I have no concern in that case, and kept myself, therefore, ignorant upon the subject of it, lest in the course of my argument I might be led to say something in relation to a case with which I have no business to interfere.

Before entering upon the argument, it is necessary that the court should distinctly understand the points in controversy between us.

The action in the State court, the judgment

in which this court are now asked to review, was an action of debt brought by the plaintiff, the health officer of the city of New York, against the defendant below, in order to recover the sum of one dollar for each steerage passenger brought by the defendant, the master of a British ship, which arrived in New York with two hundred and ninety-five steerage passengers, brought on board the said ship from Liverpool, in England, to the port of New York. The plaintiff below claimed to be entitled to recover this amount from the defendant upon the ground that he was entitled to recover it under and by virtue of an act of the Legislature of the State of New York.

To this declaration the defendant filed a demurrer, alleging as a cause of demurrer that the statute of New York under which the plaintiff made his claim was void, it having been passed in violation of the Constitution of the United States.

The plaintiff joined in demurrer, and the only question therefore raised by the pleadings was the validity of the statute of New York on which the action was founded.

The action was commenced in the Supreme Court of the State. Upon the argument of the demurrer, the court sustained the validity of the law, and gave judgment for the plaintiff. The defendant below brought his writ of error, and carried the case up to the Court for the Correction of Errors in New York, the highest court in that State. The Court of Errors affirmed the judgment of the Supreme Court, and the case is now brought by writ of error to this court, under the provisions of the Judiciary Act of 1789.

The single question, therefore, presented to the court by this record is, whether the stat- 297*] ute of the Legislature of New York *upon which the act is founded is an unconstitutional and invalid law, or whether it is a constitutional and valid law.

In order to decide this question, we must first understand what the law is. It will be found in the first volume of the Revised Statutes, 2d ed., p. 436.

"Sec. 7. The health commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.:

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year.

"Sec. 8. The moneys so received shall be denominated hospital moneys, and shall be appropriated to the use of the marine hospital, deducting a commission of two and one-half per cent. for collection.

"Sec. 9. Each master paying hospital moneys shall be entitled to demand and recover from each person for whom they shall be paid the *sum paid on his account.*

708

"Sec. 10. Every master of a coasting vessel shall pay to the health commissioner, at his office, in the city of New York, within twenty-four hours after the arrival of his vessel in the port, such hospital moneys as shall then be demandable from him; and every master, for each omission of such duty, shall forfeit the sum of one hundred dollars.

By the thirteenth section it is made the duty of the commissioners of health to account annually to the Comptroller of the State for all moneys received for the use of the marine hospital; and if such moneys shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as part of the contingent charges of the city of New York, they shall pay over the surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the said society.

It is by a subsequent section declared, that there shall be paid to the Society for the Reformation of Juvenile Delinquents the sum of eight thousand dollars.

By referring to the same book, 1 Revised Statutes, 2d ed. 417, it will be found that the board of health in the city of *New [*298 York consists, besides the mayor of the city, of the health officer, the resident physician, and the health commissioner.

The health officer is to reside at the quarantine ground, to board and examine any vessel arriving, etc., and to have the charge of the hospital at the quarantine ground.

The resident physician and the health commissioner are to reside in the city, and shall meet daily at the office of the board of health in the city during certain portions of the year. And they are to receive an annual salary of one thousand dollars each, to be paid out of the moneys appropriated for the use of the marine hospital.

In page 425, section 43, all passengers placed under quarantine, who shall be unable to maintain themselves, shall be provided for by the master of the vessel in which they shall have arrived.

These laws, then, impose a tax upon all passengers arriving at the port of New York. Have the Legislature of New York the constitutional power to impose such a tax? It is a tax, not only upon foreign passengers, but a tax upon every citizen of the United States arriving coastwise at that port. But we have in this case to deal only with that part of the act imposing a tax upon foreigners arriving in a foreign ship from a foreign port.

The principal ground upon which the validity of the law is attempted to be supported is, that it is a part of the quarantine system which it is essential for the safety and health of the city of New York that the Legislature of that State should have the power of establishing, which power they never intended to part with when they adopted the Constitution of the United States.

Let us stop here and examine into the strength of this argument, which is the very corner stone upon which the whole fabric of this statute is attempted to be reared and sustained.

That every community has a right to provide for its own safety is readily admitted. Salus populi est suprema lex, is a maxim always true in all nations, and is acted upon by all civilized, as well as all uncivilized, nations. I admit it in its fullest force. The quarantine laws of New York are upon this principle to be justified and maintained.

A brief reference to a part of their history may not be without its use in this case.

The Constitution having given to Congress power to regulate the commerce of the country with foreign nations and between the several States, under that power Congress have passed laws in relation to ships and vessels of the United States, as the means by which commerce 299*] is carried on, and *therefore within their power as having the power to regulate commerce; and these regulations have made it incumbent on vessels arriving at the different ports of the United States to make entries at the custom-house within a given time, with a manifest of their cargoes, etc., and make provision that the cargoes shall be entered by the importers within a given time.

It was found that some of the provisions of the quarantine laws of New York interfered with these provisions of the court of the United States. These laws compel vessels to come to anchor at the quarantine ground, in certain cases to land their cargoes there, and contain several other provisions of this kind. It was stated by one of the learned counsel, that a correspondence upon the subject of these laws, after repeated visitations of the yellow fever, took place between John Jay, the then governor of New York, and the President of the United States, upon the subject of these laws, which correspondence produced the act of Congress to which I shall presently draw the attention of the court.

It is certainly not necessary for me to say that John Jay was, not only one of the purest and best men this country has produced, but one of the best lawyers in the country, well acquainted with the Constitution, and familiar with all its provisions. He, together with Mr. Madison and General Hamilton, wrote the Federalist, a book well known to this court, and he was the first Chief Justice of this court.

Now, from the statement of the counsel, Mr. Jay was so strongly convinced that the exclusive power of regulating commerce was vested in Congress, that he believed that several of the provisions of the quarantine law interfered with the power of Congress, and that, although it was deemed by him and the Legislature of the State that those provisions were essential parts of the quarantine laws, yet, in order to give them validity, an act of Congress was necessary. Hence his correspondence with the President, and hence the act of Congress to which I will now draw your attention.

It will be recollected as an historical fact that in the spring of 1794, Mr. Jay was sent as minister to England, for the purpose of endeavoring to make an amicable settlement of our differences with England, which then threatened an immediate war between the two countries. Mr. Jay's treaty was made in November, 1794; he returned to the United States in the spring of 1795, and was elected Governor of New York during his absence.

The yellow fever had first made its appearance, and raged with great violence, in Philadelphia, in 1793. In 1795, in the *sum- [*300 mer, it broke out in New York, and raged there with considerable violence. It was no doubt immediately after this fever had subsided, that the attention of the Governor and Legislature of New York was called to the quarantine laws, and thus, no doubt, the correspondence of which the counsel has spoken, took place between Governor Jay and the President. And we find in 1 Story's Laws of the U. S. 432, an act passed on May 27th, 1796, entitled "An Act relative to quarantine," which authorizes the President to direct the revenue officers, and the officers commanding forts and revenue cutters, to aid in the execution of the quarantine and health laws of the States, in such manner as may appear to him necessary. This was a short law consisting of one short sentence, in substance as I have stated it.

In February, 1799—in less than three years afterwards, and after the yellow fever had again made its appearance and raged with great violence in New York in 1798—Congress passed another law on the subject (Ibid. 564), which declares that "the quarantines and other restraints which shall be required and established by the health laws of any State, or pursuant thereto, respecting any vessels arriving in or bound to any port or district thereof, whether from a foreign port or place or from another district in the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States.

"And the Secretary of the Treasury is authorized, in respect to vessels which shall be subject to quarantine, to prolong the terms limited for the entry of the same, and the report and entry of their cargoes, and to vary or dispense with any other regulations applicable to such reports.

"Provided, that nothing herein shall enable any State to collect a duty of tonnage or import without the consent of Congress."

The other sections of the act relate to the manner in which cargoes are to be landed, etc.

Now, this law shows that notwithstanding the great principle that every community has a right to provide for the safety of its people, by preventing the introduction of contagious and infectious diseases, yet, in the opinion both of Governor Jay and of Congress, so exclusive is the power of Congress to regulate commerce, that its aid and consent are necessary in order to give validity to the quarantine laws of the different States. And so cautious were Congress in giving their aid and consent, that they made an express condition in the proviso, "that nothing herein shall enable any State to collect a duty of tonnage or import without the consent of Congress."

*And if I shall hereafter succeed in [*301 proving that this tax upon passengers is an import duty, then it is not only prohibited by the Constitution, but by this act of Congress.

Having given this brief history of the introduction of the system of quarantine, I shall now proceed to inquire whether the law, the validity of which is now called in question, is a quarantine law.

I would here, however, premise, that in this argument the quarantine systems, such as they

were, which were established by the Legislatures of the different States prior to the organization of the general government, can have no bearing upon the question now under our consideration, because anterior to that time there can be no doubt that the several State Legislatures had a constitutional power to make such regulations upon the subject as they thought proper. Since the organization of the federal government, the quarantine laws of the State are enforced by the consent of Congress in the acts to which I have already referred, subject, however, to the conditions imposed by these acts; and so far as the condition upon which the assent of Congress was given has been violated, the laws are void.

But the question which I now propose to discuss is whether the law, the validity of which is called in question, can be considered as a part of the quarantine system of the port of New York.

I understand the principle of these laws to be this: The State has the right, and it is imposed upon it as a most solemn duty, to provide for the safety of its citizens by preventing, as far as human means can prevent it, the introduction among them of contagious and infectious diseases.

This I understand to be the object and the end of all quarantine laws. In order to do this, the authorities of the State have the right to prevent the introduction into the city of New York of all persons laboring under an infectious or contagious disease. They have the right to prevent the landing of any merchandise or other thing which is deemed calculated to produce infection and disease. They have the right to prevent any ship or vessel, which is likely to have the seeds of contagion or infection on board of her, from coming to the city until properly cleansed. Having these rights, they must necessarily have all the rights and powers which are essential to their due exercise. They have, therefore, the right to board and examine every ship or vessel arriving at the port, for the purpose of ascertaining the state of health of the persons on board. They have the right to examine into the cause, as to its nature and state and condition. They have the 302*] right to *examine into the state of the ship, and to have her properly cleansed, and they have a right to detain any ship or vessel at the quarantine ground for a length of time sufficient for all these purposes. All these rights are acknowledged and readily admitted to belong to every State in the Union. The expenses attending such examinations and searches may perhaps be considered in the light of port charges, and may therefore be properly chargeable to the ship or vessel. No complaint is made upon that subject. They are by the law charged upon the ship.

Now, what has the passenger tax to do with all this? Is it in any way necessary that this tax should be laid upon passengers? What is its declared object? It is to establish and support a marine hospital, to pay the salaries of a physician and his assistant, who reside in the city of New York, and to support a society for the reformation of juvenile delinquents or convicts.

Take the most favorable view of the case, *and it is moneys* raised, not to enable the *authorities of New York* to prevent the introduction of disease into that city, but to pay the expenses attending the exercise of the power of the State to protect its citizens from the consequences of disease already in the city. It is a tax to save the State the expense of protecting its citizens from disease within the city, and it is not a means of preventing the introduction of disease. It is a tax upon passengers for the benefit of the State of New York, and so the Legislature of that State evidently consider it, by appropriating it, to objects totally unconnected with the system of quarantine.

By an act of the Legislature of New York (2 Rev. Stat. 430), it will be found that the sums to be levied by the former law upon the master, mate, and seamen, are no longer to be collected by the health commissioner, but by the trustees of the seamen's fund, etc. And by section fifty-four, page 439, it is declared that the eight thousand dollars appropriated by the former act in aid of the Society for the Reformation of Juvenile Delinquents in the city of New York shall continue to be paid by the health commissioner out of the moneys collected from passengers; but if the amount collected from passengers should be insufficient (after paying all the expenses of the quarantine establishment at Staten Island) to meet the eight thousand dollars more appropriated from the hospital funds for the support of the Society for the Reformation of Juvenile Delinquents in the city of New York, then the balance to make up the eight thousand dollars shall be appropriated annually from the State treasury.

*This act is evidence of two things: [*303

1st. That the passenger tax is no part of the quarantine system, but is resorted to as a means of paying the expenses attending its execution.

2d. That the funds are applied to the relief of the State treasury.

I have thus stated the reasons why the imposition of this tax cannot be considered as any part of the quarantine laws, and by declaring it to be unconstitutional this court will not in the least interfere with the quarantine laws of the States. This law imposes a tax; it is treated as a tax levied upon passengers throughout the whole law; and the only question in the case is, whether the Legislature of the State of New York can, in consistency with the provisions of the Constitution of the United States, impose and collect such a tax, and it is to this question that my argument will be applied.

Similar provisions, it is said, are made in several of the States. I do not stop to examine into the provisions of the different State laws upon the subject, for this plain reason; the more State laws that have been passed upon this subject, the greater the necessity there is of this court's interference. If the State Legislatures have the power to impose a tax upon passengers, the amount of that tax must be fixed at such a rate as the different Legislatures in their wisdom may think proper to fix it at. Hence the court will perceive that the tax upon a passenger arriving in the United States may differ, and in all probability will differ, in amount in each State having a seaport, and thus destroy that uniformity of taxation upon persons arriving here which nothing but an act of Congress can establish, and which the interest of the country requires.

The question now to be discussed is, whether the Legislature of the State of New York have a constitutional power to impose a tax upon foreigners arriving at the port of New York, from a foreign port.

By the Constitution of the United States the people of the United States intended, instead of the old Confederation, to form a national government. However we may differ in our opinions as to the power of the general government upon some subjects relating to our internal affairs, I think all must admit, that, in regard to all our relations as a nation with other nations, or the subjects or citizens of other nations, the whole power of the country is placed by the people in the hands of the general government. Power is given to Congress to regulate commerce with foreign nations, to collect imposts and duties, to declare war and to make peace, to raise and support an army or navy. Power is given to the national government 304*] *to make treaties, etc., with foreign nations; in short, to manage all matters which may arise between this nation and any other. This is the spirit of the whole Constitution; it was one of the causes, if not the principal cause, of its formation and adoption.

Now, what shall be the intercourse between the United States and a foreign nation, and between our citizens and their citizens or subjects, and upon what terms that intercourse shall be carried on, are clearly national questions, and as such must be decided upon by the national government. The States can have no possible constitutional power in any manner to interfere with it.

It can be no answer to this to say, that, until Congress pass some regulations upon the subject, the States may make their own regulations upon it; because this is a national question. It is a subject which the States have no right to touch or interfere with in any manner. It is a subject upon which the people have intrusted them with no power.

If I am right in this, it seems to me to follow, that whether foreigners upon their arrival in the United States shall or shall not be compelled to pay a tax before they will be permitted to put their feet ashore in this land of liberty, is a question which belongs exclusively to the general or national government. If this be a correct view of the case, then it follows that, in passing the law the validity of which we are now discussing, the Legislature of New York have exceeded their powers and authority, and have improperly trenched upon the powers of the national government, and their act is therefore void.

Let us pursue this point a little further.

If the Legislature of the State of New York have the right to impose a tax upon foreigners arriving at the ports of New York, then the amount of the tax is necessarily wholly within their power and discretion. They may impose a tax of one dollar upon each passenger, or a tax of one thousand dollars. It will thus be plainly perceived that they may totally prohibit the importation of foreigners into the ports of New York, and thus thwart what may be considered the settled policy of the general government upon this subject.

Again, Congress have passed several laws in relation to passengers. They have, it is true, imposed no import duty upon their arrival in the United States. Does not this, in effect, amount to a declaration on the part of Congress that they shall pay no such duty? Is it competent for a State Legislature to say, If Congress do not impose a duty upon passengers, they have not legislated on the subject—we will therefore impose such a duty?

*According to this argument, if Con- [*305
gress think no duty should be paid upon foreign passengers arriving in the United States, yet they must impose some duty, or the State Legislatures may impose such a duty as they in their discretion, think proper.

Thus far my argument upon this point is that the whole subject of the admission of foreigners into the United States, and the terms upon which they shall be admitted, belongs, and must belong, exclusively to the national government.

I proceed now to take another view of the case.

The law of New York imposes a tax. It imposes a tax upon persons brought or imported into the United States. Is not that an impost?

The Constitution, in express terms, prohibits the State from passing any law imposing duties or imposts on imports without the consent of Congress. The precise words of this section of the Constitution are worth attending to upon this point: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports," etc.

Not upon goods or merchandise imported, but upon imports—upon any and everything imported, or brought into the country. And the words include men as well as merchandise. That the meaning of the word "imports" includes men as well as things cannot, it seems to me, be denied. In common parlance, we say, when a new manufacture is established, in which we have had no experience, we must import our workmen from Europe, where they have experience in these matters. When we speak of the great perfection which any particular manufacture may have arrived at in a short time, we say the workmen were imported from Europe.

But another clause in the Constitution throws great light upon this subject: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

I propose detaining the court for a short time by making a few observations upon this clause of the Constitution. It is a limitation upon the powers of Congress. Now, a limitation of a power admits the existence of the power limited. Congress, then, had by the Constitution, by the admission contained in this clause of it, power to prohibit the migration or importation of any persons other than citizens of the United States into the country, and they had the power, by the like admission, to impose a tax or duty upon such importation. If Congress had such power, whence did they derive it? What part of the Constitution gave it to them?

*They had power to collect and lay [*306
duties upon imports. They had power to regu-

late commerce with foreign nations, and they had all the powers necessarily belonging to a general national government, as it regards foreigners.

As the limitations in that clause of the Constitution were imposed but for a limited time, and as that time has long since expired, Congress now possess all the powers which the Constitution gave them, subject no longer to the limitations contained in this clause, which has expired by its own limitations.

Congress have, therefore, now the power—

1. To prohibit migration of foreigners altogether.

2. To impose such an import duty upon their arrival in the United States as Congress in their wisdom may think proper.

This, I presume, will not and cannot be denied.

Now, if Congress have that power, it is derived either—

1. From the power to lay and collect import duties.

2. From the power of regulating commerce with foreign nations.

3. Or from its being an attribute necessarily belonging to the national government.

And if Congress derive the power from any one of these sources, their power is necessarily exclusive of any State authority upon the subject. As to imports, I have already shown that the States are expressly prohibited by the Constitution from laying or collecting any such duties. As to the power to regulate commerce with foreign nations, I intend to endeavor to show, in a subsequent part of my argument, that that power is also exclusive of the State Legislatures. As to the authority derived from the fact that it is an attribute of the national government, there can be no doubt that, in that view of the case, the State governments can have no concurrent power on the subject.

If, therefore, Congress possess the power of levying an import duty upon persons imported or brought into the United States, if they have the power to prohibit the importation of them altogether, no State can have such power, and the law of the State of New York is unconstitutional and void.

But it is said that this clause of the Constitution was only intended to be applicable to slaves which might be brought into the United States. It seems to me that this argument cannot avail the opposing counsel. Because, if this be so, then, as I have already shown that this clause was a limitation upon the powers of Congress, if that limitation extended only to slaves, then the powers of Congress, so far as they relate to free foreigners migrating to the United States, were left, and now exist, wholly unlimited, except so far as limitations 307*] may be *found in the words of the Constitution or in the nature of the case.

But the convention intended, as the words of the clause evidently show, that the provision should not be confined to slaves. 3 Madison Papers, 1429.

Mr. Gouverneur Morris objected, that, as the clause now stands, it implies that the Legislature may tax freemen imported. Colonel Mason admitted this to be so, and said "that it was *necessary* for the case of convicts, in order to *prevent the introduction* of them." With this explanation, the clause was passed unanimously.

I shall here leave this point in the case.

I think I have shown that this tax is an impost, and that the State of New York has no constitutional power to lay and collect it, without the assent of Congress, and if collected, it must be paid into the treasury of the United States.

But we were told upon the former argument, that no import duty could be laid upon white men. I have shown that such was not the opinion of the framers of the Constitution. But what is this law of New York? It imposes a tax upon every passenger brought or imported into the port of New York. Such a tax is an impost. And if it be true that no impost can be laid upon white men, by what authority does the State of New York impose such a duty upon every passenger, white or black, bond or free? Because we call it a tax, not an impost; as if a change of the name can alter the nature of the thing.

This law is not only an impost, but a regulation of commerce; and I propose now to inquire whether, as such, it must not be considered as unconstitutional and void.

In discussing this question, it is not my intention to go into a lengthened and minute consideration of the several cases which have been heretofore decided in this court, in which the validity of State laws has been the subject of decisions here. These cases were so fully considered in the License Cases decided at the last term, that every member of the court must be familiar with them. To enter now into a labored examination of them would, therefore, be little less than a waste of the time of the court.

"Congress have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

What is the meaning of the word "commerce" in this clause of the Constitution? It becomes necessary to settle the meaning of the word. Chief Justice Marshall, in the case of Gibbons v. Ogden, 9 Wheat. 189, says, speaking of this word: "The counsel for the appellee would limit it to traffic, to buying and selling, *or the interchange of commodities, [*308 and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

And in the same case, page 193, Chief Justice Marshall says: "It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations.

Commerce, then is intercourse, and Congress have the power of regulating that intercourse; and, as I shall contend, the exclusive power of regulating the intercourse with foreign nations. The Constitution draws a plain distinction between the "commerce with foreign nations" and the "commerce among the several States." If there were no such distinction, the law would have been differently expressed; the power to regulate the commerce of the United States would have included both.

Why is this marked distinction made in the Constitution? The regulation of the commerce with foreign nations, including the regulation of all our intercourse with them, may, in many instances, materially affect the relation between us and foreign nations. It may often lead to war. It may become the subject of treaties. All which considerations show that it is a national question, from which the States must be absolutely excluded. Not so with the power of regulating commerce among the States. This is a mere internal matter among ourselves, with which foreigners can have nothing to do. They can know only the one government, and can do nothing with the State governments. The power to regulate this internal commerce is vested in Congress, and they may exercise it or not, as they think proper; and until they do exercise it, it is possible that the States may have power to regulate the matter among themselves. Not so with foreign commerce. Foreign nations know nothing of the States, and can look only to the general government. With respect to foreign commerce, it is essential that the regulations should be uniform throughout the whole country, so that the different nations should know the terms upon which their commerce or intercourse with this country can be carried on.

In all cases where the right of commercial regulations comes before this court, this distinction should never be lost sight of. In cases of commerce among the States, if Congress do not exercise the powers given to them, it may 309*] be matter of doubt *whether the State Legislatures may not make regulations of the commerce among themselves, and those regulations may be good until Congress shall undertake to make the regulations. And all the cases where it has been admitted by any judge of this court that the States have a concurrent power to make such regulations of commerce will be found to be of that nature. The two leading cases are Gibbons v. Ogden, 9 Wheat. 1, and Wilson v. The Black Bird Creek Marsh Co. 2 Peters, 245. They will both be found to be cases of internal commerce among the States.

In the case of The City of New York v. Miln, 11 Peters, the opinion of the court was delivered by Mr. Justice Barbour. He says: "We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary; in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that, being thus considered, it was passed in the exercise of a power which rightfully belonged to the State. If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the States." p. 132.

In that case, the law of New York was considered as a part of its system of poor-laws, and was, therefore, held to be constitutional. But even in that case Judge Story dissented from the opinion of the court, and stated that Chief Justice Marshall had been of opinion, upon the former argument of the case, that the law of New York was unconstitutional.

In Judge Story's opinion, we find this paragraph (p. 161): "The result of the whole reasoning is, that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by Congress, whether in the shape of a tax or other charge, or whether before or after arrival in port, interferes with the exclusive right of Congress to regulate commerce."

And this is in strict conformity with the doctrine established in the case of Brown v. The State of Maryland, 12 Wheat. 419. That was also the case of an imported article from a foreign nation, upon which the plaintiff in error had paid a duty upon its importation. The State undertoook, by law, to say that he should not sell it without a license.

The court decided that the duty required and paid upon the importation of the article was a regulation of commerce, and that, upon paying that duty, the importer had a right to sell the article; else the importation of it would be of no use to him, and he would have complied with the regulations of Congress to no purpose, if, after paying the duty, he could not sell the *article, which was the [*310 sole and only object of its importation.

The court said, that, although the imported article was within the State, yet, so long as it remained in the original package in which it was imported, it could not be considered as having become so identified with the mass of property in the State as to subject it to the power of taxation by the State.

In support of the doctrine for which I am now contending, I beg to refer the court to the opinion of Judge Johnson in the case of Gibbons v. Ogden, 9 Wheat, 227, by which it will be found that he takes the distinction between foreign commerce and the commerce among the States. The court declared that the power to regulate is exclusive, although that was a case of collision between the State law and the law of Congress.

In the case of Brown v. The State of Maryland, the decision of the court was substantially the same.

I contend, then, both upon principle and upon authority, that the power to regulate commerce with foreign nations is vested in Congress exclusively; that the States have no power to interfere with it; that commerce means intercourse, and that passengers are as much a part of that commerce and intercourse as goods or merchandise; that no State has the power of making any regulations upon the subject, and most assuredly not of laying and collecting an import duty upon passengers imported or brought into the United States. 1 Tucker's Black. Appendix, page 150; 3 Madison Papers, 1585.

Before I leave this point of the case, I would call the attention of the court to the opinion of our State Legislature upon this subject—an opinion entitled to some little weight in this case. [Mr. Ogden here read the resolution passed by the Legislature of the State of New York, in February, 1847.]

In the opinion, then of the Legislature of New York, passengers are a part of the commerce of the country, which Congress have the power to regulate, and the regulation of it belongs to Congress by virtue of the Constitution, and the State Legislature cannot legislate on the subject. This, it seems to me, is the plain language of this resolution. Now, I

think taxing passengers has something to do with regulating the commerce and intercourse between the United States and foreign nations, and in the language of the Legislature in this resolution, that regulation "belongs, by virtue of the Constitution, to Congress."

The case of pilots has frequently been referred to as a regulation of commerce, and therefore within the powers given to Congress; and in these cases the power of Congress has never been held to be exclusive, but State laws are 311*] constantly passed *on that subject, and their validity has never been questioned. I propose to make a few more observations upon this subject.

The only power which Congress can possess over pilots must be derived from the power given to them to regulate commerce. There is no express power given as to the regulation of pilots. And unless the regulation of pilots can be considered as a regulation of commerce, it is not within the constitutional power of Congress.

And it may be well doubted whether the regulation of pilots can be considered as a regulation of commerce. Pilots are rather a necessary aid to the successful carrying on of commerce than a regulation of commerce itself.

A power to regulate commerce would hardly confer the power of regulating ship carpenters, and yet they are essential to create the very means, and the only means, by which commerce can be carried on. Pilots are, it seems to me, rather to be considered as belonging to the port arrangements, such as the places where ships from different places may be anchored, as to the wharfage, etc. all of which are now considered as regulations of commerce, although the commerce of the country may be, and often is, materially affected by them.

The regulations of commerce should be uniform throughout the whole country. This never can be the case in the regulation of pilots. Different skill and experience are required at different ports. The distance which the pilot must conduct vessels is different at different ports; the dangers to be avoided are more numerous and greater at some ports than others. The charges of pilotage must, therefore, be greater at some ports than at others. No uniform regulations can, therefore, be made upon the subject. The whole spirit of the Constitution is, that the commercial regulations of Congress should be uniform throughout the whole country; and as it is impossible that the regulations of pilots should be so, it affords a strong argument to prove that their regulation never was intended to be given to Congress.

Again, the regulation of pilots can hardly be considered as a regulation of foreign commerce; it is a mere local matter, confined to particular ports and harbors, and may, therefore, be considered as a subject upon which the States may legislate, and their laws be valid, until they come in conflict with the laws of Congress.

And this seems to have been the understanding of Congress. At their first session under the Constitution, in August, 1789, in "An Act for the establishment and support of lighthouses, beacons, buoys, and public piers," we find a section declaring that all "pilots in the 312*] bays, inlets, rivers, harbors, and ports *of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

The words of this section are peculiar. Congress make no regulations as to pilots, but leave them as they were regulated by the States. They are to continue subject to the regulation of State laws then existing, and such State laws as may hereafter be enacted by the States, until further provision shall be made by Congress; seeming to act upon the principle that the State laws would be valid until interfered with by Congress.

The provision is found in an act for establishing and supporting light-houses, beacons, buoys, and public piers. The objects of the act are local, and though intended for the security and safety of the commerce of the country, they cannot be strictly called regulations of commerce. As to foreign commerce, no foreign nation could complain if we had no light-houses, no beacons, or buoys. These are things for our own advantage and convenience, by making our ports more accessible to ships and vessels. They are peculiarly advantageous to the particular ports near which they are found, and might, therefore, well be left to State legislation.

Noscitur a sociis. The provision in relation to pilots in this law is to be judged of by the other provisions found in the law, none of which can be considered as commercial regulations in the sense in which the terms are used in the Constitution.

The only other law ever passed by Congress in relation to pilots was passed on the 2d of March, 1837, which declares that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly authorized by the laws of either of the said States bounded on the said waters, to pilot the said vessel to or from the said port, etc.

It will be perceived, that this act does not pretend, in any part of it, to be a regulation of pilots. It regulates ship masters, if it can be called a regulation at all, and it authorizes them to employ certain pilots; but it is no regulation of those pilots.

I have been thus particular upon the subject of pilots, because I am confident that Congress never have attempted any regulation of them; that any uniform regulation, which is the only regulation Congress could make on the subject, is, from the nature of the subject, impossible; and that the only provision *Congress [*313 have ever pretended to make upon the subject is to consider them as local matters, like light-houses, etc., and therefore have left them properly to State laws.

There can be no doubt that any State may erect and maintain a light-house, may plant buoys and beacons for the benefit and advantage of its own ports and harbors. So may any individual, and these, although they may be extremely useful to commerce, cannot be called regulations of commerce. And pilots stand upon the same footing, and are so placed by the Act of Congress of 1789.

We may say of the laws relating to pilots, as

Chief Justice Marshall says of the inspection laws of the States, in his opinion in Gibbons v. Ogden "That these laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted."

There is another clause in the Constitution which has some bearing upon this case, and which I shall briefly consider: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

This clause, it is true, is a limitation upon the powers of Congress, and is not applicable in its terms to state legislation on the subject. But the words are general, and if Congress, who have the power of regulating the commerce of the country, and the revenue arising from that commerce, have no power to give the preference mentioned in this clause of the Constitution, surely a State which has no power to regulate commerce, and has nothing to do with the revenue derived from it, can give no such preference.

The intention of this clause in the Constitution evidently is, that the regulations of commerce and of its revenues shall be equal and uniform in all the ports of the United States. It was the inequality existing in these respects in the different ports of the United States which, more than anything else, gave birth to the Constitution.

Now, a very important part of the commerce and intercourse between the United States and Europe is the transportation of passengers. The passage money received from passengers is a most important item in the freights carried by our merchant ships. This tax upon passengers is in effect a tax upon the ship owner. He may, indeed, add it to the amount he charges for the passage. If he does so, he is compelled to charge so much more for a passage to New York than is charged to any other port. The great body of our immigrants, many of whom bring with them large families, cannot afford to pay an additional dollar for themselves and each individual of their families, 314*] *and they will therefore sail for other ports. The consequence is, that the ship owner in New York must lose the passage money altogether, or he must consent to pay the dollar himself.

The amount of this tax annually paid is much larger than is generally supposed. By the report of the commissioners of immigration, made on the 1st of October last, it appears that, from the 5th of May to the 30th of September, not quite five months, the number of passengers, foreigners, who arrived at New York was 101,546. For the remaining seven months of the year they may be fairly estimated at 100,000 more, making 200,000 in a year, which is a tax upon our ship owners of $200,000 per annum.

The court will now see that these merchants have good reason for appealing to this court for the establishment of their constitutional right to be put upon an equal footing with the ship owners in the other ports of the United States.

It is no argument against us upon this point to say, that some of the other States also impose a similar tax upon passengers. Because, if the different States have the power of imposing this tax, the amount of it will be varied according to the discretion of the different State Legislatures, which proves the necessity that this whole matter should be exclusively under the regulation of Congress, in order to produce that equality and uniformity called for by the Constitution.

My argument upon this point applies with much greater force to the case of a foreign ship or vessel importing or bringing passengers to this country. Foreigners can only know us as one nation, and certainly would have great right to complain, if compelled to pay a different rate of duty at the different ports of the United States.

I have now stated the several grounds upon which I have supposed the law of New York, the validity of which is the question in this cause, to be unconstitutional and void. The public authorities in New York have always doubted the validity of the law. Collier's Report in January, 1842; Governor Bouck's Message; the Act of the Legislature of 1844.

These public documents show—

First. That the validity of the law is considered as doubtful by the government of New York.

Second. That they are ready to abide by, and to submit to, any decision this honorable court may make upon the subject.

As a citizen of New York, I am proud to say, that, although there is no State in the Union whose laws have been so frequently before this court as violating the Constitution, yet there is no State which has ever shown greater respect and veneration *for the Constitution [*315 and for this honorable court, by always submitting without a murmur to its decisions. The pride of New York is, that she is a member of this republic—that the republic has a Constitution made and adopted for the purpose of preserving the peace, prosperity, and happiness of the people. She believes that on the preservation of this Constitution depends our Union, that upon our Union depend the happiness and prosperity and the liberties of the people of these United States. And however, in New York, we may differ among ourselves upon minor points, the greatest wish of our hearts is that this Constitution and this Union may be perpetual.

Norris v. City of Boston.

The following is a sketch of the argument of Mr. Davis, for the defendants:

He said he rose to address the court with unaffected distrust and diffidence in his ability to add anything new in a case that had been so fully investigated. The only circumstance which inspired him with confidence was the order of the court directing the rehearing, which he thought would have been more usefully executed by confiding the case to other counsel; but he had found it not extirely easy to pursue this course, as the Executive of the State had manifested a wish that he should remain in the case.

The great question involved was the constitutionality of the Act of Massachusetts of 1837, regulating the introduction of alien paupers. The plaintiff's counsel alleged, substantially—

1st. That Congress has the exclusive power to regulate foreign commerce.

2d. That in a case like that of the law of Massachusetts it is unnecessary to prove any conflict with any law of the United States, for the act of Massachusetts assumes to regulate foreign commerce, which is of itself a violation of the Constitution.

3d. That the bringing in of alien passengers is a part of foreign commerce, and hence any attempt to regulate concerning them is a regulation of commerce.

4th. That nevertheless the law of Massachusetts does in fact conflict with certain legislation and certain treaties of the United States.

5th. That the law furthermore falls within certain provisions of the Constitution, which prohibit the levying of a duty on imports, and also on tonnage.

We contend, on the other hand—

1st. That the power of Congress over foreign 316*] commerce is *not exclusive, but is and has at all times been exercised, both in regard to foreign commerce and the commerce between the States, concurrently within the territory of the State, and that no regulation of a State within its territory has been or can be adjudged unlawful, unless it be repugnant to or incompatible with some law of the United States.

2d. That, consequently, although alien passengers are brought in by vessels engaged in foreign commerce, yet they must be subject to and obey the police laws of the State, unless such laws are in collision with laws of the United States.

3d. That the law of Massachusetts does not conflict with any act or treaty of the United States upon the subject of passengers.

4th. That it does not fall within the clause of the Constitution prohibiting the levy of duties on imports or upon tonnage, but is a police act for the regulation of paupers and pauperism.

I shall notice all these positions, but not in the order in which they have been stated.

First. I shall contend that the law of Massachusetts was not made for the purpose of regulating foreign commerce, although it affects it so far as is necessary in providing for the regulation of a class of persons connected with it, but it is in fact an act modifying the pauper laws of the State, and designed to mitigate, in some degree, the burdens attempted to be thrown upon us in subjecting us to support the alien poor.

This can be made manifest by tracing the history of our legislation upon the subject, and the causes which have led to it. It will appear that the Colony, Province, and State, each in turn exercised a free, unrestrained authority over paupers and pauperism. I shall do little more than refer the court to some of the laws, and state in the briefest way their provisions.

In 16639 there is an act of the colony providing for the poor, which evidently alludes to still earlier laws. Ancient Charters and Colony Laws, 173. This act made it the duty of towns, not only to provide for the poor, but for all alike, whether native inhabitants, alien sojourners, or transient persons.

In 1692 provision was made compelling the *relatives of poor* persons to contribute, when *able, to their support.* Ibid. 252.

In 1693 provision was made for the forcible removal of paupers, not only from one town to another, but out of the colony; and further provision of the like kind was made in 1767. Ibid. 252, 662.

In 1720 the overseers of the poor were authorized and required *to bind out as [*317 apprentices the children of paupers. Ibid. 429.

By the statute of 1793, c. 59, secs. 15 and 17, felons, convicts, and infamous persons are denied the right of landing in the Commonwealth, and ship masters forbidden under penalties to bring in such.

By the statute of 1819, c. 165, masters of vessels, if required by the overseers of the poor in any town, are obliged to give bonds to indemnify the town for three years against any cost or charge from persons brought in, who might become paupers.

By the statute of 1830, c. 150, masters of vessels are required to give bonds to indemnify the towns where they may land alien passengers against liability for their support as paupers, unless excused from so doing by the overseers of the poor. And there is a further provision, that, by paying five dollars for any passenger, the claim for a bond should be commuted.

These various provisions were carried substantially into the Revised Statutes in 1836.

Thus stood the law at the end of nearly two hundred years from the first legislation now on record, by which it appears that the Colony, Province, and State had in succession asserted an unlimited power over paupers and pauperism. They asserted, not only the right to compel the body politic to provide for the poor, but they made the relatives within certain degrees contribute, if able; they bound out poor children, expelled from their territory paupers which belonged elsewhere, denied to such the right to come in, and also shut out convicts, felons, and infamous persons. They asserted manifestly the highest prerogative over the whole subject, and the State has, down to this time, considered its power in this respect unabridged. They went to the extent of determining for themselves of what and of whom their residents should consist, maintaining this right as well after the adoption of the federal Constitution as before.

About the year 1830, perhaps a little later, the King of England appointed a commission to examine into the condition of the poor, and to report the evidence, and a plan of relief. By the increase of population and the introduction of machinery instead of the human hand in manufactures, the evil of pauperism had greatly increased, and demanded some expedient to mitigate its pressure.

This commission, after years of toil and taking an unexampled mass of evidence, reported it, with their comments thereon. The evidence comes from magistrates, parish officers, clergymen etc. and discloses the most hideous details of poverty, distress, and profligacy that have ever been spread before *the public. It [*318 may all be found in the public library in this capital, but it would require a month's labor to peruse it.

The great fact material here is, that the commission found that several of the parishes had already adopted emigration as the most sure and effectual method of obtaining certain relief.

They had, therefore, raised money to pay the charges of shipping paupers to foreign lands. The commission give it as their opinion, that this mode of disposing of paupers promised much, and ought to be encouraged. The fruits of this policy were soon visible among us. Indeed, such a fraudulent conspiracy to relieve themselves, not only of the obligations of humanity but of the expense of supporting their own helpless population, could not remain long concealed. Idiots, lunatics, the lame, the aged and infirm, women and children, were thrown upon our shore destitute of everything, and our poor-houses were filled with foreigners in this hopeless and helpless condition.

The same plan of relief was also adopted at a later day on the Continent, and we seemed in a fair way to become the poor-house of Europe. The evil has gone on increasing, until not only the poor-houses and hospitals are full, but in Boston and New York immense sums have been expended in mitigating the sufferings of the alien poor and destitute.

The proof of these coming events was unmistakable farther back than 1837, when the act of Massachusetts now in question became a law. The State saw, not only parishes which were insensible to the dictates of humanity and capable of transporting their poor and destitute to unknown lands, there to leave them to the mercy of strangers, but relatives and kindred regardless of the ties of blood, who were willing to thrust from them the aged, the infirm, the insane, and the helpless, and to place them beyond the possibility of a return.

These were the circumstances which, in 1837, demanded legislation, and the act, in our view, met the exigency, and nothing more. It secures two things; first, a bond to indemnify against the liability for the support of those wholly incapable of providing for themselves; and, second, two dollars for each and every other alien passenger. This bond and money must be furnished before the passengers are permitted to land.

It is admitted that the provisions of the act are reasonable, so far as regards the class who come in forma pauperis, but the law in other respects is alleged to be invalid. It was said, among other things, that we lay hold of a ship before she comes to our jurisdiction; but this is evidently a total misapprehension, for she must, by the terms of the act, be within our 319*] *waters, in the port or harbor where the passengers are to be landed, before she is boarded and the passengers examined.

The act is in every feature manifestly a pauper law, growing out of a pressing emergency, and although as lenient as the circumstances would allow, yet our right to make and enforce it, is denied. We have seen that the State has exercised for two hundred years the right to make pauper laws. Can she do it now? I contend that this power is one of her attributes of sovereignty, which she has never surrendered, and now has the right to enjoy.

That she has not granted it to the United States, and that they do not possess it, is obvious. And it is equally obvious that the States have generally exercised this power since the adoption of the Constitution. In New York v. Miln, 11 Pet. 141, the court say the police power of New York could not be more appropriately exercised than in providing against the evils of pauperism. Also, at page 142, they declare pauperism to be a moral pestilence, as much requiring protective measures as contagion or infection. In Prigg v. Pennsylvania, 16 Peters, 625, the court say that the right to expel paupers and vagabonds is undoubted. The same principle is recognized and approved in the License Cases, 5 How. 629.

These authorities, as well as the case of Holmes v. Jennison, 14 Peters, 540, place the right of the State not only to regulate, but to expel, paupers in a very clear light. The State having this right, has she so used it as to regulate unlawfully foreign commerce, or has she usurped the taxing power of the United States? The ground assumed is, that the power of Congress to regulate commerce is exclusive, and hence the State can make no law which affects such commerce without regulating it unlawfully.

This power is not, by the terms of the grant, any more exclusive than the power over militia, or the right to make bankrupt laws. Upon examination of the adjudged cases, it will be equally manifest that the court have not so settled the question. There are dicta which seem to look that way, and some learned judges who have sat upon this bench have expressed themselves as satisfied with these dicta; but there are dicta, also, the other way, equally respectable.

The position assumed by the counsel is, that a State law made in the exercise of lawful power is unconstitutional, if it affects foreign commerce. This conclusion, I contend, cannot be maintained.

Gibbons v. Ogden, 9 Wheat. 1, is the leading case in which this question of exclusive authority has been agitated, and is the case supposed to give countenance to the idea that the power *is exclusive; and yet the court mani- [*320 festly studiously avoid deciding the question. On the contrary, they give a construction to the powers and laws of the States irreconcilable with such conclusive rights as are now claimed. The court concede, in distinct terms, that the laws concerning pilots and pilotage, quarantine, health, harbors—in short, police laws generally—are constitutional, though they do interfere with, and to some extent regulate commerce. They rest on the police power of a State exercised for necessary purposes, and are police laws—not laws regulating foreign commerce.

It is obvious that police and municipal laws do and must exist, to a great extent, and must, from the character of our government, deal with and affect foreign commerce. Debts must be collected and crimes punished; ships must be under sanitary and harbor regulations; pilots are indispensable; in general terms, life, property, and personal rights must be protected. All such laws, in their application to those engaged in foreign commerce, must affect, and influence, nay, often tend to regulate, that commerce. They cannot be executed without, and, moreover, most of them must be State laws, and cannot be supplied by the United States, if they had power to do it. The court saw all this when considering Gibbons v. Ogden, and declare, in terms not to be misapprehended, that police laws come from the acknowledged power of the State. They are, says the Chief

Justice, police laws—not laws regulating commerce. The fact that they do affect commerce does not make them unlawful, though the influence amounts to regulation, because they are made for other lawful purposes, and are as indispensable to the public welfare as foreign commerce.

The court were manifestly of opinion, that health laws, harbor laws, and police laws generally, do not conflict with the power of the United States to regulate commerce, nor disturb the harmony of the governments; but both the States and the United States may and ought to exercise their respective powers together in the ports which are common to both.

The doctrine distinctly maintained is, that all police laws are constitutional unless in conflict with some law of the United States. This opinion is fully sustained in the case of New York v. Miln, 11 Peters, 102, and in the License Cases, 5 How. 504.

This is irreconcilable with the proposition of the plaintiff's counsel, that such a law may be unconstitutional without collision with a law of the United States, and proves, moreover, that the power to regulate commerce is not exclusive.

The extent of the police powers of the State, and their right to concurrent jurisdiction over 321*] foreign commerce, for *many purposes, within a State, are illustrated in the same case in another way, still more conclusive. The court say that police measures may be similar to the measures of the United States, the forms of law may be the same as those employed by the United States to regulate commerce, and yet such police acts are not unconstitutional, unless they come in actual collision with the laws of the United States. The case, therefore, of Gibbons v. Ogden falls far short of maintaining the exclusive power over commerce which is set up in this case.

Thus stood the law in 1847, when the subject came under the consideration of the court in the License Cases, 5 Howard, when a majority of the bench concurred in opinion—

1. That the question had not been judicially settled.

2. That the power to regulate foreign commerce is concurrent.

3. That there neither is, nor can be, any unconstitutionality in State laws regulating foreign commerce within State territory, unless such laws are in conflict with some law of Congress.

The question being thus finally disposed of, I come to the inquiry, whether there is any law of the United States in conflict with the law of Massachusetts. The plaintiff's counsel allege that such conflict does exist. But before examining the laws said to be in collision, I will ascertain, as far as I am able, the principles upon which unconstitutional conflict rests.

The Constitution of the United States declares that the laws of the United States shall be supreme; and it has been often held, that, in case of conflict, the law of a State must yield. But when does illegal conflict exist? What is the evidence of it? State laws may be similar to those of the United States, may act upon the same subjects and deal with the same *persons, and not* be in collision. State laws *may control navigation*, passengers, ship owners, merchants, cargoes, etc., may enforce upon such civil process, criminal process, quarantine laws, health laws, pilotage laws, harbor laws, dock and wharfage laws, etc., and yet cause no collision, no repugnancy or incompatibility with the laws of the United States upon the same subjects.

It is not legislation upon the same subject, or every seeming conflict, then, that amounts to unconstitutional collision. The rule applicable to collision is laid down with some distinctness in 1 Story's Com. 432: "In cases of implied limitations or prohibitions it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme potential inconvenience, leading to the same result."

*A law may be potentially inconven-[*322 ient, and yet constitutional. The system presupposes that the two governments must work together in the same territory, and upon the same objects, or they cannot enjoy the functions confided to them. The first object, therefore, is to harmonize their action, and reconcile as far as possible the exercise of the powers belonging to each. The one, for example, has the care of life and health, the other of commerce; but life and health cannot be protected without controlling commerce. The object, then, should be to harmonize both, by not bringing into conflict any laws which can be reconciled by a liberal and fair interpretation of the Constitution.

Hence it is that repugnance must be direct and incompatibly plain, and hence it is that mere inconvenience is not to be regarded, and hence it is that the rule substantially excludes all cases of collision, except those which cannot be reconciled. If a navigator be arrested on board of a vessel about to sail, or the ship be seized for debt, it is attended with inconvenience. If the vessel and crew are detained at quarantine, or she is compelled to deposit ballast in a particular place, it may be inconvenient; and so it may be to take and pay a pilot. And yet it is manifest that, in most of these matters, the States do and must hold the right to make and enforce laws, and the law of collison must conform to this state of things. collision neither can, nor was it ever designed it should, provide for all the public wants and exigencies, in seaports. Hence the necessity of a concurrent, instead of an exclusive, jurisdiction in the regulation of commerce.

With these remarks, I now come to the inquiry, whether the acts which have been referred to are in collision with the law of Massachusetts.

The Act of 1799, c. 110, sec. 46 (1 Stat. at Large, 661,) exempts from duty the apparel, personal baggage and mechanical implements of all passengers. The law of Massachusetts in no respect interferes with or impedes the execution of this act. It has no provision whatever in regard to apparel, baggage, or tools. Where, then, is the direct repugnancy, the plain incompatibility, required by the rule?

The Act of 1819 c. 46 (2 Stat. at Large, 488), secures to passengers ship room, by limiting the number to two for every five tons, and has provision, also, in regard to ship stores. It requires, also, the master to report a list of the passengers.

These are all, except the last provision, designed to secure the comfort of the passengers while on the voyage. The law of Massachusetts neither impedes, modifies, nor changes any of the provisions. Indeed, the only thing 323*] in common to these *acts and the law of Massachusetts is the fact that they relate to passengers.

This last named act was considered in New York v. Miln, and the law of that State declared not to be in conflict.

It seems to be supposed that a State has no power to legislate in regard to passengers; but this is a misapprehension. Because, as I have shown, the State has the right, as it possesses concurrent power over the subject, and because it does and has exercised the power in regard to quarantine and health, subjecting passengers to detention and rigorous restraint. The pauper law of Massachusetts is as much a police act as the health laws, and there is as urgent necessity for guarding against the evils of pauperism, as against contagion.

The counsel next referred generally to the naturalization laws, leaving us to infer that the law of the State is in conflict with all of them. This may be so, but I have not sagacity enough to see in what way this conflict exists, or how the process of naturalization has any connection with foreign commerce, as it cannot occur until long after the subjects of it have arrived in the country. The connection, if any, is too remote to demand notice.

It is next said to be in conflict with the Treaty of 1794 with Great Britain; but this treaty was abrogated by the war. The Treaty of 1815, in its first article, is not very dissimilar from the fourteenth article of the Treaty of 1794. It secures reciprocal liberty of commerce to the subjects of each country; but the terms are express, that persons doing business in the one country or the other shall be subject to the laws where they are. The laws of Massachusetts cannot, therefore, conflict with any rights secured by that treaty.

On the whole, there is no direct repugnancy or plain incompatibility with any law or treaty of the United States, and therefore no unconstitutional conflict. Indeed, it would be more than difficult to distinguish this law of Massachusetts, in its influence upon foreign commerce, from numerous police acts of the States.

If no other objection than collision can be found against the law of Massachusetts, it must remain in force. But other objections are raised. The right of the State to collect of the owners of a vessel two dollars for each alien passenger is denied, and this provision is supposed to furnish proof that the act is a regulation of commerce. It becomes necessary, therefore, to inquire what right a State has to impose taxes, and whether it is restrained from imposing this tax upon ship owners.

On this point I find the doctrines held by the 324*] court so precisely *and clearly laid down, that I shall do little more than cite the language of the bench. In McCulloch v. Maryland, 4 Wheat. 425, the court declare, that the power of taxation is of vital importance to a State; that it is retained by the States; that it is not abridged by the grant of a similar power to the Union; that it is to be concurrently exercised; and that these are truths which have never been denied.

In 2 Story's Com. 410, sec. 937, the author says: "That the power of taxation remains in the States, concurrent and co-extensive with that of Congress, the slightest attention to the subject will demonstrate beyond controversy."

In the License Cases, 5 How. 582, the Chief Justice says: "The State power of taxation is concurrent with that of the general government, is equal to it, and is not bound to yield." Same case. p. 588, Justice McLean says: "The power to tax is common to the federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict."

Most of these principles are fully recognized in Providence Bank v. Billings, 4 Peters, 561.

In McCulloch v. Maryland, in answer to a suggestion that the States might abuse so unlimited a power if the law of the United States is not supreme over it, the court say: "This vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the States . . . The only security against abuse is found in the structure of the government itself." Again, at page 428: "It is admitted that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." Again, at page 429: "It is obvious that the right of taxation is an incident of sovereignty, and is co-extensive with it." The sovereignty is therefore the limit of the power.

In Weston v. City of Charleston, 2 Peters, 449, it is said: "Where the right to tax exists, it is a right which acknowledges no limits. It may be carried to any extent within the jurisdiction of the State."

In Providene Bank v. Billings, "The power may be exercised on any object brought within the jurisdiction."

The power, then, is vital, essential to the existence of a State, unabridged, concurrent, coextensive with that of the United States, coextensive with the sovereignty of the State, applies both to persons and property, knows no supreme law over it, may reach any object brought within the jurisdiction, *and [*325 may be carried in its application to any extent the government chooses.

This summary of the power is sufficient. It needs no commentary, being as broad, comprehensive, complete, and exclusive as can be desired; and yet we are asked if the State can tax a ship or a passenger. There is manifestly no limitation, except the prohibitions contained in the Constitution. The State may tax ships, wharves, warehouses, goods, men of every description, though engaged in commerce, unless restrained by positive prohibitions.

This brings me to inquire what the prohibitions are. In art. 1, sec. 10, is found the following language: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except, etc. . . . No State, shall, without the consent of Congress lay any duty of tonnage." These constitute the

only limits to the power of taxation. It is in all other things concurrent and equal.

The law of Massachusetts imposes no duty either on imports or tonnage, unless a charge upon the owner, master, or consignee for bringing in alien passengers is a duty on imports or a duty on tonnage. What are imports? Are persons imports?

In Brown v. Maryland, 12 Wheat. 437, Chief Justice Marshall, in delivering the opinion of the court, says: "An impost or duty on imports is a custom or tax levied on articles brought into the country."

Again, he says: "If we appeal to usage for the meaning of the word [imports], we shall receive the same answer; they are the articles themselves which are brought into the country."

The prohibition relates to imports and tonnage alone; imports are the articles of merchandise brought into the country. Men are articles neither of merchandise nor tonnage, and cannot be imports, in any known signification of the term. No one thinks of calling men imports or exports or cargo, but passengers. They are never included in the manifest, or deemed a part of the cargo, nor are they subjected to any of the regulations which belong to imports. In New York v. Miln, 11 Peters, 136, the court say that goods are the subject of commerce; persons are not, nor do they belong to commerce.

It is supposed that the ninth section of the first article of the Constitution gives some countenance to the opinion, that men are imports; but this clause manifestly relates to slaves and the foreign slave trade, and the right to tax those persons imported was doubtless given to discourage the traffic. As soon as the twenty years ran out, Congress suppressed the traffic, which indicates clearly the understand-
326*] ing in regard to the provision. *Moreover, the whole history of immigration shows clearly that the framers of the Constitution never anticipated interposing obstacles to it.

While, however, it is admitted that men are not usually classed with imports, yet it is contended that, in the form of imports, or as a tax generally upon commerce, the requirement of two dollars for each alien passenger is unlawful. I deny that any such inference can be drawn, without manifest violation of the constitutional rights of the States.

If any proposition is proved by authority piled on authority, it is that the right of taxation is co-extensive with the jurisdiction of the State—that it reaches all objects within that jurisdiction—is uncontrolled by any superior power in the United States, having no limitations upon it except the prohibitions contained in the Constitution. Everything except duties on imports and tonnage is left open for the States to exercise their authority upon it, when and in what manner they see fit.

The right to tax everything connected with foreign commerce save these two things is unquestionable. This right is the thing declared by the court to be valid, sacred, indispensable to the existence of a State—a right which cannot be relinquished—a right not bound to yield to any other authority. This vital, sacred, fudamental right, the relinquishment of *which* cannot be presumed, is not a matter *to be impaired* or frittered away by construction. It cannot be diminished or invaded without plain and manifest authority for it from the Constitution. The State has a right, by the terms of the Constitution, to tax passengers, or ship owners, or ship masters, or any other class of men, because it had this right before the Constitution was made, and has not granted it away, or been prohibited the use of it. This substantive right is not covered or embraced by the terms of the prohibition, is a thing separate and distinct from imports and tonnage, and was designed to be left to the use of the States, as much as land or money at interest.

If the prohibition was intended to cover more that what everybody understands to be imports and tonnage, if it were intended to exempt men or property from taxation because employed in foreign commerce, then the framers of the Constitution have utterly failed to express their meaning in intelligible language, which is highly improbable.

But if they did intend to limit the prohibition to imports and tonnage, as the language implies, how unjust it would be to enlarge that meaning so as to cover other things, by a forced, unnatural construction of the language! Both justice to the States and the sacred character of this right forbid that it should be impaired by such a process.

*It seems to be supposed by the [*327 plaintiff's counsel, that, if a tax has any bearing upon foreign commerce, this fact is proof that the State is regulating commerce, and has no right to maintain such a tax.

The fact that taxes upon men or property employed in foreign commerce, or connected therewith, would have a bearing upon it, and tend to regulate it, was as well known when the Constitution was made as at this time, and yet the right to impose such taxes is manifestly left in the States.

It is said, nevertheless, that a tax upon commerce in any form, tends just as much to regulate it, as if it were upon imports or tonnage. This may be true; but as this power was purposely left in the States to this extent, the presumption is, that the makers of the Constitution intended they should have the power to regulate commerce to this extent.

But if the doctrine contended for be admitted, it would utterly defeat all right on the part of a State to tax anything connected with foreign commerce, as the tendency of all taxation on such property or persons is to regulate it. Capital, ships, warehouses, goods, men, all would, upon this principle, be exempt, and yet we know, not only be practice, but from authority, that this unabridged right does extend to all these objects.

In 5 How. 576, the Chief Justice says "Undoubtedly a State may impose a tax upon its citizens, in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner."

Nothing can be given to the United States by construction, which is not taken from the States. The terms of the prohibition are

plain. No State shall lay a duty on imports or tonnage. Is this a denial of right to tax men or any other thing? Is anything reserved exclusively to the United States except imports and tonnage? And if not, how can a State be denied the right to its sources of revenue to the fullest extent?

We think the boundaries of jurisdiction are plainly marked by the language of the prohibition, and that it would be an unpardonable violation of the rights of the States to cover objects which are manifestly excluded.

But the case of Brown v. Maryland, 12 Wheat. 419, is much relied on to authorize a blow at the rights of the States. By this decision, two questions were raised and settled.

1. That a tax of $50 upon an importer, as [*328] such, for a license *to sell, and making it penal to sell the goods imported by himself before he pays such a tax, is tantamount to a duty on the goods imported, and therefore within the prohibition of the Constitution.

This case assumes that, if an importer is thus taxed, and denied the right to sell before he pays the tax, he is taxed because he is an importer and engaged in that business, and such a tax is evasive in form, for in substance it is a tax or duty on imports. The court take the ground, that what cannot be done directly cannot be done indirectly, but that the act, which, when done indirectly, is equivalent to its being done directly, must be clearly the same thing as that which is forbidden. In other words, it must be a manifest case of evasion—one about which there can be no reasonable doubt. The court admit the right to tax classes of men, but deny the right to tax the importer because he imports, for that is equivalent to a duty on imports.

The decision of the first point comes to this and no more. The State may levy any tax which is not obviously a duty on imports, but it cannot, by indirection, do the precise thing forbidden. It seems to us very clear that men are not imports, nor were they ever thought of by the framers of the Constitution as reserved sources of revenue to the United States.

2. The court decided that such a tax upon the importer was a regulation of commerce, and therefore unconstitutional. The court maintained, that the importer who paid a duty to the United States was in fact the purchaser of a right to sell his goods, and they determined that this right was secured to him while the goods in the original bale remained in his hands, but no longer. The right, therefore is limited to the importer, and to goods in the original bale in his hands.

The court were of opinion, that the right to tax imports in the original bale, if exercised by the States, might be carried so far as to defeat the sale, and in that case the tax would regulate the disposition of the goods by frustrating the trade. They therefore come to the conclusion, that the right to import implied the right to sell, under the limitations which have been stated.

This doctrine is probably pushed quite as far as the Constitution will bear. But passengers are not bales of goods, or articles of commerce, nor are they brought in to sell. No trade is defeated or frustrated by the law of Massachusetts, nor is any commerce by water or on land regulated. The doctrine, therefore, maintained on the second point decided can have no application to the case under consideration.

There is, then, I apprehend, nothing in Brown v. Maryland, *which tends to [*329] render the law of Massachusetts one of questionable authority. Men, I repeat, are not imports, or articles of trade or traffic. If they are, I would ask, Who is the importer? Who trades in them? Who claims the right to sell? Nor is there anything in the more general view of the question which can support the view that they are constructively imports. Why do not the counsel contend that they are tonnage? This has been done in the progress of this case, though it now seems to be abandoned. It was said at one time, that one of the acts of the United States connects passengers with tonnage, as it forbids masters the right to bring more than two for each five tons of shipping, and hence the tax of Massachusetts was alleged to be a tonnage duty.

Nothing can illustrate more forcibly the danger of converting a tax upon a ship owner or master for bringing in passengers into a duty on imports or a duty on tonnage than the fact that ingenious minds hesitate and disagree as to which of two classes of things so utterly different in their character it shall be assigned. It proves, what is true, that there is no similarity to either, nor any congruity in the association. I trust, then, the power of the court will not be strained to diminish an obvious right of the State, in order to add to the increasing power of the United States.

I will now, without pursuing this inquiry further, return to an inquiry which I reserved in the outset. I have maintained that the law of Massachusetts is a police law, and although I have argued the two dollar assessment as a revenue measure, yet I maintain that the police power carries with it a right to provide for the expense of executing any law which the public exigency demands.

Before considering the right of raising money, I will invite the attention of the court to the rights which the States are acknowledged to possess in regard to police authority, that we may see whether the law of Massachusetts oversteps the known limits of that power in dealing with individuals, or with the United States, or in raising money.

In 16 Peters, 625, it is said: "We entertain no doubt whatever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restore runaway slaves, and to remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers."

In 5 How. 629, License Cases, Mr. Justice Woodbury says: "It is the undoubted and reserved power of every State as a political body to decide . . . who shall compose its population, who becomes its residents, who its citizens, who enjoy *the privileges of [*330] its laws, and be entitled to their protection and favor, and what kind of business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a resi-

tentiary or hospital or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health and instruments of gambling and debauchery."

In New York v. Miln, 11 Peters, 141: "There can be no mode in which the power to regulate internal police could be more appropriately exercised" (than in regard to paupers). "It is the duty of the State to protect its citizens from this evil; they have endeavored to do so by passing, among other things, the section of the law in question. We should upon principle say that it had a right so to do." "We think it competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease." p. 142.

In Holmes v. Jennison, 14 Peters, the same doctrine is maintained. Also in Groves v. Slaughter, 15 Peters, 516, per Mr. Justice Baldwin.

In 5 How. 629, License Cases, Mr. Justice Woodbury says: "Who does not know that slaves [for sale] have been prohibited admittance by many of our States, whether coming from their neighbors or from abroad? And which of them [the States] cannot forbid their soil from being polluted by incendiaries and felons from any quarter?"

The constitutions of Kentucky, Mississippi, Alabama, Missouri, Arkansas—all States admitted by the acts of Congress to the Union—have provisions in their constitutions authorizing the Legislatures to exclude slaves brought in for sale from other places. Nearly all the slave States have laws upon this subject, forbidding the introduction of slaves as merchandise under penalties. The free States go farther, and so do some of the slave States, and emancipate the slaves thus brought in, in violation of law. There have been, and probably now are, laws in force raising a revenue out of the sale of negroes brought from one State to another. An account of most of these constitutions and laws may be found in Groves v. Slaughter, 15 Peters, Appendix, 75.

A particular and even minute examination of the provisions of these acts, and the power claimed by the States on this head, might be both useful and instructive; but I have no time to do more than invite the attention of the court to the subject, and make a few very obvious suggestions.

331*] *If they may, as these authorities certainly authorize them to do, exclude from their territory convicts, felons, vagabonds, paupers, and slaves, and if, as the slave States claim, they may exclude and expel free negroes without violating the commercial powers of the United States, may they not manifestly exercise the lesser power of regulating the admission of any of these or any other classes of persons, and may they not prescribe the conditions upon which they shall be permitted to come in? If they may shut out or expel, does it not follow that the power to do so implies the power to make conditions?

Yet this is all that Massachusetts does. She *says to ship masters, If you will bring among* us the insane, the imbecile, the infirm, and such as are incapable of providing for themselves, I will receive even these. I will permit those sent from the poor-houses of Europe to find a refuge here, but you shall indemnify me to some extent for the expense which will be incurred. You shall in one class of cases give bonds, in another pay a very moderate sum of money. I make this a condition upon which I open my territory to you.

I am aware that the regulations to which I have referred in regard to slaves have been considered regulations of police, and not regulations of commerce, although slaves are held and treated as properly, being bought and sold like merchandise. If slavery can upon this ground be withdrawn from the commerical power of the United States, and committed exclusively to the States, then I ask, how can those who entertain this opinion hestitate for a moment in regard to paupers and pauperism, which in no respect belong to trade, traffic, or commerce, but are manifestly subjects for police regulation? How in a matter so clear, can the power and right of the State to regulate be doubted?

The law of Massachusetts has no reference whatever to foreign commerce, except as the instrument employed to inflict an injury upon the State. It is the avenue through which these persons are introduced, and is controlled just so far as is necessary to mitigate the evil and make it endurable, but no farther. Can we not do this? Is our right doubted and denied? Then I ask those who concede the power to enforce penalties for a violation of non-intercourse laws in regard to slavery, and the right to raise revenue when sales are made of slaves from one State in another, on what ground these laws can be sustained. If the law of Massachusetts comes within the wide grasp of the commercial power of the United States, which goes, not only to foreign, but to commerce between the States, how are such laws to escape? How have they escaped hitherto? Have we no right to control the mercenary shippers, *who, stimulated [*332 by the hope of gain, are struggling to empty both the prisons and poor-houses of Europe upon us? I have read the language of this bench, in which they concede the right, and declare it to be our duty, to exercise our police power by protective and preventive measures. We are warned that it is as much our duty to provide against the moral pestilence of pauperism as against infection. We have not overstepped this boundary a hair's breadth; on the contrary, we have not come fully up to the advice, for we do not shut out the pestilence.

What kind of measures are we authorized to adopt? We may, under the authority and sanction of this court, determine who shall reside with us; we may shut out or expel vagabonds and paupers; we may guard against moral and physical pestilence; we may protect life, health, and property; we may stop the approach of that foreign commerce which brings contagion; we may say to a ship master, You shall take a pilot—you shall anchor here, and deposit your ballast there. In a word, we may give as much direction to commerce as is necessary to accomplish these objects.

This is what we may do—it is what is conceded to us by the highest authority. When we exact bonds of indemnity for lunatics, paupers, aged and infirm persons, and those incapable of supporting themselves, is it doing more than to protect ourselves by very reasonable measures? When we exact of masters two dollars for each alien brought in, to be expended in relieving these alien paupers, whom, if we receive, we must support, is this a measure outside of what is recommended?

How are we met when we attempt to exercise the power conceded to us? If we attempt to meet pauperism in the great highway of its introduction, we are rebuked for regulating foreign commerce, although everybody can see that, if this privilege be denied to us, we can take no effective measures to prevent its introduction; for we must see the persons and know their condition before we can decide what is expedient. Moreover, nothing can be effectual that is not felt by those who are chiefly instrumental in the introduction of such persons.

We may protect ourselves, say the court; but when, how, where? These are pregnant inquiries. Can we deal with paupers and pauperism as with contagion or infection? Can we hold those who bring the calamity upon us accountable? Can we protect ourselves as we do against the dangers of gun-powder and explosive articles, which put in peril life and property? We lay the burden of protective measures upon those who bring in such merchandise or such diseases.

333*] *What can a State do to avert or prevent, after the paupers and vagabonds are landed and mixed with the popluation? Such an exercise of the power conceded to us would be barren and useless. We must meet it on shipboard, as we do disease and dangerous merchandise. There we can put our hands upon the lunatics, idiots, aged and infirm paupers, etc. There we can learn what the ship owner, the master, and the agents for emigration are about. There we can detect their conspiracy with the parishes of Europe to transfer their poor and their culprits to this country, to poison our morals and increase our burdens. There is the place, and the only place, to apply the corrective, where the evidence can lead to no mistake.

If we cannot meet the evil here, and regulate it here, the power to expel and the power to prevent are empty and worthless. The result will be, that ship masters and traffickers in emigration can and will force upon us paupers, vagabonds, felons, and infamous persons, though we have an admitted power to expel them.

The Constitution was never designed to work out such results—results which are as injurious to the United States as they are to the States. If we cannot meet and control by suitable regulations the introduction of such persons, on what principle can the laws expelling or forbidding the introduction of free negroes be sustained? Such laws exist, and I apprehend it will be found difficult to sustain them on the ground of color alone.

But I have dwelt, perhaps, sufficiently on this question of power to admit or deny to persons the right to live among us. A still more important inquiry, though secondary in principle, arises as to the power to exact two dollars for each alien, as a condition upon which he may come to abide here? I contend that this feature of the law (although, in reply to the arguments of counsel, it has been treated as a revenue measure) is, in fact, strictly a police measure.

The counsel deny that the State has a right to take any money in execution of the law. I trust we have vindicated the right, as belonging to the reserved power of the State to tax whatever is within its territory; but whether we have or not, there can be little doubt that police laws carry with them the inherent right to raise in some form sufficient funds to execute the law.

It is upon this ground that fees are paid to pilots, and that masters are compelled to pay, whether they take a pilot or not. It is on this ground that ship-owners are obliged to pay the expenses, often large, of quarantine and health laws. It is on this ground that ballast laws and harbor laws are enforced. *All such acts subject the party, either [*334 to expense or to what is equivalent.

These police acts all stand on the firm basis of acknowledged right. The authority of a State to maintain and enforce them is admitted. They are mostly precautionary measures, found necessary for the public welfare. The principle running through them all is, that those who give occasion to resort to corrective legislation must bear the expense. It may be a great misfortune to have contagion on board of a vessel; but those who sail her bring it in, and must bear the expense of the measures necessary to preserve the public health. This right goes, not only to the requirement of money, but to the destruction of property, when safety demands it. This principle is inherent in the police system, and if it were not—if the expense of executing such laws could not be exacted—they could not be executed at all. The State manifestly ought not to be required to pay pilots, or for the expense of quarantine.

Is there any well founded distinction between this mode of employing police power and that adopted by Massachusetts? Is not protection against paupers just as necessary and as completely police in its character as the preservation of health?

Let us look attentively at the law of Massachusetts in this particular. It manifestly cannot be executed without expense. Officers, boats, and boatmen are necessary, for vessels must be boarded. The passengers must be examined, and bonds, in some cases, required. These are admitted to be appropriate measures, but they cannot be executed without money. Those who can give no bonds must be sent back, and this is attended with large expenses.

It is obvious that the amount of expenses can neither be foreseen nor accurately estimated. What rule could, under such circumstances, be adopted for raising funds? The Legislature, being left at discretion, thought, in the then existing state of things, a scale equal to two dollars each for such aliens as gave no bonds would be adequate to the exigency, and accordingly required the master to pay that much. And the Supreme Court of Massachusetts say,

that it little more than covered the actual expense at the time this suit was instituted. There has since been a great increase of the number of aliens arriving annually in Massachusetts, and this fact is employed to lead the court to erroneous conclusions. We believe, however, the case is to be decided by the record, and if so, it will be seen that the record does not object to the amount of money raised, but to the right to raise any. The objection is to the power of the State to demand any. We say we have a right to enough to meet all expenses, at least, under any view of 335*] constitutional *power which may be taken, and that an excess cannot be noticed by the court unless the fact appears upon the record.

I have now chiefly gone over the material considerations connected with this case, and feel deeply conscious that I have but too imperfectly discharged the duty imposed upon me. I will, however, briefly recapitulate the positions which have been assumed, that the court may, at a glance, see in connection the grounds upon which we stand.

1st. I have maintained that the law of Massachusetts is a police act for the regulation of paupers and pauperism.

2d. That the State has a right to make such laws, which are but a modification of a system which has been maintained by her people for two hundred years, who have and do claim the right of unqualified sovereignty in this particular.

3d. That although the Constitution gives to Congress the power to regulate foreign commerce, yet this is not an exclusive but a concurrent power, and that, consequently, the State may, within its own limits, regulate foreign commerce, provided it does not make laws for that purpose which are repugnant to the laws of the United States.

4th. That no such conflict or repugnancy does exist between the law of Massachusetts and any law of the United States, and therefore the law of Massachusetts is valid.

5th. That two views might be taken of that provision of the law which required the master to pay after the rate of two dollars each for all alien passengers brought into port and landed.

First, the counsel for the plaintiff maintains that it is a tax for revenue, and as such is a regulation of commerce. We meet them on this ground by saying, that the provision can be and is maintained under the taxing power of the State, which, being concurrent and coextensive with that of the United States, and equal to it, necessarily confers the right to tax navigators, owners, passengers, or any other class of persons engaged in commerce, unless the State is restrained by the prohibitions in the Constitution; that these are limited to duties on imports and tonnage; that men are neither the one nor the other, nor are they the subjects of trade and commerce, as they are not bought, or sold, or brought into the country by anyone for the purposes of trade. They are, therefore, excluded from the prohibitions, and are left to the State as a resource of revenue, and may be taxed.

The other view follows out the principle upon which we start, namely, that the law is strictly a police act made to correct an existing and growing evil, and stands upon the same basis as the quarantine and health laws of the States. In looking at the subject in this aspect, we contended that the States *do, [*336 and always have, exercised an extensive concurrent jurisdiction over foreign commerce, and those employed in it; that the laws of the States which relate to shipping, wharves, docks, piers, harbors, and the men employed in foreign commerce, are innumerable and, as was well said by Mr. Justice Catron, so numerous and diversified that Congress could not supply them in a century. I said that hence the necessity of a concurrent exercise of the power over foreign commerce was apparent. Our system, as a whole, is complicated; two governments spread over the same territory, but for different purposes, must impinge upon each other occasionally. But the day has gone by when we need feel any alarm from the strength of individual States. Virginia once held a twelfth of the political power in the Senate; now, she holds but a thirtieth, and her relative importance to the Union has waned beyond that proportion. The States, at every advance of the power and strength of the Union by an increase of the members of the confederacy, lose something of their relative importance and comparative strength. They go backward in the process, while the confederacy goes forward. This is a warning to us to take nothing from the power of the States to add to the power of the Union, for in the States lies the strength of the Union. This federal government is wholly incapable of managing the great and complicated affairs of this wide-spread country. It cannot legislate for the local wants of Maine and Texas. These are supplied by the local Legislatures of the States, whose powers are so great, so diversified, and so comprehensive, that, if this government were suspended in its operations, our persons and property would remain secure. Justice would be administered, and good order just as well preserved as it is now. The only material derangement would be in the foreign trade and commerce. It is manifest that our strength, and the durability of our system, lie in the federative principle—in the organization of States, whose powers embrace everything except a very few national objects. The limitation of this government to such objects alone gives to it its strength and usefulness, and the most unwise, if not the most fatal, course it can take will be to arrogate to itself the power of the States, by taking from them what they have been accustomed to enjoy through the whole federal history. The counsel say the power over foreign commerce is exclusive, and no doubt this doctrine extends also to commerce between the States. Commerce consists of everything belonging to trade and navigation. It is manifest, however, that the States have managed, controlled, and regulated at all times nine tenths of this intercourse. Their laws prevail, not only in the *ports, [*337 harbors, cities, etc., but I know of no attempt on the part of the United States to regulate in any way the trade between New Hampshire, Vermont, Rhode Island, and Massachusetts, or that between New Jersey, Connecticut, and New York. The great markets draw their daily supplies from the neighboring States,

which in turn supply their wants from those markets. Hitherto the United States have wisely left all these things undisturbed in the hands of the States; but if ever a contest grows up concerning this power, the decision must be that it is concurrent, as the United States are utterly incompetent to supply the necessary legislation. This is sufficiently manifest, if we take this District of Columbia as an example of the capacity and ability of Congress to administer to local wants.

Such are the grounds upon which I have endeavored to place the merits of the questions involved. We are opposed at every step, and whatever position we assume, it is alleged to be within the supposed mischief complained of. We are denied the right to board a vessel for the purpose of examining the passengers. We were always till now denied by the counsel the right to exact, in any case, a bond of indemnity for alien paupers; and as a bond is a contingent liability to pay money, it is difficult to see how it can be lawful, though it is now conceded to be so, while a claim for money is denounced as unlawful. The one right stands upon no better foundation than the other.

We are denied the right to demand money for any purpose. We can do none of these things without regulating unlawfully foreign commerce. We cannot meet and correct the evil of pauperism. England, Ireland, and Germany may empty their poor-houses upon us, and compel us to assume their burdens and to perform their duties to humanity, because we are passive, powerless instruments in their hands.

We do not believe that the States are thus shorn of their authority, or that the Constitution of the United States was ever designed to cover such broad ground, and therefore we feel confident that the law of Massachusetts is constitutional.

Smith v. Turner.

Mr. Willis Hall, for the defendant in error:

On the former argument of this cause, the distinguished counsel who will conclude this discussion illustrated it by supposing a citizen of the United States coming from Charleston by water to arrive in the harbor of New York; it may be a member of Congress, on his way to 338*] discharge his legislative *functions in the Capitol, or it may be one of this honorable court, proceeding to his seat in this august tribunal. His progress is arrested, and he is not allowed to proceed until he has paid a dollar to an official of the State or city of New York. This is true. Nor is this citizen allowed to enter the city at all, if infected with the yellow fever or any other infectious disease. And if he approaches the city by land, he will not be allowed to enter the ferry boat at Jersey City until he has paid the toll.

It would be a truer illustration to suppose a citizen or an alien—no matter whom, the President of the United States or the humblest individual that ever entered the harbor—any person capable of being the vehicle of infectious disease—to approach our city, bringing infection, bearing death to thousands—an approach more dreadful than that of an invading army. He is repelled—justly repelled—by the express authority of the law of nations. Vattel, Book, 2, ch. 9, sec. 123.

By whom is he repelled? By the federal government? Under what clause of the Constitution? Under which of its powers? Under its commercial power?—A traffic in contagion! a tariff upon disease! Under its war power? —A war with the king of terrors! No. The State, and the State alone, has the power, and alone is charged with the duty, of repelling disease, and of guarding its confines from the entrance of whatever might injure its citizens.

To turn away the stranger to perish was uncivilized and unchristian; but long experience proved that it was also unsafe. Men thus desperately situated would find means to communicate with their friends on shore, and thus the infection would be propagated in spite of all efforts at prevention.

The perception of this necessity, increasing wealth, a better civilization, and a larger infusion of the Christian maxim, "Do as you would be done by," at length erected a hospital on the coast, in connection with the quarantine, for the exclusive use of all persons entering our harbor from the sea, until they can safely be permitted to enter our thronged city.

How should the expenses of the quarantine and its appurtenances be defrayed? By the passenger, or by the State? The State did not invite the stranger to her shores. He did not come for her benefit. The misfortune which has fallen upon or threatens him is not of her procuring. Why should she divide the evil with him?

It is eminently proper that the passenger should pay all reasonable and proper expenses. He receives all the direct benefit, and the maxim applies. Qui sentit commodum debit et sentire onus. Here the State is indirectly benefited. So it *is by a turnpike; [*339 but the traveler, who receives the direct benefit, pays the toll. So in Europe it is supposed that the safety of society requires the adoption of a law in every nation that no one shall travel through the territory without a passport, but the traveler, and not the State, pays for the passport. The State is under no obligation to permit the passenger to enter her territory at all. Nothing can be more reasonable, therefore, than that she should make it the condition of his admission, that he should pay all the expenses which his admission occasions.

The record in this case shows, that, sometime in 1841, the plaintiff, as master of the ship Henry Bliss, brought into the port of New York, from Liverpool, a foreign port, and landed, two hundred and ninety-five steerage passengers.

1 Revised Statutes, p. 436, sec. 7, requires "the health commissioner of the port of New York to demand, and, in case of refusal or neglect to pay, to sue for and recover, in his name of office, the following sums, from the master of every vessel that shall arrive in the port of New York, viz.: "For the master and each cabin passenger in a vessel arriving from a foreign port, one dollar and fifty cents. For each steerage passenger, mate, sailor, or mariner, one dollar."

The defendant, as health commissioner, demanded of the plaintiff, as master, etc., the sum of two hundred and ninety-five dollars for

the use of the quarantine, for that number of steerage passengers brought by him in his vessel as aforesaid. The master refused to pay, and the health commissioner sued, as required by the statute.

The action is debt on the statute. The master demurred, on the ground that the State law is contrary to the Constitution of the United States, and void.

The Supreme Court of New York overruled the demurrer, denying that the State law is contrary to the Constitution of the United States, and declaring that the principle involved is essentially the same as that involved in the case of New York v. Miln, 11 Peters, decided by this court in favor of the State law.

The master appealed from this decision to the Court of Errors, the highest court in our State, and that court unanimously affirmed the decision of the Supreme Court. From that court the master has appealed to this high tribunal, and the only specification which he makes of the unconstitutionality which he alleges against the State law is, that it is a regulation of commerce over which the State has no jurisdiction.

This cause has already been once elaborately argued before the court. Cases involving 340*] analogous principles have since *been fully discussed by very eminent counsel. This re-argument which has been ordered admonishes me that the case itself has been thoroughly investigated by the court, which, after viewing it in every aspect, by the light of all the arguments which have been suggested, still finds itself perplexed with doubt and surrounded with difficulties.

Under these circumstances, far abler counsel might well despair of being able to present a new view of the case, or a new argument; but if I cannot hope to enlighten, I will promise at least not to detain the court longer than is necessary to run rapidly over the brief which I have prepared.

I. Our quarantine, as now established, rests upon two laws, both passed on the same day, both having a common origin, both made with obvious reference to each other, although by different Legislatures, and both forming in fact but one law.

The first was passed by the State on the 27th of February, 1799. The second was enacted by the federal government on the same day. To be understood, they must be collated and traced historically.

Far removed from danger, we now coolly discuss the provisions of laws made in the very agony of fear. We must retrace our steps; we must catch the spirit of the times before we can understand or appreciate the various provisions of those laws.

The State law is the one establishing the quarantine and marine hospital at Staten Island, and which adopts the provision as to passengers substantially as it now exists.

The law which in these days of State rights is sought to be overthrown, as going too far in asserting the separate existence of the States, was passed in the heyday of federalism and consolidation. It was passed by a federal Legislature, a federal council of revision, and *signed by John Jay*, as Governor. If it is obnoxious to the objections now urged against it, the objectionable clauses have not crept in through any oversight or inadvertence on the part of its framers. No law was ever better considered, both as to its efficiency for the purpose intended, and as to its collision with any law of the United States.

This obnoxious law was reported by a joint special committee, of which Aaron Burr was a member and De Witt Clinton was chairman. For ten years prior, the yellow fever had raged almost annually in the city, and annual laws were passed to resist it. The wit of man was exhausted, but in vain. Never did the pestilence rage more violently than in the summer of 1798. The State was in despair. The rising hopes of the metropolis began to fade. The opinion was gaining ground, *that the [*341 cause of this annual disease was indigenous, and that all precautions against its importation were useless. But the leading spirits of that day were unwilling to give up the city without a final desperate effort. The havoc in the summer of 1798 is represented as terrific. The whole country was roused. A cordon sanitaire was thrown around the city. Governor Mifflin, of Pennsylvania, proclaimed a non-intercourse between New York and Philadelphia. This may be thought to conflict strangely with the doctrine that the federal government alone has jurisdiction of commerce between the States, but it may serve as an illustration that the police laws of the States are paramount; that when men are trembling for their lives. no commercial regulations can oppose a moment's obstacle. Facts were proclaimed in Connecticut and in the neighboring cities, and when the pestilence had subsided, thanksgivings were proclaimed in this and the neighboring States. Governor Jay called the attention of the Legislature to the subject in his message, and they responded by appointing a joint special committee of the Senate and Assembly, at the head of which they placed De Witt Clinton, then a senator from the city of New York, just commencing that glorious career which has since rendered his name immortal. This act of raising a special joint committee of the two houses is as rare, and almost as significant of great danger impending over the republic, as that of appointing a dictator in ancient Rome. This joint committee reported the law of 1799 as a supplement to the law of 1798. This law contemplated, by an express provision, that the aid of the United States should be sought as far as deemed necessary, and another provision of the law imposed a light charge upon passengers, for the purpose of supporting the establishment.

The system then established has continued without material variation to this day. It seems to have had two objects in view:

1st. To cut off completely all intercourse between persons under quarantine and the city.

To effect this, the law required that the quarantine should be removed from Governor's Island, which was within three quarters of a mile of the city, to Staten Island, which was more than nine miles distant. It also required a plot of forty acres of ground to be purchased, and a wall to be thrown around it as high and impassible as that of a State prison, that no one might enter or escape without the permission of the health officer. It also directed that

a marine hospital should be built within the wall, and adequate accommodations prepared for all who should be sent to quarantine.

342*] *2d. The second object of the law was to cut off all communication between the vessel and goods, and the city.

To do this, they must put an end to the practice of suspected vessels breaking bulk at the wharves. They doubted their constitutional right thus to interfere with the landing of goods. They were puritanically scrupulous as to their federal duties. But neither Jay nor Clinton, nor Burr, ever doubted their entire right over persons, either to prohibit their landing or to prescribe such conditions as they saw fit.

To obviate this constitutional difficulty as to their interfering with the landing of goods, they determined to apply to the federal government. Accordingly, a clause was introduced into the law directing the Governor to make the application if he saw fit. This was the origin of the federal law. The court will perceive that it is directly connected with the State law, and obviously made with reference to it. Governor Jay had already applied to the federal government. He induced his friend John Adams to advert to this subject as follows, in his message of December 8th, 1798:

"While, with reverence and resignation, we contemplate the dispensations of Divine Providence in the alarming and destructive pestilence with which several of our cities and towns have been visited, there is cause for gratitude and mutual congratulations that the malady has disappeared, and that we are again permitted to assemble in safety at the seat of government for the discharge of our important duties. But when we reflect that this fatal disorder has, within a few years, made repeated ravages in some of our principal seaports, and with increased malignancy, and when we consider the magnitude of the evils arising from the interruption of public and private business, whereby the national interests are deeply affected, I think it my duty to invite the Legislature of the Union to examine the expediency of establishing suitable regulations in aid of the health laws of the respective States."

In the response, which was then customary, from the Senate, they reply to this recommendation as follows:

"Sympathy for the sufferings of our fellow-creatures from disease, and the important interests of the Union, demand of the national legislation a ready co-operation with the State governments in the use of such means as seem best calculated to prevent the return of this fatal calamity." Senate Journal, p. 21.

Thus it appears that neither the President nor the Senate contemplated the establishment of a complete system, but merely a law auxiliary to the State systems. Of course it became necessary to examine the State systems, 343*] to see what aid was *required, and especially the New York system, with special reference to which this legislation was called for.

In compliance with this recommendation of the President, Congress passed the law of the 25th of February, 1799.

This law begins by requiring the collectors and revenue officers to observe the restrictions imposed upon vessels by the State health laws, and to aid in their execution. It next provides for landing goods elsewhere than at the wharves of a city. It then requires the parties interested to pay for storage of goods "landed elsewhere," etc.

Of this law it is to be observed—

1st. That it confines itself entirely to goods, over which it was supposed, under its commercial powers and its exclusive right to collect duties, it must exercise an exclusive control.

2d. That it provides no means of supporting the quarantine. This is a universal charge throughout Europe wherever quarantines are established.

This was not an oversight, for the law provides for the expenses of purifying and storing goods, but says nothing of the expenses of purifying, healing, and maintaining passengers. This omission is fully accounted for by the fact that all the State laws, and especially the laws of New York, had already provided for the general expenses of the quarantine, and Congress had knowledge of those laws, and was satisfied with them. Another inference from the omission of this essential provision is, that Congress doubted its power to lay a tonnage or other duty for any such purpose. It certainly has no such power except under the general welfare clause, which was then stoutly denied by a party which, two years afterwards, gained the ascendency, which it has subsequently maintained.

3d. A third observation is, that it was passed on the same day with the State law which suggested to the governor the propriety of calling on the federal government for aid, and the perfect understanding which existed at that time between the two governments leaves no room to doubt that it was passed mainly at the instigation of Governor Jay; that it was made especially with reference to the New York law; that the two laws form, in fact, but one; that to be understood they must be read together; that the federal law contains not only a general, but a particular sanction of every section in the State law.

In reliance upon these two laws thus established, New York has gone to great expense in forming an adequate establishment for our harbor—one which has protected the city since its complete establishment in 1805. Of its efficiency, a distinguished physician of New Orleans thus speaks: "If the *disease is [*344 not communicable by infection, how can we account for the fact that in a few years five physicians, health officers for the quarantine of New York, have fallen victims to it, while there has not been a case known in that city for twenty-two years?"

From the foregoing facts another conclusion arises worth noting. New York has acted in good faith. Under color of police regulations, she has not attempted to regulate commerce. In her legislation she has had no object in view but protection from disease.

II. The charge which the State, by her law, exacts from passengers arriving in the port of New York to support her quarantine, is merely a common law toll, and may be defended on the same principles as the ferriage from Staten Island to the city. All the rules of a toll apply to it.

1st. It is established by the State for the

support of work done for the public good, to be paid by those only who are especially benefitted by it. 1 Mod. 474; Cro. Eliz. 711.

2d. It is supported by a good consideration, which is necessary to a toll. 2 Wilson, 296; 4 Taunt. 520; 10 Barn. & Cress. 508.

Those who do not go to the hospital receive a consideration, as well as those who do. The probability of advantage is as good a consideration as the actual enjoyment of the consideration.

Ramsgate harbor is supported by a toll upon all vessels, whether they enter or not, which come into a situation from which they would be compelled to seek refuge there, in case of a storm. 3 Wm. Bl. 714.

If a port of refuge is a proper subject of toll at a point where it becomes essential in case of a storm, much more is a hospital of refuge, at a point where there is peculiar danger of disease, and when, without it, disease would be death.

This principle of charging those who receive no actual benefit is very common. It is sufficient to instance pilotage. It is part of every system of pilotage, that, if a pilot offers, the vessel must pay pilotage whether she receives or rejects him.

3d. There is an essential difference between a toll and a tax. "Tax" comes from a word that means the arrangement of the items of the public account. It has long since come to mean the charge which the government exacts of its citizens for its support. A tax is public, a toll private. A toll rests upon a good consideration. A tax is irrespective of consideration; it rests upon the authority of government alone; it is as imperative in a bad government as a good. That the distinction is a substantial one appears from the fact that in 345*] England a toll *may be granted by the king, but a tax can be levied only by an act of Parliament. Cro. Eliz. 559; 3 Lev. 424; 2 Mod. 143; 4 Ib. 323.

In this respect, this case differs from the Massachusetts case, which was argued at the last term, and is about to be re-argued. There the two dollars exacted of the passenger for the benefit of the almshouse is applied to a purpose in which the passenger has no particular interest. It might as well have been applied to any other, or be paid at once into the treasury of the State, for its use for all purposes. It is, therefore, a tax, and rests upon the authority of government alone, but for the New York charge there is a fair equivalent—it rests upon a private consideration.

III. In all ports, quarantine (including lazarettos) is now one of the established charges. It is of modern origin. None prior to the plague in Marseilles in 1720. McCulloch's Dict. art. Quarantine; Howard on Lazarettos, passim.

The charge in England is much higher than it is here; indeed, the charge here is less than in any other commercial nation. The necessity of these establishments is now universally admitted by all disinterested persons.

The laws relating to quarantine in all nations are ususally classed among municipal regulations. They are so in France. See Dict. de *Jurisprudence, arts.* Autorité Municipale, and *Salubrité Publique.* They are so in England. Evans, in his collection of statutes, places them among police and criminal laws. 6 Evans's Statutes, 142.

For convenience, quarantine charges in England are collected at the custom-house; but they are carried to the consolidated fund. 45 Geo. III., c. 10, sec. 7. This fund is devoted to the support of the king's household and the civil expenses of the internal government. 1 Bl. Com. 331.

They are so also in Denmark. A remarkable illustration of this fact appears in the recent discussion of the "Sound dues." In a communication on the subject from the Secretary of States (the distinguished counsel who concludes this argument) attached to President Tyler's inaugural message of June, 1841, the sound dues were complained of as unreasonable. When the territory on both sides of the Sound (it is said) belonged to Denmark, there may have been some foundation for the charge; but the territory on the north of the Sound has, for several centuries, been an independent nation. There is, therefore, no longer a pretext for the exaction. The distinguished counsel admitted that the port charges which arose in consequence of being compelled to go into port to pay the dues were properly payable, for they rested upon an equivalent. By turning to *our own [*346 State papers (2 Com. and Nav. 144), it will be seen that one of these port charges is for quarantine.

Again, all the maritime States of the Union have considered quarantines as an internal municipal regulation, entirely within their jurisdiction, and no one has ever thought of applying to the Union on the subject, except where they have attempted to defray the expense by a tonnage duty, which can be laid by a State only by consent of Congress.

Virginia has never applied to Congress on the subject. She requires the master or owners of the vessel to defray the expense.

Pennsylvania and Delaware have never asked the assent of Congress to any law. They defray expenses precisely as is prescribed by the New York law.

Maryland, South Carolina, and Georgia have established their own systems, but they have preferred to defray the expenses by a tonnage duty. To do this, they were of course compelled to get the permission of Congress.

New York has considered them as municipal regulations under every dynasty. The first law on the subject on her statute book appears in 1758. 2 Liv. & Smith, Col. Laws, ch. 199. She was then a colony. All her commerce was then regulated in London, as now in Washington. Yet the execution of this law was in the hands of the colonial authorities. They prohibited the vessel from landing, until examined and purified, and charged all expenses to the master. This interference was not considered a regulation of commerce by the mother country.

The same law was re-enacted verbatim in 1784. 1 Greenl. 117. New York was then a separate and independent sovereignty, and had her own custom-house and revenue officers. Yet the execution of this law was given, not to her revenue officers, but to the master and wardens of the port.

The third law was passed in 1794. 3

Greenl. 146. New York had then become a member of the federal Union. This law assumed the whole subject of quarantine, and all its appendages, as being under the exclusive control of the State.

Thus quarantine laws, passed in three widely different dynasties preserve to the quarantine of New York the same municipal character.

This slight review of the New York laws cannot fail to impress upon the court, not only that she has always considered them essentially police laws, but that the construction which New York has put upon her rights to impose quarantine charges upon master, owner, or passengers was contemporaneous with the Constitution, and has been continued without ob-
347*] jection *more than half a century. We claim, therefore, the application of the rule in Stuart's case, that "a contemporaneous exposition of the Constitution of the United States, adopted in practice and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it." 1 Cranch, 299.

IV. All the legislation of the United States on this subject has been in corroboration and recognition of the State quarantine and health laws, and whenever this court has adverted to them, it has been to approve of them, as within the State authority, notwithstanding their admitted interference with commerce. The United States have passed three laws on the subject.

The first was the law of May 27th, 1796. 1 Story's Laws, 432. This law simply required the President to direct the revenue officers to aid in the execution of quarantine, and also the health laws of the States.

Hypercriticism may contend that the establishment of a marine hospital on the quarantine grounds, for the exclusive reception of infected persons thrown upon our coast from the sea, has nothing to do with quarantine. But it is absurd to say that it is not a pertinent and appropriate part of our health laws, and under the express sanction and protection of the United States law of 1796.

The second law was passed on the 25th of February, 1799. This law we have already examined, and found that the whole purport of the law, as well as the proposition in the President's message was to come in aid of the State laws.

The third law was passed on the 13th of July, 1832. It simply authorizes the Secretary of the Treasury to employ additional boats if necessary, to aid State quarantines.

These laws sanction the whole system of State quarantines, and everything appurtenant to quarantines, such as hospitals, and the means of purification, and the preventing the spreading of contagion. Of these laws Chief Justice Marshall has said: "The laws of the United States expressly sanction the health laws of a State." 12 Wheat. 444.

Again, the decisions of this court, in harmony with the laws of the United States, have always spoken with approbation of the health laws of the States. In Gibbons v. Ogden, Chief Justice Marshall holds the following language: "The inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description *as well as laws for regulating the [*348 internal commerce of a State, and those with respect to turnpike roads, ferries, etc., are component parts of this mass." 9 Wheat. 203.

In numerous subsequent decisions, this court have always adverted to this class of State laws in the same strain.

To this it will be said, in reply: This doctrine is readily admitted, but a marine hospital is no essential part of a system of health laws.

We answer,

First, a marine hospital or lazaretto is connected with the quarantine in every nation in Europe.

Second, nearly a century's experience in our own port, with and without an hospital, has demonstrated its necessity.

Third, the State, which has the sole discretion in the matter, has deemed it a necessary part of her quarantine.

A quarantine regulation is not merely a detention of forty, or twenty, or any other number of days. Instead of a detention, it may be a deviation, a requiring of passengers to be landed at a particular point, or it may be an order that the sick shall be received into an hospital made for the purpose, and cared for.

V. It must be admitted that the States may pass quarantine and health regulations, that is, laws to prevent the introduction of infection into their harbors. Consequently, they may resort to such means for that purpose, and to defray the expense, as they judge expedient, and as are within their jurisdiction.

The possession of the power to establish embraces the power to support. For example, the Constitution gives the power to Congress to establish postoffices. Under that power they have always exercised the right, without dispute, to exact postages.

It is a maxim in this court, laid down in the case of Miln and in numerous other cases, that a State has jurisdiction of all means not prohibited to it by the federal or State constitution. It is not pretended that the means resorted to in this case are prohibited by the State constitution; nor could such prohibition, if it existed, be the subject of inquiry in this court.

VI. The whole controversy, then, reduces itself to the single question, Is the means which has been resorted to by the State of New York to support its quarantine and health laws—that of exacting a toll or tax of passengers—prohibited to it by the federal Constitution? We confidently aver that it is not.

1st. This power, which is included in the power to prohibit the entrance or exit to and from the territories of the States, is nowhere given to the federal government. It is nowhere granted as a substantive power. The power to grant ingress and egress to and from its territory belongs to every sovereign *State. [*349 Vattel, lib. 2, ch. 7, sec. 98; 2 Ruth. Inst. 476. They may, therefore, attach what conditions they please to this privilege.

In the distribution of the substantive powers of government between the sovereignty of the United States and the State sovereignties, those only which were expressly granted fall to the share of the United States; all others remain

with the States. In 4 Wheat. 195, this court say: "It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach."

By a substantive power is meant a power which may be exercised, not as a means, but an end. It must be expressly granted, either directly and distinctly by name, or indirectly, as included in and adhering to some other granted power. This power is nowhere granted by name, nor is included in any other grant of power.

First, it is not included in the ninth section of the first article of the Constitution: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

This is a case of migration, not of importation. This section gives Congress no power over migration. It recognizes a pre-existing right in the States to exclude it at all times, and says Congress shall not exclude it before 1808. Where does Congress get the power to exclude it after 1808? The prohibition of the exercise of a power for a limited time, which Congress did not possess before at all, cannot give it to them. Congress cannot take power, not as a means, but as an end, by implication. Such a conclusion is effectually excluded by the tenth amendment: "The powers not delegated to the United States, nor prohibited to the States, are reserved to the States or the people."

Again, this section at the time was explained, and has ever since been construed, as having no other effect than giving Congress power, after 1808, to prohibit the slave trade.

Judge Iredell, the leading member of the Convention from North Carolina, thus explains this section when submitted to the State convention: "The Eastern States, who long ago have abolished slavery, did not approve of the expression "slaves." They therefore used another, which answered the same purpose.... The word "migration" refers to free persons, but the word "importation" refers to slaves, 350*] because free *persons cannot be said to be imported." 3 Ell. Deb. 1st ed., p. 98.

Judge Wilson, who had the largest agency in forming the Constitution of any man except Madison, thus explains this section to the convention of Pennsylvania: "Under the present confederation, the States may admit the importation of slaves as long as they please; but by this article, after the year 1808 the Congress will have power to prohibit such importation, notwithstanding the disposition of any State to the contrary.... The gentleman says that it means to prohibit the introduction of white people from Europe, as this tax may deter them from coming amongst us. A little impartiality and attention will discover the care that the Convention took in selecting their language. The words are, 'The migration or importation of such persons, etc., shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation.' *It is observable here* that the term 'migration' *is dropped when* a tax or duty is mentioned, so that Congress have power to impose the tax only on those imported."

Here we have the express authority of Judge Wilson (and there is no higher on a question of constitutional interpretation), that this ninth section does not give Congress the power to tax free emigrants or passengers. The advocates for this power in the federal government must look for some other clause in which this power lies concealed.

Second, we are told it is part of the power contained in the grant to Congress "to regulate commerce."

The term "regulation of commerce" had a very definite and well understood meaning at and before the Revolution. The phrase had become popularized by the disputes between the colonies and the mother country. It was not understood to embrace any of the offices between ship and shore, such as pilotage, wharfage, quarantine, etc., all of which were regulated by colonial, and not by the laws of the mother country. See Colonial Laws, passim. It was not understood to embrace the right to levy duties for revenue, either upon persons or things. The assumption of the right to levy duties upon tea, under the pretense of regulating commerce, produced the Revolution. But the right to regulate commerce was conceded to England. In the address of the Continental Congress to the people of Great Britain they say: "The colonies are entitled to a free and exclusive power of legislation in their several provincial Legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign; but from the necessity *of the case, and a [*351 regard for the mutual intercourse of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are bona fide restricted to the regulation of our foreign commerce." 1 Journal, 28, 29.

The regulation of commerce was considered as something great and international—almost synonymous with the navigation acts—acts intended by Great Britain to secure the benefits of the commerce of her colonies to herself, and to regulate her commercial intercourse with foreign nations. In this popular sense it was used by the framers of our Constitution. The grant of the power to regulate commerce to Congress was intended merely to substitute in this respect the new government for the old—the United States for England.

Passengers are not the subjects of commerce. The power to tax them, if it existed in the federal government, would not be by virtue of the power to regulate commerce. They never have been treated as such by the federal government. Duties have been levied upon goods from the first, but never upon passengers. Passengers may be landed anywhere, but goods only in ports of entry. The payment of passage money gives no more control over them than the payment of board gives the hotel keeper control over his boarders. If the power to tax them is placed upon the general taxing power of the United States, that is universally admitted to be common to the States. This law of New York is, therefore, as constitutional as any other of her tax laws, even although Congress may tax the same things.

Again, the grant to Congress of the metaphysical power to regulate commerce did not carry with it any of the physical means of its exercise. The power to regulate, etc., is a mere capacity, a jurisdiction, an authority to make rules or laws. For example, the State has power to lay a poll tax of five dollars a head on every resident of this State. But does anyone suppose that, by virtue of this power, the citizen may be called upon by a tax collector to pay this sum? Must there not be a law to that effect? A mere power in the federal or State government is latent and dormant; like the electricity of the air, it is unfelt and unseen until its energies are concentrated into the thunderbolt of a law.

It is palpable that the grant of power to regulate commerce will not authorize the collector to exclude passengers from our soil, or levy a tax upon them. There must be some law to that effect before he can move.

If there is anything or any measure attached to the mere grant of the power to regulate commerce, and which passes with it, it is the right to lay a duty on tonnage. If the grant to Con- [*352] gress *would of itself exclude the States from any act, it would from this. Yet Marshall tells us that the States would have had this right, had they not been expressly excluded from it by another clause in the Constitution. 9 Wheat. 202. If the right to lay a duty on tonnage is not taken from the States by the grant to Congress of the power to regulate commerce, with what propriety can it be said that this grant takes from them the right to tax passengers?

Again. Laying duties on imports belongs especially to commerce. Yet Hamilton says the States would have had this right had they not been expressly prohibited. Federalist, No. 32, p. 169. And in neither case does the collector derive his authority to collect duties from the grant in the Constitution, but from express laws.

A similar idea is conveyed by Marshall in the case of Sturges v. Crowninshield, 4 Wheat. 196: "It is not the mere existence of the power, but its exercise," etc. Two conclusions follow:

1. The mere grant of the metaphysical power by the Constitution does not carry with it any of the physical means necessary for its execution. It does not execute itself.

2. That although the power be exclusive, the means are not so.

This idea, that an exclusive power seizes upon the appropriate means of its execution and makes them exclusive also, has been a fruitful source of error. The argument is, A tax upon passengers is an appropriate means of regulating commerce; therefore the power to regulate commerce seizes upon it and converts it to its own nature—that is, makes it exclusive, if it is itself exclusive.

This notion of a grant of exclusive power, carrying with it the means of its own execution, and assimilating them to its own exclusive nature, is not a mere abstract speculation, but has often been attempted to be enforced, as in this case, in practice. Thus in 1824 an attempt was made to compel the boatmen on the Erie Canal to take out coasting licenses, on the fallacious idea that the exclusive power of Con- gress over commerce gave an exclusive control over all the means of commerce. DeWitt Clinton's Message of 1824.

The same assumption led to the case of Wilson v. The Black Bird Creek Marsh Co. 2 Peters, 245. In that case the Legislature of Delaware had incorporated a company, and authorized it to build a dam across a tide water navigable creek, actually used for navigation. It was thought that this means of commerce pertained exclusively to the commercial power, and that any interference with it was of itself, without any act of Congress, *an infringement [*353 of the power to regulate commerce. But Chief Justice Marshall held that the power, without a law made in pursuance thereof, was nothing; that the repugnance of the State law must be to an act of the United States made in exercise of such power.

A similar case arose in the courts of the State of New York, The People v. The Saratoga Railroad Co. 15 Wend. 114. The railroad company built a bridge over the navigable waters of the Hudson, above any port of entry, and interfering with no law of the United States. The court held, that though Congress had the power, yet that there was no repugnance to make the State law void till Congress had exercised the power by passing a repugnant act.

Still, it is objected that the law of the State of New York laying a tax or toll upon passengers is a regulation of commerce, and that Congress alone has power to make a regulation of commerce. Admitting that Congress has the exclusive right to make such regulations, this is not a regulation of commerce. Does it purport to be a regulation of commerce? Does the State undertake to regulate commerce? No. It purports and has been used for half a century as a regulation of health or quarantine. Is it an appropriate regulation of health? Yes, unquestionably. Why, then, is it called a regulation of commerce? Is it because it interferes with commerce? All quarantines must interfere with commerce more or less; yet this court has repeatedly declared that they are not on that account unconstitutional. Is it because it may be used as a regulation of commerce? So may a duty on tonnage. Yet Chief Justice Marshall says the States might use it for revenue purposes. It therefore became necessary to prohibit it by a distinct clause.

This court has repeatedly held that the States and the federal government may do the selfsame thing in the exercise each of its respective and acknowleged powers. "Whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress, acting under a different power." 11 Peters, 137.

To say that a tax upon passengers may be resorted to by the federal government as a means is saying nothing. Every act which may be done by the States may be resorted to by the federal government as a means, if "necessary and proper" to the exercise of a granted power.

It has been shown that this power to pro-

354*] hibit the entrance *of passengers, or place any conditions upon their entrance, has never been granted directly or indirectly, as a distinct substantive power, or as adhering to any other power, to the federal government.

2. This power has nowhere been prohibited to the States. All the prohibitions upon the States are found in art. 1, sec. 10. The only clause which is alleged to prohibit the States from the exercise of this power is, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws."

1. This is not an impost or duty. The lighter takes the goods from the ship to the wharf for so much a ton. This is an impost in one sense, but not in the sense in which the word is used in this section. "Impost or duty," as used in the Constitution, means such as is laid by virtue of sovereignty alone, irrespective of consideration. But we have seen that the tax laid upon passengers by the State is, in fact, a toll resting upon a private consideration, as much as pilotage or wharfage, both of which are regulated by statute.

2. Passengers are not imports. That term is applied properly to things or slaves brought into the country as properly without their own volition.

"Immigration applies as properly to voluntary as importation to involuntary arrivals" (9 Wheat. 216), is the declaration of Chief Justice Marshall.

Judges Iredell and Wilson, active members of the convention which formed the Constitution, also declare that "import" or "importation" was intentionally used to avoid the idea of its application to passengers or emigrants. 3 Ell. Deb. 1st ed. 98 and 251.

Judge Barbour, in delivering the opinion of the court in the case of The City of New York v. Miln, says, "Passengers are not the subjects of commerce, and are not imported goods," etc. 11 Peters, 136.

3. But admitting, notwithstanding these authorities, that passengers are imports, this section does not prohibit the States from laying any duty or impost upon imports, but from laying more than is "absolutely necessary for the execution of its inspection laws."

If passengers are imports, the law in question is an inspection law. Infected or decayed goods are thrown into the sea. Infected passengers are sent to the hospital, and the necessary expenses are defrayed by a duty laid by the State, by express authority of the constitution.

Inspection laws apply to imports as well as 355*] exports. The *nucleus of this provision as to State inspection laws was introduced into the convention by Colonel Mason, and applied only to exports. 3 Madison Papers, 1568, 1569. It was afterwards modified, the word "imports" introduced, and it took its present form. Ibid. 1584.

Inspection of imports must relate principally to health. If, then, this toll or tax upon passengers is a duty upon imports, it is exclusively for the execution of a State inspection law. But it is objected, that in this case more is taken *than is "absolutely* necessary." This is denied. *The State has* advanced from its treasury, for the support and execution of this inspection law, more than it has received—from the adoption of the Constitution to 1799, from $1,000 to $5,000 per annum, in 1799, $15,000; in 1809, $6,000.

During the war and the previous non-intercourse and embargo laws, from 1809 to 1815, the quarantine establishment, including the marine hospital was sustained almost exclusively by the State. And the same must again occur whenever a foreign war arises.

If, then, in time of peace, there is a surplus (which is not the case), is it not proper that it should be applied to pay the debts of the establishment, and provide for its future wants?

Again, admitting that more is exacted than is "absolutely necessary," the abuse cannot be corrected in this way. The fact does not appear in the case. The State has had no opportunity of contesting this point. This case comes up on demurrer. But suppose the record presented the question of excess properly to the court. It could not pronounce it, on any principle, a defense to a party refusing to pay at all.

Besides, the Constitution itself prescribes the appropriate remedy for the evil: "And the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress." Constitution, art. 1, sec. 10. This clause in the Constitution supposes that the State law may collect more than is necessary for the purpose, and that it is not for that reason void. The action for excess must be brought by the United States, and Congress must correct the State law. This is the appropriate remedy, and this court has nothing to do with the matter.

The conclusion is irresistible. If this section includes a tax or impost upon passengers, it contains also an authorization of the State law.

3d. Not only does the Constitution not grant the power over passengers to the federal government, and not prohibit it to the States, but, from the foundation of the government, this power *has been exercised almost exclu- [*356 sively by the States, without objection.

First, that this power of admission to their territories was purely a State power was the doctrine of the founders of our republic.

Those who formed the articles of confederation inserted the following article: "The people of each State shall have free ingress and egress to and from any other State." Confederation, art. 4. From which it is to be inferred, that the power over ingress and egress was purely a State power, and that this article was necessary to restrict this power so far as the citizens of other States of the Union were concerned; but it did not attempt to interfere with its exercise in relation to aliens.

When, a few years after the federal Constitution was formed (which was intended as a revision of the articles of confederation), this article had been found defective in overriding the health laws of the States—in absolutely requiring the admission of the citizens of other States, although they might bring yellow fever with them—the article was modified as follows: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Constitution, art. 4, sec. 2.

This section was intended to authorize the exclusion of the citizens of other States, under the same circumstances under which they exclude their own. This section had no reference to aliens. The right of the State as to them remained as before. It is worthy of observation—

1. That the New York law makes no distinction between its own citizens and all other persons.

2. That the case shows, and the fact is conceded, that all the persons on whom the tax was levied in this case were aliens.

Again, that the power over ingress and egress was not taken from the States by the new Constitution was the contemporaneous exposition.

In the first Congress after the adoption of the Constitution by the convention, in which were many members of that convention, the following resolution of the date of the 16th of September, 1788, was passed:

"Resolved, That it be, and it is hereby recommended to the several States, to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." Journal of Congress, Vol. XIII.

Laws were accordingly passed during that year and the next, and for five subsequent years after the Constitution went into operation, by most of the States; among which 357*] were Virginia, *South Carolina, Georgia, New Hampshire, Massachusetts, and New York.

Second, not only were such the expressed opinions of the statesmen of that day, but ever since. It is believed that every State in the Union has practically guarded the gates of her own territory, and permitted the ingress and egress of such things and such persons only as she pleased.

1. As to the egress of persons. All the States of the Union constantly enforce the writ of ne exeat. Numerous States, since the adoption of the Constitution, have passed or enforced laws prohibiting the egress of debtors without the leave of their creditors.

2. As to the export of things. The statutes of New York declare, that "no flour shall be exported from the State until it has been submitted to an inspector." 1 Rev. Stat. 1st ed. p. 536, sec. 1. Similar laws have been made as to beef and pork, and most of the productions of the State. Similar laws have also been passed in other States.

The State may lay an embargo absolutely prohibiting the export of any or all articles. Mr. Madison moved in convention to prohibit the States laying an embargo, but it was not thought expedient, and the proposition was rejected. 3 Madison Papers, 1444.

It is not intended to say that Congress may not resort to an embargo as a means. But it has no power to interdict the export of any article irrespective of the object. For example, it may perhaps resort to an embargo in the exercise of the war power, but it cannot do it to prevent a famine.

3. As to the ingress of persons. The State poor laws, settlement laws, laws prohibiting the entrance of paupers, convicts, infected persons, etc., are of this description.

The laws of most, if not all, of the slaveholding States, prohibiting the entrance of free blacks is another instance of the exercise of this power. Does anyone suppose the same power could legally have been exercised by Congress?

4. As to the importation of things. Mississippi, and, it is believed, some other of the Southern States, have assumed the right to prohibit the importation of slaves as merchandise, and this right has been sanctioned by this court in the case of Groves v. Slaughter, 15 Peters, 449. The same right has been claimed and exercised by all the free States.

In New York, the introduction of bank notes under one dollar, and of lottery tickets, is prohibited. 1 Rev. Stat. 1st ed. p. 666, sec. 29; p. 713, sec. 8.

So the introduction of noxious or immoral articles, injurious to the health or morals of the people, is universally prohibited by *the States, and not by the federal [*358 government; such as licentious books, immoral paintings, articles of gaming, tainted food, dangerous preparations of gunpowder, and all nuisances.

The proposition, that the laying duties or the right to regulate commerce, gives Congress the right to import what it pleases, is not true. The case of Brown v. Maryland, 12 Wheat. 419, by no means supports it. The whole doctrine of that case is, that Congress has a monopoly of duties on whatever articles the State permits to be landed.

Elsworth held in the convention, that taking from Congress the power to lay duties on exports did not take away from it the power to lay an embargo (3 Madison Papers, 1385) or prohibit exportation. On the same principle, giving the power to lay duties on imports does not give the power to import.

These examples show abundantly how extensively and constantly the States have exercised this power over ingress and egress—over imports and exports. On the other hand, no instance is recollected of Congress exercising this power over persons, except in the case of what is known as the alien law of 1798. By this law power was given to the President by his marshals, to remove certain aliens. 1 Story, 515, ch. 75.

This law was bitterly censured at the time, and the right assumed by Congress denounced as unconstitutional. And it is now almost universally admitted that it was a violent and unconstitutional stretch of federal power. Mr. Tazewell, a distinguished senator from Virginia, said: "But one power was given to Congress over aliens—that of naturalizing them; and this did not authorize Congress to prohibit the migration of foreigners to a State, or to banish them when admitted. The States had not parted from their power of admitting foreigners to their society." Ell. Deb. 1st ed. 251; 2 Virginia Stat. at Large, New Series 492.

This assumption of power on the part of Congress greatly excited and aroused the country. The Legislatures of Virginia and Kentucky denounced the law, and passed resolutions supposed to have been drawn by Jefferson and Madison, and which have ever since been considered as of incontrovertible authority in the construction of constitutional law.

The following is the fourth of the Kentucky resolutions: "That alien friends are under the jurisdiction and protection of the laws of the State where they are; that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens, and it being true as a general principle, and one of the amendments to the Constitution having also declared, that the powers not delegated to the United States by the Constitution nor prohibit-359*] ed *by it to the States are reserved to the States respectively or the people, the Act of Congress of the United States passed 22d of June, 1798, entitled 'An Act concerning aliens,' which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force."

VII. The law of the State of New York does not violate or contravene the provisions of any law or treaty of the United States. "Laws made in pursuance of the Constitution, and all treaties made or to be made, or which shall be made under the authority of the United States, shall be the Supreme law of the land." Constitution, art. 6, sec. 2.

1st. As to treaties. The vessel was an English vessel, and it is conceded that all the emigrants on whose account the toll was collected were British subjects. If the toll violates in letter or spirit any treaty with England, it is illegal and void. The treaties by which our intercourse is regulated with England are the treaties of 1794 and 1815. These treaties profess to place the two nations on terms of equal and reciprocal advantages.

1. Does it violate reciprocity? The New York law lays a tax or toll upon passengers to defray the selfsame expenses which England defrays by a tonnage duty. England collects four times as much from our vessels for the support of her quarantine and hospital as we do from hers. The expenses in England amount to nearly a dollar per ton for an ordinary vessel of three hundred or four hundred tons. We collect that amount only upon here and there a passenger vessel. If, therefore, there is any violation of the reciprocity stipulations of the treaties in the execution of quarantine or health laws, it is on the part of England. 2 State Papers, Com. and Nav. Mitchell's App. No. 9.

2. This is a law regulating the internal police of the country; and it is a rule of international law, independent of treaties, "that all foreigners are admitted into a country on condition of obeying its laws." Vattel, lib. 2, ch. 8, sec. 101. One of the laws which they are bound to obey is the payment of all reasonable tolls. Ibid. lib. 1, ch. 9, sec. 103.

This principle of international law is incorporated in these treaties, which are made expressly subject to the laws and statutes of the country. Treaty of November, 1774, art. 14; of July, 1815, art. 1; Ell. Dip. Code, 253–275. It is immaterial, so far as treaties are concerned, whether laws be made by the States or the United States. If it were within its constitutional powers, indisputably Congress might lay such a tax, as well as add a new item to the tariff. The State law is not obnoxious to the objection of infringing any treaty.

2d. As to a law. There is no law [*360 of the United States taxing passengers. Ever if they have the power, they have not used it. Nor can it fairly be said that there is a law regulating passengers. The law of 1819 (3 Story, 1722) relates to "passenger ships and vessels." It regulates the number of passengers who may be taken on board by the tonnage. It was made in the exercise of the undisputed police power of Congress over vessels on the ocean. There is nothing in it with which the State law interferes in the remotest degree.

But, it is replied, we do not contend there is any conflict with any written law, any actual regulation, but with "a non-regulation."

Congress, it is assumed, has legislated on the subject of passengers, and it is as much its will that what is not prohibited should remain as it is, as what is prohibited. In other words, that, by making one regulation on a subject, Congress takes possession of the whole subject as effectually as by making every possible regulation. This ingenious theory has never been applied in practice, and never can be.

1. None but "laws made" are declared by the Constitution to be the supreme law of the land. Is this imaginary "non-regulation" a law made by Congress? What are its terms, its provisos, and its exceptions—its extent, its length and its breadth? And who is to construe and apply it?

2. This inferential legislation is uncontrollable by Congress. A vast mass of means hitherto left exclusively to the States, as more advantageous to the country, will be immediately seized upon and appropriated by the federal government, not by virtue of any new legislation, but by this court sanctioning the theory of "non-regulation." No discretion is left to the Legislature. The Constitution becomes self-acting. It seizes, proprio vigore, when any power is put in action by the slightest act of legislation on the subject, upon all the means which might by any possibility be brought within its reach. The concurrence of State power becomes an empty sound.

The rule, in case of collision between federal and State laws on a subject of concurrent jurisdiction, laid down by Marshall, is, that "the State law, so far, and so far only, as that incompatibility exists, must necessarily yield." 5 Wheat. 49, 50. This is no longer the rule. The State laws must yield so far as the federal power extends—so far as the federal government had power to pass incompatible laws.

Things which have hitherto been left to the States must be taken from them. Pilot laws, harbor regulations, laws respecting lighterage, wharfage, etc., must be abolished. Tide mills, dams, bridges, etc., upon navigable tide water, which *line our coast, must be swept [*361 away. Under the doctrine of "non-regulation," Congress takes possession at once of all the remote as well as immediate means of executing its powers, e. g., the power to regulate commerce gives remote power over the ship builder, the timber merchant, the lumberman, etc. The names of some of the titles in the French Code of Commerce, may convey some idea of the extent of power which may be in-

cluded in the power to regulate commerce: Partnerships, Banks, Brokers, Carriers, Bills of Exchange, Vessels, Insurances, Bankruptcies, etc. Thus far Congress has left these subjects to the States; but if this doctrine of "non-regulation" prevails, the matter is taken out of the hands of Congress, and all the regulations on these subjects which it was competent for Congress to make under its constitutional power are to be considered as made already. State power is in effect annihilated; if not at once, it is so crippled that it dies a lingering death.

This rule of construction will be found oppressive in the extreme, and impossible. Oppressive, because it requires men to obey laws which they cannot know; impossible, because the courts cannot apply it. The courts easily determine the limits of a written law, and their decisions are uniform; but it surpasses human knowledge to ascertain with precision the ramifications of a subject matter.

Subjects intermingle. Commerce, manufactures, agriculture are concerned in ship building. Scarcely an act can be presented to the court which is not compound. How much of that subject, which carries with it the power of Congress, shall be necessary for that purpose?

It is to commerce particularly that this theory has been applied. "Commerce," it is said, "is a unit, and what is not regulated is as much a part of the unit as what is." We may admit that the power to regulate commerce is a unit, and is exclusive. We may admit that the regulations of commerce form one system, and are all exclusive. But the means employed or resorted to by these regulations are as diverse as nature, and as free to the States as to Congress. This case turns upon taking money as a tax or toll from passengers. This is not a regulation of any kind, but an act, a means.

These means are not permanently or necessarily attached to the regulation which adopts them. Granted that they may be resorted to to-day by a regulation of commerce, they are not inseparately attached to that regulation. They form no part of the unit. They may be resorted to to-morrow by a totally different regulation—one of health or finance on the part 262*] of *the States. The fallacy consists in confounding a regulation of commerce with the means which it adopts.

This idea of unity was first broached by Mr. Madison, who suggested that the right to regulate commerce was one and indivisible, and would exclude the States from the right to lay tonnage duty, and consequently that there was no necessity for any express prohibition in the Constitution upon the States. 3 Madison Papers, 1585. The convention thought otherwise, and inserted the prohibitory clause, and Marshall intimates that it might have been resorted to by the States had it not been prohibited. 9 Wheat. 202. The idea was again suggested by Mr. Webster in his argument in the case of Gibbons v. Ogden, 9 Wheat. 14. "Henceforth," he says, "the commerce of the State was to be a unit." This view of the nature of the commercial power was afterwards referred to by Marshall as one having great weight. Ibid. 209.

The major proposition of these distinguished men, of the unity of the commercial power, is not contested, but merely its application to commercial means. The case of Gibbons v. Ogden was not decided against the State on the ground that the law of the State violated the commercial unity, or that the means employed by the State were not in themselves common to both governments, but because a law of the United States had already appropriated them to her use, and that the law of the State attempting to do the same was necessarily repugnant to the federal law, and therefore void.

Marshall certainly did not intend, by the unity of commercial power, unity of commercial means, nor that the power of Congress to use the means of itself appropriated them, or that "non-regulation" was equivalent to regulation, in any case.

In Sturges v. Crowninshield, his language is, "It may be thought more convenient that much of it [any subject committed to Congress] should be regulated by State legislation, and Congress may purposely omit to provide for many cases to which their power extends." 4 Wheat. 195. It is obvious that he thought that the States might use any means whatever not prohibited to them, and which Congress had not by an actual law appropriated to itself.

Again, he says in Wilson v. The Black Bird Creek Marsh Co.: "If Congress had passed any act which bore upon the case, . . . we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act." True, says the objector, but Congress has power to pass such an act, and "non-regulation" is equal to regulation. It is clear that Marshall gave no such efficacy to "non-regulation."

*The repugnance which makes a [*633 State law void must be to some actual existing law of the United States, and not to some non-existing inferential regulation.

I have attempted to prove that the power over passengers either to exclude or tax them has not been given to Congress, either directly or indirectly; that it has nowhere directly or inferentially been prohibited to the State; that in practice it has been used by the States exclusively since the foundation of the government; and that the law of the State of New York now in question, made in exercise of that power, does not, in the remotest degree, infringe any treaty or any law of the United States.

I cannot conclude this argument without calling the particular attention of this court to the case of The City of New York v. Miln. The Supreme Court of the State of New York held this case to be identical with that. In that case the State law required the master to deliver a manifest of his passengers to the mayor within twenty-four hours after his arrival; to give bond and security for $300 to the city to indemnify against expenses of maintenance; that the master shall remove such passengers as the mayor, etc., shall direct; that the vessel shall be liable for any penalties incurred by the master. That law, like this, was alleged to be a regulation of commerce. That law prohibited passengers from landing altogether. This allows them to land on condition of paying ex-

penses. That law required the master to give bond and security in $300 for each passenger. This law allows each one to come on shore on payment of the expenses. That law, after two elaborate arguments, was held not to be a regulation of commerce. In what particular does it differ in principle from this? Both are made in the execution of police laws of the State. Neither assumes to regulate commerce, and both are interferences with it.

The gist of the argument of Mr. Justice Story in his dissenting opinion in that case is, that "the States cannot resort to a regulation of commerce," etc., etc. Certainly not. The very question in dispute was, whether that was a regulation of commerce. He assumes, without proving it, the whole question.

He speaks of exclusive means. Powers may be exclusive, regulations may be exclusive, but means cannot be so, unless the States are excluded from them by name in the Constitution, or unless the federal government have appropriated them, by an express law, to their own use. No doubt, as the very learned judge says, if the same means had been resorted to by Congress, it would have been in the execution of a regulation of Commerce, and when resorted to by the States, it is in the bona fide execution of a police law.

364*] *The rule is very clearly and concisely laid down by Judge Johnson: "Whenever the powers of the respective governments are frankly exercised with a distinct view to the ends of such powers, they may act upon the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers. 9 Wheat. 239.

This case cannot be decided for the plaintiff without overruling the case of Miln. This court, like all others, is presumed to be governed by the maxim, Stare decisis. For no court is it so important. Disrespect follows inconsistency, and woe to the Union when the decisions of this court shall cease to be respected. If the majority of to-day attempt to correct a supposed previous erroneous decision, the majority of to-morrow will certainly re-instate the old rule. This court remains, but its members change. Three of the five members who decided in favor of State rights in the case of Miln are gone. Where is Thompson? Where is Baldwin? Where is Barbour, who gave the opinion of the court in that case? Had these judges remained in the seats which they once adorned, this suit would never have been brought. Is it wise thus to invite speculation upon the sad changes which the inevitable doom that awaits us all must produce in this tribunal? If temporary majorities are to give the law of this court, its decisions, which should be as permanent as the republic, will become as fluctuating and mortal as its members.

The poor emigrants do not ask to be relieved of this tax. They do not bring this suit, nor is it brought for their benefit. The foreign agent, the rich shipper, is before this court striving, at the expense of these unfortunates, to swell their enormous gains. This toll is embraced in the price of passage. The emigrant knows *nothing of it. If it* is removed, he will know *nothing of it, but that* the home and the asylum that greeted him, and rescued him from disease and death on his arrival, are gone.

What cares the rich shipper of Liverpool, what cares his agent in New York, whether infection is brought to our shores—whether disease ravage our city? No ties bind him to the soil. No family or kindred to weep over. Wealth is at his disposal. He keeps aloof or flies from the pestilence which his accursed avarice has brought upon the devoted city.

But ask the emigrant, ask the destitute, ask the poor citizen, ask the thronging masses who make up the population of a great city, whom the strong bonds of poverty and affection chain to their homes, "Come weal, come woe." They will pray to preserve unimpaired the health laws of the city, *the quarantine, and [*365 its hospital, which have so long proved an efficient protection to them and their families. They will conjure you, with the agonizing earnestness of men who feel that their lives are concerned in what they ask.

Had this court listened to the suggestion, that, if this power is conceded to the States, it may be abused to the prejudice of commerce? Such a consideration is not for them. Let them close their ears, if they would not be betrayed into error.

Marshall has said, "All power may be abused, and if the fear of abuse to constitute an argument against its existence, it might be urged against the existence, of that which is indispensable to the general safety." 12 Wheat. 440.

But the suggestion is absurd. There is no such danger. If the child may be trusted to its mother, the city may be trusted to the State. It forms its greatest pride and dearest interest. The commerce of New York is its glory, and the great source of its prosperity. Will it be guilty of the suicidal folly of destroying or injuring it? No. The accommodations for the sick passenger form one of the attractions of its port. The emigrants flock to it in preference to any other. The past year, more than one hundred thousand have arrived. All the hospitals at the quarantine have been crowded, and yet no extraordinary fatality has prevailed.

On the other hand, the mortality among the emigrants who have arrived at Quebec has been frightful—not less than one tenth of the whole number. The pestilence has been scattered through the country, and the whole province has been sorely afflicted.

What has occasioned the difference but the very hospitals supported by this tax, and which must fall with it? They have been the refuge, and have yearly saved the lives, of thousands of the emigrants, and nothing, save their religion, is more gratefully cherished by them than the hospital at the quarantine ground in New York.

Conceding for a moment, that, if the State institution is destroyed, the federal government have power to replace it, will they do it? Will they continue to give it adequate support? Such is not the history of the past.

A few years before the close of the last century, Congress set on foot a marine hospital fund for the relief of sailors. In 1802, it had accumulated to more than ninety thousand dollars. At this time Massachusetts and Vi

ginia governed the Union. They concluded to divide the fund between them. Fifteen thousand dollars were appropriated to build a sailor's hospital at Boston, and thirty-five thousand went to purchase an old hospital at Gaosport, in Virginia.

366*] *Is it wise to leave an interest so local and so intensely interesting as that which concerns the lives of the citizens of New York to depend on the fluctuations of political influence? What do the Alleghanies or the Rocky Mountains know or care for the ravages of yellow fever in the city of New York?

The island of New York will soon contain a million of people. When pestilence comes, it will sweep away thousands in a day. If she sees the necessary means of self-protection withheld or removed to more favored cities, what bonds will be strong enough to bind her to submission? When, the poisoned darts of death falling thick and fast around them, her citizens are called upon to wait the slow, reluctant movements of the federal government —when, driven to desperation by the imminent danger impending over them, they see themselves cut off from reasonable succor by the selfish, unsympathizing legislation of a remote people, who send their exports to Hudson's Bay or the mouth of the Columbia, will they not be impelled to take the law into their own hands?

Our country is extending itself farther and farther to the south and west. Wisdom cries aloud, with a warning voice, to leave local interests as much as possible to local legislation, and attend only to those common and external interests for which the Union was formed. Let the States repose in the undisturbed exercise of the sovereignty which is left to them, and we may, with safety, extend our system to the extreme limits of the continent.

The State of New York asks the humble boon of being allowed to protect herself against an exclusively internal evil. Two thirds of the common revenue are collected in her harbor. She divides the annual millions which, but for the Union, would be poured into her own coffers, freely and ungrudgingly among her sisters. She calculates not the value of the Union. She glories in the honor and welfare of our common country. But she has deemed it not unreasonable that she should be allowed to protect herself against dangers to which this commerce, carried on for the common benefit, exposes her, and her alone.

Smith v. Turner.

Sketch of Mr. Van Buren's argument at the December Term, 1845. The references to the excise cases decided since were made on the re-argument in 1847.

Mr. Van Buren referred to the printed points, and said the able argument submitted on them by his colleague would perhaps justify him in remaining entirely silent, but the im-367*] portance *of the questions presented to the court seemed to him to authorize some additional suggestions. He read the sections under which this suit was brought. 1 Rev. Stat. 445, sec. 7–9. By them the health commissioner was authorized to collect, from the master of every vessel that should arrive from a foreign port at the port of New York, one dollar for each steerage passenger on board. The sum so received was devoted to the use of the marine hospital, and the master was authorized to sue for and collect from each of such passengers the sum paid on his account. The declaration contained two counts, the first alleging that the passengers were brought into the port of New York; the second, that they were landed in New York. The demurrer is to the whole declaration, on the ground that the law is repugnant to the Constitution of the United States. Of course, the facts alleged in both counts are to be taken as true. The question is not whether the law is wise or politic, but whether it is repugnant to the United States Constitution. This is the extent of the jurisdiction of this court (Judiciary Act, 1789, sec. 25), and the question is to be determined on this record. The court cannot legally know how much money has been received under this law, nor the use it has been put to, nor the extent of disease, nor the expenses of the hospital, nor when the fund falls short, nor when it overruns. If these facts are important, they should be determined by proof in a competent proceeding. On this record, the court are asked by the plaintiff in error to say that the sections referred to necessarily conflict with the United States Constitution. The tax which they impose was first laid on the 30th of March, 1798, 3 Greenl. 388, and it will be conceded that, if it was constitutional then, it is constitutional now. It does not grow unconstitutional by age. The power to declare a State law unconstitutional is one of great delicacy, as this court have frequently said, and should never be exercised in cases of doubt. 6 Cranch, 128; 4 Wheat. 621. As Mr. Ogden truly remarks, in New York v. Miln, 11 Peters, 122, "It should be so clear as to secure the acquiescence of the people and of the States, and thus to retain the affection of the different members of the Union for the Union itself." All the presumptions are in favor of the constitutionality of a law. Those who object to its unconstitutionality should be able to point to the provision of the United States Constitution with which it comes in collison, and the conflict should be so plain, that it could be immediately seen by comparing the two. The plaintiff in error says that this law conflicts with the eighth section of the first article of the Constitution; also with the tenth section of the first article; also with the ninth section of *the first article, subdivisions [*368 fourth and fifth; also with the sixth article, subdivision second; and also with the general spirit of the Constitution. The general spirit of the Constitution is to be found in its letter. The sections of the Constitution referred to should be examined separately; it is neither intelligible nor safe to contrast the law with what may be deemed the blended effect of all; and in examining them it should be remembered that the States, at the adoption of the Constitution, were free, independent, and sovereign communities; that as such they formed, as such adopted, the Constitution; that the Constitution is a grant by them of certain enumerated powers. The language of the tenth article of the Constitution only defines for greater caution what would have been the legal and constitutional effect of the grant in the man-

ner and form in which it was made, to wit, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Baldwin's Views of the Constitution, 29–32. The strict observance of these principles, in construing the Constitution, is believed by a large portion of the American people to be the surest bond of the Union itself.

First, does the law in question conflict with the eighth section of the first article of the United States Constitution? This section provides, that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." What is this power, and is it exclusive in Congress, or concurrent in Congress and in the States? The terms used are capable of indefinite extension in the hands of a skillful construer. Commerce, in an enlarged sense, covers nearly all the business relations of society. Every law that qualifies or affects its transactions or relations necessarily regulates it. Take the first clause—"Congress shall have power to regulate commerce with foreign nations." Pilot laws affect this commerce; they touch it on the open sea, they restrain those engaged in it, they regulate it; yet the States on the seaboard all have pilot laws. So, too, inspection laws. It is said these are authorized by the United States Constitution. Not so. Duties and imposts are permitted to execute them, but the laws are enacted under the inherent power of the State. It is true, most inspected articles are intended for exportation to foreign ports. But commerce consists as much of exports as imports; restraints and regulations of one are as much regulation of commerce as the other. The States also pass quarantine laws, wreck laws, harbor regulations, etc., etc.

These would seem to show a concurrent [*369] power in the States *over foreign commerce. Congress has power to regulate commerce among the States; yet the States establish ferries from one to the other. The court has held that the transportation of slaves from State to State is within the exclusive control of the States. Groves v. Slaughter, 15 Peters, 449. Congress has power to regulate commerce with the Indian tribes. Yet several States have habitually, since the adoption of the Constitution, passed laws regulating trade with the Indians. The New York constitution, article seventh, section twelfth, provides that no purchase of lands, or contract for purchase, made with Indians, within that State, subsequent to October, 1775, shall be valid, unless made by the authority and with the consent of the Legislature. A comparison of this power in the Constitution with what it was in the Articles of Confederation, shows a much greater solicitude to make this exclusive than either of the others. The ninth article of the Confederation gave Congress power to regulate the trade and manage "all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated." These restrictions were intentionally omitted in the Constitution. See *Federalist*, No. 42, by Madison. Yet the constitutionality of the laws and constitutions of the different States, regulating trade with the Indians, has never been questioned. The Constitution gives the same power to Congress over commerce among the States and with the Indian tribes that it gives over foreign commerce. If the latter is exclusive, the others are, and if the whole are exclusive, all the legislation thus briefly adverted to must be deemed void. It is submitted that the power is concurrent, subject to the positive inhibitions in the Constitution. It is the power to regulate commerce with foreign nations which demands particular attention. This law encroaches on that power or on none.

We contend respectfully, that the power to regulate commerce is only exclusive in those cases where the regulation is affected by the exercise of an authority specially given to Congress in exclusive terms in the Constitution, or specially prohibited to the States; and that the only other authority over the subject remaining in Congress is derived from the sixth article of the Constitution, which authorizes them to prostrate State laws and constitutions by their own conflicting legislation.

Mr. Hamilton, in the thirty-second number of the Federalist says that there is an exclusive delegation or alienation of State sovereignty in three cases: first, where exclusive power is in terms given to Congress; second, where an authority is granted *to the Union, [*370 and the States are prohibited from exercising a like authority; third, where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. As examples of the third class, he instances the power to establish uniform laws on the subjects of naturalization and bankruptcy.

This classification of the exclusive powers of Congress has been frequently referred to with approbation by this court. It is with extreme hesitation that a doubt is suggested as to its accuracy; but it is believed that a careful analysis of the Constitution authorizes the position, that the first two classes mentioned by Mr. Hamilton cover every case of exclusive delegation of power by the States, and that his third class of cases is covered by article sixth, subdivision second, which makes the laws of Congress, enacted in pursuance of the Constitution, the supreme law of the land.

This position is advanced with less hesitation, because, first, no case has ever been decided by the court which establishes such a classification; and second, the illustration given by Mr. Hamilton of the third class has been overruled. A single section gives the power to establish laws on the subject of naturalization and bankruptcy. They are to be alike uniform. Yet in Sturges v. Crowninshield, 4 Wheat. 122, it was expressly decided that the grant of power to Congress to establish uniform laws on the subject of bankruptcy did not alienate the power of the States. Why, then, should this effect follow the grant of power to establish uniform laws on the subject of naturalization? Each of the States, before the adoption of the Constitution, exercised this power of naturalization, and would now but for the action of Congress and the provisions of article fourth, section second. Chirac v. Chirac, 2 Wheat. 269; Collett v. Collett, 2 Dall. 294.

Mr. Van Buren then examined the various powers given to Congress by the Constitution, and endeavored to show that, whenever the power granted was, or was intended to be, exclusive, it was either—

1st. Granted in exclusive terms, or (what is synonymous) necessarily exclusive, from operating in two or more States, or without the territory of all the States; or,

2d. Granted to the general government, and prohibited to the States.

In the first class he placed the power to borrow money on the credit of the United States, to establish postoffices and post roads, to establish tribunals inferior to the Supreme Court, to define and punish piracies and felonies on the high seas, to exercise exclusive legislation 371*] over the District of Columbia, *forts, magazines, arsenals, etc., and to make all necessary and proper laws to carry the foregoing powers into execution. In the second class he placed the power to lay duties, imposts, and excises, except to execute inspection laws, to coin money, regulate the value thereof and of foreign coin, to declare war, grant letters of marque, etc., to raise and support armies, to provide and maintain a navy, and make rules for the government of the army and navy.

The States are prohibited from entering into any agreement or compact with another State, or with a foreign power. Power to make treaties is given to the President and Senate. This classification leaves, of the general powers of Congress which it is believed are not exclusive, the powers—

1st. To lay and collect taxes. This is admitted to be concurrent.

2d. Over naturalization and bankruptcy, already adverted to.

3d. To fix the standard of weights and measures. This has always been exercised by the States, and never by the general government.

4th. To punish counterfeiting. This is concurrent. 1 New York R. L. 466.

5th. To promote science and the arts by copy and patent rights. This, to the extent of State limits, is believed to be concurrent. 1 Tucker's Black. App. D. 182, 265; Livingston v. Van Ingen, 9 Johns. R. 567, 568; Gibbons v. Ogden, 9 Wheat. 221.

6th. Over the militia, which is concurrent, except so far as expressly distributed by the Constitution to the States and Congress respectively.

7th. Over commerce. Houston v. Moore, 5 Wheat. 1. It is submitted that this is a concurrent power, unless the regulation is one authorized in express terms by the Constitution, and falling under the first or second class before mentioned. For instance, commerce is usually provided for by treaties, coining money, etc., etc. It is usually protected by armies and navies, and the punishment of crimes on the high seas; it is usually interrupted by war. The authority over all these great subjects is exclusively in the general government. If commerce is incidentally regulated in other modes, the powers of the States and the general government are concurrent with the safeguard, in case of conflict, that the authority of Congress is paramount. This definition of the grant avoids three difficulties which must always be encountered by those who claim that the power over commerce, in its most enlarged signification, is exclusive:

*1. In Sturges v. Crowninshield, the [*372 court, in deciding a State insolvent or bankrupt law to be valid till Congress acts, says: "It is not the grant of a power to the Union, but its exercise, that ousts the State of jurisdiction." This, it is believed, cannot be true of an exclusive power. If such a power is granted to the Union, the State must necessarily be devested of it, whether Congress acts or not. The State is at the mercy of Congress, and helpless till it chooses to act.

2. In the argument of Gibbons v. Ogden, the distinguished counsel for the appellants contended (9 Wheat. 18), that regulation of any part made an entire system; that what was untouched was as much regulated as what was touched, and the court say there is great force in the argument, and that it has not been answered. p. 209. If this be so, a single commercial regulation by Congress would oust the States of authority, and leave their great interests to await the next movement of Congress.

3. In every argument and decision in favor of the exclusive power, counsel and court have been obliged to except from its operation pilot, health, inspection laws, etc. 9 Wheat. 18, 203–207; 12 Wheat. 444. But these are nowhere excepted in the grant, and if it is exclusive it must cover them. Inspection laws are no exception. No authority is given to the States to pass them, but they are authorized to lay imposts to execute them.

This court has never held the power to be exclusive. In Gibbons v. Ogden, the regulations were held to be conflicting, and the case was decided on that ground. 9 Wheat. 200. In New York v. Miln, 11 Peters. 146, the court decline deciding the question. In Groves v. Slaughter, 15 Peters, 508, it is left an open question. But in the License Cases, 5 Howard, a majority of the judges expressly hold the power to be concurrent. The plaintiff in error, then, to show the act now before the court an unconstitutional regulation of commerce, if we are correct, must point, either—

1st. To the clause in the United States Constitution which delegates exclusively to the general government the authority to make this law.

2d. To the express prohibition on the States to make it.

Neither can be shown. If not, it remains with that mass of inherent power appertaining to State Sovereignty which has never been alienated. All the States have passed laws similar to this for the last half century. He should refer to them particularly hereafter, and show that all these laws arrested vessels on the high seas, inspected them, discharged, and destroyed their cargoes, forbade them to anchor, etc., etc., and charged the *ex- [*372 pense of executing the laws on the cargo, consignee, captain, or passenger, at discretion. The "regulations of commerce," if any, in the act before the court, were the control and direction exercised over the captain, passengers, ship, and cargo. The orders to them were where to stop, when to proceed, what should be destroyed, etc. Yet these were within the unquestionable power of the States, and were not

even seriously disputed here. They were sanctioned in the case of New York v. Miln. They occurred always in the pilot, inspection, quarantine, and slave laws.

It seemed to him these considerations must dispose of the theory that commerce was a unit; that it included all intercourse; that the whole power over the subject of commerce, and its mode of prosecution, was surrendered to Congress; that what was untouched was as much regulated as what was touched, etc., etc.

But it was urged that, if this was a case of concurrent power, Congress has acted on the subject, and that there was a conflict of legislation; also, that the act before the court conflicted with treaties made by the United States. He examined these positions at length, and endeavored to show that the legislation of Congress, so far from conflicting, was in aid and approbation of the law. He referred to the law of 1796, ch. 31; 1 Story, 432; Act of 1799, ch. 118; Ib. 564; New York v. Miln, 11 Peters, 138, 139.

The treaties referred to were expressly subject to the laws of the two countries. If this law violated them, no tariff law, and certainly no law prohibiting the entry of colored persons into States, could be upheld. But it was urged that the tax of one dollar on each steerage passenger was "a regulation of commerce." This he denied. The taxing power and the commercial power were totally distinct. Even laying imposts is not a regulation of commerce. 9 Wheat. 201. Chief Justice Marshall says: "There is no analogy between the power of taxation and the power of regulating commerce."

The tax in this case is laid on an inhabitant of New York, within her limits and jurisdiction. It is laid when the ship has arrived in the port of New York. As the record shows in this case, the passengers, as they are called, had landed. To deny the right of the State to do this is the most alarming proposition ever yet presented to this court. He contended—

1st. That the State had the power altogether to forbid the landing on her shores of such persons as she chose to forbid, or to expel those who had entered, and, as a necessary consequence, she might dictate the terms on which they should be permitted to enter. This was vital to her self-preservation. *And having this right, the manner of its exercise must, of necessity, be left to her discretion. It was to be presumed self-interest, if no higher motive, would induce a discreet exercise of this power. But if the State was unreasonable—Stat pro ratione voluntas. This court had no power to supervise her conduct. In support of this he cited New York v. Miln, 11 Peters, 132, 136; 7 Statutes of South Carolina, 459; Aiken's Alabama Dig. 352; 1 Lislet's Dig. La. Laws, 499. He also cited laws forbidding or regulating the admission of free persons of color in fifteen different States—non-slave-holding as well as slave-holding States. In Groves v. Slaughter, 55 Peters, it was held that the right to admit slaves from other States into Mississippi, or to forbid them to enter, rested exclusively with that State, and was unaffected by the authority of Congress to regulate commerce among the States. The argument that *the general government*, being charged with the *foreign relations of the country*, acquired the right to regulate the terms upon which aliens should be admitted into the States, could not be maintained. The States retain the right to prescribe who shall hold property within their jurisdiction, who shall vote, etc. The sole power given to Congress is to prescribe the terms of citizenship by means of naturalization laws. In support of these positions he cited Senator Tazewell's speech against the Alien and Sedition Law. 4 Ell. Deb. 2d. ed. 453; 3 Madison Papers, 1385. Also, the Virginia and Kentucky resolutions and reports on the same subject. 4 Ell. Deb. 566 to 608 inclusive.

[*374] [*375]

2d. That the right of a State to tax all persons and things within her jurisdiction was only limited by the express prohibitions of the United States Constitution, and that none of these prohibitions reached the tax in question. The power of taxation is vital to a State. The concurrent right of taxation given by the Constitution to the general government was one great objection to its adoption. It would never have received the sanction of the States, if they had not been satisfied that the right to raise money from persons and property within their limits was unrestricted except in specified particulars. See Federalist, Nos. 32, 33, 34, 36. The importance of this power to the State, and its unlimited character, have been frequently asserted by this court. 4 Wheat. 436; 6 Ib. 429; 9 Ib. 198; Providence Bank v. Billings, 4 Peters, 463. The power not only extends to all the real and personal property of its citizens, but to that of non-residents, to the property of the general government, 4 Wheat. 436, and to the United States stock. 1 Nott & McCord, 527. Nor is there any such exemption as the plaintiff in error claims for the instruments of commerce. *Importing merchants, ship owners, and others, are taxable like all other inhabitants, for all their property, whatever it may consist of. 5 How. 576, 592.

There are but two restrictions on the State power of taxation:

1. No State shall, without consent of Congress, lay any imposts except what may be absolutely necessary to execute its inspection laws.

2. No State shall, without the consent of Congress, lay any duty of tonnage. The tax in question is not a duty of tonnage. If a passenger ship of five hundred tons comes into New York without passengers, the law imposes no tax. This is not an impost or duty on imports; a human being is not an import. New York v. Miln, 11 Peters, 132, 136; 12 Wheat. 437.

The authority of Congress over imports was carried to its utmost verge in Brown v. Maryland, 12 Wheat. 442. It was there held, that the right to sell articles imported and having paid duties could not be taxed while the articles remained in the original package; that the importer by paying duties acquired a right to sell; that they could not be specifically taxed till bulk was broken and they were mingled with the mass of property subject to State taxation. See opinion of Chief Justice Taney, 5 How. 574; and of Justice McLean, Ib. 587. This reasoning is inapplicable to a free human being. If he is exempt from taxation when entering the State, he must remain so always. If he can once float on the waters of New York,

or stand on her soil, exempt from taxation, no ingenuity can fix a time when he becomes subject to taxation. He is a perpetual exempt. Unless the plaintiff in error showed a prohibition on the State to lay this tax, it fell within the general taxing power of the State.

3d. The tax in question is an indispensable part of a health and quarantine system, which is the exclusive subject of State jurisdiction.

Under this head Mr. Van Buren traced minutely the history of the New York health and quarantine laws from their earliest institution. The tax in question was first laid in 1798, precisely as now. 3 Greenl. Laws of New York, 388. The site of the marine hospital was purchased and the hospital built by the State; frequent appropriations had been made from the State treasury to meet deficiencies in the fund. It was now inadequate to defray the charges upon it. 3 Greenl. 305; 1b. 455; Laws of New York, 1804, ch. 469, 1805, ch. 31, 1809, ch. 66; 2 Rev. Laws 534. The rates had been frequently adjusted so as to meet the expenditures [*376 with the least burden *on the passengers. Laws of New York 1843, ch. 213; 1844, ch. 316. The original and declared object of the tax was to pay the expense of guarding the city against infectious and pestilential diseases brought in from abroad. This object had been steadily adhered to. The occasional and temporary diversion of an accidental surplus furnished no exception. It was inevitable where claims were pressed on the Legislature, and had been more than made good by advances from the State treasury. The fact that some might pay the tax who did not receive medical aid did not make the tax illegal. The same was true of all quarantine charges. A quarantine and health system could not be otherwise maintained. The pilot system was maintained in part by compulsory charges on those who had refused to take a pilot. Tate's Dig. Virginia Laws, p. 740, sec. 4; 1 Bullard & Curry's Dig. Louisiana Laws, 467-469. Taxes on passengers for the support of hospitals were laid in Delaware, Pennsylvania, Maryland and Louisiana. They had been levied ever since the adoption of the Constitution. 2 Laws of Delaware, 1357; 7 Smith's Laws of Pennsylvania, p. 20, sec. 21; Laws of Louisiana, 1842, No. 158, p. 458; Dorsey's Laws of Maryland, 1601. It was not true that Congress exercised exclusive authority over the foreign transportation. Pennsylvania compelled German passenger ships to keep a physician on board, to attend to passengers gratis, and to pay an interpreter to prove to its authorities a compliance with the law. 7 Smith, p. 29, ch. 4488.

Mr. Van Buren then examined the quarantine laws of the Atlantic States, and showed that all of them arrested ships, discharged cargo, if necessary, and destroyed it, charging expenses on cargo, master, owner, and consignee, at discretion. He referred to the following statutes: Rev. Stat. of Maine, p. 186, sec. 27; Rev. Stat. of Massachusetts, 212; Laws of 1816, ch. 44 secs. 6, 7; Rev. Stat. of Rhode Island, p. 264, secs. 5, 6; Statutes of Connecticut, p. 621, sec. 12; Elmer's Digest of the Laws of New Jersey, p. 133, sec. 3; Purdon's Digest of Pennsylvania Laws, 632; 2 Laws of Delaware, 1357; Laws of Maryland, 1793, ch. 50; 2 Rev. Stat. of Virginia, p. 207, sec. 13; 1 Rev. Stat. of North Carolina, 496; 6 Statutes at Large of South Carolina, 472; Law of Georgia of December 14, 1793; Aiken's Alabama Digest, 352; 1 Lislet's Digest of the Laws of Louisiana, 525.

To the argument that section ninth, article first, of the Constitution, prohibiting Congress from forbidding, prior to 1808, the migration or importation of such persons as the States shall think proper to admit, gives Congress exclusive jurisdiction over the admission of persons into the States, he replied, that this section *applies exclusively to slaves. It [*377 was so understood by the framers of the Constitution. Federalist, No. 42; 3 Madd. Papers, 1388, 1390, 1391, 1429. It has been so held by this court. 9 Wheat. 206; 15 Peters, 513. The section recognizes the right of the States to admit or forbid. If it gave Congress power to tax the admission of whites, it would not destroy the concurrent power of State taxation. The authority given to Congress to tax the importation of persons shows such a tax is not an impost. The power to lay imposts, the general government has by another grant. To the argument that this tax violates subdivision sixth, section ninth, article first, of the Constitution, which forbids giving a preference through a regulation of commerce to the ports of one State over those of another, he replied, that the restrictions in section ninth were all imposed on Congress. He examined them to show that none referred to State legislation. State taxation was notoriously unequal. The Constitution of the United States in no degree forbids this. He instanced the rates of pilotage, wharf and harbor charges, personal taxes, etc. This tax was not "a regulation of commerce." It was a confusion of terms to complain of a tax as oppressive, and at the same time as giving a preference to one port over another. The preference, if any, was caused by the legislation of other States.

It was urged that New York might defray the expense of the hospital and health establishment from other sources within her undisputed control. This was true. But ought she to do so? Was it not just this burden should be borne by those who created it? Beyond this, was it unconstitutional that the expense should be thus defrayed? The last was the only question which the court could pass upon. It was suggested that Congress should assume the charge of this subject. The powers of Congress are given to it as the Legislature of the Union; in no other capacity can it act. 6 Wheat. 424. The power of Congress to lay and collect taxes is limited to the objects of paying the debt and providing for the common defense and general welfare of the United States, and these objects are enumerated. Federalist, No. 41. Would this justify Congress in laying a tax to protect the health of New York and persons arriving there? The power over exports is confined to this State; jurisdiction over persons in our territory belongs to New York. Under such circumstances, with what wisdom, skill, or advantage could Congress interfere? Baldwin's Views, 194-197. The State legislation heretofore referred to shows, that, since the adoption of the Constitution, this whole subject has been exclusively controlled by State legislation. This is a practical construction of the Constitution

378*] *of great weight. This court has said, a contemporary exposition of the Constitution of the United States, adopted in practice and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it. Stewart v. Laud, 1 Cranch, 309.

Mr. Van Buren adverted to the printed points submitted to the court, and insisted, on the whole case—

1. That, if the law in question be "a regulation of commerce," it is such a regulation as the State has a right to make. The right has never been granted exclusively to the Union or prohibited to the States. It rests with the State.

II. If Congress might legislate on the same subject, it has not done so in a manner conflicting with this law.

III. The tax laid is not an impost or duty of tonnage.

The court needed no assurance, he added, that the people of New York feel a deep interest in the decision of this question. The law has stood for half a century, has been adopted and approved by Congress; system has grown up under it; with an exposed situation, the health and lives of her citizens and of the whole people have been protected by it. Our State had not been a large claimant on either the justice or bounty of the Union; yet she is believed to have contributed something to its aggrandizement. The strength, the intellect, and the lives of her citizens have been freely tendered to its support. She has cheerfully poured into its lap, as her alma mater, the immense resources collected at her port. Her insolvent laws have been prostrated by the judgment in Sturges v. Crowninshield. This very power "to regulate commerce," under which her splendid schemes of internal improvement have been projected and executed, has not been wielded to dig her canals, or, to any considerable extent, to deepen her rivers or to protect her harbors. Nay, the effort of the State to aid them, and to encourage the brilliant but unrequitted genius of one of her sons, was deemed by this court to conflict with this overreaching power of Congress, and fell a victim to judicial condemnation. She indulges the hope, at least, that it will not now be so construed as to prostrate her institutions of public health which have defied the constructions of half a century of time, and of transcendent ability. She saw with unaffected concern the prodigious strides made by this power to regulate commerce towards engrossing and consolidating the power of the Union. This may well be regarded as the mastodon of construction, starting from this bench, and in its giant strides trampling upon the rights of the States and their sovereignty. Fortunately, it is only known to the present day by its colossal bones, scattered through the reports of the early opin-
379*] ions of *members of this court. Its march was arrested, its life terminated, in New York v. Miln. The noble ground then assumed was maintained in the License Cases. He had no right to advise the court, but as an humble citizen contributing a mite towards public opinion, there could be no impropriety in alluding to the jealousy felt towards this branch of the government. The life tenure of its judges removes them from the direct effect of public opinion. Selected by the general government, they are yet in some sort arbiters between it and the States. It is desirable they should secure the affections of the people. Their recent decisions have largely effected this, and the people regard these as indications that popular and liberal impulses have reached this bench. To confirm this, they have only to adhere to the just rules already laid down, to the practice the great maxim which secures respect and renders certain the rights of property and life, Stare decisis. In the case at bar, New York asks nothing but justice at their hands. Granting much, yielding much, to the wealth, glory, and power of the Union—a Union in which she feels a just pride, and the value of which she never stopped to calculate—she does not feel that it is immodest to ask (if it be considered asking) that she may avail herself of her local position to sustain in part the expense to her citizens, and the danger to their health and lives, which attend her exposure and the Union's commerce—that she may arrest and purify the stream before it enters her veins, that the blood of life to the rest of the Union may not be infection and death to her.

Norris v. City of Boston.

Mr. J. Prescott Hall, for the plaintiff in error:

The object of the writ of error in this case is to test the constitutionality of an act of the Legislature of the State of Massachusetts, passed in the year 1837, entitled, "An Act relating to alien passengers."

With the general question involved in the cause, this court is entirely familiar. It is a branch of constitutional law which has occupied its attention at intervals during the last thirty years.

The controversy with regard to the powers of the several States over commerce and navigation, and their authority to control these and analogous subjects, supposed to be beyond their jurisdiction, began as far back as the year 1819, with the case of McCulloch v. Maryland, 4 Wheat. 316, when it was here decided, that the act of Congress establishing a bank of the United States was not only constitutional, but that the States had no warrant for taxing its branches, or power, by *these or [*380
other means, to impede their action, or drive them beyond their territorial limits.

In strict analogy with this case was that of Weston v. The City of Charleston, 2 Peters, 449, in the year 1829, when this court held that a tax imposed by a State on stock issued for loans to the United States was unconstitutional, and could not be collected.

The question as to the power of the States over commerce and navigation was directly presented by Gibbons v. Ogden, in the year 1824, when it was held that the State of New York could not grant to any of its citizens an exclusive right to traverse the great bays and navigable waters of that State with vessels propelled by steam, to the exclusion of those from other States, licensed or enrolled under acts of Congress.

These discussions led to another, in the year 1827, when this court decided that the State of Maryland could not compel merchants, engaged in the business of importing and selling foreign goods by the bale or package, to take

out licenses for the same, and to pay a sum of money, or tax, for the privilege. Brown v. State of Maryland, 12 Wheat. 419.

Then followed, after an interval of ten years, the case of The City of New York v. Miln, 11 Peters, 102, which is supposed to control the present controversy and recognize the power of a State to regulate, in some degree, the commerce and navigation of the whole country, even on the tide waters which wash our shores.

Nor will such controversies cease, perhaps, until other kindred subjects have been explored and examined; for New York claims now, and exercises, the power of imposing burdens upon the disposition of foreign merchandise in its original condition as imported, when sold in a particular manner—that is, by auction.

The recent decisions of this court upon the license laws of New Hampshire, Massachusetts, and Rhode Island may be also referred to, as bearing materially upon the reasoning we must employ, in expressing our views upon the subject now under consideration; but as they will undergo a critical examination in the progress of the argument, they are here merely glanced at in passing.

This brief statement of the course of legislation and decision upon these subjects brings us back to the case now before the court. It arises under the act of Massachusetts before referred to, passed in the year 1837, shortly after the case of The City of New York v. Miln had opened the eyes of her legislators to this new source of revenue.

This law provides, that, upon the arrival of a 381*] vessel in the *waters of Massachusetts with alien passengers on board an officer of the city or town where such passengers are to be landed shall stop the vessel, and examine into the condition of its passengers.

If any lunatics or infirm persons, incompetent to maintain themselves, are found, they cannot be permitted to land till security is given against their becoming chargeable within ten years; and no other alien passenger shall be permitted to land until two dollars are paid for each, to be appropriated for the support of foreign paupers.

By another provision of the same law, the State pilots are required to anchor vessels at particular places, suitable for the examination of such passengers; and all this may be done while the ship is yet, comparatively, at sea—more than a cannon-shot from the shore, and beyond the jurisdiction of Massachusetts. The examination may be made, and the tax is exacted, before the passage money is earned; before the voyage is completed; while the insurance is running; before the passenger touches the soil of the State; while all is in itinere.

The validity of the act is defended upon the ground that it is a poor-law; that it is a police regulation; that the State has a system of pauper laws, of which this is a part; that the money, when collected, is expended in the support of foreign paupers; and that, as the means are appropriate to the end, the law itself may be upheld as valid.

The States have the power, beyond doubt, to pass poor-laws and make police regulations. But the question is, Can they provide for paupers, foreign or domestic, by a tax upon the commerce or navigation of the United States? Can they levy contributions upon aliens and citizens of other States, on shipboard, for the support of their police regulations and pauper systems? Are they not forbidden the exercise of this power by the Constitution of the United States, which is the paramount law of the land? The means may be appropriate to attain the end, if the State has the power to use them; but have they any such power? And that is the whole question before the court.

If the tax were imposed upon merchandise imported from foreign countries, the means to accomplish the object would be as appropriate as any other; and Massachusetts, were she an independent nation, might employ them at her discretion. But when she came into the Union, in 1789, she gave up, in express terms, all control over foreign commerce, although she was more interested in it at that time than any other State.

But she never did tax foreign commerce, be it observed, when she had the power to do so, for the support of paupers; *on the [*382 contrary, for more than half a century, she maintained her own system by her other means. The tempting bait was first thrown out in the year 1837, by the case of New York v. Miln, and she seized it with avidity.

In our view of the law in question, it imposes a tax on the commerce of the country for the benefit of Massachusetts and its treasury. We consider it as a direct invasion of the power of Congress to regulate navigation and trade, and therefore as unconstitutional and void.

It is not an inspection law, nor a quarantine or police regulation; and if it were, the States cannot lay taxes on the commerce of the country, or any part of it, to build up and support police or quarantine establishments, although we admit the incidental expenses and ordinary fees of inspection belonging to sanatory regulations may be exacted by the States.

But the law in question imposes a duty on imports without the assent of Congress; for there may be importations of men as well as merchandise. The ninth section of the first article of the Constitution of the United States, when speaking of "the migration or importation" "of persons," is not restricted to any particular class of persons. The words are general, they are applicable to all persons, bond or free, and show that the whole power over such importations is confided to Congress.

Nor is the use of the word "importation," when connected with "persons," peculiar to the Constitution. An act passed by Congress in 1793 is entitled, "An Act to prevent the importation of certain persons into certain States where, by the laws thereof, their admission is prohibited." And Judge Marshall held, in the case of The Brig Wilson, 1 Brockenbrough, 437, that the prohibition of the law comprehended freemen as well as slaves. Various English statutes, applicable to the British Isles, where slavery does not exist, have been passed to regulate or impede or prohibit the importation of persons, free in their own countries, and who would be so in England. Stat. 1 and 2 P. & M. c. 4; 5 Eliz. c. 20; Jacob's Law Dict. art. Egyptians.

And it may be remarked here, that the very act of Congress before referred to proves that

the whole power of regulating or prohibiting the importation of persons is vested exclusively in the general government. It was passed upon a petition from North Carolina, setting forth that the French had set free their slaves in Gaudaloupe, and the aid of Congress was invoked to protect the institutions of the South from the dangerous contact of free persons of color. The State felt its want of power over the subject. She knew it was vested in Con-
383*] gress alone, *and to Congress she turned for relief. That body immediately prohibited the "importation" of "negroes, mulattoes, and persons of color," free as well as slaves, into any State which by law had prohibited or should prohibit the importation of any such person or persons. And this act sanctioned to this day the legislation of the Southern States, to a great extent, upon this very subject.

The act of the State of Massachusetts now under examination might also be regarded, were it necessary, as imposing a duty on tonnage; being a tax on passengers by the poll. The number of passengers to be taken on board, or imported, in ships of the United States, is limited by law to a fixed relation, or ratio, with the tonnage of the vessel; and as only two passengers are allowed for every five tons, a tax of two dollars on each person is a tax on the vessel of eighty cents a ton.

The question before the court is a question as to power, and of power alone. It is a question as to the power on the part of a State to tax the commerce of the Union, to raise a revenue for her own uses. Give Massachusetts the authority to collect money from passengers for the support of paupers, and see how quickly she will extend the system. If it is advisable to support emigrants when in a state of destitution, it is also desirable to educate their children, so that they may not become a burden upon the Commonwealth at a future day. The expense of free schools is far beyond that of pauper asylums; and if Massachusetts has the power to raise revenue by these means for one purpose, so may she for the other.

It is true Chief Justice Shaw, in this very case of Norris v. The City of Boston, now before the court, restricts the power of the State to the object for which the tax is laid. He supposes that the States may impose small burdens of this kind, but are prohibited from their extension. He says 4 Met. 207: "If, under the form of pilotage, a large sum of money should be demanded of any inward bound vessel, the effect of which would be to raise a revenue from foreign commerce, the pretense of its being pilotage would not make it legal. And this suggestion answers an argument much pressed, that if the State could demand two dollars in respect to each passenger, it could demand two hundred, or two thousand, and so raise a large revenue for any and all purposes. We think it is plain, that, if any such large sum were exacted of passengers, it would indicate the real purpose and design of the law to be to raise revenue, and not in good faith to carry into effect a useful and beneficent poor-law—useful and beneficent to such aliens themselves; and therefore it would be in contravention of the Constitution and laws of the United States, and void."

384*] *With great respect, we submit that these reasons for the decision of the Supreme Court of Massachusetts are not strong enough to sustain it. No court can determine the constitutionality of a law by the extent to which its purposes are carried; for if a State has the power to pass a law, she alone can limit its exercise. The courts cannot regulate or control the discretion of legislators; and if their power be once admitted, all control over them is surrendered up. The Chief Justice of this court has said, in express terms, that "upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."

Can the Supreme Court of Massachusetts say that its Legislature may impose a tax of two dollars upon each alien passenger, but cannot increase it to five? Can the court inquire into the condition of the treasury, count foreign paupers, ascertain the extent of their wants, and so determine whether the tax was designed for constitutional purposes or not? Is there any limit in the power of a State to tax the property of its own citizens in any way and to any extent it may see fit? Must not the same authority which selects the objects of taxation determine its extent also? Where is the limit? Who can define its bounds? Surely the courts cannot, and it has always been held that the power to tax is a power to destroy. 2 Peters, 467; 4 Wheaton, 431.

The money to be derived from the tax in the present case is not devoted to the use of those particular aliens who pay it, but to all aliens subsequently to arrive. The strong are to pay for the feeble, the rich for the poor. Passengers arrive at Boston, New York, and New Orleans, who have no purpose of remaining in those places. Their destination is westward, towards the interior States, who have no soil touching upon that ocean which, by the Constitution, is as free to them as to the States which are washed by its waves.

Emigration, is encouraged by the Constitution of the United States. Its prohibition and impediments in its way were subjects of complaint in the Declaration of Independence. The laws of Congress encourage and protect emigration. The condition of mankind solicits it; ships are given up entirely to the importation of passengers, their decks being loaded with responsible beings instead of merchandise. Steam has added its power to that of the winds, and vessels propelled by its energies will be hereafter exclusively devoted to this great branch of commerce.

New York and Boston and New Orleans have almost a monopoly of this business, and they seize the occasion to raise revenue from it. It may be well to regulate this matter: it *may be expedient to raise a fund for [*385 paupers; it is kind and benevolent to do so; but the question is, How can it be lawfully done? Who shall make this regulation of commerce—Congress or the States? Congress has the power to make the burden uniform; the States cannot. Massachusetts taxes the passenger two dollars; New York but one. Those who arrive in Boston, for the most part, pay through to other States. Those who come to New York, oftentimes without touching at the city, ascend the Hudson, and continue their progress without ceasing, until they reach the

great prairies of the west. Yet each and all of these countless thousands leave a portion of their property, destined for their own use in other States, in the treasuries of these two ocean powers, and for the benefit of persons other than themselves. The Norwegian is taxed for the Frenchman, the Dane for the Irishman, the German for the Englishman, and all for the benefit of New York and Massachusetts. If these two States have the burdens of foreign pauperism, so have they also the benefits of foreign commerce. The sails of their ships whiten every sea, while the internal States, shut out from the ocean, have no such benefits in the same degree.

The tax of Massachusetts is not applicable to such paupers as arrive at the same time with the rich and the healthful. Her laws guard the Commonwealth sedulously against this burden, by requiring those who are in the condition of becoming a charge upon the State to give ample security for ten years against such charge before they are permitted to land. The pauper gives security; those who are above his condition pay a tax—not for themselves, but for others.

The law of Massachusetts discriminates, taxing aliens alone. If it may do this, it may discriminate among nations. Treaties would have nothing to do with the subject, for the States cannot make them; nor could Congress restrain them if the power in question is a mere police regulation or sanatory measure. Congress cannot regulate or restrain the States in matters of police and health, as each State has unlimited power over these subjects, to be exercised according to its own discretion.

If States may tax those who arrive by sea, they may tax those who travel by land. They may favor the North and burden the South; and New York, in her laws, does discriminate, in relation to this very subject, favorably to New Jersey, Connecticut, and Rhode Island, and adversely towards the other States. She takes upon herself to say, that coastwise passengers shall all be taxed; but that those from contiguous States, because of the frequency of intercourse, shall not be burdened to the same degree as those who are more remote.

386*] *With entire confidence, we submit that this cannot be done. New York cannot discriminate between the Southern and the Eastern States in favor of the latter and against the former. She has no power over the subject. Citizens of one State have the privileges and immunities of citizens in all the other States, and they cannot be limited or curtailed in their rights by State authority. Even Congress could not do this, as its legislation must be uniform throughout the nation.

But the act of Massachusetts taxes aliens who come here for temporary purposes of business. Alien passengers in steamers and ships of war, whether foreign or domestic, are brought within its terms. The packets which ply constantly, in all seasons of the year, between Boston and Liverpool, are subject to its demands, and must obey them.

The comity of nations forbids the exercise of this power to this extent, for the very idea of taxation, includes, or implies, that of reciprocal rights and duties; of allegiance on one side, and protection on the other.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself." "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not." 2 Peters, 563, 564; 4 Wheat. 429.

Aliens and merchandise are not "introduced" into Massachusetts by her "permission," nor do commerce and navigation exist by her "authority." The persons and property of aliens do not belong to the "body politic" of that State, and her "sovereignty" does not extend to commerce and navigation, nor to aliens before they come within her jurisdiction. Until landed, they are under the jurisdiction of the United States, covered and protected by their laws.

It will not be denied that Congress may impose taxes or duties at pleasure on men and merchandise, upon their importation (within the limits of treaties), without any objection as to its constitutional right to do so. But suppose the power were exercised by Congress; from whence would such authority be derived? Obviously, from the power "to lay and collect taxes, duties, imposts, and excises," and "to regulate commerce." The control of Congress over foreign commerce is *unlimited, [*387 while that of the States has been given up to the general government.

Massachusetts cannot raise a fund for her pauper system by taxing the property of aliens on shipboard before it is landed or made subject to her jurisdiction. She could lay no duty, for instance, under the tariff of 1842, on "wearing apparel and other personal effects, not merchandise, professional books, instruments, implements and tools of trade, occupation or employment of persons arriving in the United States," because this law declared that those articles should be exempt from duty. And upon this subject Congress has legislated from the beginning to the same effect.

Has not the general government, then, interposed its authority and prescribed the terms under which aliens shall come into the ports of the United States—not the ports of Boston and New York, but the ports of the nation at large, each and all of them, from the St. John's to the Rio Grande? Congress has said that the personal effects, not merchandise of aliens, shall be admitted exempt from duties. It has nowhere taxed their persons, but has permitted them, so far as their legislation is concerned, to come in free of charge. If the States cannot tax the personal effects, not merchandise, of aliens because Congress has permitted them to be free, how can they tax their persons, which, by clear implication, are to be free also?

Congress as often regulates commerce by permitting it to go untrammeled as it does by direct action. If that power were to impose taxes upon specific articles enumerated in a tar-

iff, and omit all others, the latter would be free; for all articles not directly charged with duty by some act of Congress are undoubtedly exempt therefrom. The Liverpool Hero, 2 Gall. 188.

No State can, without the consent of Congress, lay any duty on imports except to carry out, as far as may be necessary, their inspection laws; and this by the express words of the tenth section of the first article of the Constitution. But suppose that section had been omitted; could the States then impose duties upon imports while the eighth section remains, which gives to Congress the entire control over the subject?

"From the vast inequality," says Chief Justice Marshall, "between the different States of the confederacy as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessa-
388*] ry as it was, and jealous as the *States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interests of all would be best promoted by placing the whole subject under the control of Congress."

It is obvious that the same power which imposes a light duty can impose a very heavy one; one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised at all; it must be exercised at the will of those in whose hands it is placed. 4 Wheat. 438, 439.

It is not denied by the plaintiff in error, that States can establish systems of pauper laws, which may include aliens as well as natives; but they cannot tax commerce or navigation in order to procure the means for their support. For this purpose they must assess their own property and their own constituents, and not assume a power to tax, because of the benevolent objects for which the revenue is to be raised. If the end will sanction the means, then all power of restraining taxation is at an end.

We do not complain of any just exercise of a police power, nor of inspection laws, nor demands for lists of passengers, nor of acts to keep out pestilence or regulate the introduction of persons burdensome to the Commonwealth, nor of the stopping of ships for examination merely. All these things may be done, and yet no authority found in the States to tax passengers, brought into the country in the due course of commerce and navigation, for the purpose of supporting these measures.

If the States may impose these burdens, they may exclude passengers altogether. If they can tax aliens as such, they may expel them, when landed, by an oppressive exercise of the power. If they tax on arrival, they may tax on departure, and there is no limit to the power.

It is supposed that this case is governed by *that of The City of* New York v. Miln; but upon examination it will be found that the action in that case was not founded upon any section of the passenger law which imposed a tax upon them. It was an action of debt, for the recovery of a penalty for not reporting the names of the passengers. The declaration averred that a certain vessel arrived in the port of New York from Liverpool, with passengers on board, and that the master did not make a report in writing to the mayor of the city of the name, place of birth and last legal settlement, age, and occupation of the several persons brought as passengers on the ship, contrary to *the [*389 provisions of the act of the State of New York (partly recited in the declaration), whereby an action accrued to the plaintiff to demand from the defendant, the consignee of the ship, the sum of seven thousand five hundred dollars. To this declaration there was a demurrer and joinder.

The decision of the court was therefore confined to that part of the act which requires the master, within twenty-four hours after the arrival of his vessel, to make report of his passengers, but the question as to the power of taxation did not arise. It is true there were many general remarks upon constitutional law, made by the judges who gave opinions; but the points before the court and the questions passed upon were those above referred to.

Chief Justice Taney, in remarking upon this case of New York v. Miln, observes, that, "the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court." 5 How. 584.

But can the maritime States, by their own acts, prohibit the importation of settlers for the public lands, or their migration to those unoccupied regions of the interior which are ready to welcome their approach? Congress has legislated upon the subject of emigration and naturalization, the exclusive power over which is given to that body by the Constitution. It has also legislated concerning the carrying of passengers, prescribing the space they shall be entitled to occupy on shipboard, the food and water with which they shall be supplied, and the privileges they shall enjoy.

The institutions and laws of the United States encourage the emigration of foreigners, and our untilled soil requires the stimulating power of their industry. Can the maritime States, then, by their own legislation, restrain or destroy that commerce which relates to the importation of passengers, and their migration to other States open for their reception? The law of Massachusetts prescribes some of the terms upon which aliens may land upon her shores. If it can prescribe some, it can prescribe others. It may establish burdensome or impossible conditions, and so shut out emigrants altogether. Let it not be forgotten that this is a question of power exclusively. Emigrants arrive in Boston destined for Iowa. This convenient eastern port is selected as a place of disembarkation, the ultimate purpose being a permanent settlement elsewhere. The passengers are not, as a matter of course, either diseased, *decrepit or infirm. They may [*390

be young, above want, adventurous, and determined. Upon approaching the shores of their first western port they are met by the tax gatherer, who demands two dollars from each man, each woman, and each child. Having submitted to this exaction, the emigrants pass immediately on towards their long-sought home in the fertile regions of the West. When they arrive at the boundary of New York another tax gatherer may meet them, and, under the pretense of pauperism and the burdens of poverty, he may demand two dollars also from each emigrant, for the privilege of crossing the borders of another State. For, if Massachusetts can tax them as they come in by sea, New York may tax them also as they journey through her territory by land; and this may be repeated in every State through which they may desire to pass.

It is submitted to the court, that the States have no such power. We repeat, that although the States may pass poor-laws, establish sanatory regulations, and provide for inspections, yet they cannot tax any branch of the foreign commerce of the country, to aid them in their projects, be they charitable or not. The power cannot be derived from the subject to which the money is to be applied, but must exist, if it exist at all, altogether independently of such objects.

The whole subject of emigration, so far as it is connected with commerce and navigation, is under the control of Congress, and there it should remain. That body can exercise the power wisely, discreetly, and disinterestedly, for the benefit of the whole country, without permitting any improper burden to be placed upon the maritime States. Their laws will be uniform; those of the States must necessarily be diverse—the tax in Massachusetts being two dollars, while in New York it is but one. The sovereign power may annex what conditions it pleases to the admission of foreigners within its jurisdiction, or prohibit it altogether. But that sovereign power, in this country, is in the United States, and the whole subject is committed, with great propriety, by the Constitution, to the Congress of the whole people, and not to the States in their corporate capacities.

But the passengers referred to are not in all cases emigrants, coming here for permanent settlement. In many cases there are merchants, visiting our shores for purposes of commerce merely, and we submit that to tax them is to tax the commerce of the country, which cannot be done by the States.

The act of Massachusetts is also open to another objection which is obvious. The tax is not specifically on the alien passengers themselves, although it may be so indirectly. It for- [*391*] bids "the landing of any such persons until the master, owner, consignee, or agent shall have paid two dollars for each passenger so landing.

We submit that this is a direct impost upon the masters or owners, in direct relation to their commercial avocations; it is a tax upon the master as master, upon the owner because he imports emigrants rather than merchandise. Massachusetts cannot compel a merchant to pay two dollars for each chest of tea he may import into Boston: and to impose upon him a duty of two dollars upon each person he may import is as direct an interference with the commerce of the country as a tax upon baggage or personal effects would be. Passengers are brought in as freight; they take the place of cargo, and occupy all the decks of the ship. To tax the passengers is to tax the freight; and if the latter cannot be done, the former cannot. The business of importing emigrants has become a matter of great importance to the merchants of New York and Boston, who derive large emoluments from this employment of their ships, the receipts for passage money being counted by millions instead of thousands. Passage money and freight are in law identical, and are governed by the same rules. 1 Pet. Adm. 123-125.

The navigation of the country is under the exclusive control of Congress; and if it were under that of the States, what would be the consequence? Massachusetts, having power over the subject, might impose a tax of five dollars upon each emigrant imported in ships other than her own, and by this means secure a monopoly, as far as this could be done by legislation, for the vessels belonging to her own citizens. Uniformity in the laws of commerce and navigation would be destroyed, and we should go back in effect to the old Confederation. Jealousies would spring up, and retaliation begin, and this entire branch of the commerce of the country would fall into chaos. Thirty years ago, during the steamboat controversy, Connecticut passed retaliatory laws against New York; and if the States can regulate the conditions upon which passengers may land, these conditions may and would vary in all the maritime States.

They do so now. In this respect there is no uniformity in the State laws; and hence the whole subject, should be and is referred to Congress. That body has the entire control over our foreign relations, which are wisely placed by the Constitution beyond State interference.

If Massachusetts can tax passengers arriving within her jurisdiction before they come under the control of her laws, so may New Mexico and California, when States. These latter would have a strong temptation to ex- [*392 ercise the right at this time, and might make New York herself feel the weight of State power. For if States can lay an impost upon aliens, they may also upon natives, as New York herself now does.

She does not discriminate between citizens of the United States and foreigners, but imposes the same tax upon both. Neither is she particularly nice as to the objects to which the revenue thus raised is appropriated.

To support an establishment for the reform of young offenders she gives eight thousand dollars per annum; a large donation is bestowed upon her hospitals and dispensaries; and finally, should there be a surplus of revenue thus derived, the State treasury itself becomes the depository of all balances which remain. If she has the power to impose the tax, and raise the revenue, she doubtless has the power to dispose of it in any way she may see fit. She may defray out of it all the expenses of her civil list, maintain her schools, and support her paupers. These with which revenue may be raised by means of imposts upon commerce

presents great temptations to State power. The convenience of the system is obvious. If it can be upheld under the Constitution of the United States, it will be resorted to by every State upon the Atlantic and the Pacific, and indirectly a large portion of the revenues of the States will be derived from commerce and navigation. The temptation would not be resisted, and hence those who framed the great charter under which the States are restrained wisely took the power to regulate commerce from these sovereignties, and bestowed it upon Congress.

We submit to the court, that the law of Massachusetts now under consideration is unconstitutional and void.

Mr. Justice McLean:

Smith v. Turner.

Under the general denomination of health laws in New York, and by the seventh section of an act relating to the marine hospital, it is provided, that "the health commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz:

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting vessel, 393*] for each person *on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the money so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys a right to demand and recover from each person the sum paid on his account." The tenth section declares any master, who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of one hundred dollars. By the eleventh section, the commissioners of health are required to account annually to the comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

The plaintiff in error was master of the British ship Henry Bliss, which vessel touched at the port of New York in the month of June, 1841, and landed two hundred and ninety steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover one dollar for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a *regulation* of commerce, and in conflict with *the Constitution of the* United States. The Supreme Court of the State overruled the demurrer, and the Court of Errors affirmed the judgment. This brings before this court, under the twenty-fifth section of the Judiciary Act, the constitutionality of the New York statute.

I will consider the case under two general heads:

1. Is the power of Congress to regulate commerce an exclusive power?

2. Is the statute of New York a regulation of commerce?

In the eighth section of the first article of the Constitution it is declared that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Before the adoption of the Constitution, the States, respectively, exercised sovereign power, under no other limitations than those contained in the Articles of Confederation. By the third section of the sixth article of that instrument, it was declared that "no State shall lay any imposts or duties which may *interfere [*394 with any stipulations in treaties entered into by the United States in Congress assembled;" and this was the only commercial restriction on State power.

As might have been expected, this independent legislation, being influenced by local interests and policy, became conflicting and hostile insomuch that a change of the system was necessary to preserve the fruits of the Revolution. This led to the adoption of the federal Constitution.

It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the federal government and inhibited to the States, either expressly or by necessary implication. This implication may arise from the nature of the power.

In the same section which gives the commercial power to Congress, is given power "to borrow money on the credit of the United States," "to establish a uniform rule of naturalization," "to coin money," "to establish post-offices and post roads," "to constitute tribunals inferior to the Supreme Court," "to define and punish piracies and felonies committed on the high seas," "to declare war," "to provide and maintain a navy," etc., and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Only one of these powers is, in the Constitution, expressly inhibited to the States; and yet, from the nature of the other powers, they are equally beyond State jurisdiction.

In the case of Holmes v. Jennison, 14 Peters, 570, the Chief Justice, in giving his own and the opinion of three of his brethren, says: "All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce, to define and punish piracies," etc. "Where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the States." p. 574.

In Houston v. Moore, 5 Wheat. 23, the court

say: "We are altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with one another."

The court, again, in treating of the commercial power, say, in Gibbons v. Ogden, 9 Wheat. 196: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exer- 395*] cised to its utmost extent, and *acknowledges no limitations other than are prescribed in the Constitution." "The sovereignty of Congress, though limited to specified objects, is plenary as to these objects." "The power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions," etc. And in the same case, page 199: "Where, then, each government exercises the power of taxation, neither is exercising the power of the other; but when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."

And Mr. Justice Johnson, who gave a separate opinion in the same case, observes, "The power to regulate commerce here meant to be granted was the power to regulate commerce which previously existed in the States." And again, "The power to regulate commerce is necessarily exclusive."

In Brown v. The State of Maryland, 12 Peters, 446, the court says: "It is not, therefore, matter of surprise that the grant of commercial power should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States." This question, they remark, "was considered in the case of Gibbons v. Ogden, in which it was declared to be complete in itself, and to acknowledge no limitations," etc. And Mr. Justice Baldwin, in the case of Groves v. Slaughter, 15 Peters, 511, says: "That the power of Congress to regulate commerce among the several States is exclusive of any interference by the States has been, in my opinion, conclusively settled by the solemn opinions of this court," in the two cases above cited. And he observes, "If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt."

Mr. Justice Story, in the case of New York v. Miln, 11 Peters, 158, in speaking of the doctrine of concurrent power in the States to regulate commerce, says, that, in the case of Gibbons v. Ogden, "it was deliberately examined and deemed inadmissible by the court." "Mr. Chief Justice Marshall, with his accustomed accuracy and fullness of illustration, reviewed, at that time, the whole grounds of the controversy; and from that time to the present, the question has been considered, so far as I know, at rest. The power given to Congress to regulate commerce with foreign nations and among the States has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise."

*When the commercial power was [*396 under discussion in the convention which formed the Constitution, Mr. Madison observed, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority." Mr. Sherman said: "The power of the United States to regulate trade, being supreme, can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." Mr. Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it." And the motion was carried, "that no State shall lay any duty on tonnage without the consent of Congress." 3 Madison Papers, 1585, 1586.

The adoption of the above provision in the Constitution, and also the one in the same section—"that no State shall, without the assent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress"—is a restriction, it is contended, upon the acknowledged power of the States.

The force of this argument was admitted by the court in the case of Gibbons v. Ogden, and it was answered by the allegation, that the restriction operated on the taxing power of the States. The same argument was used in the thirty-second number of the Federalist. I yield more to the authority of this position than to the stringency of the argument in support of it. To prohibit the exercise of a power by a State, as a general rule, admits the existence of such power. But this may not be universally true. Had there been no inhibition on the States as to "coining money and fixing the value thereof," or as to tonnage duties, it could not have been successfully contended that the States might exercise those powers. All duties are required to be uniform, and this could not be the result of State action. And the power to coin money and regulate its value, for the Union, is equally beyond the power of a State.

Doubts may exist as to the true construction of an instrument in the minds of its framers, and to obviate those doubts, additional, if not unnecessary provisions may be inserted. This remark applies to the Constitution in the instances named, and in others.

A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution. If such power exist, it may be exercised independently of the federal authority.

*It does not follow, as is often said, [*397 with little accuracy, that, when a State law shall conflict with an act of Congress, the former must yield. On the contrary, except in certain cases named in the federal Constitution, this is never correct when the act of the State is strictly within its powers.

I am aware this court have held that a State may pass a bankrupt law, which is annulled when Congress shall act on the same subject. In Sturges v. Crowninshield, 4 Wheat. 122, the court say: "Wherever the terms in

which a power is granted by the Constitution to Congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by Congress, the subject is as completely taken away from State Legislatures as if they had been forbidden to act upon it." But they say, "The power granted to Congress of establishing uniform laws on the subject of bankruptcy is not of this description."

The case of Wilson v. The Black Bird Creek Marsh Company, 2 Pet. 250, it is contended, recognizes the right of a State to exercise a commercial power, where no conflict is produced with an act of Congress.

It must be admitted that the language of the eminent Chief Justice who wrote the opinion is less guarded than his opinions generally were on constitutional questions.

A company was incorporated and authorized to construct a dam over Black Bird Creek, in the State of Delaware, below where the tide ebbed and flowed, in order to drain the marsh, and by that means improve the health of the neighborhood. The plaintiffs, being desirous of ascending the creek, with their vessel, above the dam, removed a part of it as an obstruction, for which the company recovered damages. The Chief Justice in speaking of the structure of the dam, the drainage of the marsh, and the improvement of the health of the neighborhood, says: "Means calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." And he observes: "If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows," 398*] etc., "we should feel not much *difficulty in saying that a State law coming in conflict with such act would be void. But Congress had passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States—a power which has not been so exercised as to affect the question."

The language of the Chief Justice must be construed in reference to the question before the court; to suppose that he intended to lay down the general proposition, that a State might pass any act to obstruct or regulate commerce which did not come in conflict with an act of Congress, would not only be unauthorized by the language used, and the facts of the case before the court, but it would contradict the language of the court in Gibbons v. Ogden, Brown v. Maryland, and every case in which the commercial power has been considered.

The Chief Justice was speaking of a creek which falls into the Delaware, and admitted in the pleadings to be navigable, but of so limited an extent that it might well be doubted whether the general regulation of commerce could apply to it. Hundreds of creeks within the flow of the tide were similarly situated. In such cases, involving doubt whether the jurisdiction may not be exclusively exercised by the State, it is politic and proper in the judicial power to follow the action of Congress. Over the navigable waters of a State, Congress can exercise no commercial power, except as regards an intercourse with other States of the Union or foreign countries. And doubtless there are many creeks made navigable by the flowing of the tide, or by the backwater from large rivers, which the general phraseology of an act to regulate commerce may not embrace. In all such cases, and many others that may be found to exist, the court could not safely exercise a jurisdiction not expressly sanctioned by Congress.

When the language of the court is applied to the facts of the above case, no such general principle as contended for is sanctioned. The construction of the dam was complained of, not as a regulation of commerce, but an obstruction of it; and the court held, that, "as Congress had not assumed to control State legislation over those small navigable creeks into which the tide flows, the judicial power could not do so. The act of the State was an internal and a police power to guard the health of its citizens. By the erection of the dam, commerce could only be affected as charged consequentially and contingently. The State neither assumed nor exercised a commercial power. In this whole case, nothing more is found than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of the government.

*A concurrent power excludes the [*399 idea of a dependent power. The general government and a State exercise concurrent powers in taxing the people of the State. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action.

But the argument is, that a State acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject; and that the State must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the States. But this argument degrades the States by making their legislation, to the extent stated, subject to the will of Congress. State powers do not rest upon this basis. Congress can in no respect restrict or enlarge State powers, though they

may adopt a State law. State powers are at all times and under all circumstances exercised independently of the general government, and are never declared void or inoperative except when they transcend State jurisdiction. And on the same principle, the federal authority is void when exercised beyond its constitutional limits.

The organization of the militia by a State, and also a State bankrupt law, may be superseded by the action of Congress. But this is not within the above principle. The action of the State is local, and may be necessary on both subjects, and that of Congress is general. In neither case is the same power exercised. No one doubts the power of a State to regulate its internal commerce.

It has been well remarked, that the regulation of commerce consists as much in negative as in positive action. There is not a federal power which has been exerted in all its diversified means of operation. And yet it may have been exercised by Congress, influenced by a judicious policy and the instruction of the people. Is a commercial regulation open to State action because the federal power has not been exhausted? No ingenuity can provide for 400*] every contingency; and if it *could, it might not be wise to do so. Shall free goods be taxed by a State because Congress have not taxed them? Or shall a State increase the duty, on the ground that it is too low? Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress.

That it is inconsistent with the exclusive power will be admitted; but the exercise of a subordinate commercial power by a State is contended for. When this power is exercised, how can it be known that the identical thing has not been duly considered by Congress? And how can Congress, by any legislation, prevent this interference? A practical enforcement of this system, if system it may be called, would overthrow the federal commercial power.

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of Gibbons v. Ogden, reiterated in Brown v. The State of Maryland, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion, that the power "to regulate commerce with foreign nations, and among the several States," by the Constitution, is exclusively vested in Congress.

I come now to inquire, under the second general proposition, Is the statute of New York a regulation of foreign commerce?

All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation. Congress have no more power to control this than a State has to regulate commerce "with foreign nations and among the several States." And yet Congress may tax the property within a State, of every description, owned by its citizens, on the basis provided in the Constitution, the same as a State may tax it. But if Congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce and commerce among the several States, the regulation of which, with certain constitutional exceptions, is exclusively vested in Congress, no State can regulate.

In giving the commercial power to Congress the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals, or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare.

*The inspection laws of a State ap- [*401
ply chiefly to exports, and the State may lay duties and imposts on imports or exports to pay the expense of executing those laws. But a State is limited to what shall be "absolutely necessary" for that purpose. And still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

The cautious manner in which the exercise of this commercial power by a State is guarded, shows an extreme jealousy of it by the convention; and no doubt the hostile regulations of commerce by the States, under the Confederation, had induced this jealousy. No one can read this provision, and the one which follows it in relation to tonnage duties, without being convinced that they cover, and were intended to cover, the entire subject of foreign commerce. A criticism on the term "import," by which to limit the obvious meaning of this paragraph, is scarcely admissible in construing so grave an instrument.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question. In Gibbons v. Ogden, this court say: "No clear distinction is perceived between the powers to regulate vessels in transporting men for hire and property for hire." The provision of the Constitution, that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808," is a restriction on the general power of Congress to regulate commerce. In reference to this clause, this court say, in the above case: "This section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."

To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted. As a branch of commerce the transportation of passengers has always given a profitable employment to our ships, and within a few years past has required

an amount of tonnage nearly equal to that of imported merchandise.

Is this great branch of our commerce left open to State regulation on the ground that the prohibition refers to an import, and a man is not an import?

Pilot laws, enacted by the different States, 402*] have been referred *to as commercial regulations. That these laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive their force? Certainly not from the States. By the fourth section of the Act of the 7th of August, 1789, it is provided, "that all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." These State laws, by adoption, are the laws of Congress, and as such, effect is given to them. So the laws of the States which regulate the practice of their courts are adopted by Congress to regulate the practice of the federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specially enacted by Congress. A repeal of them by the State, unless future changes in the acts be also adopted, does not affect their force in regard to federal action.

In the above instances, it has been deemed proper for Congress to legislate by adopting the law of the States. And it is not doubted that this has been found convenient to the public service. Pilot laws were in force in every commercial State on the seaboard when the Constitution was adopted; and on the introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceeding with which the people of the different States were familiar. In regard to pilots, it was not essential that the laws should be uniform—their duties could be best regulated, by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued shows that the public interest has required no change.

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged.

A State cannot regulate foreigu commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use. 403*] *An inquiry is made whether Congress, under "the power to regulate commerce among the several States," can impose a tax *for the use of* canals, railroads, turnpike roads, *and bridges, constructed* by a State or its citizens. I answer, that Congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed, not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement

The act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port, of one dollar and fifty cents; and of one dollar on the mate, each steerage passenger, sailor, or mariner. And the master is made responsible for the tax, he having a right to exact it of the others. The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society.

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. And with the same propriety it may include the expenditures of any branch of the civil administration of the city of New York, or of the State. In fact, I can see no principle on which the fund can be limited, if it may be used as authorized by the act. The amount of the tax is as much within the discretion of the Legislature of New York as the objects to which it may be applied.

It is insisted that if the act, as regards the hospital fund, be within the power of the State, the application of a part of the fund to other objects, as provided in the act, cannot make it unconstitutional. This argument is unsustainable. If the State has power to impose a tax to defray the necessary expenses of a health regulation, and this power being exerted, can the tax be increased so as to defray the expenses of the State government? This is within the principle asserted.

The case of The City of New York v. Miln, 11 Peters, 102, is relied on with great confidence as sustaining the act in question. As I assented to the points ruled in that case, consistency, unless convinced of having erred, will compel me to support the law now before us, if it be the same in principle. The law in Miln's case required that "the master or commander of any ship or other vessel arriving at the port of New York shall, *within [*404 twenty-four hours after his arrival, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, the name, place of birth and last legal settlement, age, and occupation of every person brought as a passenger; and of all persons permitted to land at any place during the voyage, or go on board of some other vessel, with the intention of proceeding to said city; under the penalty on such master or commander, and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively, of seventy-five dollars for each individual not so reported." And the suit was brought against Miln as consignee of the ship Emily, for the failure of

the master to make report of the passengers on board of his vessel.

In their opinion this court say: "The law operated on the territory of New York, over which that State possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation;" and "on persons whose rights and duties are rightfully prescribed and controlled by the laws of the respective States, within whose territorial limits they are found." This law was considered as an internal police regulation, and as not interfering with commerce.

A duty was not laid upon the vessel or the passengers, but the report only was required from the master, as above stated. Now, every State has an unquestionable right to require a register of the names of the persons who come within it to reside temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency which might occur. It opposed no obstruction to commerce, imposed no tax nor delay, but acted upon the master, owner, or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the State, mingling with its citizens, and subject to its laws.

But the health law, as it is called, under consideration, is altogether different in its objects and means. It imposes a tax or duty on the passengers, officers, and sailors, holding the master responsible for the amount at the immediate termination of the voyage, and necessarily before the passengers have set their feet on land. The tax on each passenger, in the discretion of the Legislature, might have been five or ten dollars, or any other sum, amounting even to a prohibition of the transportation of passengers; and the professed object of the tax is as well for the benefit of juvenile offenders as for the marine hospital. And it is not denied that a considerable sum thus received has been applied to the former object. The amount and application of this tax are only important to show the consequences of the exercise of this power by the States. The principle involved is vital to the commercial power of the Union.

405*] *The transportation of passengers is regulated by Congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector, a list of the passengers from a foreign port, stating the age, sex, and occupation of each, and the place of their destination. In England, the same subject is regulated by act of Parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation—upon what may, in effect, be called an import. In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers. For the transportation of both the ship owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the State, they become subject to its laws.

In Gibbons v. Ogden, the court held that the act of laying "duties or imposts on imports or exports" is derived from the taxing power; and they lay much stress on the fact that this power is given in the same sentence as the power to "lay and collect taxes." "The power," they say, "to regulate commerce is given" in a separate clause, "as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred;" and they remark, that, had not the States been prohibited, they might, under the power to tax, have levied "duties on imports or exports." 9 Wheat. 201.

The Constitution requires that all "duties and imposts shall be uniform," and declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Now, it is inexplicable to me how thirteen or more independent States could tax imports under these provisions of the Constitution. The tax must be uniform throughout the Union; consequently the exercise of the power by any one State would be unconstitutional, as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the Constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these *provisions of the Constitution [*406 operate only on the federal government, and the States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the Constitution has failed to accomplish the great object of those who adopted it.

These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution.

It is immaterial under what power duties on imports are imposed. That they are the principal means by which commerce is regulated no one can question. Whether duties shall be imposed with the view to protect our manufacturers, or for purposes of revenue only, has always been a leading subject of discussion in Congress; and also what foreign articles may be admitted free of duty. The force of the argument, that things untouched by the regulating power have been equally considered with those of the same class on which it has operated, is not admitted by the counsel for the defendant. But does not all experience sustain the argument? A large amount of foreign articles brought into this country for several years have been admitted free of duty. Have not these articles been considered by Congress? The discussion in both houses of Congress, the report by the committees of both, and the laws

that have been enacted, show that they have been duly considered.

Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers. The slave States have the power, as this court held in Groves v. Slaughter, to prohibit slaves from being brought into them as merchandise. But this was on the ground that such a prohibition did not come within the power of Congress "to regulate commerce among the several States." It is suggested that, under this view of the commercial power, slaves may be introduced into the free States. Does anyone suppose that Congress can ever revive the slave trade? And if this were possible, slaves thus introduced would be free.

As early as May 27th, 1796, Congress enacted, that "the President be authorized to direct the revenue officers commanding forts and revenue cutters to aid in the execution of quarantine, and also in the execution of the health laws of the States respectively." And by the Act of February 25th, 1799, which repealed the above act, more enlarged provisions were enacted, requiring the revenue officers of 407*] the United States to conform *to and aid in the execution of the quarantine and health laws of the States. In the first section of this law there is a proviso, that "nothing therein shall enable any State to collect a duty of tonnage or impost without the consent of Congress."

A proviso limits the provisions of the act into which it is introduced. But this proviso may be considered as not restricted to this purpose. It shows with what caution Congress guarded the commercial power, and it is an authoritative provision against its exercise by the States. An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. In this sense it was no doubt used in the above act. Any other construction would be an imputation on the intelligence of Congress.

If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut, and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip.

If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the Lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. And the same principle will sustain a right in every State to tax all persons who shall pass through its territory on railroad cars, canal boats, stages, or in any other manner. This would enable a State to establish and enforce a non-intercourse with every other State.

The ninth section of the first article of the Constitution declares: "Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from State taxation, they can claim no exemption under the exercise of the same power among the States. In McCulloch v. The State of Maryland, 4 Wheat. 431, this court say: "That there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

*The officers and crew of the vessel [*408 are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instruments. The passengers are taxed as passengers, being the subjects of commerce from a foreign country. By the fourteenth article of the Treaty of 1794, with England, it is stipulated that the people of each country may freely come, with their ships and cargoes, to the other, subject only to the laws and statutes of the two countries respectively. The statutes here referred to are those of the federal government, and not of the States. The general government only is known in our foreign intercourse.

By the forty-sixth section of the Act of March, 1799, the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade, from a foreign port, are admitted free of duty. These provisions of the treaty and of the act are still in force, and they have a strong bearing on this subject. They are, in effect, repugnant to the act of New York.

It is not doubted that a large portion, perhaps nine tenths, of the foreign passengers landed at the port of New York pass through the State to other places of residence. At such places, therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, Congress should make suitable provisions for their relief. And I have no doubt this will be done.

The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means. If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a State to tax objects not subject to its jurisdiction.

The Attorney-General of New York admitted that if the commercial power were exclusively vested in Congress, no part of it can be exercised by a State. The soundness of this conclusion is not only sustainable by the de-

cisions of this court, but by every approved rule of construction. That the power is exclusive seems to be as fully established as any other power under the Constitution which has been controverted.

A tax or duty upon tonnage, merchandise, or passengers, is a regulation of commerce, and cannot be laid by a State, except under the sanction of Congress and for the purposes specified in the Constitution. On the subject of foreign commerce, including the transportation of passengers, Congress have adopted 409*] *such regulations as they deemed proper, taking into view our relations with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void.

Norris v. City of Boston.

This is a writ of error, which brings before the court the judgment of the Supreme Court of the State of Massachusetts.

"An Act relating to alien passengers," passed the 20th of April, 1837, by the Legislature of Massachusetts, contains the following provisions:

"Sec. 1. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessel and examine into the condition of said passengers.

"Sec. 2. If on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officers so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"Sec. 3. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

The plaintiff being an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain, arriving in the port of Boston, from that place, in command of a schooner called the Union Jack, which had on board nineteen alien passengers, for each of which two dollars were demanded of the plaintiff, and paid by him, on protest that the exaction was illegal. An action being brought to recover back this *money, against the [*410 city of Boston, in the Court of Common Pleas, under the instructions of the court the jury found a verdict for the defendant, on which judgment was entered; and which was affirmed on a writ of error to the Supreme Court.

Under the first and second sections of the above act, the persons appointed may go on board of a ship from a foreign port, which arrives at the port of Boston with alien passengers on board, and examine whether any of them are lunatics, idiots, maimed, aged, or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore, unless security shall be given that they shall not become a city, town, or State charge. This is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come, nor any one of them, within the second section. The tax of two dollars was paid by the master for each of these passengers before they were permitted to land. This, according to the view taken in the above case of Smith v. Turner, was a regulation of commerce, and not being within the power of the State, the act imposing the tax is void.

The fund thus raised was no doubt faithfully applied for the support of foreign paupers, but the question is one of power, and not of policy. The judgment of the Supreme Court, in my opinion, should be reversed, and this cause be remanded to that court, with instructions to carry out the judgment of this court.

Mr. Justice Wayne:

Norris v. City of Boston, and Smith v. Turner.

I agree with Mr. Justice McLean, Mr. Justice Catron, Mr. Justice McKinley, and Mr. Justice Grier, that the laws of Massachusetts and New York so far as they are in question in these cases, are unconstitutional and void. I would not say so, if I had any, the least, doubt of it; for I think it obligatory upon this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind.

Before stating, however, what they are, it will be well for me to say, that the four judges and myself who concur in giving the judgment in these cases do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; *and that is, [*411 that a majority of us do not think it necessary in these cases to reaffirm, with our brother McLean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes," is exclusively vested in Congress, and that no part of it can be exercised by a State.

I believe it to be so, just as it is expressed in the preceding sentence. And in the sense in which those words were used by this court in

the case of Gibbons v. Ogden, 9 Wheat. 198. All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in Congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as is given by this court in Gibbons v. Ogden.

Still, I do not think it necessary to re-affirm that position in these cases, as a part of our judgments upon them. Its exclusiveness in Congress will, it is true, be an unavoidable inference from some of the arguments which I shall use upon the power of Congress to regulate commerce; but it will be seen that the argument, as a whole, will be a proper and apt foundation for the conclusion to which five of us have come—that the laws of Massachusetts and New York, so far as they are resisted by the plaintiffs in the cases before us, are tax acts, in the nature of regulations acting upon the commerce of the United States, such as no State can now constitutionally pass.

For the acts of Massachusetts and New York imposing taxes upon passengers, and for the pleadings upon which these cases have been brought to this court, I refer to the opinion of Mr. Justice Catron. They are fully and accurately stated. I take pleasure in saying that I concur with him in all the points made in his opinion, and in his reasoning in support of them. They are sustained by such minute references to the legislation of Congress and to treaty stipulations, that nothing of either is left to be added. As an argument, it closes this controversy against any other view of the subject matter, in opposition to my learned brother's conclusions.

His leading positions are, that the acts of Massachusetts and New York are tax revenue acts upon the commerce of the United States, as that commerce has been regulated by the legislation of Congress and by treaty stipulations; that the power to regulate commerce having been acted upon by Congress indicates how far the power is to be exercised for the United States as a nation, with which there 412*] can be no interference *by any State legislation; that a treaty permitting the ingress of foreigners into the United States, with or without any other stipulation than a reciprocal right of ingress for our people into the territories of the nation with which the treaty may be made, prevents a State from imposing a poll tax or personal impost upon foreigners, either directly or indirectly, for any purpose whatever, as a condition for being landed in any part of the United States, whether such foreigners shall come to it for commercial purposes, or as immigrants, or for temporary visitation.

Those of us who are united with Mr. Justice Catron in giving the judgments in these cases concur with him in those opinions. Mr. Justice McKinley and Mr. Justice Grier have just said so, my own concurrence has been already expressed, and the second division of Mr. Justice McLean's opinion contains conclusions identical with those of Mr. Justice Catron concerning the unconstitutionality of the laws of Massachusetts and New York, on account of the conflict between them with the legislation of Congress and with treaty stipulations. I also concur with Mr. Justice McKinley in his interpretation of the ninth section of the first article of the Constitution; also with Mr. Justice Grier, in his opinion in the case of Norris v. The City of Boston.

I have been more particular in speaking of the opinions of Messrs. Justices McLean and Catron than I would otherwise have been, and of the points of agreement between them, and of the concurrence of Messrs. Justices McKinley and Grier and myself in all in which both opinions agree, because a summary may be made from them of what the court means to decide in the cases before us. In my view, after a very careful perusal of those opinions, and of those also of Mr. Justice McKinley and Mr. Justice Grier, I think the court means now to decide—

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into ports in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question *in these cases con- [*413
flict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject, always, to the laws and statutes of the two countries, respectively;" and that said laws are therefore unconstitutional and void.

4. That, the Congress of the United States having by sundry acts passed at different times admitted foreigners into the United States with their personal luggage and tools of trade free from all duty and imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is in transitu to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusetts or New York, and before the passengers have been landed, are in violation of said acts of Congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New

York, so far as they impose any obligation upon the owners of consignees of vessels, or upon the captains of vessels or freighters of the same arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void; being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of Congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the Constitution includes within it the migration of other persons, 414*] *as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another," is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the States, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

8. That the power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the States may, in the exercise of such police power, without *any violation of [*415 the power in Congress to regulate commerce, exact from the owner or consignee of a quarantine vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Having done what I thought it was right to do to prevent hereafter any misapprehension of what the court now means to decide. I will give some reasons, in addition to those which have been urged by my associates, in support of our common result. In the first place, let it be understood, that, in whatever I may say upon the power which Congress has "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," the internal trade of a State is not meant to be included; that not being in any way within the regulating power of Congress.

In the consideration, too, of the power in Congress to regulate commerce, I shall not rely, in the first instance, upon what may be constitutionally done in many commercial particulars, as well under the treaty-making power as by the legislation of Congress. My first object is to show the plentitude of the power in Congress from the grant itself, without aid from any other clause in the Constitution. The treaty-making power for commercial purposes, however, and other clauses in the Constitution relating to commerce, may afterwards be used to enforce and illustrate the extent and character of the power which Congress has to regulate commerce. It is a grant of legislative power, susceptible, from its terms and the subject matter, of definite and indisputable interpretation.

Any mere comment upon the etymology of the words "regulate" and "commerce" would be unsatisfactory in such a discussion. But if their meaning, as they were used by the framers of the Constitution, can be made precise by the subject matter, then it cannot be doubted that it was intended by them that Congress should have the legislative power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, to the exclusion of any regulation for such commerce by any one of the States.

All commerce between nations is permissive or conventional. The first includes every allowance of it, under what is termed by writers upon international law the liberty or freedom

of commerce—its allowance by statutes, or by the orders of any magistracy having the power to exercise the sovereignty of a nation in respect to commerce. Coventional commerce is, of course, that which nations carry on with each other under treaty stipulations. With colonial commerce—another distinct kind, between nations and their colonies, which the 416*] laws *of nations permit the former to monopolize—we have nothing to do upon this occasion.

Now, what commerce was in fact, at least so far as European nations were concerned, had been settled beyond all dispute before our separation from the mother country. It was well known to the framers of the Constitution, in all its extent and variety. Hard denials of many of its privileges had taught them what it was. They were familiar with the many valuable works upon trade and international law which were written and published, and which had been circulated in England and in the colonies from the early part of the last century up to the beginning of the Revolution. It is not too much to say, that our controversies with the mother country upon the subject had given to the statesmen in America in that day more accurate knowledge of all that concerned trade in all its branches and rights, and a more prompt use of it for any occasion, than is now known or could be used by the statesmen and jurists of our own time. Their knowledge, then, may well be invoked to measure the constitutional power of Congress to regulate commerce.

Commerce between nations or among States has several branches. Martens, in his Summary of the Laws of Nations, says: "It consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufacturers; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."

"Generally speaking, the commerce in Europe is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for that purpose. A state of war forms here a natural exception. However, as long as there is no treaty existing, every State retains its natural right to lay on such commerce whatever restriction it pleases. A nation is then fully authorized to prohibit the entry or exportation of certain merchandise, to institute customs and to augment them at pleasure, to prescribe the manner in which the commerce with its dominions shall be carried on, to point out the places where it shall be carried on, or to exempt from it certain parts of its dominions to exercise freely its sovereign power over the foreigners living in its territories, to make whatever distinctions between the nations with whom it trades it may find conducive to its interests."

In all of the foregoing particulars Congress may act legislatively. It is conceded that the 417*] States may not do so in any *one of them; and if, in virtue of the power to lay taxes, the United States and the States may act in that way concurrently upon foreigners when they reside in a State, it does not follow that the States may impose a personal impost upon them, as the condition of their being permitted to land in a port of the United States. "Duties on the entry of merchandise are to be paid indiscriminately by foreigners as well as subjects. Personal imposts it is customary not to exact from foreigners till they have for some time been inhabitants of the State." Martens, p. 97.

Keeping, then, in mind what commerce is, and how far a nation may legally limit her own commercial transactions with another State, we cannot be at loss to determine, from the subject matter of the clause in the Constitution, that the meaning of the terms used in it is to exclude the States from regulating commerce in any way, except their own internal trade, and to confide its legislative regulation completely and entirely to Congress. When I say completely and entirely to Congress, I mean all that can be included in the term "commerce among the several States," subject, of course, to the right of the States to pass inspection laws in the mode prescribed by the Constitution, to the prohibition of any duty upon exports, either from one State to another State or to foreign countries, and to that commercial uniformity which the Constitution enjoins respecting all that relates to the introduction of merchandise into the United States, and those who may bring it for sale, whether they are citizens or foreigners, and all that concerns navigation, whether vessels are employed in the transportation of passengers or freight, or both, including, also all the regulations which the necessities and safety of navigation may require. "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government."

But the conclusion derived from the subject matter of the clause, as I have just stated it, is strengthened particularly by what may be done in respect to commerce by treaty, and by other clauses in the Constitution relating to Commerce. Martens (p. 151) says: "The mere general liberty of trade, such as it is acknowledged at present in Europe, being too vague to secure to a nation all the advantages it is necessary it should derive from its commerce, commercial powers have been obliged to have recourse to treaties for their mutual benefit. The number of these treaties is considerably augmented since the *six- [*418 teenth century. However they may differ in their conditions, they turn generally on these three points: 1. On commerce in time of peace. 2. On the measures to be pursued with respect to commerce and commercial subjects in case of rupture between the parties. 3. On the commerce of the contracting party that may happen to remain neuter, while the other contracting party is at war with a third power. With respect to the first point the custom is, 1. To settle in general the privileges that the contracting powers grant reciprocally to their subjects. 2. To enter into the particulars of the rights to be enjoyed by their subjects, as well with respect to their property as to their

personal rights. Particular care is usually taken to provide for the free enjoyment of their religion; for their right to the benefit of the laws of the country; for the security of the books of commerce, etc. 3. To mention specifically the kinds of merchandise which are to be admitted to be imported or exported, and the advantages to be granted relatively to customs, tonnage, etc.

"With respect to the rights and immunities in case of a rupture between the parties, the great objects to be obtained are, 1. An exemption from seizure of the person or effects of the subjects residing in the territory of the other contracting power. 2. To fix the time which they shall have to remove with their property out of the territory. 3. Or to point out the conditions on which they may be permitted to remain in the enemy's country during the war.

"In specifying the rights of commerce to be enjoyed by the neutral power, it is particularly necessary, 1. To exempt its vessels from embargo. 2. To specify the merchandise which is to be accounted contraband of war, and to settle the penalties in case of contravention. 3. To agree on the manner in which vessels shall be searched at sea. 4. To stipulate whether neutral bottoms are to make neutral goods or not."

It seems to me, when such regulations of commerce as may be made by treaty are considered in connection with that clause in the Constitution giving to Congress the power to regulate it by legislation, and also in connection with the restraints upon the States in the tenth section of the first article of the Constitution, in respect to treaties and commerce, that the States have parted with all power over commerce, except the regulation of their internal trade. The restraints in that section are, that no State shall enter into any treaty, alliance, or confederation; no State shall, without the consent of Congress, lay any duties on imports or exports, except what may be necessary for executing its inspection laws; no State shall, without the consent of Congress, lay 419*] any duty of tonnage, *or enter into any agreement or compact with another State or with a foreign power.

The States, then, cannot regulate commerce by a treaty or compact, and before it can be claimed that they may do so in any way by legislation, it must be shown that the surrender which they have made to a common government to regulate commerce for the benefit of all of them has been done in terms which necessarily imply that the same power may be used by them separately, or that the power in Congress to regulate commerce has been modified by some other clause in the Constitution. No such modifying clause exists. The terms used do not, in their ordinary import, admit of any exception from the entireness of the power in Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The exercise of any such power of regulation by the States, or any one or more of them, would conflict with the constitutional authority of the United States to regulate commerce by legislation and by treaty, and would measurably replace the States in their commercial attitude to each other as they stood under the Articles of Confederation, and not as they meant to be when "we, the people of the United States," in their separate sovereignties, as they existed under the Articles of Confederation, superseded the latter by their ratification of "the Constitution for the United States of America."

In what I have said concerning commercial regulations under the treaty-making power, I do not mean to be understood as saying that by treaty all regulation of commerce can be made, independently of legislation by Congress. That question I do not enter into here, for in such cases as are now before the court I have no right to do so. It has only been alluded to by me to prevent any such inference from being made.

Apply the foregoing reasoning to the acts of Massachusetts and New York, and whatever may be the motive for such enactments or their legislative denomination, if they practically operate as regulations of commerce, or as restraints upon navigation, they are unconstitutional. When they are considered in connection with the existing legislation of Congress in respect to trade and navigation, and with treaty stipulations, they are certainly found to be in conflict with the supreme law of the land.

But those acts conflict also with other clauses in the Constitution relating to commerce and navigation; also, with that clause which declares that duties, imposts, and excises shall be uniform throughout the United States. Not in respect to excises, for those being taxes upon the consumption or retail sale *of commodities, the States have a [*420 power to lay them, as well as Congress. Not so, however, as to duties and imposts; the first, in its ordinary taxing sense, being taxes or customs upon merchandise; and an impost being also, in its restrained sense, a duty upon imported goods, but also, in its more enlarged meaning, any tax or imposition upon persons. Notwithstanding what may have otherwise been said, I was brought to the conclusion, in my consideration of the taxing power of Congress before these cases were before us, that there was no substantial reason for supposing it was used by the framers of the Constitution exclusively in its more confined sense.

But I return to those clauses with which I have said the acts in question conflict. It will be conceded by all, that the fifth clause of the ninth section of the first article of the Constitution, declaring that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," was intended to establish among them a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States. When Congress enacts regulations of commerce or revenue, it does so for the United States, and the equality exists. When a State passes a law in any way acting upon commerce, or one of revenue, it can only do so for itself, and the equality is destroyed. In such a case the Constitution would be violated, both in spirit and in letter.

Again, it is declared in the first clause of the eighth section of the first article of the Constitution, that all duties, imposts and excises

shall be uniform throughout the United States; that is, first, that when Congress lays duties, imposts, or excises, they shall be uniform; and second that if, in the exercise of the taxing power, Congress shall not lay duties or imposts upon persons and particular things imported, the States shall not destroy the uniformity, in the absence of regulation, by taxing either. Things imported, it is admitted, the States cannot tax, whether Congress has made them dutiable articles or free goods; but persons, it is said, they can, because a State's right to tax is only restrained in respect to imports and exports, and, as a person is not an import, a tax or duty may be laid upon him as the condition of his admission into the State.

But this is not a correct or full view of the point. A State's right to tax may only be limited to the extent mentioned; but that does not give the State the right to tax a foreigner or person for coming into one of the States of the United States. That would be a tax or revenue act, in the nature of a regulation of commerce, acting upon navigation. It is not a 421*] disputable *point, that, under the power given to Congress to lay and collect taxes, duties, imposts, and excises, it may, in the exercise of its power to regulate commerce, tax persons as well as things, as the condition of their admission into the United States. To lay and collect taxes, duties, and imposts gives to Congress a plenary power over all persons and things for taxation, except exports. Such is the received meaning of the word "taxes" in its most extended sense, and always so when it is not used in contradistinction to terms of taxation, having a limited meaning as to the objects to which, by usage, the terms apply. It is in the Constitution used in both senses. In its extended sense, when it is said that Congress may lay and collect taxes; and in a more confined sense, in contradistinction to duties, imposts, and excises.

The power, then, to tax, and the power to regulate commerce, give to Congress the right to tax persons who may come into the United States, as a regulation of commerce and navigation. I have already mentioned, among the restraints which nations may impose upon the liberty or freedom of commerce, those which may be put upon foreigners coming into or residing within their territories. This right exists to its fullest extent, as a portion of the commercial rights of nations, when not limited by treaties.

The power to regulate commerce with foreign nations and among the several States having been given to Congress, Congress may, but the States cannot, tax persons for coming into the United States.

It is urged, however, in reply to what has just been said, that, as the power to regulate commerce and the right to levy taxes are distinct and substantive powers, the first cannot be used to limit the right of the States to tax, beyond the prohibition upon them not to tax exports or imports. The proposition is rightly stated, but what is gained in these cases from it? Nothing. The sums directed to be paid by or for passengers are said to be taxes which the States have a right to impose, in virtue of *their police powers*, either to prevent the evils *of pauperism* or to protect their inhabitants from apprehended disease. But the question in these cases is, not whether the States may or may not tax, but whether they can levy a tax upon passengers coming into the United States under the authority and sanction of the laws of Congress and treaty stipulations.

The right in a nation or State occurs—not in all cases, for there are international exceptions—upon all persons and things when they come or are brought within the territory of a State. Not, however, because the person or thing is within the territory, but because they are under the sovereignty or political *jurisdic- [*422 tion of the State. If not within the latter, the right to tax does not arise until that event occurs. States may have territorial jurisdiction for most of the purposes of sovereignty, without political jurisdiction for some of them.

The distinction is not mine. It has been long since made by jurists and writers upon national law, because the history of nations from an early antiquity until now, shows such relations between them. The framers of the Constitution acted upon it throughout, in all the sovereign powers which they proposed that the States should yield to the United States. Martens properly says, that, to have a just idea of the states of which Europe is composed, we must distinguish those which are absolutely sovereign from those which are but demi-sovereign. The states of the German empire, for instance, and the Italian princes who acknowledge their submission to the empire—and the German states, in their present Diet for great national purposes, with a vicar at its head, over-topping in might and majesty, but with regulated power, all before who have been emperors of Germany. I do not mean to say that the States of this Union are demi-sovereign to the general government in the sense in which some of the nations in Europe are to other nations; but that such connection between those nations furnishes the proof of the distinction between territorial sovereignty and political sovereignty. The sovereignty of these States and that of the United States, in all constitutional particulars, have a different origin. But I do mean to say, that the distinction between territorial and political jurisdiction arises, whether the association be voluntary between States, or otherwise. Whenever one power has an exterritorial right over the territory or sovereignty of another power, it is called by writers "a partial right of sovereignty." Is not that exactly the case between the United States, as a nation, and the States? Do not the constitutional powers of the United States act upon the territory, as well as upon the sovereignty, of the States, to the extent of what was their sovereignty before they yielded it to the United States? Can any one of the sovereign powers of the United States be carried out by legislation, without acting upon the territory and sovereignty of the States? This being so, Congress may say, and does say, whence a voyage may begin to the United States, and where it may end in a State of the United States. Though in its transit it enters the territory of a State, the political jurisdiction of the State cannot interfere with it by taxation in any way until the voyage has ended; not until the persons who may be brought as passengers have been landed, or the goods which may have been entered as

merchandise have passed from the hands of the 423*] importer, or have been *made by himself a portion of the mass of the general property of the State. It is upon this distinction between territorial and political jurisdiction that the case of Brown v. Maryland rests. Without it, it has no other foundation, although it is not so expressed in the opinion of the court.

In these cases the laws complained of meet the vessels when they have arrived in the harbor, on the way to the port to which they are bound, before the passengers have been landed. And before they are landed they are met by superadded conditions in the shape of a tax, with which it is said they must comply, or which the captain must pay for them, before they are permitted to land. Certainly it is not within the political jurisdiction of a State, in such circumstances of a voyage, to tax passengers.

But it is said, nothwithstanding, that the tax may be laid in virtue of police power in the States, never surrendered by them to the United States. A proper understanding of the police power of a nation will probably remove the objection from the minds of those who made it. What is the supreme police power of a State? It is one of the different means used by sovereignty to accomplish that great object, the good of the State. It is either national or municipal, in the confined application of that word to corporations and cities. It was used in the argument invariably in its national sense. In that sense it comprehends the restraint which nations may put upon the liberty of entry and passage of persons into different countries, for the purposes of visitation or commerce.

The first restraint that nations reserve to themselves is the right to be informed of the name and quality of every foreigner that arrives. That, and no more than that, was Miln's case. 11 Peters. Nations have a right to keep at a distance all suspected persons; to forbid the entry of foreigners or foreign merchandise of a certain description, as circumstances may require. In a word, it extends to every person and every thing in the territory; and foreigners are subject to it, as well as subjects to the State, except only ministers and other diplomatic functionaries; and they are bound to observe municipal police, though not liable to its penalties.

"The care of hindering what might trouble the internal tranquillity and security of the State is the basis of the police, and authorizes the sovereign to make laws and establish institutions for that purpose, and as every foreigner living in the State ought to concur in promoting the object, even those who enjoy the right exterritorially (such as sovereigns and ministers) cannot dispense with observing the laws of police, although in case of transgression they cannot be punished like native or temporary subjects of the State."

424*] *Police powers, then, and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign. Certainly the States of this Union have not retained them to the extent of the preceding enumeration. How much of it have the States retained? I answer, unhesitatingly, all necessary to their internal government. Generally, all not delegated by them in the Articles of Confederation to the United States of America; all not yielded by them under the Constitution of the United States. Among them, qualified rights to protect their inhabitants by quarantine from disease; imperfect and qualified, because the commercial power which Congress has is necessarily connected with quarantine. And Congress may, by adoption, presently and for the future, provide for the observance of such State laws, making such alterations as the interests and conveniences of commerce and navigation may require, always keeping in mind that the great object of quarantine shall be secured.

Such has been the interpretation of the rights of the States to quarantine, and of that of Congress over it, from the beginning of the federal government. Under it the States and the United States, both having measurably concurrent rights of legislation in the matter, have reposed quietly and without any harm to either, until the acts now in question caused this controversy. The Act of February 25th, 1799, 1 Stat. at Large, 619, will show this.

By that act, collectors, revenue officers, masters and crews of revenue cutters, and military officers in command of forts upon the coast, are required to aid in the execution of the State's quarantine laws. But then, and it may be observed particularly in reference to the acts of Massachusetts and New York now in question, the law provides that nothing in the act "shall enable a State to collect a duty of tonnage or impost without the consent of Congress;" that no part of the cargo of any vessel shall in any case be taken out, otherwise than as by law is allowed, or according to the regulations thereinafter established; thus showing that the State's quarantine power over the cargo for the purpose of purifying it or the vessel has been taken away. By the second section of the same act, the power of the States in respect to warehouses and other buildings for the purification of the cargo is also taken away, and exclusively assumed by the United States. And by the third section, in order that the States may be subjected to as little expense as possible, and that the safety of the public revenue may not be lessened, it is provided that the United States, under the orders of the President of the United States, shall purchase or erect suitable *warehouses, with wharves and inclos- [*425 ures for goods and merchandise taken from vessels subject to quarantine, or other restraint, pursuant to the health laws of any State. And in regard to the word "imposts," in the first section of the act, I may here remark, though I have heretofore given its meaning, that it means in the act, as well as it does in the Constitution, personal imposts upon a foreigner enjoying the protection of a State, or it may be a condition of his admission, Martens, p. 97, as well as any tax or duty upon goods; and Martens, as well as all other jurists and writers upon international law, uses the word in the sense I have said it has, also, as "imposts on real estates and duties on the entry and consumption of merchandises." pp. 97, 98.

But, further, by the police power in the States they have reserved the right to be informed of the name and quality of every forcigner that arrives in the State. This, and no more than this, was Miln's case, in 11 Peters. But after they have been landed, as is said in

Miln's case. And it was surprising to me, in the argument of these cases, that that admission in Miln's case was overlooked by those who spoke in favor of the constitutionality of the laws of Massachusetts and New York; for the right of New York to a list of passengers, notwithstanding the passenger laws of the United States, is put upon the ground that those laws "affect passengers whilst on their voyage, and until they shall have landed." And "after that, and when they shall have ceased to have any connection with the ship, and when, therefore, they shall have ceased to be passengers, the acts of Congress applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can with no propriety of language be said to come in conflict with the law of a State, whose operation only begins where that of the laws of Congress ends." That is, that the passenger acts, as my brother Catron has shown in his opinion, extend to his protection from all State interference, by taxation or otherwise, from the time of his embarcation abroad until he is landed in the port of the United States for which the vessel sailed.

The States have also reserved the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. But they have not reserved the use of taxation universally as the means to accomplish that object, as they had it before they became the United States. Having surrendered to the United States the sovereign police power over commerce, to be exercised by Congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for 426*] *the purposes of trade, independently of every other condition of admittance which the States may attempt to impose upon such persons. When it is done in either way, the United States, of course, subject the foreigner to the laws of the United States, and cannot exempt him from the internal power of police of the States in any particular in which it is not constitutionally in conflict with the laws of the United States. And in this sense it is that, in treaties providing for such mutual admission of foreigners between nations, it is universally said, "but subject always to the laws and statutes of the two countries respectively;" but certainly not to such of the laws of a State as would exclude the foreigner, or which add another condition to his admission into the United States.

And, further, I may here remark that this right of taxation claimed for the States upon foreign passengers is inconsistent with the naturalization clause in the Constitution, and the laws of Congress regulating it. If a State can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole and long cherished policy of this country and of the Constitution in respect to immigrants coming to the United States.

But I have said the States have a right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the *same class of* men. And when Congress shall *legislate—if it be not* disrespectful for one who is a member of the judiciary to suppose so absurd a thing of another department of the government—to make paupers, vagabonds, suspected persons, and fugitives from justice subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have over commerce. Paupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment as convicts. They have no rights of national intercourse; no one has a right to transport them, without authority of law, from where they are to any other place, and their only rights where they may be, are such as the law gives to all men who have not altogether forfeited its protection.

The States may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off. But can such a police power be rightfully *exercised over those who [*427 are not paupers, vagabonds, or fugitives from justice? The international right of visitation forbids it. The freedom or liberty of commerce allowed by all European nations to the inhabitants of other nations does not permit it; and the constitutional obligations of the States of this Union to the United States, in respect to commerce and navigation and naturalization, have qualified the original discretion of the States as to who shall come and live in the United States. Of the extent of those qualifications, or what may be the rights of the United States and the States individually in that regard, I shall not speak now.

But it was assumed that a State has unlimited discretion, in virtue of its unsurrendered police power, to determine what persons shall reside in it. Then it was said to follow, that the State can remove all persons who are thought dangerous to its welfare; and to this right to remove, it was said, the right to determine who shall enter the State is an inseparable incident.

That erroneous proposition of the State's discretion in this matter has led to all the more mistaken inferences made from it. The error arose from its having been overlooked that a part of the supreme police power of a nation is identical, as I have shown it to be, with its sovereignty over commerce. Or, more properly speaking, the regulation of commerce is one of those particular rights collectively placed in the hands of the sovereign for the good of the State. Until it is shown that the police power in one of its particulars is not what it has just been said to be, the discretion of a State of this Union to determine what persons may come to and reside in it, and what persons may be removed from it, remains unproved. It cannot be proved, and the laws of Massachusetts and New York derive no support from police power in favor of their constitutionality.

Some reliance in the argument was put upon the cases of Holmes v. Jennison, 14 Pet. 540, Groves v. Slaughter, 15 Pet. 449, and Prigg v. Commonwealth of Pennsylvania, 16 Pet.

539, to maintain the discretion of a State to say who shall come to and live in it. Why either case should have been cited for such a purpose I was at a loss to know, and have been more so from a subsequent examination of each of them.

All that is decided in the case of Holmes v. Jennison is, that the States of this Union have no constitutional power to give up fugitives from justice to the authorities of a nation from which they have fled. That it is not an international obligation to do so, and that all authority to make treaties for such a purpose is in the United States.

428*] *The point ruled in the case of Groves v. Slaughter is, that the State of Mississippi could constitutionally prohibit negroes from being brought into that State for sale as merchandise, but that the provision in her constitution required legislation before it acted upon the subject matter.

The case of Prigg v. The Commonwealth of Pennsylvania is inapplicable to the cases before us, except in the support which it gives to the construction of the police power, as stated in this opinion—that it is applicable to idlers, vagabonds, paupers, and, I may add, fugitives from justice, and suspected persons.

Miln's case I will speak of hereafter, and now only say that no point was ruled in it, either in respect to commerce or the right of the State to a list of passengers who may come by sea into New York after they are landed, which gives any countenance or support to the laws now in question.

The fear expressed, that if the States have not the discretion to determine who may come and live in them, the United States may introduce into the Southern States emancipated negroes from the West Indies and elsewhere, has no foundation. It is not an allowable inference from the denial of that position, or the assertion of the reverse of it.

All the political sovereignty of the United States, within the States, must be exercised according to the subject matter upon which it may be brought to bear, and according to what was the actual condition of the States in their domestic institutions when the Constitution was formed, until a State shall please to alter them. The Constitution was formed by States in which slavery existed, and was not likely to be relinquished, and States in which slavery had been, but was abolished, or for the prospective abolition of which provision had been made by law. The undisturbed continuance of that difference between the States at that time, unless as it might be changed by a State itself, was the recognized condition in the Constitution for the national Union. It has that, and can have no other, foundation.

Is it not acknowledged by all that the ninth section of the first article of the Constitution is a recognition of that fact? There are other clauses in the Constitution equally, and some of them more, expressive of it.

That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it when it was *formed, by their object and purpose in [*429 forming it, and by the actual recognition in it of the dissimilar institutions of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of ifs and syllogisms.

It will be found, too, should this matter of introducing free negroes into the Southern States ever become the subject of judicial inquiry, that they have a guard against it in the Constitution, making it altogether unnecessary for them to resort to the casus gentis extraordinarius, the casus extremæ necessitatis of nations, for their protection and preservation. They may rely upon the Constitution, and the correct interpretation of it, without seeking to be relieved from any of their obligations under it, or having recourse to the jus necessitatis for self-preservation.

I have purposely refrained from repeating anything that has been said in the opinions of my learned brothers, with whom I am united in pronouncing the laws of Massachusetts and New York in question unconstitutional. What they have said for themselves they have also said for me, and I do not believe that I have said anything in this opinion which is not sanctioned by them.

Having said all that I mean to say directly concerning the cases before us, I will now do what I have long wished to do, but for which a proper opportunity has not been presented before. It is to make a narrative in respect to the case of The City of New York v. Miln, reported in 11 Peters, 102, that hereafter the profession may know definitely what was and what was not decided in that case by this court. It has been much relied upon in the cases before us for what was not decided by the court.

The opinion given by Mr. Justice Barbour in that case, though reported as the opinion of the court, had not at any time the concurrence of a majority of its members, except in this particular—that so much of the act of New York as required the captain of a vessel to report his passengers as the act directs it to be done was a police regulation, and therefore was not unconstitutional or a violation of the power of Congress to regulate commerce. In that particular and in that only, and, as it is said in the conclusion of the opinion, "that so much of the section of the act of the Legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said act is constitutional." 11 Peters, 143. But as to all besides in that opinion as to the constitutional power of Congress to regulate commerce—except *the disclaimer in the 132d page, that [*430 it was not intended to enter into any examination of the question, whether the power to regulate commerce be or be not exclusive of the States—and especially the declaration that persons were not the subjects of commerce, the opinion had not the assent of a majority of the members of this court, nor even that of a majority of the judges who concurred in the judgment. The report of the case in Peters, and the opinion of Mr. Justice Baldwin, accidentally excluded from the report, without the

slightest fault in the then reporter of the court or in the clerk, but which we have in full in Baldwin's View of the Constitution, published in the same year, fully sustain what I have just said. I mention nothing from memory, and stand upon the record for all that I have said or shall say, concerning the case.

The court then consisted of seven justices, including the Chief Justice; all of us were present at the argument; all of us were in consultation upon the case; all of us heard the opinions read, which were written by Messrs. Justices Thompson and Barbour, in the case; and all of us, except Mr. Justice Baldwin, were present in this room when Mr. Justice Barbour read the opinion which appears in Peters as the opinion of the court.

The case had been argued by counsel on both sides, as if the whole of the act of New York were involved in the certificate of the division of opinion by which it was brought before this court. The point certified was in these words: "That the act of the Legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the ports of New York and foreign ports, and is unconstitutional and void."

In the consultation of the judges upon the case, as the report shows, the first point considered by us was one of jurisdiction. That is, that the point certified was a submission of the whole case, which is not permitted, and was not a specific point arising on the trial of the cause. The court thought it was the latter, principally for the reason given by Mr. Justice Thompson, as it appears in his opinion. That reason was, that the question arose upon a general demurrer to the declaration, and that the certificate under which the cause was sent to this court contains the pleadings upon which the question arose, which show that no part of the act was drawn in question, except that which relates to the neglect of the master to report to the mayor or recorder an account of his passengers, according to the requisitions of the act. In the discussion of the case, however, by the judges, the nature and exclusiveness of the power in Congress to regulate commerce was much considered. There was a divided mind among us about it. Four of the 431*] *court being of the opinion, that, according to the Constitution and the decisions of this court in Gibbons v. Ogden, and in Brown v. Maryland, the power in Congress to regulate commerce was exclusive. Three of them thought otherwise. And to this state of the court is owing the disclaimer in the opinion, already mentioned by me, that the exclusiveness of the power to regulate commerce was not in the case a point for examination.

But there was another point of difference among the judges in respect to what was commerce under the constitutional grant to Congress, particularly whether it did not include an intercourse of persons and passengers in vessels. Two of the court—the report of the case shows it—thought, in the language of the opinion, that "persons are not subject to commerce." Mr. Justice Thompson, declined giving any opinion on that point, and repeated it in *the* opinion published by him. Four of the *justices, including* Mr. Justice Baldwin, thought *that commerce did* comprehend the intercourse of persons or passengers. For this statement I refer to the opinion of Mr. Justice Thompson, to the dissenting opinon of Mr. Justice Story, to the opinion of Mr. Justice Baldwin, to the constantly avowed opinion of Mr. Justice McLean, and to what has already been known by the justices of this court to be my own opinion upon this point.

In this state of the opinions of the court, Mr. Justice Thompson was designated to write an opinion—that the law in question was a police regulation, and not unconstitutional. He did so, and read to the court the opinion, which he afterwards published. It was objected to by a majority of the court, on account of some expressions in it concerning the power of Congress to regulate commerce, and as our differences could not be reconciled, Mr. Justice Thompson said he would read it as his own.

Then Mr. Justice Barbour was asked to write an opinion for the majority of the court. He did so, and read that which is printed as such, in our last conference of that term, the night before the adjournment of the court. The next day it was read in court, all of the judges being present when it was read, except Mr. Justice Baldwin. In the course of that morning's sitting, or immediately after it, Mr. Justice Baldwin, having examined the opinion, objected to its being considered the opinion of the court, on account of what was said in it concerning the power of Congress to regulate commerce, and what was commerce. He sought Mr. Justice Barbour, with the view of having it erased from the opinion, declaring, as all the rest of us knew, that his objection to the opinion of *Mr. Justice Thompson was [*432 on account of what it contained upon the subject of commerce; that his objection to the reasoning upon the same matter in Mr. Justice Barbour's opinion was stronger, and that he had only assented that an opinion for the court should be written, on the understanding that so much of the act of New York as was in issue by the pleadings should be treated as a regulation, not of commerce, but police. Without his concurrence, no opinion could have been written. Unfortunately, Mr. Justice Barbour had left the court room immediately after reading his opinion, already prepared to leave Washington in a steamer which was in waiting for him. Mr. Justice Baldwin did not see him. The court was adjourned. Then there was no authority to make any alteration in what had been read as the opinion of the court. Mr. Justice Baldwin wished it, but, under the circumstances of preparation which each judge was making for his departure from Washington, nothing was done, and Mr. Justice Baldwin determined to neutralize what he objected to in the opinion by publishing in the reports his own opinion of the case. That was not done, but he did so contemporarily with the publication of the reports, in his View of the Constitution. There it is, to speak for itself, and it shows, as I have said, that so much of the opinion in the case of New York v. Miln as related to commerce did not have the assent of Mr. Justice Baldwin, and therefore not the assent of a majority of the court.

How, then, did the case stand? Mr. Justice Thompson gave his own opinion, agreeing with that of Mr. Justice Barbour, that so much

of the section of the act of the Legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said section is constitutional, but giving his own views of the commercial question as it stood in relation to the case. The attitude of Mr. Justice Baldwin with respect to the opinion has just been told. Mr. Justice Story dissented from every part of the opinion, on the ground that the section of the act in controversy was a regulation of commerce, which a State could not constitutionally pass. Mr. Justice McLean is here to speak for himself, and he did then speak as he has done to-day in these cases concerning the power in Congress to regulate commerce being exclusive, and held that persons are the subjects of commerce as well as goods, contrary to what is said in the opinion (136th page), that persons are not. I certainly objected to the opinion then, for the same reasons as Mr. Justice McLean. Thus there were left of the seven judges but two, the Chief Justice and Mr. Justice Barbour, in favor of the opinion as a whole.

433*] *I have made this narrative and explanation, under a solemn conviction of judicial duty, to disabuse the public mind from wrong impressions of what this court did decide in that case; and particularly from the misapprehension that it was ever intended by this court, in the case of New York v. Miln, to reverse or modify, in any way or in the slightest particular, what had been the judgments and opinions expressed by this court in the cases of Gibbons v. Ogden and Brown v. Maryland. And I am happy in being able to think, notwithstanding the differing opinions which have been expressed concerning what was decided in those cases, that they are likely to stand without reversal.

The Chief Justice, the morning after I had read the foregoing statement in the case of New York v. Miln, made another to counteract it, in which he says his recollections differ from mine in several particulars. I do not complain of it in any way. But it enables me to confirm my own in some degree from his, and in every other particular in which it does not give such assistance, the facts related by me are indisputable, being all in the report of the case in Peters, from which I took them. They are in exact coincidence, too, with my own recollections.

The only fact in my statement not altogether, but in part, taken from the record, is Mr. Justice Baldwin's discontent with the opinion written by Mr. Justice Barbour, and his wish that it might not as a whole be published in our volume of reports as the opinion of the court. The Chief Justice admits that Mr. Justice Baldwin did apply to him after the adjournment of the court, and before they left Washington, for that purpose. Now if, by mistake or oversight, a judge shall fall into an admission, which more care afterwards enables him to recall and correct before the judgment has been published, but after it has been read, whatever may be the operation of the judgment, does it follow that the argument in the opinion in which the judgment is given continues to be the law of the court? And if the same judge, after more careful and matured thought, publishes contemporarily his opinion, differing from the dictum which had escaped his notice, will that make it law? Is it not plain that it is a case of mistake, which cannot make the law? And if his co-operation is essential to the validity of the original opinion, from those who may advocate it being thrown into the minority by his withdrawal, and his declaration that he never meant to co-operate in it in the particular objected to, can it be said that it ever was the law of the court? Is it at all an uncommon thing in the English and American law reports, that a case is published as law which is *deemed afterwards [*434 not to be so, on account of error in its publication, from its not having been really the opinion of the court when it was published? Mistake in all cases restores things to the correct condition in which they were before the mistake was made, except where the policy of the law has determined that it shall be otherwise. A single mistaken and misstated case is not within that policy. Long acquiescence, or repeated judicial decisions, may be, and then only because the interests of society have been accommodated to the error.

But the Chief Justice says that he has the strongest reason to suppose that Mr. Justice Baldwin became satisfied, because, in his opinion in the case of Groves v. Slaughter, he quotes the case of New York v. Miln with approbation, when speaking in that case of the difference between commercial and police powers.

I certainly cannot object to the opinion of Mr. Justice Baldwin in Groves v. Slaughter being a test between the Chief Justice and myself in this matter; for Mr. Justice Baldwin's opinion in that case is the strongest proof that could have been given four years afterwards, by himself, that he never was reconciled to the opinion of Mr. Justice Barbour in Miln's case as a whole. For instance, in that opinion he does not leave the exclusive power of Congress to regulate commerce to the disclaimer in Miln's case, that it was not the intention of the judges to decide that point in that case. He says: "That the power of Congress to regulate commerce among the States is exclusive of any interference by the States has been, in my opinion, conclusively settled by the solemn opinions of this court in Gibbons v. Ogden, 9 Wheat. 186–222, and in Brown v. Maryland, 12 Wheat. 438–446. If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt, nor can there be any adjudications of this court which must be considered as authoritative upon any question, if these are not to be so on this." And the learned judge goes on to say, "Cases may indeed arise, wherein there may be found difficulty in discriminating between regulations of commerce among the several States and the regulation of the internal police of a State, but the subject matter of such regulations of either description will lead to the true line which separates them, when they are examined with a disposition to avoid a collision between the powers granted to the federal government by the people of the several States and those which they reserved exclusively to themselves.

Commerce among the States, as defined by this court, is trade traffic, intercourse, and dealing in articles of commerce between States by its 435*] citizens *or others, and carried on in more than one State. Police relates only to the internal concerns of one State; and commerce within it is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more States, referring solely thereto, is within the powers granted exclusively to Congress, and that those regulations which affect only the commerce carried on within one State, or which refer only to subjects of internal police, are within the powers reserved." And then it is that the sentence follows cited by the Chief Justice to show that he had reason to suppose that Mr. Justice Baldwin had become satisfied. The citation made by me from his opinion shows what his opinion was in respect to the power of Congress to regulate commerce, confirming what I have said in my statement, that four of us were of the same opinion when that point was touched upon in the case of Miln, and that Mr. Justice Baldwin refused to sanction what was said by Mr. Justice Thompson in respect to it in the opinion written by him for the court in Miln's case. And that he was not satisfied as to that sentence of Mr. Justice Barbour's opinion in which it is said that persons are not the subjects of commerce, is manifest from that part of his opinion in Groves v. Slaughter in which he says that commerce is "trade, traffic, intercourse"; intercourse, in the sense of commerce, meaning, as it always does, "connection by reciprocal dealings between persons and nations." But, further, the Chief Justice says that Mr. Justice Baldwin called upon him and said there was a sentence or paragraph in the opinion with which he was dissatisfied, and wished altered, thus confirming all that I have said in respect to the case in what is in it concerning persons not being the subjects of commerce, that being the only declaration in the opinion relating to commerce, it having been previously declared that the exclusiveness of the regulation of commerce in Congress was not to be decided. All that was meant to be decided in Miln's case was, that the regulation stated in the certificate of division of opinion between the judges in the Circuit Court was not a regulation of commerce, but one of police. In respect to our lamented brother Barbour not knowing the dissatisfaction of our brother Baldwin and other members of the court with the opinion, I know that he did know it. In regard to the Chief Justice's declaration, that he had never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin, and never at any time, until this case came before us, heard any from 436*] any other member of the court *who had assented to or acquiesced in the opinion; while, of course, that must be taken to be so, as far as the Chief Justice is concerned, I must say that I have never, in any instance, heard the case of Miln cited for the purpose of showing that persons are not within the regulating power of Congress over commerce, without at once saying to the counsel that that point had not been decided in that case. I have repeatedly done so in open court, and, as I supposed, was heard by every member of it. I have only said, in reply to the Chief Justice's statement, what was necessary to show that it was not decided in Miln's case, by this court, that persons are not within the power of Congress to regulate commerce.

Indeed, it would be most extraordinary if the case of Gibbons v. Ogden could be considered as having been reversed by a single sentence in the opinion of New York v. Miln; upon a point, too, not in any way involved in the certificate of the division of opinion by which that case was brought to this court. The sentence is, that "they [persons] are not the subjects of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods."

In the case of Gibbons v. Ogden, the court said: "Commerce is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Again. These words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend." "In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines." "If Congress has the power to regulate it, that power must be exercised whenever this subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State." "The power of Congress comprehends navigation within the limits of every State in the Union, so far as that navigation may be connected with commerce with foreign nations, or among the several States." "It is the power to regulate; that is, to prescribe the rule by which commerce is governed." "Vessels have always been employed to a greater or less extent in the transportation of *passen- [*437 gers, and never have been supposed, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of cargo."

In my opinion, the case of Gibbons v. Ogden rules the cases before us. If there were no other reasons, with such an authority to direct my course, I could not refrain from saying that the acts of Massachusetts and New York, so far as they are in question, are unconstitutional and void.

The case of Gibbons v. Ogden, in the extent and variety of learning, and in the acuteness of

distinction with which it was argued by counsel, is not surpassed by any other case in the reports of courts. In the consideration given to it by the court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind, every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful.

The case will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy.

There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defense of the Constitution has not this day been weakened by their successors.

Mr. Justice Catron:

Smith v. Turner.

The first question arising in this controversy is, whether the legislation of New York, giving rise to the suit, is a regulation of commerce; and this must be ascertained, in a great degree, from a due consideration of the State laws regulating the port of the city of New York in respect to navigation and intercourse. They are embodied in a system running through various titles in the Revised Statutes. The sections on which the action before us is founded will be found in Vol. I., pp. 445, 446. Title fourth purports to treat of the marine hospital and its funds, then, in 1829, erected on Staten Island, 438*] under the superintendence *of a health officer, who is to be a physician, and certain commissioners of health. By section seventh, it is provided that "the health commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.: 1. From the master of every vessel from a foreign port, for himself and every cabin passenger, one dollar and fifty cents; and for each steerage passenger, mate, sailor, or marine, one dollar. 2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

"Sec. 8. The moneys so received shall be denominated 'hospital moneys,' and shall be appropriated to the use of the marine hospital, deducting a commission to the health commissioner of two and one half per cent. for collection."

Turner, the health commissioner, sued Smith, as master of the ship Henry Bliss, a British vessel, coming from Liverpool, in England, for the amount of money claimed as due from the defendant under the above provisions, because he brought in two hundred and ninety-five steerage passengers, who were British subjects, immigrating into the United States, and intending to become inhabitants thereof.

By section ninth, the master paying the hospital money may recover from each person for whom it was paid the sum paid on his account, in case of a foreign vessel; and by section tenth, the master of a coasting vessel shall pay the tax in twenty-four hours after the vessel arrives in port, under the penalty of one hundred dollars.

The eleventh section directs the health commissioners annually to account to the Comptroller of the State for the moneys received by them by means of the tax for the use of the marine hospital, and if such moneys shall in any one year exceed the sum necessary to defray the expenses or their trust, including salaries, etc. they shall pay over such surplus to the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society.

By the Act of April 25th, 1840, the Comptroller of the State was authorized to draw on the treasurer annually, for twenty years, a sum not exceeding fifteen thousand dollars in each year, for the benefit of the State hospitals in the city, and a sum of eight thousand dollars is there recognized as payable to the Society for the Reformation of Juvenile Delinquents; and the *city hospital is bound by the [*439 act to support at least twenty indigent persons from any part of the State. Thus a State hospital is also supported out of the fund, as well as an institution for young culprits, imposing an annual charge on the fund of twenty-three thousand dollars, having no necessary connection with commerce; and, by the Act of 1841, three medical dispensaries are endowed out of the fund to an amount of four thousand five hundred dollars.

The ship Henry Bliss was engaged in foreign commerce when she arrived in the port of New York, and when the tax was demanded of Smith, the master, by Turner, the health commissioner. The baggage of passengers was on board, and also their tools of trade, if they had any, and of course the passengers were on board, for the master is sued, in one count, for landing them after the demand. The tax of two hundred and ninety-five dollars was therefore demanded before the voyage was ended, or the money earned for carrying passengers and their goods. The vessel itself was undoubtedly regulated by our acts of Congress, and also by our treaty with Great Britain of 1815—the national character of the vessel being British. She had full liberty to land, and so the goods on board belonging to trade and coming in for sale stood regulated, and could be landed and entered at the custom-house. And by the same treaty, passengers on board coming to the United States in pursuit of commerce in buying and selling were free to land. The master and crew were of the ship and navigation, and stood equally regulated with the ship. The property of passengers could not be taxed or seized, being expressly and affirmatively protected by the Act of 1799. It was an import, and whilst it continued in form of an import, could be landed and transferred by the owners inland. This is the effect of the decision in Brown v. The State of Maryland. As the State power had nothing left to act upon but the person simply, nor any means of collecting the tax from passengers, it was levied on the master, of necessity, in a round sum.

As the ship was regulated, and was free to land all the property on board, the question arises, whether these immigrant passengers were not also regulated, and entitled by law to accompany their goods and to land, exempt from State taxation.

The record states, that "the two hundred and ninety-five passengers imported in the ship Henry Bliss belonged to Great Britain, and intended to become inhabitants of the United States."

By the laws of nations, all commerce by personal intercourse is free until restricted; nor has our government at any time proposed to restrain by taxation such immigrants as the record describes.

440*] *Our first step towards establishing an independent government was by the Declaration of Independence. By that act it was declared that the British king had endeavored to prevent the population of the colonies by obstructing the laws for the naturalization of foreigners, and refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands. During the Confederation, the States passed naturalization laws for themselves, respectively, in which there was great want of uniformity, and therefore the Constitution provided that Congress should have power "to establish a uniform rule of naturalization." In execution of this power, Congress passed an act at its second session (March 26th, 1790), providing that any alien, being a free white person, who shall have resided in the United States two years, and in any one State one year, may become a citizen by taking an oath to support the Constitution in a court of record, and such step shall naturalize all the children of such person under twenty-one years of age. In 1795, another act was passed (Ch. 20), requiring five years' residence; and on the 26th of April, 1802 (ch. 28), the naturalization laws were amended. This act is now in force, with slight alterations. Under these laws have been admitted such numbers, that they and their descendants constitute a great part of our population. Every department of science, of labor, occupation, and pursuit, is filled up, more or less, by naturalized citizens and their numerous offspring. From the first day of our separate existence to this time has the policy of drawing hither aliens, to the end of becoming citizens, been a favorite policy of the United States; it has been cherished by Congress with rare steadiness and vigor. By this policy our extensive and fertile country has been, to a considerable extent, filled up by a respectable population, both physically and mentally, one that is easily governed and usually of approved patriotism. We have invited to come to our country from other lands all free white persons, of every grade and of every religious belief, and when here to enjoy our protection, and at the end of five years to enjoy all our rights, except that of becoming President of the United States. Pursuant to this notorious and long established policy, the two hundred and ninety-five passengers in the Henry Bliss arrived at the port of New York.

Keeping in view the spirit of the Declaration of Independence with respect to the importance *of augmenting* the population of the United *States, and the early* laws of naturalization, Congress at divers subsequent periods, passed laws to facilitate and encourage more and more the immigration of Europeans into the United States for the purpose of settlement and residence.

*The twenty-third section of the gen- [*441
eral Collection Act of the 2d of March, 1799, requires that every master of a vessel arriving in the United States shall have on board a manifest, in writing, signed by such master, of the goods, wares, and merchandise on board such vessel, "together with the name or names of the several passengers on board the said ship or vessel, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and description of packages belonging to each respectively."

The twenty-fifth section of the same act makes it the duty of the master to produce, on his arrival within four leagues of the coast, such manifest to such officer or officers of the customs as shall first come on board his said ship or vessel; and by the twenty-sixth section, a fine of five hunderd dollars is imposed on the master for not producing such manifest.

By the thirtieth section of the same act, the master is required, within twenty-four hours after his arrival from a foreign port, to repair to the office of the collector and make report of the arrival of his ship; "and within forty-eight hours after such arrival, shall make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars, required to be inserted in a manifest;" and he is required to make oath or solemn affirmation to the truth of such report. But the material section of that act is the forty-sixth. That section declares, that "the wearing apparel, and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States shall be free of duty." The same section prescribes a form of declaration, that the packages contain no goods or merchandise other than the wearing apparel, personal baggage, and tools of trade belonging to the person making the declaration, or his family. Before the property exempt from duty is allowed to be landed, a permit to do so must be obtained from the collector of the port, and each owner is bound to pay a fee for such privileges, for the support of the revenue officers.

It is quite obvious, from these proceedings, that the passengers who were thus in the contemplation of Congress were, for the most part, immigrants, or persons coming to settle in the United States with their families. The Act of the 27th of April, 1816, section second, re-enacts, in substance, that part of the forty-sixth section of the Act of the 2d of March, 1799, above quoted. Exemptions and privileges in favor of passengers arriving in the United States are carried still further, by the provisions of the fourth subdivision of the ninth section of the Duty Act of the 30th of August, 1842. Among articles *declared by that [*442
act to be free of duty are "wearing apparel in actual use, and other personal effects, not merchandise, professional books, instruments, implements and tools of trade, occupation, or employment, of persons arriving in the United States." This provision is very broad. It not only exempts from duty tools of mechanical

trades, but all instruments and implements of occupation and employment, and also all professional books, without limitation of value of numbers.

A still further enlargement of these privileges and exemptions is contained in the Duty Act of the 30th of July, 1846: for the eleventh section of that act (schedule 1), in addition to the passengers' articles made free by the Act of 1842, declares free from duty "household effects, old and in use, of persons or families from foreign countries, if used abroad by them, and not intended for any other person or persons."

Now, is it possible to reconcile State laws, laying direct and heavy taxes on every immigrant passenger and every member of his family, with this careful, studied, and ever increasing security of immigrants against every legal burden or charge of any kind? Could Congress have done more than it has done, unless it had adopted what would have been justly regarded as a strange act of legislation, the insertion of passengers themselves in the list of free articles?

The first and one of the principal acts to be performed on bringing ships and goods from foreign countries into the United States is the production of a manifest; and in such manifest, along with the specifications of the cargo, the names and description of the passengers, with a specification of their packages of property, are to be inserted. Then comes a direct exemption of all such property from duties. All agree, that, if Congress had included the owners, and declared that immigrants might come into the country free of tax, these State laws would be void; and can any man say, in the face of the legislation of Congress from 1799 to 1846, that the will of Congress is not as clearly manifested as if it had made such a direct declaration? It is evident that, by these repeated and well considered acts of legislation, Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce. Certain conditions and restraints it has imposed; and subject to these only, and acting in the spirit of all our history and all our policy, it has opened the door widely and invited the subjects of other countries to leave the crowded population of Europe and come to the United States, and seek here new homes for themselves and their families. We cannot take into consideration what may or may not be the policy adopted or cherished by 443*] particular States; some States may *be more desirous than others that immigrants from Europe should come and settle themselves within their limits; and in this respect no one State can rightfully claim the power of thwarting by its own authority the established policy of all the States united.

The foregoing conclusions are fortified by the provisions of the Act of March 2d, 1819. It provides that not more than two passengers shall be brought or carried to each five tons' measure of the vessel, under a severe penalty; and if the number exceeds the custom-house measure by twenty persons, the vessel itself shall be forfeited, according to the ninety-first section of the Act of 1799. The kind and quantity of provisions are prescribed, as well as the quantity of water, and if the passengers are put on short allowance, a right is given to them to recover at the rate of three dollars a day to each passenger, and they are allowed to recover the same in the manner seamen's wages are recovered, that is, in a summary manner, in a District Court of the United States. The master is also required, when the vessel arrives in the United States, at the same time that he delivers a manifest of his cargo, and if there be none, then when he makes entry of the vessel, to deliver and report to the collector, by manifest, all the passengers taken on board the ship at any foreign port or place, designating age, sex, and occupation, the country to which they severally belong, and that of which it is their intention to become inhabitants; which manifest shall be sworn to as manifests of cargo are, and subject to the same penalties. These regulations apply to foreign vessels as well as to our own, which bring passengers to the United States.

1. By the legislation of Congress, the passenger is allowed to sue in a court of the United States, and there to appear in person, as a seaman may, and have redress for injuries inflicted on him by the master during the voyage.

2. The passenger is allowed to appear at the custom-house with his goods, consisting often of all his personal property, and there, if required, take the oath prescribed by the acts of Congress and get his property relieved from taxation. The clothes on his person, and the money in his purse, from which the tax is sought, may freely land as protected imports; and yet the State laws under consideration forbid the owner to land; they hold him out of the courts, and separate him from his property, until, by coercion, he pays to the master for the use of the State any amount of tax the State may at its discretion set upon him and upon his family; and this on the assumption that Congress has not regulated in respect to his free admission.

*And how does the assumption stand, [*444 that a poll tax may be levied on all passengers, notwithstanding our commercial treaties? By the fourteenth article of the Treaty of 1794 (known as Jay's treaty), and which article was renewed by our treaty with Great Britain of 1815, it was stipulated that reciprocal liberty of commerce should exist between the United States and all the British territories in Europe: "That the inhabitants of Great Britain shall have liberty freely and securely to come with their ships and cargoes to our ports, to enter the same, and to remain and reside in any part of our territories; also, to hire and occupy houses and warehouses for the purposes of their commerce." And that no higher or other duties should be imposed on British vessels than were by our laws imposed on American vessels coming into our ports from Great Britain, and that our people should have reciprocal rights in the British ports and territories.

The taxes under consideration are imposed on all persons engaged in commerce who are aliens, no matter where they are from. We have commercial treaties of the same import with the one above recited with almost every nation whose inhabitants prosecute commerce to the United States; all these are free to come and enter our country, so far as a treaty can secure

the right. Many thousands of men are annually engaged in this commerce. It is prosecuted, for a great portion of the territory of the United States, at and through the two great ports where these taxes have been imposed; and it is a matter of history, that the greater portion of our foreign commerce enters these ports. There aliens must come as passengers to prosecute commerce and to trade, and the question is, Can the States tax them out, or tax them at all, in the face of our treaties expressly providing for their free and secure admission?

It is thus seen to what dangerous extents these State laws have been pushed; and that they may be extended, if upheld by this court, to every ferry boat that crosses a narrow water within the flow of tide which divides States, and to all boats crossing rivers that are State boundaries, is evident.

These laws now impose taxes on vessels through their masters, in respect to the masters and crews, and all passengers on board, when the vessel commences and ends its voyage within sight and hearing of the port where the tax is demandable, making no distinction between citizens and aliens. They tax, through the masters, all American vessels coming from other States (including steamboats) protected by coasting licenses, under United States authority, and also exempt by the Constitution from paying duties in another State. They tax, through the masters, foreign vessels protected 445*] by the Constitution *from tonnage duties, save by the authority of Congress, and who are also protected by treaty stipulations. They tax passengers who are owners and agents of the vessel, and accompany the ship. They tax owners, agents, and servants who accompany goods brought in for sale, and who are by our treaties at full liberty freely to come and reside if any part of our territories in pursuit of foreign commerce.

The tax is demandable from the master on entering the port, and the law provides that, when he pays the money to the State collector, the master may, by way of remedy over, recover by suit from each passenger the sum paid on his account. And it is insisted that the master had still a better remedy in the carrier's lien on goods of passengers, which he might detain, and by this means coerce payment at once before the vessel landed.

Plainly, this latter was the principal mode of distress contemplated by the State authorities, as wives and children could not be sued, nor have they any property, and therefore property of heads of families could only be reached on their account.

Now, what do these laws require the master to do? As the agent of New York, and as her tax collector, he is required to levy the tax on goods of passenger, and make it out of property which is beyond the reach of the State laws; and yet the thing is to be done by force of these same State laws. Suppose it to be true, that this forcing the master to levy a distress on protected goods is yet no tax on him or his vessel, and therefore, in that respect, the law laying the tax does not violate the Constitution; all this would only throw the tax from one protected subject to another—it would shift the burden from the master and vessel on to *the goods of the passenger*, which are as much protected by the Constitution and acts of Congress as the master and vessel.

And how would this assumption, that a State law may escape constitutional invasion, by giving a remedy over, operate in practice?

Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution—more than all other causes it led to the result; and the provision prohibiting the States from laying any duty on imports or exports, and the one which declares that vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another, were especially intended to prevent the evil. Around our extensive seaboard, on our great lakes, and through our great rivers, this protection is relied on against State assumption and State interference. Throughout the *Union, [*446 our vessels of every description go free and unrestrained, regardless of State authority. They enter at pleasure, depart at pleasure, and pay no duties. Steamboats pass for thousands of miles on rivers that are State boundaries, not knowing nor regarding in whose jurisdiction they are, claiming protection under these provisions of the Constitution. If they did not exist, such vessels might be harassed by insupportable exactions. If it be the true meaning of the Constitution, that a State can evade them by declaring that the master may be taxed in regard to passengers, on the mere assertion that he shall have a remedy over against the passengers, citizens and aliens, and that the State may assess the amount of tax at discretion, then the old evil will be revived, that the States may tax at every town and village where a vessel of any kind lands. They may tax on the assumption of self-defense, or on any other assumption, and raise a revenue from others, and thereby exempt their own inhabitants from taxation.

If the first part of the State law is void, because it lays a duty on the vessel, under the disguise of taxing its representative, the master, how can the after part, giving the master a remedy over against passengers, be more valid than its void antecedent? All property on board belonging to passengers is absolutely protected from State taxation. And how can a State be heard to say, that truly she cannot make distress on property for want of power, but still that she can create the power in the master to do that which her own officers cannot do?

In the next place, the Constitution, by article first, section eighth, provides, that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."

Such taxes may be laid on foreign commerce as regulations of revenue; these regulations are the ordinary ones to which the Constitution refers. Congress has no power to lay any but uniform taxes when regulating foreign commerce to the end of revenue—taxes equal and alike at all the ports of entry, giving no one a preference over another. Nor has Congress power to lay taxes to pay the debts of a State, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends.

The question, whether the power to regulate commerce and navigation is exclusive in the government of the United States, or whether a State may regulate within its own waters and ports in particular cases, does not arise in this cause. The question here is, whether a State 447*] can regulate foreign commerce *by "a revenue measure," for the purposes of its own treasury. If the State taxes, with the consent of Congress, the vessel directly, by a tonnage duty, or indirectly, by taxing the master and crew, or taxes the cargo by an impost, or assumes to tax passengers, or to regulate in any other mode, she assumes to exercise the jurisdiction of Congress, and to regulate navigation engaged in foreign commerce; she does that which Congress has the power to do, and is restrained by the Constitution within the same limits to which Congress is restricted. And as Congress cannot raise money for the benefit of a State treasury, so neither can a State exercise the same power for the same purpose.

Again, give the argument all the benefit that it claims; concede the full municipal power in the State to tax all persons within her territory, as a general rule, whether they have been there a year or an hour; and still she could not impose a capitation tax on this passenger by the hand of her own tax collector. The tax was demanded whilst they were on board. All the property they brought with them, the clothes and moneys on their persons, were imports; that is, "property imported or brought into this country from another country." No duty could be laid on it by the State; as, until it was separated from the ship, it belonged to foreign commerce and was an import. Had the tax been imposed directly on the passengers, as a poll tax is on land, and had the heads of families been bound to pay for their wives, children, and servants, and had the collector, with the tax list in his hand (which was an execution in fact), gone on board, he would have found no property that was not protected, which he could touch by way of distress to make the money. The passengers could defy him, could turn about, go to another port in the next State, land, and go their way. Here, then, a demand was made for a most stringent tax, which could not be enforced at the time and place of demand from anybody, without violating the Constitution, various acts of Congress, and a most important commercial treaty.

It has also been urged on the court, with great earnestness, that, as this tax is levied for the support of alien paupers and purposes of city police, and as the police power has not been taken from the States, that the "object" for which it was imposed brings it within the State power. City police is part of the State police, and on this assumption a poll tax on foreigners might be imposed to maintain almost the entire municipal power throughout the State, embracing the administration of justice in criminal cases, as well as numerous city expenses, together with the support of the poor. 448*] The objects *and assumptions might, indeed, be endless. Were this court once to hold that aliens belonging to foreign commerce, and passengers coming from other States, could have a poll tax levied on them on entering any port of a State, on the assumption that the tax should be applied to maintain State police powers, and by this means the State treasury could be filled, the time is not distant when States holding the great inlets of commerce might raise all necessary revenues from foreign intercourse, and from intercourse among the States, and thereby exempt their own inhabitants from taxation altogether. The money once being in the treasury, the State Legislature might apply it to any and every purpose, at discretion, as New York has done; and if more was needed, the capitation tax might be increased at discretion, the power to tax having no other limitation.

The passengers in this instance were not subjects of any police power or sanatory regulation, but healthy persons of good moral character, as we are bound to presume, nothing appearing to the contrary; nor had the State of New York manifested by her legislation any objection to such persons entering the State.

Again, it was urged that the States had the absolute power to exclude all aliens before the Constitution was formed, and that this power remained unsurrendered and unimpaired; that it might be exercised in any form that the States saw proper to adopt; and having the power to admit or reject at pleasure, the States might, as a condition to admission, demand from all aliens a sum of money, and if they refused to pay, the States might keep them out, nor could Congress or a treaty interfere. If such power existed in the State of New York, it has not been exerted in this instance. That it was intended to impose a condition hostile to the admission of the passengers, in respect to whom the master was sued, is without the slightest foundation. They were not hindered or interfered with in any degree by the State law. It is a general revenue measure, and declares that the general health commissioner demand, and be entitled to receive, and in case of neglect or refusal shall sue for and recover, from the master of every vessel from a foreign port that shall arrive in the port of New York, for himself and each cabin passenger, one dollar and fifty cents; and for each steerage passenger, mate, sailor, or marine, one dollar; and from the master of each coasting vessel, for each person on board, twenty-five cents. No restraint is imposed on passengers, either of foreign vessels or of coasting vessels.

In the one case, as in the other, the merchants, traders, and visitors in the cabin, and the immigrants in the steerage, were equally free, to *come into the harbor, and equal- [*449
ly welcome to enter the State. She does not address herself to them at all, but demands a revenue duty from the master, making the presence of passengers the pretext. We have to deal with the law as we find it, and not with an imaginary case that it might involve, but undoubtedly does not.

For the reason just stated, I had not intended to examine the question presenting the State right claimed, but it has become so involved in the discussion at the bar and among the judges, that silence cannot be consistently observed. The assumption is, that a State may enforce a non-intercourse law excluding all aliens, and having power to do this, she may do any act tending to that end, but short of positive prohibition. If the premises be true, the conclusion cannot be questioned.

The Constitution was a compromise between

all the States of conflicting rights among them. They conferred on one government all national power, which it would be impossible to make uniform in a proess of legislation by several distinct and independent State governments; and in order that the equality should be preserved as far as practicable and consistent with justice, two branches of the national Legislature were created. In one, the States are represented equally, and in the other, according to their respective populations. As part of the treaty-making power, the States are equal. The action of the general government by legislation or by treaty is the action of the States and of their inhabitants; these the Senate, the House of Representatives, and the President represent. This is the federal power. In the exercise of its authority over foreign commerce it is supreme. It may admit or it may refuse foreign intercourse, partially or entirely.

The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate. To comprehend its whole scope, the mind must take in the entire country and its local governments. They were at the time of its adoption thirteen States. There existed a large territory beyond them already ceded by Virginia, and other territory was soon expected to be ceded by North Carolina and Georgia. New States were in contemplation far off from ports on the ocean, through which ports aliens must come to our vacant territories and new States, and through these ports foreign commerce must of necessity be carried on by our inland population. We had several thousand miles of sea coast; we adjoined the British possessions on the east and north for several thousand miles, and were divided from them by lines on land to a great extent; and on the west and south we were bounded for three 450*] thousand miles and more *by the possessions of Spain. With neither of these governments was our intercourse by any means harmonious at that time.

Provision had to be made for foreign commerce coming from Europe and other quarters, by navigation in the pursuit of profitable merchandise and trade, and also to regulate personal intercourse among aliens coming to our shores by navigation in pursuit of trade and merchandise, as well as for the comfort and protection of visitors and travelers coming in by the ocean.

Then, again, on our inland borders, along our extensive lines of separation from foreign nations, trade was to be regulated; but more especially was personal intercourse to be governed by standing and general rules, binding the people of each nation on either side of the line. This could only be done by treaty of nation with nation. If the individual States had retained national power, and each might have treated for itself, anyone might have broken its treaty and given cause of war, and involved other States in the war; therefore all power to treat, or have foreign intercourse, was surrendered by the States; and so were the powers to make war and to naturalize aliens given up. These were vested in the general government for the benefit of the whole. This became "the *nation" known to* foreign governments, and was solely responsible to them for the acts of all the States and their inhabitants.

The general government has the sole power by treaty to regulate that foreign commerce which consists in navigation, and in buying and selling. To carry on this commerce, men must enter the United States (whose territory is an unit to this end) by the authority of the nation; and what may be done in this respect will abundantly appear by what has been done from our first administration under the Constitution to the present time, without opposition from State authority, and without being questioned, except by a barren and inconsistent theory, that admits exclusive power in the general government to let in ships and goods, but denies its authority to let in the men who navigate the vessels, and those who come to sell the goods and purchase our productions in return.

Our first commercial treaty with Great Britain was that of 1794, made under the sanction of President Washington's administration. By the fourteenth article, already referred to, the inhabitants of the king of Great Britain, coming from his majesty's territories in Europe, had granted to them liberty, freely and securely, and without hindrance or molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within our territories, to enter the same, to resort there, to remain and reside there, without limitation of *time; and reciprocal liberty was [*451 granted to the people and inhabitants of the United States in his majesty's European territories but subject always, as to what respects this article, to the laws and statutes of the two countries respectively. This stipulation was substantially renewed by the Treaty of 1815, article first. In the British dominions our inhabitants were to abide by the general laws of Great Britain, and in our territories the subjects and inhabitants of that country were to abide by the laws of the United States, and also by the laws of any State where they might be. But the treaty does not refer to laws of exclusion. The State laws could not drive out those admitted by treaty without violating it, and furnishing cause of war; nor could State laws interpose any hindrance or molestation to the free liberty of coming. We have similar treaties with many other nations of the earth, extending over much of its surface, and covering populations more than equal to one half of its inhabitants. Millions of people may thus freely come and reside in our territories without limitation of time, and after a residence of five years, by taking the proper steps, may be admitted to citizenship under our naturalization laws. Thousands of such persons have been admitted, and we are constantly admitting them now; and when they become citizens they may go into every State without restraint, being entitled "to all the privileges and immunities of citizens of the several States."

And as respects intercourse across our line of separation from the British possessions in America, it is agreed, by the third article of the Treaty of 1794, "that it shall at all times be free to his majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of said boundary line, freely to pass and repass, by land or inland navigation, into the respective territories

and countries of the two parties on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof; and freely to carry on trade and commerce with each other." Tolls and rates of ferriage are to be the same, on either side of the line, that natives pay on that side.

Although this treaty was abrogated by the war of 1812, still I understand that it was intended to be renewed, so far as it regulated intercourse at our inland borders, by the second article of the Treaty of 1815.

Thus have stood fact and practice for half a century, in the face of the theory, that individual States have the discretionary power to exclude aliens, because the power was reserved to the States, is exclusively in them, and remains unimpaired by the Constitution.

452*] *It is also insisted that the States may tax all persons and property within their respective jurisdiction, except in cases where they are affirmatively prohibited. This is a truism not open to denial. Certainly the States may tax their own inhabitants at discretion, unless they have surrendered the power. But constitutional exceptions to the State power are so broad as to render the claim valueless in the present instance. The States cannot lay export duties, nor duties on imports, nor tonnage duties on vessels. If they tax the master and crew, they indirectly lay a duty on the vessel. If the passengers on board are taxed, the protected goods—the imports—are reached.

In short, when the tax in question was demandable by the State law, and demanded, the ship rode in the harbor of New York, with all persons and property on board, as an unit belonging to foreign commerce. She stood as single as when on the open ocean, and was as exempt from the State taxing power.

For the reasons here given, I think the judgment of the State court should be reversed, because that part of the State law on which it is founded was void.

Grier, J. I concur with this opinion of my brother Catron.

Note.—I here take occasion to say, that the State police power was more relied on and debated in the cause of Norris v. The City of Boston than in this cause. In that case I had prepared an opinion, and was ready to deliver it when I delivered this opinion in open court. But being dissatisfied with its composition, and agreeing entirely with my brother Grier on all the principles involved in both causes, and especially on the State power of exclusion in particular instances, I asked him to write out our joint views in the cause coming up from Massachusetts. This he has done to my entire satisfaction, and therefore I have said nothing here on the reserved powers of the States to protect themselves, but refer to that opinion as containing my views on the subject, and with which I fully concur throughout.

Mr. Justice McKinley:

Norris v. City of Boston, and
Smith v. Turner.

I have examined the opinions of Mr. Justice McLean and Mr. Justice Catron, and concur in the whole reasoning upon the main question, but wish to add, succinctly, my own views upon a single provision of the Constitution.

The first clause of the ninth section and first article of the *Constitution provides, [*453 that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

On the last argument of this cause, no reference was made to this clause of the Constitution; nor have I ever heard a full and satisfactory argument on the subject. Yet on a full examination of this clause, connected with other provisions of the Constitution, it has had a controlling influence on my mind in the determination of the case before us. Some of my brethren have insisted that the clause here quoted applies exclusively to the importation of slaves. If the phrase, "the migration or importation of such persons," was intended by the Convention to mean slaves only, why, in the assertion of the taxing power, did they, in the same clause, separate migration from importation, and use the following language: "But a tax or duty may be imposed on such importation, not exceeding ten dollars for each person?" All will admit, that, if the word "migration" were excluded from the clause, it would apply to slaves only. An unsuccessful attempt was made in the Convention to amend this clause by striking out the word "migration," and thereby to make it apply to slaves exclusively. In the face of this fact, the debates in the Convention, certain numbers of the Federalist, together with Mr. Madison's report to the Legislature of Virginia in 1799—eleven years after the adoption of the Constitution—are relied on to prove that the words "migration" and "importation" are synonyms, within the true intent and meaning of this clause. The acknowledged accuracy of language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument.

I have been unable to find anything in the debates of the Convention, in the Federalist, or the report of Mr. Madison, inconsistent with the construction here given. Were they, however, directly opposed to it, they could not, by any known rule of construction, control or modify the plain and unambiguous language of the clause in question. The conclusion, to my mind, is therefore irresistible, that there are two separate and distinct classes of persons intended to be provided for by this clause.

Although they are both subjects of commerce, the latter class only is the subject of trade and importation. The slaves are not immigrants, and had no exercise of volition in their transportation from Africa to the United States.

The owner was bound to enter them at the custom-house as *any other article of [*454 commerce or importation, and to pay the duty imposed by law, whilst the persons of the first class, although subjects of commerce, had the free exercise of volition, and could remove at pleasure from one place to another; and when they determined to migrate or remove from any European government to the United States,

they voluntarily dissolved the bond of allegiance to their sovereign, with the intention to contract a temporary or permanent allegiance to the government of the United States, and if transported in an American ship, that allegiance commenced the moment they got on board. They were subject to, and protected by, the laws of the United States, to the end of their voyage.

Having thus shown that there are two separate and distinct classes included in, and provided for, by the clause of the Constitution referred to, the question arises, how far the persons of the first class are protected, by the Constitution and laws of the United States, from the operation of the statute of New York now under consideration. The power was conferred on Congres to prohibit migration and importation of such persons into all the new States, from and after the time of their admission into the Union, because the exemption from the prohibition of Congress was confined exclusively to the States then existing, and left the power to operate upon all the new States admitted into the Union prior to 1808. Four new States having been thus admitted within that time, it follows, beyond controversy, that the power of Congress over the whole subject of migration and importation was complete throughout the United States after 1808.

The power to prohibit the admission of "all such persons" includes, necessarily, the power to admit them on such conditions as Congress may think proper to impose; and therefore, as a condition, Congress has the unlimited power of taxing them. If this reasoning be correct, the whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations. How far, then, are these immigrants protected, upon their arrival in the United States, against the power of State statutes? The ship, the cargo, the master, the crew, and the passengers are all under the protection of the laws of the United States, to the final termination of the voyage; and the passengers have a right to be landed and go on shore, under the protection and subject to these laws only, except so far as they may be subject to the quarantine laws of the place where they are landed; which laws are not drawn in question in this controversy. The great question here is, Where does the power of the United States over this subject end, and where 455*] does the *State power begin? This is, perhaps, one of the most perplexing questions ever submitted to the consideration of this court.

A similar question arose in the case of Brown v. The State of Maryland, 12 Wheat. 419, in which the court carried out the power of Congress to regulate commerce with foreign nations, upon the subject then under consideration, to the line which separates it from the reserved powers of the States, and plainly established the power of the States over the same subject matter beyond that line.

The clause of the Constitution already referred to in this case, taken in connection with the provision which confers on Congress the power to pass all laws necessary and proper for *carrying into effect* the enumerated and all *other powers granted* by the Constitution, seems necessarily to include the whole power over this subject; and the Constitution and laws of the United States being the supreme law of the land, State power cannot be extended over the same subject. It therefore follows, that passengers can never be subject to State laws until they become a portion of the population of the State, temporarily or permanently; and this view of the subject seems to be fully sustained by the case above referred to. Were it even admitted that the State of New York had power to pass the statute under consideration, in the absence of legislation by Congress on this subject, it would avail nothing in this case, because the whole ground had been occupied by Congress before that act was passed, as has been fully shown by the preceding opinion of my brother Catron. The laws referred to in that opinion show conclusively that the passengers, their moneys, their clothing, their baggage, their tools, their implements, etc., are permitted to land in the United States without tax, duty, or impost.

I therefore concur in the opinion that the judgment of the court below should be reversed.

Mr. Justice Catron concurs in the foregoing opinion, and adopts it as forming part of his own, so far as Mr. Justice McKinley's individual views are expressed, when taken in connection with Mr. Justice Catron's opinion.

Mr. Justice Grier:

Norris v. City of Boston.

As the law of Massachusetts which is the subject of consideration in this case differs in some respects from that of New York, on which the court have just passed in the case of Smith v. Turner, I propose briefly to notice it. In so doing, it is not *my purpose [*456 to repeat the arguments urged in vindication of the judgment of the court in that case, and which equally apply to this, but rather to state distinctly what I consider the point really presented by this case, and to examine some of the propositions assumed, and arguments urged with so much ability by the learned counsel of the defendants.

The plaintiff in this case is an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain. He arrived at the port of Boston in June, 1837, in command of a schooner belonging to the port of St. John's, having on board nineteen alien passengers. Prior to landing, he was compelled to pay to the city of Boston the sum of two dollars each for permission to land said passengers. This sum of thirty-eight dollars was paid under protest, and this suit instituted to recover it back.

The demand was made, and the money received from the plaintiff, in pursuance of the following Act of the Legislature of Massachusetts, passed on the 20th of April, 1837, and entitled, "An Act relating to alien passengers:"

"Sec. 1. When any vessel shall arrive at any port or harbor within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby author-

ized and required to appoint, shall go on board such vessels and examine into the condition of such passengers.

"Sec. 2. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient surety, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"Sec. 3. No alien passengers, other than those spoken of in the preceding section, shall be permitted to land until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct, for the support of foreign paupers.

"Sec. 4. The officer or officers required in the first section of this act to be appointed by the mayor and aldermen, or the selectmen, 457*] *respectively, shall, from time to time, notify the pilots of the port of said city or town of the place or places where the said examination is to be made, and the said pilots shall be required to anchor all such vessels at the place so appointed, and require said vessels there to remain till such examination shall be made; and any pilot who shall refuse or neglect to perform the duty imposed upon him by this section, or who shall, through negligence or design, permit any alien passenger to land before such examination shall be had, shall forfeit to the city or town a sum not less than fifty nor more than two thousand dollars.

"Sec. 5. The provisions of this act shall not apply to any vessel coming on shore in distress, or to any alien passengers taken from any wreck where life is in danger."

It must be borne in mind (what has been sometimes forgotton), that the controversy in this case is not with regard to the right claimed by the State of Massachusetts, in the second section of this act, to repel from her shores lunatics, idiots, criminals, or paupers, which any foreign country, or even of her sister States, might endeavor to thrust upon her; nor the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of the States has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul. It is admitted by all, that those powers which relate to merely municipal legislation, or what may be more properly called "internal police," are not surrendered or restrained; and that it is as competent and necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported. The case of New York v. Miln asserts this doctrine, and no more. The law under consideration in that case did not interfere with passengers as such, either directly or indirectly, who were not paupers. It put forth no claim to tax all persons for leave to land and pass through the State to other States, or a right to regulate the intercourse of foreign nations with the United States, or to control the policy of the general government with regard to immigrants.

But what is the claim set up in the third section of the act under consideration, with which alone we have now to deal?

It is not the exaction of a fee or toll from passengers for some personal service rendered to them, nor from the master of the vessel for some inspection or other service rendered either to the vessel or its cargo. It is not a fee or tax for a *license to foreigners to be- [*458 come denizens or citizens of the Commonwealth of Massachusetts; for they have sought no such privilege, and, so far as is yet known, may have been on their way to some other place.

It is not an exercise of the police power with regard to paupers, idiots, or convicts. The second section effectually guards against injury from them. It is only after the passenger has been found, on inspection, not to be within the description whose crimes or poverty require exclusion, that the master of the vessel is taxed for leave to land him. Had this act commenced with the third section, might it not have been truly entitled, "An Act to raise revenue off vessels engaged in the transportation of passengers?" Its true character cannot be changed by its collocation, nor can it be termed a police regulation because it is in the same act which contains police regulations.

In its letter and its spirit it is an exaction from the master, owner, or consignee of a vessel engaged in the transportation of passengers, graduated on the freight or passage-money earned by the vessel. It is, in fact, a duty on the vessel, not measured by her tonnage, it is true, but producing a like result, by merely changing the ratio. It is a taxation of the master, as representative of the vessel and her cargo.

It has been argued that this is not a tax on the master or the vessel, because in effect it is paid by the passenger having enhanced the price of his passage. Let us test the value of this argument by its application to other cases that naturally suggest themselves. If this act had, in direct terms, compelled the master to pay a tax or duty levied or graduated on the ratio of the tonnage of his vessel, whose freight was earned by the transportation of passengers, it might have been said, with equal truth, that the duty was paid by the passenger, and not by the vessel. And so, if it had laid an impost on the goods of the passenger imported by the vessel, it might have been said, with equal reason, it was only a tax on the passenger at last, as it comes out of his pocket, and, graduating it by the amount of his goods, affects only the modus or ratio by which its amount is calculated. In this way, the most stringent enactments may be easily evaded.

It is a just and well settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a

vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size 459*] *and power of the steam engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce, and not owned by her own citizens, by changing its name from a "duty on tonnage" to a tax on the master, or an impost upon imports, by calling it a charge on the owner or supercargo, and justify this evasion of a great principle by producing a dictionary or a dictum to prove that a ship captain is not a vessel, nor a supercargo an import?

The Constitution of the United States, and the powers confided by it to the general government, to be exercised for the benefit of all the States, ought not to be nullified or evaded by astute verbal criticism, without regard to the grand aim and object of the instrument, and the principles on which it is based. A constitution must necessarily be an instrument, which enumerates, rather than defines, the powers granted by it. While we are not advocates for a latitudinous construction, yet "we know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they are conferred."

Before proceeding to examine the more prominent and plausible arguments which have been urged in support of the power now claimed by the State of Massachusetts, it may be proper to notice some assumptions of fact which have been used for the purpose of showing the necessity of such a power, from the hardships which it is supposed would otherwise be inflicted on those States which claim the right to exercise it.

It was assumed as a fact, that all the foreigners who arrived at the ports of Boston and New York, and afterwards became paupers, remained in those cities, and there became a public charge; and that, therefore, this tax was for their own benefit, or that of their class. But is this the fact? Of the many ten thousands who yearly arrive at those ports, how small a proportion select their residence there! Hundreds are almost daily transferred from the vessels in which they arrive to the railroad car and steamboat, and proceed immediately on their journey to the Western States. Are Boston, New York, and New Orleans, through which they are compelled to pass, the only cities of the Union which have to bear the burden of supporting such immigrants as afterwards become chargeable as paupers? It may well be questioned whether their proportion of this burden exceeds the ratio of their great wealth and population. But it appears by the second section of the act now before us, that all persons whose poverty, age, or infirmities 460*] render them *incompetent to maintain themselves are not permitted to land until a bond has been given, in the sum of one thousand dollars, with sufficient security, that they *will not become a city*, town, or State charge *within ten years*. By the stringency of these bonds, the poor, the aged, and the infirm are compelled to continue their journey and migrate to other States; and yet, after having thus driven off all persons of this class, and obtained an indemnity against loss by them if they remain, it is complained of as a hardship, that the State should not be allowed to tax those who, on examination, are found not to be within this description—who are not paupers, nor likely to become such; and that this exaction should be demanded, not for a license to remain and become domiciled in the State, but for leave to pass through it. But admitting the hardship of not permitting these States to raise revenue by taxing the citizens of other States, or immigrants seeking to become such, the answer still remains, that the question before the court is not one of feeling or discretion, but of power.

The arguments in support of this power in a State to tax vessels employed in the transportation of passengers assume, 1st. That it is a tax upon passengers or persons, and not upon vessels. 2d. That the States are sovereign, and that "the sovereign may forbid the entry of his territory either to foreigners in general or in particular cases, or for certain purposes, according as he may think it advantageous to the State; and since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has power to annex what conditions he pleases to the permission to enter;" that the State of Massachusetts, having this power to exclude altogether, may therefore impose as a condition for license to pass through her territory any amount of tax she may see fit; and this is but the exercise of the police power reserved to the States, and which cannot be controlled by the government of the Union. 3d. That it is but an exercise of the municipal power which every State has, to tax persons and things within her jurisdiction, and with which other States have no concern.

Let us assume, for the sake of argument, that this is not a duty on the vessel, nor an interference with commercial regulations made by Congress, but a tax on persons transported in the vessel, and carry out the propositions based on this hypothesis to their legitimate results.

It must be admitted that it is not an exercise of the usual power to tax persons resident within a State, and their property; but is a tax on passengers qua passengers. It is a condition annexed to a license to them to pass through the State, on their journey to other States. It is founded on a claim by a *State of the power to exclude all per- [*461 sons from entering her ports or passing through her territory.

It is true, that, if a State has such an absolute and uncontrolled right to exclude, the inference that she may prescribe the conditions of entrance, in the shape of a license or a tax, must necessarily follow. The conclusion cannot be evaded if the premises be proved. A right to exclude is a power to tax; and the converse of the proposition is also true, that a power to tax is a power to exclude; and it follows, as a necessary result, from this doctrine, that those States in which are situated the great ports or gates of commerce have a right to exclude, if they see fit, all immigrants from access to the interior States, and to prescribe the conditions on which they shall be

allowed to proceed on their journey, whether it be the payment of two or of two hundred dollars. Twelve States of this Union are without a seaport. The United States have, within and beyond the limits of these States, many millions of acres of vacant lands. It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation. Is it possible that the framers of our Constitution have committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted to gain access to the other States? Moreover, if persons migrating to the Western States may be compelled to contribute to the revenue of Massachusetts or New York, or Louisiana, whether for the support of paupers or penitentiaries, they may with equal justice be subjected to the same exactions in every other city or State through which they are compelled to pass; and thus the unfortunate immigrant, before he arrives at his destined home, be made a pauper by oppressive duties on his transit. Besides, if a State may exercise this right of taxation or exclusion on a foreigner, on the pretext that he may become a pauper, the same doctrine will apply to citizens of other States of this Union; and thus the citizens of the interior States, who have no ports on the ocean, may be made tributary to those who hold the gates of exit and entrance to commerce. If the bays and harbors in the United States are so exclusively the property of the States within whose boundaries they lie, that, the moment a ship comes within them, she and all her passengers become the subjects of unlimited taxation before they can be permitted to touch the shore, the assertion, that this is a question with which the citizens of [*462] other States have no *concern, may well be doubted. If these States still retain all the rights of sovereignty, as this argument assumes, one of the chief objects for which this Union was formed has totally failed; and "we may again witness the scene of conflicting commercial regulations and exactions which were once so destructive to the harmony of the States, and fatal to their commercial interests abroad."

To guard against the recurrence of these evils, the Constitution has conferred on Congress the power to regulate commerce with foreign nations, and among the States. That, as regards our intercourse with other nations and with one another, we might be one people —not a mere confederacy of sovereign States for the purposes of defense or aggression.

Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. "But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. *Every district has a right to partici-*

pate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State." Gibbons v. Ogden, 9 Wheat. 195.

The question, whether this power is exclusive, is one on which the majority of this court have intimated different opinions at different times; but it is one of little practical importance in the present case, for this power has not lain dormant, like those for enacting a uniform bankrupt law, and for organizing the militia. The United States have made treaties, and have regulated our intercourse with foreign nations by prescribing its conditions. No single State has, therefore, a right to change them. To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes, that, because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?

*The argument of those who chal- [*463 lenge the right to exercise this power for the States of Massachusetts and New York, on the ground that it is a necessary appurtenant to the police power, seems fallacious, also, in this respect. It assumes, that, because a State, in the exercise of her acknowledged right, may exclude paupers, lunatics, etc., therefore she may exclude all persons, whether they come within this category or not. But she may exclude putrid and pestilential goods from being landed on her shores; yet it does not follow that she may prescribe what sound goods may by landed, or prohibit their importation altogether. The powers used for self-defense and protection against harm cannot be perverted into weapons of offense and aggression upon the rights of others. A State is left free to impose such taxes as she pleases upon those who have elected to become residents or citizens; but it is not necessary to her safety or welfare that she should exact a transit duty on persons or property for permission to pass to other States.

It has been argued, also, that, as the jurisdiction of the State extends over the bays and harbors within her boundaries for the purpose of punishing crimes committed thereon, therefore her jurisdiction is absolute for every purpose to the same extent; and that, as she may tax persons resident on land and their ships engaged in commerce, she has an equal right to tax the persons or property of foreigners or citizens of other States, the moment their vessels arrive within their jurisdictional limits. But this argument is obnoxious to the imputation of proving too much, and therefore not to be relied on as proving anything. For if a State has an absolute right to tax vessels and persons coming from foreign ports, or those of other States, before they reach the shore, and as a condition for license to land in her ports,

she may tax to any amount, and neither Congress nor this court can restrain her in the exercise of that right; it follows, also, as a necessary consequence, that she may exclude all vessels but her own from entering her ports, and may grant monopolies of the navigation of her bays and rivers. This the State of New York at one time attempted, but was restrained by the decision of this court in the case of Gibbons v. Ogden.

In conclusion, we are of opinion.

1st. That the object of the constitutional prohibition to the States to lay duties on tonnage and imposts on imports was to protect both vessel and cargo from State taxation while in transitu; and this prohibition cannot be evaded, and the same result effected, by calling it a tax on the master or passengers.

2d. That the power exercised in these cases 464*] to prohibit the *immigration of foreigners to other States, except on prescribed conditions, and to tax the commerce or intercourse between the citizens of these States, is not a police power, nor necessary for the preservation of the health, the morals, or the domestic peace of the States who claim to exercise it.

3d. That the power to tax this intercourse necessarily challenges the right to exclude it altogether, and thus to thwart the policy of the other States and the Union.

4th. That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it.

Catron, J. I concur with the foregoing opinion of Mr. Justice Grier.

Mr. Chief Justice Taney, dissenting:

Norris v. City of Boston, and
Smith v. Turner.

I do not concur in the judgment of the court in these two cases, and proceed to state the grounds on which I dissent.

The constitutionality of the laws of Massachusetts and New York in some respects depends upon the same principles. There are, however, different questions in the two cases, and I shall make myself better understood by examining separately one of the cases, and then pointing out how far the same reasoning applies to the other, and in what respect there is a difference between them; and, first, as to the case from Massachusetts.

This law meets the vessel after she has arrived in the harbor, and within the territorial limits of the State, but before the passengers have landed, and while they are still afloat on navigable water. It requires the State officer to go on board and examine into the condition of the passengers, and provides that, if any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the examining officer, to maintain themselves, or who have been paupers in any other country, shall be found on board, such alien passenger shall not be permitted to land until the master, owner, consignee, or agent of the vessel shall give bond, with sufficient security, that no such lunatic or indigent person shall become a city, town, or State charge within ten years from the date of the bond. These provisions are contained in the first two sections. It is the third section that has given rise to this controversy, and which *enacts that no [*465 alien passengers other than those before spoken of shall be permitted to land until the master, owner, consignee, or agent of the vessel shall pay to the boarding officer the sum of two dollars for each passenger so landing; the money thus collected to be appropriated to the support of foreign paupers.

This law is a part of the pauper laws of the State, and the provision in question is intended to create a fund for the support of alien paupers, and to prevent its own citizens from being burdened with their support.

I do not deem it material at this time to inquire whether the sum demanded is a tax or not. Of that question I shall speak hereafter. The character of the transaction and the meaning of the law cannot be misunderstood. If the alien chooses to remain on board, and to depart with the ship, or in any other vessel, the captain is not required to pay the money. Its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. He obtains this privilege from the State by the payment of the money. It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger; and he in fact pays it, either in the enhanced price of his passage, or directly to the captain, before he is allowed to embark for the voyage. The nature of the transaction and the ordinary course of business show that this must be the case; and the present claim, therefore, comes before the court without any equitable considerations to recommend it, and does not call upon us to restore money to a party from whom it has been wrongfully exacted. If the plaintiff recovers, he will most probably obtain from the State the money which he has doubtless already received from the passenger, for the purpose of being paid to the State; and which, if the State is not entitled to it, ought to be refunded to the passenger. The writ of error, however, brings up nothing for revision here but the constitutionality of the law under which this money was demanded and paid, and that question I proceed to examine.

And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. *I think there is no treaty or [*466 act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such

a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce.

I had supposed this question not now open to dispute. It was distinctly decided in Holmes v. Jennison, 14 Pet. 540, in Groves v. Slaughter, 15 Pet. 449, and in Prigg v. The Commonwealth of Pennsylvania, 16 Pet. 439.

If these cases are to stand, the right of the State is undoubted. And it is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. For it will hardly be said that the United States may permit them to enter, and compel the State to receive them, and that the State may immediately afterward expel them. There could be no reason of policy or humanity for compelling the States, by the power of Congress, to imbibe the poison, and then leaving them to find a remedy for it by their own exertions and at their own expense. Certainly no such distinction can be found in the Constitution, and such a division of power would be an inconsistency, not to say an absurdity, for which I presume no one will contend. If the State has the power to determine whether the persons objected to shall remain in the State in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of Groves v. Slaughter, the Mississippi constitution prohibited the entry of the objectionable persons, and the opinions of the court throughout treat the exercise of this power as being the same with that of expelling them after they have entered.

Neither can this be a concurrent power, and whether it belongs to the general or to the State government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States 467*] possess it, *then any act on the subject by the general government, in conflict with the State law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the States as to who should and who should not be permitted to reside in a State, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion.

Again, if the State has the right to exclude from its borders any person or persons whom it may regard as dangerous to the safety of its citizens, it must necessarily have the right to decide when and towards whom this power is to be exercised. It is in its nature a discretionary power, to be exercised according to the judgment of the party which possesses it. And it must, therefore, rest with the State to determine whether any particular class or description of persons are likely to produce discontents or insurrection in its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population. For if the general government can in any respect, or by any form of legislation, control or restrain a State in the exercise of this power, or decide whether it has been exercised with proper discretion, and towards proper persons, and on proper occasions, then the real and substantial power would be in Congress, and not in the States. In the cases decided in this court, and hereinbefore referred to, the power determining who is or is not dangerous to the interests and well-being of the people of the State has been uniformly admitted to reside in the State.

I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several States have a right to remove from among their people, and to prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government.

This brings me to speak more particularly of the Massachusetts law, now under consideration. It seems that Massachusetts deems the introduction of aliens into the State from foreign countries likely to produce in the State a numerous pauper population, heavily and injuriously burdensome to its citizens. It would be easy to show, from the public history of the times, that the apprehensions of the State are well founded; that a fearful amount of disease and pauperism is daily brought *to our [*468 shores in emigrant ships, and that measures of precaution and self-defense have become absolutely necessary on the Atlantic border. But whether this law was necessary or not is not a question for this court; and I forbear, therefore, to discuss its justice and necessity. This court has no power to inquire whether a State has acted wisely or justly in the exercise of its reserved powers. Massachusetts had the sole and exclusive right to judge for herself whether any evil was to be apprehended from the introduction of alien passengers from foreign countries. And in the exercise of her discretion, she had a right to exclude them if she thought proper to do so. Of course I do not speak of public functionaries or agents, or officers of foreign governments. Undoubtedly no State has a right to interfere with the free ingress of persons of that description. But there does not appear to have been any such among the aliens who are the subjects of this suit, and no question, therefore, can arise on that score.

Massachusetts, then, having the right to refuse permission to alien passengers from foreign countries to land upon her territory, and

the right to reject them as a class or description of persons who may prove injurious to her interests, was she bound to admit or reject them without reserve? Was she bound either to repel them altogether, or to admit them absolutely and unconditionally? And might she not admit them upon such securities and conditions as she supposed would protect the interests of her own citizens, while it enabled the State to extend the offices of humanity and kindness to the sick and helpless stranger? There is certainly no provision in the Constitution which restrains the power of the State in this respect. And if she may reject altogether, it follows that she may admit upon such terms and conditions as she thinks proper, and it cannot be material whether the security required be a bond to indemnify or the payment of a certain sum of money.

In a case where a party has a discretionary power to forbid or permit an act to be done, as he shall think best for his own interests, he is never bound absolutely and unconditionally to forbid or permit it. He may always permit it upon such terms and conditions as he supposes will make the act compatible with his own interests. I know no exception to the rule. An individual may forbid another from digging a ditch through his land to draw off water from the property of the party who desires the permission. Yet he may allow him to do it upon such conditions and terms as, in his judgment, are sufficient to protect his own property from overflow; and for this purpose he may either take a bond and security, or he may accept a sum of money in lieu of it, and take upon 469*] himself the obligation *of guarding against the danger. The same rule must apply to governments who are charged with the duty of protecting their citizens. Massachusetts has legislated upon this principle. She requires bond and security from one class of aliens, and from another, whom she deems less likely to become chargeable, she accepts a sum of money, and takes upon herself the obligation of providing a remedy for the apprehended evil.

I do not understand that the lawfulness of the provision for taking bond, where the emigrants are actual paupers and unable to gain a livelihood, has been controverted. That question, it is true, is not before us in this case, but the right of the State to protect itself against the burden of supporting those who come to us from European almshouses seems to be conceded in the argument. Yet there is no provision in the Constitution of the United States which makes any distinction between different descriptions of aliens, or which reserves the power to the State as to one class and denies it over the other. And if no such distinction is to be found in the Constitution, this court cannot engraft one upon it. The power of the State as to these two classes of aliens must be regarded here as standing upon the same principles. It is in its nature and essence a discretionary power, and if it resides in the State as to the poor and the diseased, it must also reside in it as to all.

In both cases the power depends upon the same principles, and the same construction of *the Constitution of* the United States; it results *from the discretionary* power which resides in a State to determine from what person or description of persons the danger of pauperism is to be apprehended, and to provide the necessary safeguards against it. Most evidently this court cannot supervise the exercise of such a power by the State, nor control or regulate it, nor determine whether the occasion called for it, nor whether the funds raised have been properly administered. This would be substituting the discretion of the court for the discretionary power reserved to the State.

Moreover, if this court should undertake to exercise this supervisory power, it would take upon itself a duty which it is utterly incapable of discharging. For how could this court ascertain whether the persons classed by the boarding officer of the State as paupers belonged to that denomination or not? How could it ascertain what had been the pursuits, habits, and mode of life of every emigrant, and how far he was liable to lose his health, and become, with a helpless family, a charge upon the citizens of the State? How could it determine who was sick and who was well? Who was rich and who was poor? Who was likely to become chargeable and who not? Yet all *this [*470 must be done, and must be decided, too, upon legal evidence, admissible in a court of justice, if it is determined that the State may provide against the admission of one description of aliens, but not against another; that it may take securities against paupers and persons diseased, but not against those who are in health or have the means of support; and that this court have the power to supervise the conduct of the State authorities, and to regulate it and determine whether it has been properly exercised or not.

I can, therefore, see no ground for the exercise of this power by the government of the United States or any of its tribunals. In my opinion, the clear, established, and safe rule is that it is reserved to the several States, to be exercised by them according to their own sound discretion, and according to their own views of what their interest and safety require. It is a power of self-preservation, and was never intended to be surrendered.

But it is argued in support of the claim of the plaintiff, that the conveyance of passengers from foreign countries is a branch of commerce, and that the provisions of the Massachusetts law, which meet the ship on navigable water and detain her until the bond is given and the money paid, are a regulation of commerce; and that the grant to Congress of the power to regulate commerce is of itself a prohibition to the States to make any regulation upon the subject. The construction of this article of the Constitution was fully discussed in the opinions delivered in the License Cases, reported in 5 Howard. I do not propose to repeat here what I then said, or what was said by other members of the court with whom I agreed. It will appear by the report of the case, that five of the justices of this court, being a majority of the whole bench, held that the grant of the power to Congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbors, for the convenience of trade or the security of health; and that such regulations were valid, unless they came in conflict

with an act of Congress. After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported. Referring to my opinion on that occasion, and the reasoning by which it is 471*] maintained, as showing what I *still think upon the subject, I desire now to add to it a reference to the thirty-second number of the Federalist, which shows that the construction given to this clause of the Constitution by a majority of the justices of this court is the same that was given to it at the time of its adoption by the eminent men of the day who were concerned in framing it, and active in supporting it. For in that number it is explicitly affirmed, that, "notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States." The grant of a general authority to regulate commerce is not, therefore, a prohibition to the States to make any regulations concerning it within their own territorial limits, not in conflict with the regulations of Congress.

But I pass from this objection, which was sufficiently discussed in the License Cases, and come to the next objection founded on the same clause. It is this: that the law in question is a regulation of commerce, and is in conflict with the regulations of Congress and with treaties, and must yield to the paramount authority over this subject granted to the United States.

It is a sufficient answer to this argument to say, that no treaty or act of Congres has been produced which gives, or attempts to give, to all aliens the right to land in a State. The Act of March 2, 1799, ch. 23, sec. 46, has been referred to, and much pressed in the argument. But this law obviously does nothing more than exempt certain articles belonging to a passenger from the duties which the United States had a right to exact if they thought proper. Undoubtedly the law presupposes that the passenger will be permitted to land. But it does not attempt to confer on him the right. Indeed, the construction contended for would be a startling one to the States, if Congress has the power now claimed for it. For neither this nor any other law of Congress prescribes the character or condition of the persons who may be taken on board in a foreign port to be brought to the United States. It makes no regulations upon the subject, and leaves the selection altogether to the discretion and pleasure of the ship owner or ship master. The ship owner, as well as the ship master, is in many cases a foreigner, acting sometimes, perhaps, under the influence of foreign governments or foreign cities, and having no common interest or sympathy with the people of the United States; and he may be far more disposed to bring away the worst and most dangerous portion of the population rather than the moral and industrious citizen. And as the Act of 1799 speaks of passengers *generally, and makes no distinction as [*472 to their character or health, if the argument of the counsel for the plaintiff can be maintained, and this law gives every passenger which the ship owner has selected and brought with him the right to land, then this act of Congress has not only taken away from the States the right to determine who is and who is not fit to be received among them, but has delegated this high and delicate power to foreign ship masters and foreign ship owners. And if they have taken on board tenants of their almshouses or workhouses, or felons from their jails, if Congress has the power contended for, and this act of Congress will bear the construction given to it, and give to every passenger the right to land, then this mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it.

It is impossible, upon any sound principle of construction, so to interpret this law of Congress. Its language will not justify it, nor can such be supposed to have been the policy of the United States, or such its disposition towards the States. The general government merely intended to exercise its powers in exempting the articles mentioned from duties, leaving it to the States to determine whether it was compatible with their interest and safety to permit the person to land. And this power the States have always exercised before and since the passage of this act of Congress.

The same answer may be given to the argument on treaty stipulations. The Treaty of 1794, article 4, referred to and relied on, is no longer in force. But the same provision is, however, substantially contained in the first article of the convention with Great Britain of July 3, 1815, with this exception, that it puts British subjects in this respect on the same footing with other foreigners. But the permission there mutually given, to reside and hire houses and warehouses, and to trade and traffic, is in express terms made subject to the laws of the two countries respectively. Now, the privileges here given within the several States are all regulated by State laws, and the reference to the laws of this country necessarily applies to them, and subjects the foreigner to their decision and control. Indeed, the treaty may be said to disavow the construction now attempted to be given to it. Nor do I see how any argument against the validity of the State law can be drawn from the Act of Congress of 1819. On the contrary, this act seems accurately to mark the line of division between the powers of the general and State governments over this subject; and the powers of the former have been exercised in the passage of this law without encroaching on the rights of the latter. It regulates *the number of passengers [*473 which may be taken on board, and brought to this country from foreign ports, in proportion to the tonnage of the vessel, and directs that, at the time of making his entry at the custom-house, the captain shall deliver to the collector a list of the passengers taken on board at any foreign port or place, stating their age, sex, and

occupation, and whether they intend to become inhabitants of this country, and how many have died on the voyage; and this list is to be returned quarterly to the State Department, to be laid before Congress. But the law makes no provision for their landing, nor does it require any inspection as to their health or condition. These matters are evidently intended to be left to the State government, when the voyage has ended, by the proper custom house entry. For it cannot be supposed that, if the Legislature of the United States intended by this law to give the passengers a right to land, it would have been so regardless of the lives, and health, and interests of our own citizens as to make no inquiry and no examination upon a subject which so nearly concerned them. But it directs no inquiries, evidently because the power was believed to belong to the States. And as the landing of the passengers depended on the State laws, the inquiries as to their health and condition properly belonged to the State authorities. The Act of 1819 may fairly be taken as denoting the true line of division between the two sovereignties, as established by the Constitution of the United States and recognized by Congress.

I forbear to speak of other laws and treaties referred to. They are of the same import, and are susceptible of the same answer. There is no conflict, therefore, between the law of Massachusetts and any treaty or law of the United States.

Undoubtedly, vessels engaged in the transportation of passengers from foreign countries may be regulated by Congress, and are a part of the commerce of the country. Congress may prescribe how the vessel shall be manned and navigated and equipped, and how many passengers she may bring, and what provision shall be made for them, and what tonnage she shall pay. But the law of Massachusetts now in question does not in any respect attempt to regulate this trade or impose burdens upon it. I do not speak of the duty enjoined upon the pilot, because that provision is not now before us, although I see no objection to it. But this law imposes no tonnage duty on the ship, or any tax upon the captain or passengers for entering its waters. It merely refuses permission to the passengers to land until the security demanded by the State for the protection of its own people from the evils of pauperism has been given. If, however, the treaty or act of 474*] Congress above referred to had *attempted to compel the State to receive them without any security, the question would not be on any conflicting regulations of commerce, but upon one far more important to the States, that is, the power of deciding who should or should not be permitted to reside among its citizens. Upon that subject I have already stated my opinion. I cannot believe that it was ever intended to vest in Congress, by the general words in relation to the regulation of commerce, this overwhelming power over the States. For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the States, then the emancipated slaves of the West Indies have at *this hour the absolute* right to reside, hire *houses, and traffic* and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences. It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times to confer unnecessary authority under any such delusion. And I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the States.

But there is another clause in the Constitution which it is said confers the exclusive power over this subject upon the general government. The ninth section of the first article declares that the migration or importation of such persons as any of the States then existing should think proper to admit should not be prohibited by the Congress prior to the year 1808, but that a tax or duty might be imposed on such importation, not exceeding ten dollars for each importation. The word "migration" is supposed to apply to alien freemen voluntarily migrating to this country, and this clause to place their admission or migration entirely in the power of Congress.

At the time of the adoption of the Constitution, this clause was understood by its friends to apply altogether to slaves. The Madison Papers will show that it was introduced and adopted solely to prevent Congress, before the time specified, from prohibiting the introduction of slaves from Africa into such States as should think proper to admit them. It was discussed on that ground in the debates upon it in the Convention; and the same construction is given to it in the forty-second number of the Federalist, which was written by Mr. Madison, and certainly nobody could have understood the object and intention of this clause better than he did.

*It appears from this number of the [*475 Federalist that, those who in that day were opposed to the Constitution, and endeavoring to prevent its adoption, represented the word "migration" as embracing freemen who might desire to migrate from Europe to this country, and objected to the clause because it put it in the power of Congress to prevent it. But the objection made on that ground is dismissed in a few words, as being so evidently founded on misconstruction as to be unworthy of serious reply; and it is proper to remark that the objection then made was, that it was calculated to prevent voluntary and beneficial migration from Europe, which all the States desired to encourage. Now, the argument is, that it was inserted to secure it, and to prevent it from being interrupted by the States. If the word can be applied to voluntary immigrants, the construction put upon it by those who opposed the Constitution is certainly the just one; for it is difficult to imagine why a power should be so explicitly and carefully conferred on Congress to prohibit immigration, unless the majority of the States desired to put an end to it, and to prevent any particular State from contravening this policy. But it is admitted on all hands, that it was then the policy of all the States to encourage immigration, as it was also the poli-

cy of the far greater number of them to discourage the African slave trade. And with these opposite views upon these two subjects, the framers of the Constitution would never have bound them together in the same clause, nor spoken of them as kindred subjects which ought to be treated alike, and which it would be the probable policy of Congress to prohibit at the same time. No State could fear any evil from the discouragement of immigration by other States, because it would have the power of opening its own doors to the immigrant, and of securing to itself the advantages it desired. The refusal of other States could in no degree affect its interests or counteract its policy. It is only upon the ground that they considered it an evil, and desired to prevent it, that this word can be construed to mean freemen, and to class them in the same provision, and in the same words with the importation of slaves. The limitation of the prohibition also shows that it does not apply to voluntary immigrants. Congress could not prohibit the migration and importation of such persons during the time specified "in such States as might think proper to admit them." This provision clearly implies that there was a well known difference of policy among the States upon the subject to which this article relates. Now, in regard to voluntary immigrants, all the States, without exception, not only admitted them, but encouraged them to come; and the words "in such States as may think proper to admit them" 476*] *would have been useless and out of place if applied to voluntary immigrants. But in relation to slaves it was known to be otherwise; for while the African slave trade was still permitted in some of the more Southern States, it had been prohibited may years before, not only in what are now called free States, but also in States where slavery still exists. In Maryland, for example, it was prohibited as early as 1783. The qualification of the power of prohibition, therefore, by the words above mentioned, was entirely appropriate to the importation of slaves, but inappropriate and useless in relation to freemen. They could not and would not have been inserted if the clause in question embraced them.

I admit that the word "migration" in this clause of the Constitution has occasioned some difficulty in its construction; yet it was, in my judgment, inserted to prevent doubts or cavils upon its meaning; for as the words "imports" and "importation" in the English laws had always been applied to "property and things," as contradistinguished from "persons," it seems to have been apprehended that disputes might arise whether these words covered the introduction of men into the country, although these men were the property of the persons who brought them in. The framers of the Constitution were unwilling to use the word "slaves" in the instrument, and described them as persons; and so describing them they employed a word that would describe them as persons and which had uniformly been used when persons were spoken of, and also the word which was always applied to matters of property. The whole context of the sentence, and its provisions and limitations, and the construction given to it by those who assisted in framing the clause in question, show that it was intended to embrace those persons only who were brought in as property.

But apart from these considerations, and assuming that the word "migration" was intended to describe those who voluntarily came into the country, the power granted is merely a power to prohibit, not a power to compel the State to admit it.

And it is carrying the powers of the general government by construction, and without express grant or necessary implication, much farther than has ever heretofore been done, if the former is to be construed to carry with it the latter. The powers are totally different in their nature, and totally different in their action on the States. The prohibition could merely retard the growth of population in the States. It could bring upon them no danger, nor any new evil, moral or physical.

But the power of compelling them to receive and to retain among them persons whom the State may deem dangerous to its peace, or who may be tainted with crimes or infectious *diseases, or who may be a burden [*477 upon its industrious citizens, would subject its domestic concerns and social relations to the power of the federal government.

It would require very plain and unambiguous words to convince me that the States had consented thus to place themselves at the feet of the general government; and if this power is granted in regard to voluntary immigrants, it is equally granted in the case of slaves. The grant of power is the same, and in the same words, with respect to migration and to importation, with the exception of the right to impose a tax upon the latter; and if the States have granted this great power in one case, they have granted it in the other; and every State may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the State, and however earnestly it may desire to prevent it. If the word "migration" is supposed to include voluntary immigrants, it ought at least to be confined to the power granted, and not extended by construction to another power, altogether unlike in its character and consequences, and far more formidable to the States.

But another clause is relied on by the plaintiff to show that this law is unconstitutional. It is said that passengers are imports, and that this charge is therefore an impost or duty on imports, and prohibited to the States by the second clause of the tenth section of the first article. This objection, as well as others which I have previously noticed, is in direct conflict with decisions heretofore made by this court. The point was directly presented in the case of Miln v. The City of New York, 11 Peters, 102, and was there deliberately considered, and the court decided that passengers clearly were not imports. This decision is perfectly in accordance with the definition of the word previously given in the case of Brown v. Maryland, 12 Wheat. 419. Indeed, it not only accords with this definition, but with the long established and well settled meaning of the word. For I think it may safely be affirmed, that, both in England and this country, the words "imports" and "importation," in statutes, in statistical tables, in official reports, and in public debates, have uniformly been applied to

articles of property, and never to passengers voluntarily coming to the country in ships; and in the debates of the Convention itself, the words are constantly so used.

The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not 478*] *use the word "imports," when they inserted it in the Constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States.

But if the plaintiff could succeed in maintaining that passengers were imports, and that the money demanded was a duty on imports, he would at the same time prove that it belongs to the United States, and not to him, and, consequently, that he is not entitled to recover it. The tenth section of the first article prohibits a State from laying any duty on imports or exports except what may be absolutely necessary for the execution of its inspection laws. Whatever is necessary for that purpose may therefore be laid by the State without the previous consent of Congress.

If passengers are imports, then their condition may be examined and inspected by an officer of the State like any other import, for the purpose of ascertaining whether they may not when landed bring disease or pauperism into the State; for if the State is bound to permit them to land, its citizens have yet the right to know if there is danger, that they may endeavor to avert it, or to escape from it. They have, therefore, under the clause of the Constitution above mentioned, the power to lay a duty on this import, as it is called, to pay the necessary expenses of the inspection. It is, however, said that more than sufficient to pay the necessary expenses of the inspection was collected, and that the duty was laid also for other purposes. This is true. But it does not follow that the party who paid the money is entitled to recover it back from the State. On the contrary, it is expressly provided in the clause above mentioned, that the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States. If, therefore, these passengers were imports, within the meaning of this clause of the Constitution, and the money in question a duty on imports, then the net produce or surplus, after paying the necessary expenses of inspection, belongs to the treasury of the United States. The plaintiff has no right to it, and cannot maintain a suit for it. It is appropriated by the express words of the Constitution to the United States, and they, and they alone, would have a right to claim it from the State. The argument, however, that passengers are imports, is, in my judgment, most evidently without any reasonable foundation.

The only remaining topic which seems to require examination *is the objection, [*479 that the money demanded is a tax on the captain of the vessel, and therefore a regulation of commerce.

This argument, I think, is sufficiently answered by what I have already said as to the real and true character of the transaction, and the relative powers of the Union and the States. But I proceed to inquire whether, if the law of Massachusetts be a tax, it is not a legitimate exercise of its taxing power, putting aside for the present the other considerations herein before mentioned, and which I think amply sufficient to maintain its validity.

Undoubtedly the ship, although engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to the general government; and I assent fully to the doctrine upon that subject laid down in the case of Gibbons v. Ogden. But it has always been held that the power to regulate commerce does not give to Congress the power to tax it, nor prohibit the States from taxing it in their own ports, and within their own jurisdiction. The authority of Congress to lay taxes upon it is derived from the express grant of power, in the eighth section of the first article, to lay and collect taxes, duties, imposts, and excises, and the inability of the States to tax it arises from the express prohibition contained in the tenth section of the same article.

This was the construction of the Constitution at the time of its adoption, the construction under which the people of the States adopted it, and which has been affirmed in the clearest terms by the decisions of this court.

In the thirty-second number of the Federalist, before referred to, and several of the preceding numbers, the construction of the Constitution as to the taxing power of the general government and of the States is very fully examined, and with all that clearness and ability which everywhere mark the labors of its distinguished authors; and in these numbers, and more especially in the one above mentioned, the construction above stated is given to the Constitution, and supported by the most conclusive arguments. It maintains that no right of taxation which the States had previously enjoyed was surrendered unless expressly prohibited; that it was not impaired by any affirmative grant of power to the general government; that duties on imports were a part of the taxing power, and that the States would have had a right, after the adoption of the Constitution, to lay duties on imports and exports, if they had not been expressly prohibited.

The grant of the power to regulate commerce, therefore, did not, in the opinion of Mr. Hamilton, Mr. Madison, and Mr. Jay, prohibit the States from laying imposts and duties upon *imports brought into their own terri- [*480 tories. It did not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the regulation of commerce; and the right of taxation in the States remaining over every subject where it before existed, with the exception only of those expressly prohibited.

This construction, as given by the Federalist, was recognized as the true one, and affirmed by this court, in the case of Gibbons v. Ogden

9 Wheat. 201. The passage upon this subject is so clear and forcible, that I quote the words used in the opinion of the court, which was delivered by Chief Justice Marshall.

"In a separate clause," he says, "of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution then considers those powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition upon the subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce."

With such authorities to support me, so clearly and explicitly stating the doctrine, it cannot be necessary to pursue the argument further.

I may therefore safely assume, that, according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States; and that they would at this day have the right to tax the merchandise brought into their ports and harbors by the authority and under the regulations of Congress, had they not been expressly prohibited.

They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far, their taxing power over commerce is restrained, but no further. They retain all the rest; and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden.

481*] *And this brings me back to the question whether alien passengers from a foreign country are imports. I have already discussed that question, and need not repeat what I have said. Most clearly, in my opinion, they are not imports; and if they are not, then, according to the authorities referred to, the State has a right to tax them—their authority to tax not being abridged in any respect by the power in the general government to regulate commerce. I say nothing as to its being a tonnage duty, for, although mentioned in the argument, I do not suppose any reliance could be placed upon it.

It is said that this is a tax upon the captain, and therefore a tax upon an instrument of commerce. According to the authorities before referred to, if it were a tax on the captain it would be no objection to it, unless it were indirectly a duty on imports or tonnage.

Unquestionably a tax on the captain of a ship, bringing in merchandise, would be indirectly a tax on imports, and consequently unlawful; but his being an instrument of commerce and navigation does not make it so; for a tax upon the instrument of commerce is not forbidden. Indeed, taxes upon property in ships are continually laid, and their validity never yet doubted. And to maintain that a tax upon him is invalid, it must first be shown that passengers are imports or merchandise, and that the tax was therefore indirectly a tax upon imports.

But although this money is demanded of the captain, and required to be paid by him or his owner before the passenger is landed, it is in no proper and legitimate sense of the word a tax on him. Goods and merchandise cannot be landed by the captain until the duties upon them are paid or secured. He may, if he pleases, pay the duty without waiting for his owner or consignee. So here the captain, if he chose, might pay the money and obtain the privilege of landing his passengers without waiting for his owner or consignee. But he was under no obligation to do it. Like the case of a cargo, he could not land his passengers until it was done. Yet the duties demanded in the former case have never been supposed to be a tax on the captain, but upon the goods imported. And it would be against all analogy, and against the ordinary construction of all statutes, to call this demand a tax on the captain. The amount demanded depends upon the number of passengers who desire to land. It is not a fixed amount on every captain or every ship engaged in the passenger trade; nor upon her amount of tonnage. It is no objection, then, to the Massachusetts law to say, that the ship is a vehicle or the captain an instrument of commerce.

The taxing power of the State is restrained only where the *tax is directly or indi- [*482 rectly a duty on imports or tonnage. And the case before us is the first in which this power has been held to be still further abridged by mere affirmative grants of power to the general government. In my judgment, this restriction on the power of the States is a new doctrine, in opposition to the contemporaneous construction and the authority of adjudged cases. And if it is hereafter to be the law of this court, that the power to regulate commerce has abridged the taxing power of the States upon the vehicles or instruments of commerce, I cannot foresee to what it may lead; whether the same prohibition, upon the same principle, may not be carried out in respect to ship owners and merchandise in a way seriously to impair the powers of taxation which have heretofore been exercised by the States.

I conclude the subject by quoting the language of Chief Justice Marshall in the case of Billings v. The Providence Bank, in 4 Peters, 561, where, speaking upon this subject, he says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it—that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in

which the deliberate purpose of the State to abandon it does not appear."

Such has heretofore been the language of this court, and I can see nothing in the power granted to Congress to regulate commerce that shows a deliberate purpose on the part of the States who adopted the Constitution to abandon any right of taxation except what is directly prohibited. The contrary appears in the authentic publications of the time.

It cannot be necessary to say anything upon the article of the Constitution which gives to Congress the power to establish a uniform rule of naturalization. The motive and object of this provision are too plain to be misunderstood. Under the Constitution of the United States, citizens of each State are entitled to the privileges and immunities of citizens in the several States; and no State would be willing that another State should determine for it what foreigner should become one of its citizens, and be entitled to hold lands and to vote at its elections. For, without this provision, any one State could have given the right of citizenship in every other State; and, as every citizen of a State is also a citizen of the United States, 483*] *a single State, without this provision, might have given to any number of foreigners it pleased the right to all the privileges of citizenship in commerce, trade, and navigation, although they did not even reside amongst us.

The nature of our institutions under the federal government made it a matter of absolute necessity that this power should be confided to the government of the Union, where all the States were represented, and where all had a voice; a necessity so obvious that no statesman could have overlooked it. The article has nothing to do with the admission or rejection of aliens, nor with immigration, but with the rights of citizenship. Its sole object was to prevent one State from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such.

It is proper to add, that the State laws which were under examination in the License Cases applied altogether to merchandise of the description mentioned in those laws, which was imported into a State from foreign countries or from another State; and as the States have no power to lay a tax or duty on imports, the laws in question were subject to the control of Congress until the articles had ceased to be imports, according to the legal meaning of the word. And it is with reference to such importations and regulations of Congress and the States concerning them, that the paramount power of Congress is spoken of in some of the opinions then delivered.

The questions as to the power of a State to exclude from its territories such aliens as it may deem unfit to reside among its citizens, and to prescribe the conditions on which they may enter it, and as to the power of a State to levy a tax for revenue upon alien passengers arriving from foreign ports, were neither of them involved in those cases, and were not considered or discussed in the opinions.

I come now to the case from New York.

The object of this law is to guard its citizens, not only from the burdens and evils of foreign paupers, but also against the introduction of contagious diseases. It is not, therefore, like the law of Massachusetts, confined to aliens, but the money is required to be paid for every passenger arriving from a foreign port. The tax is imposed on the passenger in this case clearly and distinctly; for although the captain who lands them is made liable for the collection, yet a right is expressly secured to him to recover it from the passenger. There can be no objection to this law upon the ground that the burden is imposed upon citizens of other States, because citizens of New York are equally liable; but embracing, as it does, its own citizens and citizens of other States, when they arrive from a *foreign port, the right of a State [*484 to determine what person or class of persons shall reside among them does not arise, and what I have said upon that subject in the Boston case is inapplicable to this. In every other respect, however, it stands upon the same principles, involving also other and further considerations, which I proceed to notice, and which place it upon grounds equally firm with the case from Massachusetts.

It will be admitted, I understand, that New York has the right to protect herself from contagious diseases, and possesses the right to inspect ships with cargoes, and to determine when it is safe to permit the vessel to come to the wharf, or the cargo to be discharged. In other words, it may establish quarantine laws. Consequently the State may tax the ship and cargo with the expenses of inspection, and with the costs and expenses of all measures deemed necessary by the State authorities. This is uniformly the case in quarantine regulations; and although there is not the least appearance of disease in the crew, and the cargo is free from taint, yet if the ship comes from a port where a contagious disease is supposed to exist, she is always placed under quarantine, and subjected to the delay and expenses incident to that condition, and neither the crew nor cargo suffered to land until the State authorities are satisfied that it may be done without danger The power of deciding from what port or ports there is danger of disease, and what ship or crew shall be made subject to quarantine, on account of the port from which she sailed, and what precautions and securities are required to guard against it, must of necessity belong to the State authorities; for otherwise the power to direct the quarantine could not be executed. And this power of a State has been constantly maintained and affirmed in this court whenever the subject has been under consideration. And when the State authorities have directed the quarantine, if proof should be offered showing that the foreign ports to which it applied were free from disease, and that there was no just ground for apprehension, this court would hardly, upon that ground, feel itself authorized to pronounce the expenses charged upon the vessel to be unconstitutional, and the law imposing them to be void.

Upon every principle of reason and justice, the same rule must be applied to passengers that is applied to ships and cargoes. If, for example, while rumors were recently prevailing that the cholera had shown itself in the principal seaport towns of Europe, New York had been injudicious enough to embarrass her own trade by placing at quarantine all vessels

and persons coming from those ports, and burdened them with the heavy expenses and ruinous delays incident to that measure—or 485*] *if she were to do so now, when apprehensions are felt that it may again suddenly make its appearance in the great marts of European trade—this court certainly would not undertake to determine that these fears are groundless, and precautionary measures unnecessary, and the law therefore unconstitutional, and that every passenger might land at his own pleasure. Nobody, I am sure, will contend for such a power. And however groundless the apprehension, and however injurious and uncalled for such regulations may be, still, if adopted by the State, they must be obeyed, and the courts of the United States cannot treat them as nullities.

If the State has the same right to guard itself from persons from whom infection is feared that it has to protect itself against the danger arising from ships with cargoes, it follows that it may exercise the same power in regard to the former that it exercises in relation to the latter, and may tax them with the expense of the sanatory measures which their arrival from a foreign port is supposed to render necessary or prudent.

For the expenses imposed on ships with cargoes, or on the captain or owner, are as much a tax as the demand of a particular sum to be paid to the officer of the State, to be expended for the same purpose. It is in truth always the demand of a sum of money to indemnify the State for the expense it incurs. And, as I have already said, these charges are not always made and enforced against ships actually infected with disease, but frequently upon a particular class of vessels; that is to say, upon all ships coming from ports from which danger is apprehended—upon the sound and healthy as well as the infected. The charge is not made upon those ships alone which bring disease with them, but upon all that come from a port or ports from which it is feared disease may be brought. It is true the expenses may and do differ in amount, according to the condition of the ship and cargo. Yet all are subjected to the tax, to the amount of the charges incurred by the State.

Now, in the great commercial emporium of New York, hundreds are almost daily arriving from different parts of the world, and that multitude of strangers (among whom are always many of the indigent and infirm) inevitably produces a mass of pauperism which, if not otherwise provided for, must press heavily on the industry of its citizens; and which, moreover, constantly subjects them to the danger of infectious diseases. It is to guard them against these dangers that the law in question was passed. The apprehensions which appear to have given rise to it may be without foundation as to some of the foreign ports from which 486*] passengers have arrived, but that *is not a subject of inquiry here; and it will hardly be denied that there are sufficient grounds for apprehension and for measures of precaution as to many of the places from which passenger ships are frequently arriving. Indeed, it can hardly be said that there is any European port from which emigrants usually come which can be regarded as an exception.

The danger arising from passenger ships cannot be provided against, with a due regard to the interests and convenience of trade and to the calls of humanity, by precisely the same means that are usually employed in cases of ships with cargoes. In the latter case, you may act without difficulty upon the particular ship, and charge it with the expenses which are incident to the quarantine regulations. But how are you to provide for hundreds of sick and suffering passengers? for infancy and age? for those who have no means—who are not objects of taxation, but of charity? You must have an extensive hospital, suitable grounds about it, nurses and physicians, and provide food and medicine for them. And it is but just that these expenses should be borne by the class of persons who make them necessary; that is to say, the passengers from foreign ports. It is from them, as a class, that the danger is feared, and they occasion the expenditure. They are all entitled to share in the relief which is provided, and the State cannot foresee which of them will require it and which will not. It is provided for all that need it, and all should therefore contribute. You must deal with them as you do with ships with merchandise and crews arriving from ports where infectious diseases are supposed to exist; when, although the crew are in perfect health, and the ship and cargo free from infection, yet the ship owner must bear the expense of the sanatory precautions which are supposed to be necessary on account of the place from which the vessel comes.

The State might, it is true, have adopted towards the passenger ships the quarantine regulations usually applied to ships with merchandise. It might have directed that the passenger ships from any foreign port should be anchored in the stream, and the passengers not permitted to land for the period of time deemed prudent. And if this had been done, the ship owner would have been burdened with the support of his numerous passengers, and his ship detained for days, or even weeks, after the voyage was ended. And if a contagious disease had broken out on the passage, or appeared after the vessel arrived in port, the delay and expense to him would have been still more serious.

The sanatory measures prescribed by this law are far more favorable to the passengers than the ancient regulations, and incom- [*487 parably more so to the feeble, the sick, and the poor. They are far more favorable, also, and less burdensome, to the ship owner; and no one, I think, can fail to see that the ancient quarantine regulations, when applied to passenger ships, are altogether unsuited to the present condition of things, to the convenience of trade, and to the enlightened policy which governs our intercourse with foreign nations. The ancient quarantine regulations were introduced when the passenger trade, as a regular occupation, was unknown, and when the intercourse between nations was totally unlike what it is at the present day. And after all, these quarantine regulations are nothing more than the mode in which a nation exercises its power of guarding its citizens from the danger of disease.

It was, no doubt, well suited to the state of the world at the time when it was generally adopted; but can there be any reason why a State may not adopt other sanatory regulations in the place of them, more suitable to the free, speedy, and extended intercourse of modern times? Can there be any reason why they should not be made less oppressive to the passenger, and to the ship owner and mariner, and less embarrassing and injurious to commerce? This is evidently what the New York law intended to accomplish, and has accomplished, while the law has been permitted to stand. It is no more a regulation of commerce, and, indeed, is far less burdensome and occasions less interruption to commerce, than the ancient quarantine regulations. And I cannot see upon what ground it can be supposed that the Constitution of the United States permits a State to use the ancient means of guarding the health of its citizens, and at the same time denies to it the power of mitigating its hardships and of adapting its sanatory regulation to the extended and incessant intercourse with foreign nations, and the more enlightened philanthropy of modern times; nor why the State should be denied the privilege of providing for the sick and suffering on shore, instead of leaving them to perish on shipboard. Quarantine regulations are not specific and unalterable powers in a State; they are but the means of executing a power. And certainly other and better means may be adopted in place of them, if they are not prohibited by the Constitution of the United States. And if the old mode is constitutional, the one adopted by the law of New York must be equally free from objection. Indeed, the case of The City of New York v. Miln, so often referred to in the argument, ought, in my judgment, to decide this. It seems to me that the present case is entirely within the principles there ruled by the court.

I had not intended to say anything further in relation to the case of New York v. Miln, but the remarks of one of my brethren have ren-
488*] dered *it necessary for me to speak of it more particularly, since I have referred to it as the deliberate judgment of the court. It is eleven years since that decision was pronounced. After that lapse of time, I am sensible that I ought not to undertake to state everything that passed in conference or in private conversations, because I may be mistaken in some particulars, although my impressions are strong that all the circumstances are yet in my memory. And I am the less disposed to enter upon such a statement, because, in my judgment, its judicial authority ought not to rest on any such circumstances depending on individual memory. The court at that time consisted of seven members; four of them are dead, and among them the eminent jurist who delivered the opinion of the court. All of the seven judges were present, and partook in the deliberations which preceded the decision. The opinion must have been read in conference, and assented to or acquiesced in by a majority of the court, precisely as it stood, otherwise it could not have been delivered as the court's opinion. It was delivered from the bench in *open court*, as usual, and only one of the seven *judges, Mr. Justice* Story, dissented. Mr. Jus*tice Thompson* delivered his own opinion, which concurred in the opinion of the court, but which, at the same time, added another ground, which the court declined taking and determined to leave open. This will be seen by referring to the opinions. And if an opinion thus prepared and delivered and promulgated in the official report may now be put aside, on the ground that it did not express what at that time was the opinion of the majority of the court, I do not see how the decisions, when announced by a single judge (as is usual when the majority concur), can hereafter command the public confidence. What is said to have happened in this case may, for aught we know, have happened in others. In Gibbons v. Ogden, for example, or Brown v. The State of Maryland, which have been so often referred to.

The question which the court determined to leave open was, whether regulations of commerce, as such, by a State within its own territories, are prohibited by the grant of the power to Congress. This appears in the opinion itself, and the law of New York was maintained on what was called the police power of the State. I ought to add, as Mr. Justice Baldwin has been particularly referred to, that the court adjourned on the day the opinion was delivered, and on the next day he called on me and said there was a sentence, or a paragraph, I do not remember which, that had escaped his attention, and which he was dissatisfied with, and wished altered. Of course nothing could be done, as the court had separated, and Mr. Justice *Barbour, as well as others, had [*489 left town. Mr. Justice Barbour and Mr. Justice Baldwin were both present at the next term, and for several terms after; but I never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin, and never at any time, until this case came before us, heard any from any other member of the court who had assented to or acquiesced in the opinion, nor any proposition to correct it. I have no reason to suppose that Mr. Justice Barbour ever heard in his lifetime that the accuracy of his opinion had been questioned, or that any alteration had been desired in it. And I have the strongest reason to suppose that Mr. Justice Baldwin had become satisfied, because, in his opinion in Groves v. Slaughter, he quotes the case of New York v. Miln with approbation, when speaking in that case of the difference between commercial and police power. The passage is in 15 Pet. 511, where he uses the following language: "The opinion of this court in the case of New York v. Miln, 11 Pet. 130, etc., draws the true line between the two classes of regulations, and gives an easy solution to any doubt which may arise on the clause of the constitution of Mississippi which has been under consideration." I quote his words as judicially spoken, and forming a part of the official report.

I have deemed it my duty to say this much, as I am one of the three surviving judges who sat in that case. My silence would justly have created the belief that I concurred in the statement which has been made in relation to the case of which I am speaking. But I do not concur. My recollections, on the contrary, differ from it in several particulars. But it would be out of place to enter on such a discussion here. All I desire to say is, that I know noth-

ing that, in my judgment, ought to deprive the case of New York v. Miln of its full judicial weight as it stands in the official report. Mr. Justice Barbour delivered the opinion. Mr. Justice Thompson's opinion maintains, in the main, the same principles; Mr. Justice Baldwin, four years afterwards, quoted it with approbation; and I certainly assented to it—making a majority of the whole court. I speak of the opinion of my deceased brethren from their public acts. Of the opinions of those who sit beside me I have no right to speak, because they are yet here and have spoken for themselves. But it is due to myself to say, that certainly, at the time the opinion was delivered, I had no reason to suppose that they did not both fully concur in the reasoning and principles, as well as in the judgment. And if the decision now made is to come in conflict with the principles maintained in that case, those who follow us in these seats must hereafter decide between the two cases, and determine which of 490*] them best *accords with the true construction of the Constitution, and ought, therefore to stand. The law now in question, like the law under consideration in the case of New York v. Miln, is, in all of its substantial objects and provisions, in strict analogy to the ordinary quarantine regulations in relation to ships with cargoes from places supposed to be dangerous; at least as much so as the nature of the danger brought by a passenger ship, and the means necessary to guard against it, will permit.

But if this law is held to be invalid, either because it is a regulation of commerce, or because it comes in conflict with a law of Congress, in what mode can the State protect itself? How can it provide against the danger of pestilence and pauperism from passenger ships? It is admitted that it has a right to do so; that want and disease are not the subjects of commerce, and not within the power granted to Congress. They do not obey its laws. Yet, if the State has the right, there must be a remedy, in some form or other, in its own hands, as there is in the case of ships with cargoes. The State can scarcely be required to take upon itself, and impose upon the industry of its citizens, the duty of supporting the immense mass of poverty and helplessness which is now pressing so heavily upon property in Europe, and which it is endeavoring to throw off. It cannot be expected that it should take upon itself the burden of providing buildings, grounds, food, and all the necessary comforts for the multitude of helpless and poor passengers who are daily arriving from foreign ports. Neither, I presume, will it be expected that the citizens of New York should disregard the calls of sympathy and charity, and repulse from their shores the needy and wretched who are seeking an asylum amongst them. Those who deny the legality of the mode adopted would seem to be called upon to point out another consistent with the rights and safety of the State, and with the interests of commerce in the present condition of the commercial world, and not inconsistent with the obligations of humanity. I have heard none suggested, and I think it would be difficult to devise one on the principles on which this case is decided, unless the health and the lives of the citizens *of every State are made* altogether dependent upon the protection of the federal government, and the reserved powers of the States over this subject, which were affirmed by this court in Gibbons v. Ogden and Brown v. The State of Maryland, are now to be denied.

With regard to the taxing power in the State, the case of Brown v. The State of Maryland, referred to in the argument, does not apply to it. The rights of the ship owner or the captain were in no degree involved in that suit. Nor was there *any question as to when the [*491 voyage terminated, as to the ship, or when passengers were entitled to land. The case turned altogether upon the rights of the importer, the owner of imported goods; and the inquiry was, how long and under what circumstances they continued, after they had been actually landed, to be imports or parts of foreign commerce, subject to the control of Congress and exempt therefore from taxation by the State. And even with regard to the importer, that case did not decide that he was not liable to be taxed for the amount of his capital employed in trade, although these imports were a part of that capital.

But here there is no owner. It is the case of passengers—freemen. It is admitted that they are not exempt from taxation after they are on shore. And the question is, When was the voyage or passage ended, and when did the captain and passengers pass from the jurisdiction and protection of the general government and enter into that of the State. The act of 1819 regulated and prescribed the duties of the ship owner and captain during the voyage, and until the entry was made at the custom-house and the proper list delivered. It makes no further provision in relation to any of the parties. The voyage was evidently regarded as then completed, and the captain and passengers as passing from the protection and regulations of Congress, into the protection and exclusive jurisdiction of the State. The passengers were no longer under the control of the captain. They might have landed where and when they pleased, if the State law permitted it, and the captain had no right to prevent them. If he attempted to do so, there was no law of Congress to afford redress or to grant relief. They must have looked for protection to the State law and the State authorities. If a murder had been committed, there was no law of Congress to punish it. The personal safety of the passengers and the captain, and their rights of property, were exclusively under the jurisdiction and protection of the State. If the right of taxation did not exist in this case in return for the protection afforded, it is, I think, a new exception to the general rule upon that subject. For all the parties, the captain as well as the passengers, were as entirely dependent for the protection of their rights upon the State authorities, as if they were dwelling in a house in one of its cities; and I cannot see why they should not be equally liable to be taxed, when no clause can be found in the Constitution of the United States which prohibits it.

The different provisions of the two laws, and the different circumstances of the two cases, made it necessary to say this much concerning the case from New York. In all other respects, *except those to which I have adverted, [*492 they stand upon the same principles, and what I have said of the Boston case is equally applicable to this.

In speaking of the taxing power in this case, I must, however, be understood as speaking of it as it is presented in the record—that is to say, as the case of passengers from a foreign port. The provisions contained in that law relating to American citizens who are passengers from the ports of other States is a different question, and involves very different considerations. It is not now before us; yet, in order to avoid misunderstanding, it is proper to say, that, in my opinion, it cannot be maintained. Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and territory of the Union. And the various provisions in the Constitution of the United States—such, for example, as the right to sue in a federal court sitting in another State, the right to pursue and reclaim one who has escaped from service, the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties—all prove that it intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.

But upon the question which the record brings up, the judgment in the New York case, as well as that from Massachusetts, ought, in my opinion, to be affirmed.

NOTE.—It has been said in the discussion of these cases, by those who maintain that the State laws are unconstitutional, that "commerce" means "intercourse"; and that the power granted to regulate it ought to be construed to include intercourse. I have never been able to see that any argument which needed exami-

493*] nation *could be justly founded on this suggestion, and therefore omitted to notice it in the aforegoing opinion. But some stress was, perhaps, intended to be laid on the word "intercourse" thus introduced, and I therefore subjoin this brief note, in order to show that it has not been overlooked.

It has always been admitted, in the discussions upon this clause of the Constitution, that the power to regulate commerce includes navigation, and ships, and crews, because they are the ordinary means of commercial intercourse; and if it is intended by the introduction of the word "intercourse" merely to say that the power to regulate commerce includes in it navigation, and the vehicles and instruments of commerce, it leaves the question in dispute precisely where it stood before, and requires no further answer.

But if "intercourse" means something more than "commerce," and would give to the general government a wider range of power over the States, no one, I am sure, will claim for this court the power to interpolate it, or to construe the Constitution as if it was found there. And if, under the authority to regulate commerce, Congress cannot compel the States to admit or reject aliens or other persons coming from foreign ports, but would possess the power if the word "intercourse" is, by construction, substituted in its place, everyone will admit that a construction which substitutes a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority.

The introduction of the word "intercourse," therefore, comes to this: if it means nothing more than the word "commerce," it is merely the addition of a word without changing the argument; but if it is a word of larger meaning, it is sufficient to say that then this court cannot substitute it for the word of more limited meaning contained in the Constitution. In either view, therefore, of the meaning to be attached to this word "intercourse," it can form no foundation for an argument to support the power now claimed for the general government

And if commerce with foreign nations could be construed to include the intercourse of persons, and to embrace travelers and passengers, as well as merchandise and trade, Congress would also have the power the regulate this intercourse between the several States, and to exercise this power of regulation over citizens passing from one State to another. It of course needs no argument to prove that such a power over the intercourse of persons passing from one State to another is not granted to the federal government by the power to regulate commerce among the several States. Yet, if commerce does not mean the intercourse of persons between the several States, *and does not embrace [*494 passengers or travelers from one State to another, it necessarily follows that the same word does not include passengers or travelers from foreign countries. And if Congress, under its power to regulate commerce with foreign nations, possesses the power claimed for it in the decision of this case, the same course of reasoning and the same rule of construction (by substituting "intercourse" for "commerce") would give the general government the same power over the intercourse of persons between different States.

Allusion has been made in the course of these discussions to the exclusive power of the federal government in relation to intercourse with foreign nations, potentates, and public authorities. This exclusive power is derived from its power of peace and war, its treaty-making power, its exclusive right to send and receive ambassadors and other public functionaries; and its intercourse in exercising this power is exclusively with governments and public authorities, and has no connection whatever with private persons, whether they be emigrants or passengers, or travelers by land

or water from a foreign country. This power over intercourse with foreign governments and authorities has frequently been spoken of, in opinions delivered in this court, as an exclusive power. And I do not suppose that any of these opinions have been alluded to in this case, as furnishing any argument upon the question now before us. For an argument drawn from a mere similitude of words, which are used in relation to a subject entirely different, would be a sophism too palpable to need serious reply.

Mr. Justice Daniel, dissenting:

Norris v. City of Boston, and
Smith v. Turner.

Of the decision of the court just given, a solemn sense of duty compels me to declare my disapproval. Impressed as I am with the mischiefs with which that decision is believed to be fraught, trampling down, as to me it seems to do, some of the strongest defenses of the safety and independence of the States of this confederacy, it would be worse than a fault in me could I contemplate the invasion in silence. I am unable to suppress my alarm at the approach of power claimed to be uncontrollable and unlimited. My objections to the decision of the court, and the grounds on which it is rested, both at the bar and by the court, will be exemplified in detail in considering the case of Smith v. Turner, arising under the statute of New York. The provision of the statute in question is in the following words:

495*] *"The health commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.: 1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar." Rev. Stat. of New York, 445.

It is wholly irrelevant to the case before us to introduce any other provisions of this statute; such provisions have no connection with this cause, which originated in the single provision just cited; the intrusion of other provisions of the law of New York can tend only to confusion, and to the effect of diverting the mind from the only proper question for our decision.

Under this provision of the statute, an action was brought by the defendant in error, as health officer of New York, against the plaintiff in error, to recover the amount authorized by the statute to be demanded of him for bringing within the port of the city of New York, from a foreign country, two hundred and ninety-five alien passengers. It is deemed necessary particularly to state the character of the persons with respect to whose entrance the demand originated and was made, with the view to anticipate objections which might be founded on a supposed invasion of the right of transit in American citizens from one portion of the nation to another. To raise such an objection would be the creation of a mere man of straw, for the quixotic parade of being tilted at and demolished. This case involves no right of transit in American citizens or their property; it is a question raised simply and entirely upon the right of the State to impose conditions on which aliens, or persons from foreign countries, may be introduced within her territory. When a case of a different character, touching the right of transit in citizens, shall arise, it will then, and not till then, be proper to consider it. We cannot properly take cognizance of matters existing only in imagination. Whether this statute of New York and those which have preceded it in pari materia, be wise, or beneficent, or equitable, or otherwise, in their provisions—whether, under color of those statutes, more may have been collected than either justice or prudence, or the objects professed in those laws, would require; whether the amounts collected have been diverted to purposes different from those alleged in excuse for such collection—are not questions adjourned hither for adjudication upon this record. The legitimate and only regular inquiry before the court is this: whether the authority claimed and exerted by New York, and *the mode she [*496 has chosen for its exertion, be in conformity with the provisions of the Constitution? I shall dismiss from my view of this cause every other question, as irrelevant and out of place.

The legislation of New York, and the proceedings adopted to enforce it, are assailed as violations of the Constitution, first, as being repugnant to, and an interference with, the power delegated to Congress to regulate foreign commerce. And this general proposition has been divided into two more specific grounds of objection:

1st. The prohibition to the States to levy taxes or imposts on imports.

2d. The alleged right of Congress to regulate exclusively the admission of aliens—a right insisted on as falling by construction within the commercial power, or within some other implication in the Constitution.

As guides in the examination of these objections, I will take leave to propound certain rules or principles regarded by myself, at least, as postulates, and conceded to be such, perhaps, by every expositor of the Constitution and of the powers of the State governments.

1st. Then, Congress have no powers save those which are expressly delegated by the Constitution, and such as are necessary to the exercise of powers expressly delegated. Constitution, art. 1, sec. 8, clause 18, and Amendments art. 10.

2d. The necessary auxiliary powers vested by art. 1, sec. 8, of the Constitution cannot be correctly interpreted as conferring powers which, in their own nature, are original, independent, substantive powers; they must be incident to original substantive grants, ancillary in their nature and objects, and controlled by, and limited to, the original grants themselves.

3d. The question, whether a law be void for its repugnancy to the Constitution, ought seldom, if ever, to be decided in the affirmative in a doubtful case. It is not on slight implication and vague conjecture, that a Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with

each other. 6 Cranch, 128. Various other cases might be adduced to the same effect. Governed by the above principles, whose soundness will scarcely be doubted, I proceed to inquire wherein the existing legislation of New York is in conflict with the Constitution, or with any regulation of Congress established under the authority of that instrument. Whilst, with respect to the paramount authority in Congress to regulate commerce with for-
497*] eign *nations and amongst the several States (with the exceptions and qualifications of internal commerce and of regulations necessary for the health and security of society), there appears to have been great unanimity everywhere amongst all persons, much diversity of opinion has existed amongst members of this tribunal as to another characteristic of this grant to Congress; namely, as to whether it implies an exclusiveness which necessarily denies and forbids, apart from actual or practical collision or interference, everything like the power of commercial regulation on the part of the States.

To collate or comment upon these various opinions would here be a work of detail and curiosity rather than of utility. A reference to them is no further necessary than to remark, that their preponderance is against the position of exclusiveness in the sense above mentioned, or in any acceptation beyond an actual interference or an unavoidable and essential repugnance in the nature of the separate State and federal action.

And still more would an examination of these opinions be useless, if, indeed, it would not be irregular, since the decision at the last term but one of this court, upon the license laws of Massachusetts, Rhode Island, and New Hampshire, reported in 5 Howard, 504, in which decision the preceding cases upon this subject were reviewed, and the character of exclusiveness in the power delegated to Congress repelled and denied. It was my purpose, with this general reference to the decisions of this court, to pass from the point of exclusiveness in the power of Congress over commercial regulations to other questions involved in the present cause; but certain positions just confidently stated from the bench seem to require a pause in my progress, long enough to show the inconsistency of these positions with the Constitution—their direct conflict, indeed, with themselves. Thus, in the argument to sustain the exclusiveness of the commercial power in Congress, it has been affirmed that, the powers of the federal government being complete, and within the scope of their design and objects admitting of no partition, the State governments can exercise no powers affecting subjects falling within the range of federal authority, actual or potential, or in subordination to the federal government; yet it is remarkable that this assertion has been followed in the same breath by the concession, that the pilot laws are, to some extent, regulations of commerce, and that pilot laws, though enacted by the States, are constitutional, and are valid and operative until they shall be controlled by federal legislation.

Again, the very language of the Constitution *may be appealed* to for the recognition of
498] *powers to* be exercised by the *States, until they shall be superseded by a paramount authority vested in the federal government. Instances of these are the powers to train the militia, to lay duties or imposts on imports or exports, so far as this shall be necessary to execute the inspection laws; and the provision in the fourth section of the first article of the Constitution, declaring that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof, subject to the power of Congress at any time to alter such regulation. Here, then, are examples put by the Constitution itself, which wholly overthrow this idea of necessity for universal exclusiveness in the investiture of federal power; examples surely not of minor importance to any which can be derived from the ordinary exigencies of trade. I must stop here, too, long enough to advert to a citation which has been made, in support of the idea of exclusive commercial power, from the opinion of the late Mr. Justice Baldwin, in the case of Groves v. Slaughter, 15 Peters, 511. With regard to this opinion, it would seem to be enough to deprive it of binding influence as authority, to remark that it was a dissent by a single judge; and this opinion should have still less weight here or elsewhere, when it shall be understood to have asserted the extraordinary doctrine that the States of this Union can have no power to prohibit the introduction of slaves within their territory when carried thither for sale or traffic, because the power to regulate commerce is there asserted to reside in Congress alone. It may safely be concluded, I think, that the justice who cites, with seeming approbation, the opinion of Mr. Justice Baldwin, will hesitate to follow it to the eccentric and startling conclusion to which that opinion has attained.

In opposition to the opinion of Mr. Justice Baldwin, I will place the sounder and more orthodox views of Mr. Justice Story upon this claim to exclusive power in Congress, as expressed in the case of Houston v. Moore, 5 Wheat. 48, with so much clearness and force as to warrant their insertion here, and which must strongly commend them to every constitutional lawyer. The remarks of Justice Story are these: "Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are *not at [*499 liberty to add one jot of power to the national government beyond what the people have granted by the Constitution; and, on the other hand, we are bound to support the Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains. The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance to State authority and State legislation, it is not

to be admitted that a mere grant of such powers in affirmative terms to Congress, does per se transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that, in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority, and State laws so far, and so far only, as such incompatibility exists, must necessarily yield. Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the Constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties, and probably to hazard the existence of the Constitution itself." Here, indeed, is a commentary on the Constitution worthy of universal acceptation.

As the case of Gibbons v. Ogden has been much relied on in the argument of these cases, and is constantly appealed to as the authoritative assertion of the principle of exclusiveness in the power in Congress to regulate commerce, it is proper here to inquire how far the decision of Gibbons v. Ogden affirms this principle, so often and so confidently ascribed to it; and after all that has been said on this subject, it 500*] may be matter *of surprise to learn, that the court, in the decision above mentioned, so far from affirming that principle, emphatically disclaims all intention to pass upon it. It is true that the court, in speaking of the power to regulate commerce vested in Congress by the Constitution, says, that, like all other powers vested in Congress, "it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are comprised by the Constitution." How far exclusiveness in its nature or in the modes of its exercise is indispensable to this completeness of the power itself, the court does not say; but, as has been already remarked, declares its intention not to speak on these topics. These are the words of the court: "In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?" And, in fine, upon this question of exclusiveness, the case of Wilson v. The Black Bird Creek Marsh Company affirms, in language too explicit for misapprehension, that the States may, by their legislation, create what may be obstructions of the means of commercial intercourse, subject to the controlling and paramount authority of Congress. The words of the court in the case last mentioned are these: "If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. The act is not in violation of this power in its dormant state." 2 Peters, 252.

I now proceed to inquire whether the exaction of one dollar by New York from aliens arriving within her limits from abroad by sea, can be denominated a regulation of commerce, either according to the etymological meaning of the word "commerce," or according to its application in common parlance. "Commerce," *from con and mercis, critically [*501 signifies a mutual selling or traffic, and in ordinary and practical acceptation it means trade, bargain, sale, exchange, barter; embracing these both as its means and its objects. Different and metaphorical significations of the term can doubtless be suggested by ingenious imaginations. Thus we read in a great poet of "looks commercing with the skies;" but this sublimated application of the term would badly accord with the views of commerce in a mercantile sense, or with the utilitarian spirt of this calculating and prosaic age.[1]

Does the law of New York operate either directly or necessarily upon any one of these ingredients of commerce? Does it look to them at all? With regard to the emigrant, this law institutes no inquiry either as to his pursuits, or his intentions, or his property. He may be a philospher, an agriculturist, a mechanic, a merchant, a traveler, or a man of pleasure; he may be opulent, or he may be poor; none of these circumstances affect his admission. It is

1. —Commerce, from con and merx, which Vossius derives from the Hebrew, to divide a part of his own for a part of another's, to exchange, to bargain and sell, to trade or traffic, to have intercourse for purposes of traffic. Merchand, or merchant, from merx to merces, contracted from mercis, is by some derived from mercari, by others from the Greek μέρος, pars, quia res per partes venditur. To merchant, to buy, to trade, to traffic. —Richardson's Dictionary.

required, upon his entering the State, that there be paid by, or for him, a given sum, graduated upon a calculation of benefit to himself and to others similarly situated with himself—or, if you choose, upon a calculation of advantage to the State; but, under whatever aspect it is viewed, wholly irrespective of property or occupation. So far, then, as the emigrant himself is considered, this imposition steers entirely clear of regulating commerce, in any conceivable sense; it is literally a tax upon a person placing himself within the sphere of the taxing power, and the nature and character of the proceeding are in no wise changed where payment shall be made by the master of the vessel acting as the agent, and on behalf of the emigrant. It would still be purely an exercise of the great, indefeasible right of taxation, which, it has been explicitly said by this court, would extend to every subject but for the restriction as to imports and exports imposed by the Constitution; a right, too, expressly declared to belong to a branch of power wholly different from the power to regulate commerce, and forming no part of that power. Thus, in the case of Gibbons v. Ogden, 9 Wheaton, 201, this court, speaking of the power of laying duties or imposts on imports or exports, make use of the following language: "We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of 502*] *the eighth section. 'Congress shall have power to lay and collect taxes, duties, imposts, and excises;' and before commerce is mentioned, the rule by which the exertion of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The constitution, then, considers these two powers, as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might consequently have exercised it by levying duties on imports or exports had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception to the acknowledged power of the States to levy taxes; not from the questionable power to regulate commerce." Again, in the same case, p. 200, it is declared that "there is no analogy between the power of taxation and the power to regulate commerce;" that the powers are not the same; that there is neither affinity nor resemblance between them. p. 198. It follows ex necessitate from this language, that the right to regulate commerce must mean something essentially distinct and separate from the power to impose duties or taxes upon imports; and that the latter might exist independently of and without the former. The assertion of the court here is too clear and emphatic to be misapprehended; and it would seem to follow by regular induction therefrom, that a tax directly upon the master himself, in consideration of the emigrants brought by him within the limits of the State, could not be within the prohibition of the Constitution, unless those emigrants could in legal or in ordinary acceptation be made to fall within the meaning of the term "imports." This would be absolutely necessary, and by a different construction the authority of Gibbons v. Ogden would be wholly overthrown. It is said, upon the authority of Gibbons v. Ogden, that "commerce" includes "navigation," as a necessary means or instrument. Let this, as a general proposition, be conceded, still it by no means follows that "navigation" always implies "commerce," and much less does it follow that the instruments of commerce, simply because they may be instruments, either as agents or as property, are to be wholly exempted from burdens incident to all other subjects of social polity. I will not contend that the master, his vessel, and his mariners and passengers, are not *all subject to [*503 proper regulations of commerce enacted by Congress; the proposition I maintain is this: that regulations of commerce do not embrace taxes on any or on all the subjects above named, exacted within the just sphere of the power imposing them. Thus, then, the assessment made by New York is purely a tax, not a regulation of commerce; but it is not a tax on imports, unless passengers can be brought within this denomination; if they cannot, it is a tax simply on persons coming within the jurisdiction of the taxing power. And who shall deny or control this sovereign attribute, when operating within its legitimate sphere? When and by whom shall any restriction be put upon it beyond the point to which it has been voluntarily and expressly conceded by the Constitution? And this point, it is said, by the decision of Gibbons v. Ogden, is established singly and determinately in the prohibition to impose taxes on imports. With regard to this essential and sovereign power of taxation, it may be proper here to advert to the caution with which it was granted, and the extreme jealousy which was manifested towards any and every apprehended encroachment upon it by the Constitution when it was offered for adoption. Against such dreaded encroachment, were pointed some of the most strenuous objections of the opponents of the new government. They insisted that revenue was a requisite to the purposes of the local administrations as to the of the Union, and that the former were at least of equal importance with the latter to the happiness of the people; that it was therefore as necessary that the State government should be able to command the means of supplying their wants, as that the national government should possess the like means in respect to the wants of the Union; and they said that, as the laws of the Union were to become the supreme law of the land, and as the national government was to have power to pass all laws necessary for carrying into execution the authorities with which it was proposed to vest it, the national government might at any time abolish the taxes imposed for State objects, upon the pretense of an interference with its own. The objections just stated, and the feeling of mistrust in which they had their origin, the advocates of the Constitution found it indispensable to remove; hence it is that in the Federalist we find several numbers of that able work devoted

particularly to the purpose of reconciling the existence of the power of taxation in the federal government with its possession and exercise on the part of the States, and nothing can be more explicit than is the admission contained in these papers of the independent and unqualified power in the States in reference to this subject. 504*] In the thirty-second number *of the Federalist, the writer thus expresses himself: "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm (with the exception of duties on imports and exports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution." Again, in the same number, speaking with respect to the prohibition on the States from imposing duties on imports, it is said: "This restriction implies an admission, that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the States remains undiminished." Such were the principles and doctrines of the Constitution as admitted, nay, urged, by the advocates for its adoption; and it is thought that there is no candid inquirer into the history of the times who will profess to believe that, had their admission not been thus made and earnestly pressed, the Constitution could have been accepted by the States. The contemporaneous interpretation thus given by the very fabricators of the instrument itself, confirmed, as has been shown, by the decision of Gibbons v. Ogden, is perhaps more emphatically declared in the latter decision of this court in the case of The Providence Bank v. Billings, 4 Peters, 561, where the court expresses itself in the following language: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to affirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community are interested in maintaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." Can it be admitted, then—can it be established by any correct reasoning—that this high sovereign attribute, pronounced by this court to be of vital importance, and essential to the existence of a government, must be yielded, upon mere implication, to a theory based on no express authority, but on construction alone—not recommended by superior utility, but greatly 505*] *embarrassing in practice the theory of exclusive power in Congress to regulate commerce?

The inquiry next in order, and growing out of the aforegoing views, is this: Can the emigrant, or passenger on whom the tax is assessed, on his arrival within the State, be properly denominated an import? It has been contended that he may, because, according to the classical derivation of the term from importare, or in and porta, he has, like everything else in the ship, been brought in. The advocates of this etymological interpretation should be cautious of adopting it, since it might imply too much, may lead to strange confusion, and ultimately to conclusions directly adverse to those they would deduce from it. Thus, if the alien passenger is an import, simply from the fact of being brought into the State, will not the master and mariners also be imports, precisely for the same reason, although they may be natives and inhabitants of, and merely returning to, the country and port at which the vessel arrives, and thus, if imported, must be imported home, having equally sustained, a short time previously, when temporarily leaving that home, the character also of exports? Again, under this interpretation a dilemma might arise as to whether the ship, as she had been brought in, would not likewise be an import, or whether the ship had imported the crew, or the crew the ship; for although the latter would have been conducted into port by the former, it would be literally true that they would have been brought in by her. These departures from the common and received acceptation of language may give rise to distinctions as astute as those in Scriblerius upon the famous bequest of Sir John Swale of all his black and white horses, and equally useful with those either in the development of truth or the establishment of justice. But the strict etymologists have this further difficulty to encounter. It is said by Livy, and by Varro, in his book De Linguâ Latinâ, that the Romans when they laid out a town, as a religous ceremony observed on such occasions, delineated its boundaries with a plough; and that wherever they designed there should be a gate, they took up the plough and left a space. Hence the word porta, a gate, a portando aratrum. Those, then, who will insist upon etymological acceptation, necessarily place themselves, as imported, within the gate; in other words, within the municipal authority of the State, and by consequence within the acknowledged operation of its laws. But such critical derivation cannot be admitted as accordant either with common acceptation or general experience; by these the term "imports" is justly applicable to articles of trade proper—goods, chattels, property, subjects in their nature passive and having no volition—not to *men whose emigration is the result of [*506 will, and could not be accomplished without their co-operation, and is as much their own act as it is the act of others; nay, much more so. The conclusion, then, is undeniable, that alien passengers, rational beings, freemen carrying into execution their deliberate intentions, never can, without a singular perversion, be classed with the subjects of sale, barter, or traffic; or, in other words, with imports.

The law of New York has been further assailed in argument, as being an infraction of the fourteenth article of the treaty of amity and commerce negotiated between Great Brit-

ain and the United States in the year 1794, by which article it is provided that "there shall be between all the dominions of his majesty in Europe, and the territories of the United States, a reciprocal and perfect liberty of commerce and navigation. The people and the inhabitants of the two countries shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within the dominions and territories aforesaid, and to enter into the same; to resort there, and to remain and reside there without any limitation of time; also to hire and possess houses and warehouses for the purposes of their commerce; and generally the merchants and traders on each side shall enjoy the most complete protection and security for their commerce, but subject always, as to what respects this article, to the laws and statutes of the two countries respectively."

It has been insisted that the article of the treaty just cited, having stipulated that British subjects shall have liberty freely and securely, and without hindrance, to come with their ships and cargoes to the lands, countries, cities, ports, etc., and to remain and reside for the purposes of their commerce; and the second clause of the sixth article of the Constitution having declared the Constitution and the laws of the United States, made in pursuance thereof, and treaties made under the authority of the United States, to be the supreme law of the land, the laws of New York, being in derogation of the fourteenth article of the Treaty of 1794, are unconstitutional and void. The fourteenth article of the Treaty of 1794, having expired by limitation of time anterior to the enactment of the statutes complained of, it cannot in terms, as a part of that compact, be brought to bear upon this case. The same provision, however, with the single variation that British subjects are placed on the same footing with other foreigners who shall be admitted to enter American ports, was renewed by the first article of the Treaty of 1815, and by the third article of the same treaty was 507*] *continued for four years. Subsequently, by the fourth article of the Convention with Great Britain of 1818, it was extended for ten years, and finally, by the first article of the Convention with the same power of the 6th of August, 1827, for an indefinite period, but liable to be terminated upon notice, from either of the contracting parties, of twelve months from and after the 20th day of October, 1828. The fourteenth article of the Treaty of 1794, or rather its effect and meaning, with the variation above, engrafted on the Treaty of 1815, may be considered as subsisting at the present time. Before examining particularly the force of the objection founded upon this stipulation, and of the effect sought to be imparted to it from the clause of the Constitution adduced in its support, I cannot forbear to recur to my opinion expressed on a former occasion, it being the view I still entertain as to what should be the interpretation of the second clause of the sixth article of the Constitution. The opinion referred to is as follows:

"This provision of the Constitution, it is to *be feared,* is sometimes expounded without *those qualifications* which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, either in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, in order to be valid, must be made within the scope of the same powers; for there can be no authority of the United States, save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a State, or of any citizen of a State." 5 Howard, 613.

Admitting this fourteenth article of the treaty to be in full force, and that it purported to take from the State of New York the right to tax aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose, because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation. In the next place, the right of taxation claimed by New York can by no rational construction of it be made to conflict with a correct comprehension of the treaty stipulations in question. These neither express nor imply anything more *than [*508 security for free, but regular, legitimate commercial intercourse, between the people of the contracting nations, and exemption from burdens or restrictions inconsistent with such intercourse; for this was the sole purpose either contemplated or professed. If these stipulations can be extended beyond this meaning, and, under the terms "shall have liberty freely and securely to come and enter the ports of the country, and to remain and reside, and to hire and occupy houses for the purposes of their commerce," there can be claimed the right to withdraw, for an indefinite period, either the persons or the property of aliens from the power of taxation in the States, then there is asserted for Congress or the executive the power of exerting, through foreign governments and foreign subjects, a control over the internal rights and polity of the States, which the framers of the Constitution and the decisions of this court, already quoted, have denied to the government in the exercise of its regular domestic functions. It would be difficult to limit, or even to imagine, the mischiefs comprised in such an interpretation of the treaty stipulations above mentioned. As one example of these, if it should suit the commercial speculations of British subjects to land within the territory of any of the States cargoes of negroes from Jamaica, Hayti, or Africa, it would be difficult, according to the broad interpretation of the commercial privileges conferred by those stipulations, to designate any legitimate power in the States to prevent this invasion of their domestic security. According to the doctrines advanced, they could neither repulse nor tax the nuisance.

The argument constructed by counsel and by some of the judges upon the provisions of the act of Congress authorizing the importation of the tools of mechanics, their clothing, etc., free from duties, presents itself to my mind as wanting in logical integrity, and as utterly destructive of positions which those who urge this argument elsewhere maintain. The exemption allowed by Congress can correctly be made to signify nothing more than this: that the general government will not levy duties on the private effects of certain classes of persons who may be admitted into the country. But, by any rule of common sense, can this exemption be made to signify permission to those persons to land at all events in the States? It asserts or implies no such thing; much less does it convey a command, or the power to issue a command, to the States to admit them. Must not this benefit of exemption from duties be always in enjoyment subordinate to and dependent upon the right of the owner of the property exempted to enter the country? This is inevitable, unless it be contended that a mere forbearance to exact duties on the property is 509*] identical with *ordering the admission of its owner; thus making the man the incident of the property, and not the property that of the man—a reductio in absurdum, which cannot be escaped from by those who deduce the right of admission from the act of Congress. But are those who assume this ground aware that it is destructive of other positions which they themselves have not only conceded, but even insist upon? They have admitted the power or right of self-preservation in the States, and, as a means of securing this right, the power of excluding felons, convicts, paupers, and persons infected; but according to this argument, based upon the acts of Congress and on the treaty stipulations for free access and commorancy, all must be permitted to land and to remain; for these acts of Congress and treaty stipulations contain no exceptions in favor of the safety of the States; they are general, and in their terms ride over all such considerations as health, morals, or security amongst the people of the States. This argument cannot be maintained. The true interpretation of the act of Congress referred to is this: tools, clothing, and personal property of mechanics, are goods, chattels, imports, in the known and proper sense of the term "imports"; Congress, having under the Constitution the power to impose duties on these, possess the correlative right of exempting them from duties; this they have done, and nothing beyond this. Congress have not pretended to declare permission to the mechanic, or to any other description of person, directly, to come into the States, because they have no such direct power under the Constitution, and cannot assume or exercise it indirectly.

I will now consider the second head of objection to the legislation of New York, as propounded in the division stated in the commencement of this opinion, namely, the alleged right of Congress to regulate exclusively the admission of aliens, as a right comprehended within the commercial power, or within some other implication in the Constitution.

Over aliens, qua aliens, no direct authority has been delegated to Congress by the Constitution. Congress have the right to declare war, and they are bound to the duty of repelling invasions. They have the power, too, to establish an uniform rule of naturalization. By an exercise of the former power, Congress can place in the condition of alien enemies all who are under allegiance to a nation in open war with the United States; by an exercise of the second, they can extend to alien friends the common privileges of citizens. Beyond these predicaments put by the Constitution, and arising out of the law of nations, where is the power in Congress to deal with aliens, as a class, at all? And much more the power, when falling within *neither of the aforego- [*510 ing predicaments, to invite them to or to repel them from our shores, or to prescribe the terms on which, in the first instance, they shall have access to, and, if they choose, residence within, the several States—and this, too, regardless of the considerations either of interest or safety deemed important by the States themselves. The Constitution, confessedly, has delegated no such direct power to Congress, and it never can be claimed as auxiliary to that which, in a definite and tangible form, can nowhere be found within that instrument.

The power to regulate the admission, as implied in the right of banishment or deportation, of aliens, not the citizens or subjects of nations in actual war with the United States, was at one period of our history assumed by the federal government; and a succinct review of the arguments by which this pretension was sought to be sustained must expose its absolute fallacy.

Congress, it was insisted, could exert this power under the law of nations, to which aliens are properly amenable. To this it was answered, that, under the law of nations, aliens are responsible only for national offenses —offenses in which their nation bears a part; they are then alien enemies. That alien friends, on the other hand, owe a temporary allegiance to the government under which they reside, and for their individual offenses committed against the laws of that government they are responsible, as other members of the community, to the municipal laws.

Again, it was asserted that the right was vested in Congress under the power to make war, and under the power and the duty to prevent invasion. The obvious refutation of this argument was furnished in the reply, that alien friends could not be the subjects of war (public national conflict), nor in any sense the instruments of hostile invasion, such invasion being an operation of war. Neither could they fall within the power vested by the Constitution to grant letters of marque and reprisal, as an equivocal authority partaking of the characters of war and peace; "reprisal being a seizure of foreign persons and property, with a view to obtain that justice for injuries done by one State or its members, for which a refusal of the aggressors requires such a resort to force under the law of nations. It must be considered as an abuse of words to call the removal of persons from a country a seizure or a reprisal on them; nor is the distinction to be overlooked between reprisal on persons within the country, and under the faith of its laws, and on persons out of the country." Madison's Report. It

may, then, be correctly affirmed, that by no 511*] direct delegation of *power by the Constitution—not by the power to declare war, not by the power to make reprisals, not by the more general power to punish offenses against the laws of nations, nor by the power and duty of repelling invasions—has the right been given to Congress to regulate either the admission or the expulsion of alien friends. Does such a right result from any rational or necessary implication contained in the Constitution? We find that, even anterior to the adoption of this instrument, attempts were made to ascribe to it the delegation of such a power by the ninth section of the first article, and this description was strenuously urged as a reason against its adoption. The objection, whether fairly or uncandidly urged, was founded, no doubt, upon some ambiguity of language of the ninth section; an ambiguity perfectly explained by contemporaneous exposition, and by the written history of its progress and ultimate adoption. Let us see how this section has been interpreted at its date by those who bore the chief part in the formation of the Constitution; and who, to commend it when completed to their countrymen, undertook and accomplished an able and critical exposition of its every term. We shall see, by the almost unanimous declaration of these sages, that the clause and article in question was intended to apply to the African slave trade, and to no other matter whatever. Thus, in the forty-second number of the Federalist, it is said by Mr. Madison, speaking of the section and article in question: "It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever within these States a traffic which has so long and so loudly upbraided the barbarism of modern policy." Again he says, "Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another, as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer—for they deserve none—but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government."

Before proceeding farther with the history of this article, it will be well to contrast the view of its scope and objects, as given in the quotation just made from the Federalist, with 512*] the *arguments of the counsel who press this article as evidence of an intention to vest in Congress the sole power of controlling the admission of aliens, subsequently, at least, to the year 1808. It is strenuously urged by them, that the introduction of aliens has always been accordant with the policy of the government, and so highly promotive of advantage to the country in clearing and cultivating its forests, and increasing its physical strength, that the power of interfering with these important objects should not be subjected to the hazard of State abuses, but that they should be intrusted to the federal government alone. Yet the learned counsel will be somewhat surprised to hear that the migration or importation he so zealously advocates is proved (by contemporaneous authority, on which he rests his argument) to be "an unnatural traffic, which has so long and so loudly upbraided the barbarism of modern policy;" and that "it ought to be regarded as a great point gained in favor of humanity, that a period of twenty years might terminate it forever in these States." For such, and such only, is the migration limited to the States for twenty years, by the ninth section of the fourth article, on which counsel found themselves; such only the migration over which the Constitution has given power to Congress, as the natural meaning of the section signifies, and which alone it was intended to convey, as we are told by those who framed it[1].

If the history of the ninth section of article fourth be traced, in the proceedings of the Convention, from its introduction into that body until finally moulded and engrafted upon the Constitution (3 Madison Papers, from p. 1388 to p. 1673), it will be found that not one member of the Convention ever treated this section in other terms, or as designed for any other purpose, than as a power specially given to Congress by that section alone to abolish the foreign slave trade from the period limited by that section, with the exception of a single observation of Colonel Mason, of Virginia, that the provision as it stood might be necessary in order to prevent the introduction of convicts; but not pretending to extend the power of Congress beyond these and the foreign slave trade.

*The migration or importation em- [*513
braced in it is in the debates uniformly and plainly called the slave trade by certain Southern States, which the Convention would have abolished by the Constitution itself, but for the avowed necessity of propitiating those States by its toleration for twenty years. There, too, it will be seen that Mr. Gouverneur Morris, with a frankness and sagacity highly creditable, objected to the ambiguous language in which the section was proposed and adopted. He said "he was for making the clause read at once, 'the importation of slaves' into North Carolina, south Carolina, and Georgia shall not be prohibited, etc. This, he said, was most fair, and would avoid the ambiguity by which, under the power with regard to naturalization, the liberty re-

1.—3 Madison Papers, August 21st, 1787. 1. Proposition by Mr. Martin against article 7. Motion to exclude slave trade. (Vol. III. p. 1388.) Mr. Rutledge, Mr. Ellsworth, and Mr. Pinckney, all opposed to Mr. Martin's motion (pp. 1388 and 1389). August 22.—Mr. Sherman, though against slave trade, was opposed to taking it from the States (p. 1390). Colonel Mason thought it *immoral and dangerous*, and was for its immediate *abolition (pp. 1390, 1391)*. Mr. Ellsworth opposed to interference; if it was so immoral as to require interference, they ought to abolish it, and free all slaves (p. 1391); that slaves were necessary, and must be imported for use in the sickly rice swamps of South Carolina and Georgia (p. 1392). Mr. Pinckney, General Pinckney, Mr. Baldwin, Mr. Wilson, Mr. Gerry, Mr. Dickinson, Mr. Williamson, Mr. Rutledge, Mr. Sherman (Vol. III. pp. 1392–1397), all treat of this article as applicable only to the slave trade.

served to the States might be defeated. He wished it to be known, also, that this part of the Constitution was a compliance with those States." 3 Madison Papers, 1427 and 1478. A portion of the Convention objected to an open sanction of the slave trade upon the very face of the Constitution, whilst the Southern States would not yield their views of their own interests or necessities; hence, in the spirit of compromise, the section was unfortunately permitted to retain the ambiguity objected to by Mr. Morris; and hence, too, the color given for those misconstructions of the restriction on the general government, and the manner in which it is expressed, so decidedly reprehended in the number of the Federalist already quoted. This ninth section of the fourth article of the Constitution has, on a former occasion, been invoked in support of the power claimed for the federal government over alien friends. The supporters in Congress of the alien law, passed in 1798, endeavored to draw from this very section a justification of that extraordinary enactment; and as their argument deduced from it is, perhaps, as cogent as any likely to be propounded at this day, it may be properly adverted to as a fair sample of the pretension advanced in this case, and of the foundation on which it seeks to plant itself. The argument alluded to was by a committee of the House of Representatives, and is in these words: "That as the Constitution has given to the States no power to remove aliens during the period of the limitation under consideration, in the meantime, on the construction assumed, there would be no authority in the country to send away dangerous aliens, which cannot be admitted." Let the comment of a truly great man on these startling heresies expose their true character. "It is not," says Mr. Madison, "the inconclusiveness of the general reasoning on this passage which chiefly calls the attention to it. It is the principle assumed by it, that the powers 514*] held by the States *are given to them by the Constitution of the United States, and the inference from this principle, that the powers supposed to be necessary, which are not so given to the State governments, must reside in the government of the United States. The respect which is felt for every portion of the constituted authorities forbids some reflections which this singular paragraph might excite; and they are the more readily suppressed, as it may be presumed with justice, perhaps, as well as candor, that inadvertence may have had its share in the error. It would be unjustifiable delicacy, nevertheless, to pass by so portentous a claim without a monitory notice of the fatal tendency with which it would be pregnant." Madison's Report. The assertion of a general necessity for permission to the States from the general government, either to expel from their confines those who are mischievous or dangerous, or to admit to hospitality and settlement whomsoever they may deem it advantageous to receive, carries with it either a denial to the former, as perfect original sovereignties, of the right of self-preservation, or presumes a concession to the latter, the creature of the States, wholly incompatible with its exercise.

This authority over alien friends belongs not, then, to the general government, by any express delegation of power, nor by necessary or proper implication from express grants. The claim to it is essentially a revival of what public sentiment so generally and decisively condemned as an usurpation in the alien law of 1798; and however this revival may at this time be freed from former imputations of foreign antipathies or partialities, it must, nevertheless, be inseparable from—nay, it must be the inevitable cause of far greater evils—jealousy, ill-feeling, and dangerous conflict between the members of this confederacy and their common agent.

Thus far I have preferred to consider this case as depending rather upon great fundamental principles, inseparable from the systems of government under which this country is placed, than as dependent upon forms of pleading, and conclusions deducible from those forms. But judging of the case in the latter aspect as moulded by those forms, it seems to fall directly within the operation of a precedent settled by this court, which must, if regarded, decide the law to be with the defendant in error. By the second count in the declaration, it is averred that the defendant below (the plaintiff in error), being the master of the ship Henry Bliss, in violation of the laws of New York, brought into the port of New York, and there actually landed the same, two hundred and ninety-five passengers; the demurrer to the declaration, admitting the truth of these averments, places the locale of the origin, as well as the infraction *of the obligation de- [*515 clared on, within the municipal authority of the State, and without the pale of the authority of Congress to regulate commerce with foreign nations. In this view, this case is brought, not only within the reasoning, but within the literal terms, of the decision of The City of New York v. Miln, and must be sustained upon the authority of that decision, were there no other grounds on which it could be supported. But as it is manifest that this case involves the high, and what this court has asserted (with the single exception of taxes on imports) to be the perfect and undiminished and indispensable, power of taxation in a sovereign State, it would have seemed to me a species of delinquency not to make that right the prominent and controlling subject of investigation and decision, or to have forborne to vindicate it in its full integrity.

Between this case and that of Norris v. The City of Boston, there are some shades of difference; they are such, however, as by me are not regarded as essential; both the cases rest in reality upon the right of taxation in the States; and as the latter case has been examined with so much more of learning and ability than I could have brought to its investigation, by his Honor the Chief Justice, I shall content myself with declaring my entire concurrence in his reasonings and conclusions upon it.

It is my opinion that the judgment of the Court for the Trial of Impeachments and Correction of Errors in New York, and the judgment of the Supreme Judicial Court of Massachusetts, should be affirmed.

Note.—In the opinions placed on file by some of the justices constituting the majority in the decision of this case, there appearing to be positions and arguments which are not recollected as having been propounded from the

bench, and which are regarded as scarcely reconcilable with the former then examined and replied to by the minority, it becomes an act of justice to the minority that those positions and arguments, now for the first time encountered, should not pass without comment. Such comment is called for, in order to vindicate the dissenting justices, first, from the folly of combating reasonings and positions which do not appear upon the record; and, second, from the delinquency of seeming to recoil from exigencies, with which, however they may be supposed to have existed, the dissenting justices never were in fact confronted. It is called for by this further and obvious consideration, that, should the modification or retraction of opinions delivered in court obtain in practice, it would result in this palpable irregularity; namely, that opinions, which, as 516*] those of the *court, should have been premeditated and solemnly pronounced from the bench antecedently to the opinions of the minority, may in reality be nothing more than criticisms on opinions delivered subsequently in the order of business to those of the majority, or they may be mere after-thoughts, changing entirely the true aspect of causes as they stood in the court, and presenting through the published reports what would not be a true history of the causes decided.

Examples of diversity between the opinions in this cause, comprehended as they were delivered in court, and as subsequently modified, will now be adverted to. The first is found in the solecism, never propounded, perhaps, from any tribunal—one, indeed, which it might have been supposed no human imagination, not the most fruitful in anomalies, could ever conceive—"that the action of the federal government by legislation and treatics is the action of the States and their inhabitants." If this extraordinary proposition can be taken as universally or as generally true, then State sovereignty, State rights, or State existence even, must be less than empty names, and the Constitution of the United States, with all its limitations on federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing, absolute. Everything in the nature of civil or political right is thus ingulfed in federal legislation, and in the power of negotiating treaties. History tells us of an absolute monarch who characterized himself and his authority by the declaration, "I am the State." This revolting assertion of despotism was, even in the seventeenth century, deemed worthy of being handed down for the reprobation of the friends of civil and political liberty. What, then, must be thought in our day, and in future time, of a doctrine which, under a government professedly one of character exclusively, claims beyond the terms of that charter, not merely the absolute control of civil and political rights, but the power to descend to and regulate ad libitum the private and personal concerns of life. Thus the ground now assumed in terms for the federal government is, that the power to regulate commerce *means still more* especially" the power to regulate "personal intercourse." Again, it is asserted that the federal government, in the regulation of commerce, "may admit or may refuse foreign intercourse partially or entirely." If those who resort to this term "intercourse" mean merely commercial transactions as generally understood, their argument is an unmeaning variation of words, and is worth nothing. They obtain by the attempted *substi- [*517 tution no new power. They have the power to regulate commerce, and nothing beyond this. Commercial intercourse is simply commerce. But if they adopt the word "intercourse" singly, in its extended and general acceptation, and without the proper qualifying adjunct, they violate the text and the meaning of the Constitution, and grasp at powers greatly beyond the scope of any authority legitimately connected with commerce as well understood. The term "commerce," found in the text of the Constitution, has a received, established, and adjudged acceptation. The wise men who framed the Constitution designed it for practical application. They preferred, therefore, to convey its meaning in language which was plain and familiar, and avoided words and phrases which were equivocal, unusual, or recondite, as apt sources of future perplexity. They well understood the signification of the word "intercourse," and knew it was by no means synonymous with the word "commerce"; they shunned, therefore, the ambiguity and seeming affectation of adopting it, in order to express their meaning when speaking of commerce. This word "intercourse," nowhere found in the Constitution, implies infinitely more than the word "commerce." Intercourse "with foreign nations, amongst the States, and with the Indian tribes." Under this language, not only might national, commercial, or political intercourse be comprehended, but every conceivable intercourse between the individuals of our own country and foreigners, and amongst the citizens of the different States, might be transferred to the federal government. And thus we see that, with respect to intercourse with aliens, in time of peace, too, it is now broadly asserted that all power has been vested exclusively in the federal government. The investiture of power in Congress under this term would not be limited by this construction to this point. It would extend, not only to the right of going abroad to foreign countries, and of requiring licenses and passports for that purpose; it would embrace also the right of transit for persons and property between the different States of the Union, and the power of regulating highways and vehicles of transportation. We have here a few examples of the mischiefs incident to the doctrine which first interpolates into the Constitution the term "intercourse" in lieu of the word "commerce" contained in that instrument, and which then, by an arbitrary acceptation given to this term, claims for Congress whatsoever it may be thought desirable to comprise within its meaning. By permitting such an abuse, every limit may be removed from the power of the federal government, and no engine of usurpation could be more conveniently devised than the introduction of a favorite word which the interpolator *would surely have as much right to [*518 interpret as to introduce. This would be ful-

filling almost to the letter the account in the Tale of a Tub, of Jack, Peter, and Martin engaged in the interpretation of their father's will. Once let the barriers of the Constitution be removed, and the march of abuse will be onward and without bounds.

Mr. Justice Nelson, dissenting:

Norris v. City of Boston, and
Smith v. Turner.

I have examined particularly the opinion of the Chief Justice delivered in these cases of Smith v. Turner, and Norris v. The City of Boston, and have concurred, not only in its conclusions, but in the grounds and principles upon which it is arrived at; and am in favor of affirming the judgments in both cases.

Mr. Justice Woodbury, dissenting:

Norris v. City of Boston, and
Smith v. Turner.

In relation to the case of Smith v. Turner, from New York, I wish merely to express my non-concurrence with the opinions pronounced by the majority of this court. But standing more intimately connected with the case of Norris v. Boston, by my official duties in the first circuit, I feel more obliged to state, in some detail, the reasons for my opinion, though otherwise content to acquiesce silently in the views expressed by the Chief Justice; and though not flattering myself with being able, after the elaborate discussions we have just heard, to present much that is either novel or interesting.

The portion of the statute of Massachusetts which in this case is assailed, as most questionable in respect to its conformity with the Constitution, is the third section. The object of that is to forbid alien passengers to land in any port in the State, until the master or owner of the vessel pays "two dollars for each passenger so landing." The provisions in the other sections, and especially the second one, requiring indemnity for the support of lunatics, idiots, and infirm persons on board of vessels before they are landed, if they have been or are paupers, seem admitted by most persons to be a fair exercise of the police powers of a State.

This claim of indemnity is likewise excused or conceded as a power which has long been exercised by several of the Atlantic States in self-defense against the ruinous burdens which would otherwise be flung upon them by the incursions of paupers from abroad, and their laws are often as stringent against the introduction of that class of persons from adjoining States [*519] as from foreign countries. Revised Statutes of New Hampshire, ch. 67, sec. 5; 5 Howard, 629.

Such legislation commenced in Massachusetts early after our ancestors arrived at Plymouth. It first empowered the removal of foreign paupers. See Colonial Charters and Laws, 1639, p. 172, and 1692, p. 252. It extended next to the requisition of indemnity from the master, as early as the year 1701. See Statute of 13 Wm. III., Ibid. 363. But while it embraced removals of paupers not settled in the colony, and indemnity required from the master for the support of foreigners introduced by sea, I do not think it assumed the special form used in the third section of this statute, until the year 1837, after the decision in the case of The City of New York v. Miln, 11 Peters, 107. I shall not, therefore, discuss further the provisions in the second section of the statute; for, at all events, the requisitions of that section, if not by all admitted to be constitutional, are less objectionable than those of the third; and if the last can be vindicated, the first must be, and hence the last has constituted the burden of the arguments on both sides.

It will be remembered that this third section imposes a condition on landing alien passengers, or, in other words, levies a toll or fee on the master for landing them, whether then paupers or not, and that the present action is to recover back the money which has been collected from the master for landing such passengers.

After providing, in the following words, that, "when any vessel shall arrive at any port or harbor within the State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessel and examine into the condition of said passengers." The third section of the statute declares that "no alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

It is conceded that the sum paid here on account of "alien passengers" was demanded of them, when coming in some "vessel," and was collected after she arrived at a "port or harbor within the State." Then, and not till then, the master was required to pay two dollars for each before landing, "to be paid into the [*520 treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

By a subsequent law, as the foreign paupers had been made chargeable to the State treasury, the balances of this fund in the different towns were required to be transferred to that treasury.

After careful examination, I am not satisfied that this exercise of power by a State is incapable of being sustained as a matter of right, under one or all of three positions.

1st. That it is a lawful exercise of the police power of the State to help to maintain its foreign paupers.

2d. If not, that it may be regarded as justified by the sovereign power which every State possesses to prescribe the conditions on which aliens may enjoy a residence within, and the protection of, the State.

3d. Or it may be justified under the municipal power of the State to impose taxes within its limits for State purposes. I think, too, that this power has never been ceded to the general

government, either expressly or by implication, in any of the grants relied on for that purpose, such as to lay duties on imports, or to prohibit the importation of certain persons after the year 1808, or to regulate commerce.

Under the first ground of vindication for the State, the whole statute was most probably enacted with the laudable design to obtain some assistance in maintaining humanely the large number of paupers, and persons likely soon to become paupers, coming to our shores by means furnished by the municipal authorities in various parts of Europe. See 3 Ex. Doc. of 29th Congress, 2d Session, No. 54. Convicts were likewise sent, or preparing to be sent, hither from some cities on the Continent. Ibid.

A natural desire, then, would exist, and would appear by some law, to obtain, first, indemnity against the support of emigrants actually paupers, and likely at once to become chargeable; and, second, funds to maintain such as, though not actually paupers, would probably become so, from this class of aliens.

It is due to the cause of humanity, as well as the public economy of the State, that the maintenance of paupers, whether of foreign or domestic origin, should be well provided for. Instead of being whipped or carted back to their places of abode or settlement, as was once the practice in England and this country in respect to them; or, if aliens, instead of being reshipped over a desolate waste of ocean, they are to be treated with kindness and relieved or maintained. But still, if feasible, it should. in jus- [*521] tice, be at the *expense of those introducing them, and introducing the evils which may attend on them. This seems to have been the attempt in this statute, and as such was a matter of legitimate police in relation to paupers.

But those persons affected by the third section not being at the time actual paupers, but merely alien passengers, the expediency or right to tax the master for landing them does not seem so clear, in a police view, as it is to exact indemnity against the support of those already paupers. Yet it is not wholly without good reasons, so far as regards the master or owner who makes a profit by bringing into a State persons having no prior rights there, and likely in time to add something to its fiscal burdens and the number of its unproductive inhabitants. He who causes this danger, and is the willing instrument in it, and profits by it, cannot, in these views, object to the condition or tax imposed by the State, who may not consider the benefits likely to arise from such a population a full counterbalance to all the anticipated disadvantages and contingencies. But the aspect of the case is somewhat different, looking at the tax as falling wholly on the passenger. It may not be untrue, generally, that some portion of a burden like this rests eventually on the passenger, rather than the master or owner. Neil v. State of Ohio, 3 Howard, 741–743. Yet it does not always; and it is the master, and the owners through him, who complain in the present action, and not the passengers; if it fell on the latter alone, they would be likely, not only to complain, but to go in vessels to other States where onerous conditions had not been imposed. Supposing, however, the burden in fact to light on them, it is in some, though a less degree, and in a different view, as a matter of right, to be vindicated.

Were its expediency alone the question before us, some, and among them myself, would be inclined to doubt as to the expediency of such a tax on alien passengers in general, not paupers or convicts. Whatever may be their religion, whether Catholic or Protestant, or their occupation, whether laborers, mechanics, or farmers, the majority of them are believed to be useful additions to the population of the New World, and since, as well as before our Revolution, have deserved encouragement in their immigration by easy terms of naturalization, of voting, of holding office, and all the political and civil privileges which their industry and patriotism have in so many instances shown to be usefully bestowed. See Declaration of Independence; Naturalization Law; 1 Lloyd's Debates, Gales and Seaton's ed. p. 1147; Taylor v. Carpenter, 2 Wood. & M. If a design existed in any statute to thwart this policy, or if *such were its necessary [*522 consequence, the measure would be of very questionable expediency. But the makers of this law may have had no such design, and such does not seem to be the necessary consequence of it, as large numbers of emigrants still continue to arrive in Massachusetts, when they would be likely to ship for ports in other States where no such law exists, if this operated on them as a discouragement, and like other taxes when felt, or when high, had become in some degree prohibitory.

The conduct of the State, too, in this measure, as a matter of right, is the only question to be decided by us, and may be a very different one from its expediency. Every sovereign State possesses the right to decide this matter of expediency for itself, provided it has the power to control or govern the subject. Our inquiry, therefore, relates merely to that power or right in a State; and the ground now under consideration to support the exercise of it is her authority to prescribe terms, in a police view, to the entry into her boundaries of persons who are likely to become chargeable as paupers, and who are aliens.

In this view, as connected with her police over pauperism, and as a question of mere right, it may be fairly done by imposing terms which, though incidentally making it more expensive for aliens to come here, are designed to maintain such of them and of their class as are likely, in many instances, ere long to become paupers in a strange country, and usually without sufficient means for support in case either of sickness, or accident, or reverses in business. So it is not without justification that a class of passengers from whom much expense arises in supporting paupers should, though not at that moment chargeable, advance something for this purpose at a time when they are able to contribute, and when alone it can with certainty be collected. See New York v. Miln, 11 Peters, 156. When this is done in a law providing against the increase of pauperism, and seems legitimately to be connected with the subject, and when the sum required of the master or passenger is not disproportionate to the ordinary charge, there appears no reason to regard it as any measure except what it professes to be—one connected with the State police

as to alien passengers, one connected with the support of paupers, and one designed neither to regulate commerce nor be a source of revenue for general purposes. 5 Howard, 626.

The tax is now transferred to the State treasury, when collected, for the reason that the support of foreign paupers is transferred there; and this accords with an honest design to collect the money only for that object.

523*] *The last year, so fruitful in immigration and its contagious diseases of ship fever and the terrific cholera, and the death of so many from the former, as well as the extraordinary expense consequent from these causes, furnish a strong illustration that the terms required are neither excessive nor inappropriate.

There are many other reasons showing that this is legitimately a police measure, and, as such, competent for the State to adopt. It respects the character of those persons to come within the limits of the State; it looks to the benefits and burdens deemed likely to be connected with their presence; it regards the privileges they may rightfully claim of relief, whenever sick or infirm, though on shipboard, if within the boundaries of the State; it has an eye to the protection they will humanely receive if merely in transitu through the State to other governments, and the burdens which, in case of disease or accidents, without much means, they may thus throw upon the State. And the fund collected is expressly and wholly applied, after deducting the expenses of its collection, to "the support of foreign paupers."

A police measure, in common parlance, often relates to something connected with public morals; and in that limited view would still embrace the subject of pauperism, as this court held in 16 Peters, 625. But in law, the word "police" is much broader, and includes all legislation for the internal policy of a State. 4 Bl. Com. ch. 13.

The police of the ocean belongs to Congress and the admiralty powers of the general government; but not the police of the land or of harbors. Waring v. Clarke, 5 Howard, 471.

Nor is it any less a police measure because money, rather than a bond of indemnity, is required as a condition of admission to protection and privileges. The payment of money is sometimes imposed in the nature of a toll or license fee, but it is still a matter of police. It is sometimes demanded in the nature of charges to cover actual or anticipated expenses. Such is the case with all quarantine charges. Substantially, too, it is demanded under the indemnity given by the second section, if the person becomes chargeable; and if that be justifiable, so must be this; the fact that one is contingent and the other absolute cannot affect their constitutionality. Neither is it of consequence that the charge might be defrayed otherwise, if the State pleased, as from other taxes or other sources. This is a matter entirely discretionary with the State. This might be done with respect to quarantine expenses or pilotage of vessels; yet the State, being the sole judge of what is most expedient in respect to this, can legally impose it on the vessel, or master, or

524*] *passengers, rather than on others, unless clearly forbidden by the federal Constitution. And it can be none the less a police measure than is a quarantine charge, because the master or owner is required to pay it, or even the passengers, rather than the other people of the State, by a general tax.

Even to exclude paupers entirely has been held to be a police measure, justifiable in a State. Prigg v. Pennsylvania, 16 Peters, 625; 5 Howard, 629. Why, then, is not the milder measure of a fee or tax justifiable in respect to those alien passengers considered likely to become paupers, and to be applied solely to the support of those who do become chargeable from that class? And why is not this as much a police measure as the other? If such measures must be admitted to be local, are of State recognizance, belong to State interests, they clearly are among State rights.

Viewed as a mere police regulation, then, this statute does not conflict with any constitutional provision. Measures which are legitimately of a police character are not pretended to be ceded anywhere in the Constitution to the general government in express terms; and as little can it be argued that they are impliedly to be considered as ceded, if they be honestly and truly police measures. Hence, in all the decisions of this tribunal on the powers granted to the general government, either expressly or by implication, measures of that character have been regarded as not properly to be included. License Cases, 5 Howard, 624; Baldwin's Views, 184, 188; cases cited in The United States v. New Bedford Bridge, 1 Wood. & M. 423.

Thus viewed, the case also comes clearly within the principles settled in New York v. Miln, 11 Peters, 102, and is fortified by the views in the License Cases, 5 Howard, 504. The fact that the police regulation in the case of Miln was enforced by a penalty instead of a toll, and in the License Cases by a prohibition at times, as well as a fee, does not alter the principle, unless the mode of doing it in the present case should be found, on further examination, before closing, to be forbidden to the States.

But if this justification should fail, there is another favorable view of legislation such as that of the third section of the statute of Massachusetts, which has already been suggested, and which is so important as to deserve a separate consideration. It presents a vindication for it different from that of a mere police regulation, connected with the introduction or support of aliens, who are or may afterwards become paupers, and results from the power of every sovereign State to impose such terms as she pleases on the admission or continuance of foreigners *within her borders. If this [*525 power can be shown to exist, and it is in its nature and character a police power also, then we have already demonstrated that the States can rightly continue to exercise it. But if it be not such a power, and hence cannot be ranked under that title and enjoy the benefit of the decisions exempting police powers from control by the general government, yet if it exists as a municipal rather than a police power, and has been constantly exercised by the States, they cannot be considered as not entitled to it, unless they have clearly ceded it to Congress in some form or other.

First, then, as to its existence. The best writers on national law, as well as our own decisions, show that this power of excluding

emigrants exists in all States which are sovereign. Vattel, B, 1, ch. 19, sec. 231; 5 Howard, 525, 629; New York v. Miln, 11 Peters, 142; Prigg v. Pennsylvania, 16 Peters, 625; and Holmes v. Jennison, 14 Peters, 565.

Those coming may be voluntary emigrants from other nations, or traveling absentees, or refugees in revolutions, party exiles, compulsory victims of power, or they may consist of cargoes of shackled slaves, or large bands of convicts, or brigands, or persons with incendiary purposes, or imbecile paupers, or those suffering from infectious diseases, or fanatics, with principles and designs more dangerous than either, or under circumstances of great ignorance, as liberated serfs, likely at once, or soon, to make them a serious burden in their support as paupers, and a contamination of public morals. There can be no doubt, on principles of national law, of the right to prevent the entry of these, either absolutely or on such conditions as the State may deem it prudent to impose. In this view, a condition of the kind here imposed, on admission to land and enjoy various privileges, is not so unreasonable, and finds vindication in the principles of public law the world over. Vattel, B, 1, ch. 19, secs. 219, 231, and B, 2, ch. 7, secs. 93, 94.

In this aspect, it may be justified as to the passengers, on the ground of protection and privileges sought by them in the State, either permanently or transiently, and the power of the State to impose conditions before and while yielding it. When we speak here or elsewhere of the right of a State to decide and regulate who shall be its citizens, and on what terms, we mean, of course, subject to any restraint on her power which she herself has granted to the general government, and which, instead of overlooking, we intend to examine with care before closing.

It having been, then, both in Europe and America, a matter of municipal regulation whether aliens shall or shall not reside in any particular State, or even cross its borders, it fol-
526*] lows *that, if a sovereign State pleases, it may, as a matter of clear right, exclude them entirely, or only when paupers or convicts. (Baldwin's Views, 193, 194), or only when slaves, or, what is still more common in America, in free States as well as slave States, exclude colored emigrants, though free. As further proof and illustration that this power exists in the States, and has never been parted with, it was early exercised by Virginia as to others than paupers (1 Bl. Com. by Tucker, pt. 2, App. p. 33), and it is now exercised, in one form or another, as to various persons, by more than half the States of the Union. 11 Peters, 142; 15 Ib. 516; 16 Ib. 625; 1 Brockenbrough, 434; 14 Peters, 508; 5 Howard, 629.

Even the old Congress, September 16th, 1788, recommended to the States to pass laws excluding convicts; and they did this, though after the new Constitution was adopted, and that fact announced to the country. "Resolved, That it be, and it is hereby recommended to the several States to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." Journal of Congress for *1788, p. 867.*

But the principle goes further, and extends to the right to exclude paupers, as well as convicts, by the States. Baldwin's Views, 188, 193, 194; and Mr. Justice Story, in the case of New York v. Miln, 11 Peters, 156, says as to the States: "I admit that they have a right to pass poor laws, and laws to prevent the introduction of paupers into the States, under like qualifications."

Many of the States also exercised this power, not only during the Revolution, but after peace, and Massachusetts especially did, forbidding the return of refugees, by a law in 1783, ch. 69. Several of the States had done the same as to refugees. See Federalist, No. 42.

The first naturalization laws by Congress recognized this old right in the States, and expressly provided that such persons could not become naturalized without the special consent of those States which had prohibited their return. Thus in the first act: "Provided, also, that no person heretofore proscribed by any State shall be admitted a citizen as aforesaid, except by an act of the Legislature of the State in which such person was proscribed." March 26, 1790, 1 Stat. at Large, 104; see a similar proviso to the third section of the Act of 29th January, 1795, 1 Stat. at Large, 415.

The power given to Congress, as to naturalization generally, does not conflict with this question of taxing or excluding alien passengers, as acts of naturalization apply to those aliens only who have already resided here from two to five years, and not *to aliens [*527 not resident here at all, or not so long. See acts of 1790, 1795, and 1800.

And it is not a little remarkable, in proof that this power of exclusion still remains in the States rightfully, that while, as before stated, it has been exercised by various States in the Union—some as to paupers, some as to convicts, some as to refugees, some as to slaves, and some as to free blacks—it never has been exercised by the general government as to mere aliens, not enemies, except so far as included in what are called the Alien and Sedition Laws of 1798. By the former, being "An act concerning aliens," passed June 15th, 1798 (1 Stat. at Large, 571), power was assumed by the general government, in time of peace, to remove or expel them from the country; and that act, no less than the latter, passed about a month after (Ibid. 596), was generally denounced as unconstitutional, and suffered to expire without renewal; on the ground, among others assigned for it, that, if such a power existed at all, it was in the States, and not in the general government, unless under the war power, and then against alien enemies alone. 4 Elliot's Deb. 581, 582, 586; Virginia Resolutions of 1798.

It deserves special notice, too, that, when it was exercised on another occasion by the general government, not against aliens as such, but slaves imported from abroad, it was in aid of State laws passed before 1808, and in subordination to them. The only act of Congress on this subject before 1808 expressly recognized the power of the State alone then to prohibit the introduction or importation "of any negro, mulatto, or other person of color," and punished it only where the States had. See Act of Feb. 28, 1803, 2 Stat. at Large, 205. In

further illustration of this recognition and co-operation with the States, it provided, in the third section, that all officers of the United States should "notice and be governed by the provisions of the laws now existing in the several States, prohibiting the admission or importation of any negro, mulatto, or other person of color as aforesaid; and they are hereby enjoined vigilantly to carry into effect said laws," i. e., the laws of the States. See 1 Brockenbrough, 432.

The Act of March 2d, 1807, forbidding the bringing in of slaves (2 Stat. at Large), 426, was to take effect on the 1st of January, 1808, and was thus manifestly intended to carry into operation the admitted power of prohibition by Congress, after that date, of certain persons contemplated in the ninth section of the first article, and as a branch of trade or commerce which Congress, in other parts of the Constitution, was empowered to regulate. That act was aimed solely at the foreign slave trade, and 528*] *not at the bringing in of any other persons than slaves, and not as if Congress supposed that, under the ninth section, it was contemplated to give it power, or recognize its power, over anything but the foreign slave trade. But of this more hereafter.

It will be seen also in this, that the power of each State to forbid the foreign slave trade was expressly recognized as existing since, no less than before 1808, being regarded as a concurrent power, and that by this section no authority was conferred on Congress over the domestic slave trade, either before or since 1808.

If the old Congress did not suppose it was right and proper for the States to act in this way on the introduction of aliens, after the new Constitution went into operation, why did they, by their resolution of 1787, recommend to the States to forbid the introduction of convicts from abroad, rather than recommend it to be done by Congress under the new Constitution?

It is on this principle that a State has a right, if it pleases, to remove foreign criminals from within its limits, or allow them to be removed by others. Holmes v. Jennison, 14 Peters, 568. Thought the obligation to do so is, to be sure, an imperfect one, of the performance of which she is judge, and sole judge, till Congress make some stipulation with foreign powers as to their surrender (11 Peters, 391); and if States do not surrender this right of affixing conditions to their ingress, the police authorities of Europe will proceed still further to inundate them with actual convicts and paupers, however mitigated the evil may be at times by the voluntary immigration with the rest of many of the enterprising, industrious, and talented. But if the right be carried beyond this, and be exercised with a view to exclude rival artisans, or laborers, or to shut out all foreigners, though persecuted and unfortunate, from mere naked prejudice, or with a view to thwart any conjectural policy of the general government, this course, as before suggested, would be open to much just criticism.

Again, considering the power to forbid as existing absolutely in a State, it is for the State where the power resides to decide on what is sufficient cause for it—whether municipal or economical, sickness or crime; as, for example, danger of pauperism, danger to health, danger to morals, danger to property, danger to public principles by revolutions and change of government, or danger to religion. This power over the person is much less than that exercised over ships and merchandise under State quarantine laws, though the general government regulates, for duties and commerce, the ships and their *cargoes. If the power be [*529 clear, however others may differ as to the expediency of the exercise of it as to particular classes or in a particular form, this cannot impair the power.

It is well considered, also, that if the power to forbid or expel exists, the power to impose conditions of admission is included as an incident or subordinate. Vattel (B. 2, ch. 8, sec. 99), observes, that, "since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases to the permission to enter." Holmes v. Jennison, 14 Peters, 569, 615, Appendix.

The usage in several States supports this view. Thus the State of Maryland now, of Delaware since 1787, of Pennsylvania since 1818, if not before, and of Louisiana since 1842, besides New York and Massachusetts, pursue this policy in this form. 7 Smith's Laws of Pennsylvania, 21; 2 Laws of Delaware, 107, 995; 1 Dorsey's Laws of Maryland, 6, 10. And though it is conceded that laws like this in Massachusetts are likely, in excited times, to become of a dangerous character, if perverted to illegitimate purposes, and though it is manifestly injudicious to push all the powers possessed by the States to a harsh extent against foreigners any more than citizens, yet, in my view, it is essential to sovereignty to be able to prescribe the conditions or terms on which aliens or their property shall be allowed to remain under its protection, and enjoy its municipal privileges. Vattel, B. 1, ch. 19, secs. 219, 231.

As a question of international law, also, they could do the same as to the citizens of other States, if not prevented by other clauses in the Constitution reserving to them certain rights over the whole Union, and which probably protect them from any legislation which does not at least press as hard on their own citizens as on those of other States. Thus, in article fourth, section second: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And the old Confederation (article fourth) protected the ingress and egress of the citizens of each State with others, and made the duties imposed on them the same.

Such is the case of Turner v. Smith, considered in connection with this, collecting the same of its own citizens as of others; and to argue that States may abuse the power, by taxing citizens of other States different from their own, is a fallacy, because Congress would also be quite as likely to abuse the power, because an abuse would react on the State itself, and lessen or destroy this business through it, and because the abuse, instead of being successful, would probably *be pronounced un- [*530 constitutional by this court, whenever appealed to.

With such exceptions, I am aware of no limitations on the powers of the States, as a mat-

ter of right, to go to the extent indicated in imposing terms of admission within their own limits, unless they be so conducted as to interfere with some other power, express or implied, which has been clearly granted to Congress, and which will be considered hereafter.

The last ground of vindication of this power, as exercised by Massachusetts in the third section, is under its aspect as imposing a tax.

Considering this, the inquiry may be broad enough to ascertain whether the measure is not constitutional, under the taxing power of the State generally, independent of its authority, already examined, as to a police, over the support of paupers, and, as to municipal regulations, over the admission of travelers and non-residents.

It deserves remark, in the outset, that such a tax, under the name of a toll or passport fee, is not uncommon in foreign countries on alien travelers when passing their frontiers. In that view it would be vindicated under long usage and numerous precedents abroad, and several in this country, already referred to.

It requires notice, also, that this provision, considered as a license fee, is not open to the objection of not being asserted beforehand at stated periods, and collected at the time of other taxes. When fees of a specific sum are exacted for licenses to sell certain goods, or exercise certain trades, or exhibit something rare, or for admissions to certain privileges, they are not regarded so much in the light of common taxes as of fees or tolls. They resemble this payment required here more than a tax on property, as they are not always annual, or collected at stated seasons; they are not imposed on citizens only, or permanent residents, but frequently are demanded as often as an event happens, or a certain act is done, and at any period, and from any visitor or transient resident. But fees or tolls thus collected are still legitimate taxes.

Another view of it as a tax is its imposition on the master of the vessel himself, on account of his capital or business in trade, carrying passengers, and not a tax on the passengers themselves. The master is often a citizen of the State where he arrives with a cargo and passengers. In such a case, he might be taxed on account of his business, like other citizens; and so, on other general principles, might masters of vessels who are not citizens, but who come within the limits and jurisdiction and protection of the State, and are hence, on that ac- 531*] count, *rightfully subjected to its taxation, and made to bear a share of its burdens. It is customary in most countries, as before named, to impose taxes on particular professions and trades or businesses, as well as on property; and whether in the shape of a license or fee, or an excise or poll tax, or any other form, it is of little consequence when the object of the tax is legitimate, as here, and its amount reasonable.

States, generally, have the right also to impose poll taxes as well as those on property, though they should be proportionate and moderate in amount. This one is not much above the usual amount of poll taxes in New England. Nor need they require any length of residence before a person is subject to such a tax; *and sometimes* none is required, though it is *usual to have it* imposed only on a fixed day.

The power of taxation, generally, in all independent States, is unlimited as to persons and things, except as they may have been pleased, by contract or otherwise, to restrict themselves. Such a power, likewise is one of the most indispensable to their welfare, and even their existence.

On the extent of the cession of taxation to the general government, and its restriction on the States, more will be presented hereafter; but in all cases of doubt, the leaning may well be towards the States, as the general government has ample means ordinarily by taxing imports, and the States limited means, after parting with that great and vastly increased source of revenue connected with imposts. The States may, therefore, and do frequently, tax everything but exports, imports, and tonnage, as such. They daily tax things connected with foreign commerce as well as domestic trade. They can tax the timber, cordage, and iron of which the vessels for foreign trade are made; tax their cargoes to the owners as stock in trade; tax the vessels as property, and tax the owners and crew per head for their polls. Their power in this respect travels over water as well as land, if only within their territorial limits.

It seems conceded, that, if this tax, as a tax, had not been imposed till the passenger had reached the shore, the present objection must fail. But the power of the State is manifestly as great in a harbor within her limits to tax men and property as it is on shore, and can no more be abused there than on shore, and can no more conflict there than on shore, with any authority of Congress as a taxing power not on imports as imports. Thus, after emigrants have landed, and are on the wharves, or on public roads, or in the public hotels, or in private dwelling-houses, they could all be taxed, though with less ease; and they could all, if the State felt so disposed to abuse the power, be taxed out of their limits as quickly and effectually as *have been the Jews in former times [*532 in several of the most enlightened nations of modern Europe.

To argue, likewise, that the State thus undertakes to assess taxes on persons not liable, and to control what it has not got, is begging the question, either that these passengers were not within its limits, or that all persons actually within its limits are not liable to its laws and not within its control. To contend, also, that this payment cannot be exacted, on the ground that the great correction of excessive taxation is its oppression on the constituent, which causes a reaction to reduce it (4 Wheat. 316, 428), and in this case the tax does not operate on a constituent, is another fallacy, to some extent. For most taxes operate on some classes of people who are not voters, as, for example, women, and especially resident aliens; and if this reasoning would exempt these passengers, when within the limits of the State, it would also exempt all aliens, and others not voters, however long resident there, or however much property they possess.

It seems likewise well settled, that, by the laws of national intercourse and as a consequence of the protection and hospitality yielded to aliens, they are subject to ordinary reasonable taxation in their persons and property by the government where they reside, as fully as

citizens. Vattel, B, 2, ch. 10, sec. 132, p. 235; Taylor v. Carpenter, 2 Wood. & M. But I am not aware of the imposition of such a tax in this form, except as a toll or a passport; it being, when a poll tax, placed on those who have before acquired a domicil in the State, or have come to obtain one animo manendi. Yet, whatever its form, it would not answer hastily to denounce it as without competent authority, when imposed within the usual territorial limits of the State.

In short, the States evidently meant still to retain all power of this kind, except where, for special reasons at home, neither government was to tax exports, and, for strong reasons both at home and abroad, only the general government was to tax imports and tonnage.

Having explained what seem to me the principal reasons in favor of a power so vital to the States as that exercised by Massachusetts in this statute, whether it be police or municipal, regulating its residents or taxing them, I shall proceed to the last general consideration, which is whether this power has in any way been parted with to Congress entirely, or as to certain objects, including aliens.

It is not pretended that there is eo nomine any express delegation of this power to Congress, or any express prohibition of it to the States. And yet, by the tenth amendment of the 533*] Constitution, *it is provided, in so many words, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If, in the face of this, Congress is to be regarded as having obtained a power of restriction over the States on this subject, it must be by mere implication, and this either from the grant to impose taxes and duties, or that which is usually considered a clause only to prohibit and tax the slave trade, or that to regulate commerce. And this statute of Massachusetts, in order to be unconstitutional, must be equivalent to one of these, or conflicting with one of them.

In relation, first, to the most important of these objections, regarding the statute in the light of a tax, and as such supposed to conflict with the general power of taxation conferred on Congress, as well as the exclusive power to tax imports, I would remark, that the very prohibition to the States, in express terms, to tax imports, furnishes additional proof that other taxation by the States was not meant to be forbidden in other cases and as to other matters. Expressio unius, exclusio est alterius. It would be very extraordinary, also, that, when expressly ceding powers of taxation to the general government, the States should refrain from making them exclusive in terms, except as to imports and tonnage, and yet should be considered as having intended, by mere implication, there or elsewhere in the instrument, to grant away all their great birthright over all other taxation, or at least some most important branches of it. Such has not been the construction or practical action of the two governments for the last half century, but the States have continued to tax all the sources of revenue ceded to Congress, when not in terms forbidden. This was the only safe course. Federalist, No. 32.

One of the best tests that this kind of tax or fee for admission to the privileges of a State is permissible, if not expressly forbidden, is the construction in two great cases of direct taxes on land imposed by Congress, in 1798 and 1813. The States, on both of those occasions, still continued to impose and collect their taxes on lands, because not forbidden expressly by the Constitution to do it. And can anyone doubt, that, so far as regards taxation even of ordinary imports, the States could still exercise it if they had not been expressly forbidden by this clause? Collet v. Collet, 2 Dallas, 296; Gibbons v. Ogden, 9 Wheat. 201. If they could not, why was the express prohibition made? Why was it deemed necessary? Federalist, No. 32.

This furnishes a striking illustration of the true general rule of construction, that, notwithstanding a grant to Congress is express, if *the States are not directly forbidden [*534 to act, it does not give to Congress exclusive authority over the matter, but the States may exercise a power in several respects relating to it, unless, from the nature of the subject and their relations to the general government, a prohibition is fairly or necessarily implied. This power in some instances seems to be concurrent or co-ordinate, and in others subordinate. On this rule of construction there has been much less doubt, in this particular case as to taxation, than as a general principle on some other matters, which will hereafter be noticed under another head. The argument for it is unanswerable, that, though the States have, as to ordinary taxation of common subjects, granted a power to Congress, it is merely an additional power to their own, and not inconsistent with it.

It has been conceded by most American jurists, and, indeed, may be regarded as settled by this court, that this concurrent power of taxation, except on imports and exports and tonnage (the last two specially and exclusively resigned to the general government) is vital to the States, and still clearly exists in them. In support of this may be seen the following authorities; McCulloch v. State of Maryland, 4 Wheat. 316, 425; Gibbons v. Ogden, 9 Wheat. 1, by Chief Justice Marshall; Providence Bank v. Billings, 4 Peters, 561; Brown v. State of Maryland, 12 Wheat. 441; 4 Gill and Johns. 132; 2 Story's Com. on Const. sec. 437; 5 Howard, 588; Weston v. City of Charleston, 2 Peters 449; Federalist, No. 42.

Nor is the case of Brown v. Maryland, so often referred to, opposed to this view. It seems to have been a question of taxation, but the decision was not that, by the grant to the general government of the power to lay taxes and imposts, it must be considered, from "the nature of the power," "that it (taxation generally) should be exercised exclusively by Congress." On the contrary, all the cases before and hereafter cited, bearing on this question, concede that the general power of taxation still remains in the States; but in that instance it was considered to be used so as to amount to a tax on imports, and, such a tax being expressly prohibited to the States, it was adjudged there that for this reason it was unconstitutional. Under this head, then, as to taxation,

it only remains to ascertain whether the toll or tax here imposed on alien passengers can be justly considered a tax on imports, as it was in the case of Brown v. Maryland, when laid on foreign goods. If so considered, it is conceded that this tax has been expressly forbidden to be imposed by a State, unless with the consent of Congress, or to aid in enforcing the inspection laws of the State. Clearly it does not come within either of those last exceptions, 535*] *and therefore the right to impose it must depend upon the question, whether it is an "impost," and whether passengers are "imports" within the meaning of the Constitution. An impost is usually an ad valorem or specific duty, and not a fee like this for allowing a particular act, or a poll tax like this—a fixed sum per head. An import is also an article of merchandise, goods of some kind—property, "commodities." Brown v. Maryland, 12 Wheat. 437; see McCulloch's Dict. Imports; 5 Howard, 594, 614. It does not include persons unless they are brought in as property—as slaves, unwilling or passive emigrants, like the importation referred to in the ninth section of the first article of the Constitution. New York v. Miln, 11 Peters, 136; Case of The Brig Wilson, 1 Brock. 423.

Now, there is no pretense that mere passengers in vessels are of this character, or are property; otherwise they must be valued, and pay the general ad valorem duty now imposed on non-enumerated articles. They are brought in by no owner, like property generally, or like slaves. They are not the subject of entry or sale. The great objection to the tax in Brown v. Maryland was, that it clogged the sale of the goods. They are not like merchandise, too, because they may be warehoused, and re-exported or branded, or valued by an invoice. They may go on shore anywhere, but goods cannot. A tax on them is not, then, in any sense, a tax on imports, even in the purview of Brown v. Maryland. There it was held not to be permitted until the import in the original package or cask is broken up, which it is difficult to predicate of a man or passenger. The definition there, also, is "imports are things imported," not persons, not passengers; or they are "articles brought in,' and not freemen coming of their own accord. 12 Wheat. 437. And when "imports" or "importation" is applied to men, as is the case in some acts of Congress, and in the ninth section of the first article of the Constitution, it is to men or "persons" who are property and passive, and brought in against their will or for sale as slaves brought as an article of commerce, like other merchandise. New York v. Miln, 11 Peters, 136; 15 Peters, 505; 1 Bl. Com. by Tucker, pt. 2, App. 50.

But, so far from this being the view as to free passengers taxed in this statute—that they are merchandise or articles of commerce, and so considered in any act since 1808, or before—it happens that, while the foreign import or trade as to slaves is abolished, and is made a capital offense, free passengers are not prohibited, nor their introduction punished as a crime. 4 Elliot's Deb. 119. If "importation" in the ninth section applied to one class of persons, *and "migration"* to another, as has been argued, then allowing a tax by Congress on the "importation" *of any person was meant [*536 to be confined to slaves, and is not allowed on "migration," either in words or spirit, and hence it confers no power on Congress to tax other persons (see Iredell's remarks, 4 Elliot's Deb. 119); and a special clause was thought necessary to give the power to tax even the "importation" of slaves, because "a duty on impost" was usually a tax on things, and not persons. 1 Bl. Com. by Tucker, App. 231.

Indeed, if passengers were "imports" for the purpose of revenue by the general government, then, as was never pretended, they should and can now be taxed by our collectors, because they are not enumerated in the tariff acts to be admitted "free" of duty, and all non-enumerated imports have a general duty imposed on them at the end of the tariff; as, for instance, in the Act of July 30, 1846, section third, "a duty of twenty per cent. ad valorem" is laid "on all goods, wares, and merchandise imported from foreign countries, and not specially provided for in this act."

To come within the scope of a tariff, and within the principle of retaliation by or towards foreign powers, which was the cause of the policy of making imposts on imports exclusive in Congress, the import must still be merchandise or produce, some rival fruit of industry, an article of trade, a subject, or at least an instrument, of commerce. Passengers, being neither, come not within the letter or spirit or object of this provision in the Constitution.

It is, however, argued, that though passengers may not be imports, yet the carrying of them is a branch of commercial business, and a legitimate and usual employment of navigation.

Grant this, and still a tax on the passenger would not be laying a duty on "imports" or on "tonnage;" but it might be supposed to affect foreign commerce at times, and in some forms and places, and thus interfere with the power to regulate that, though not with the prohibition to tax imports and tonnage. Consequently, when hereafter considering the meaning of the grant "to regulate commerce," this view of the objection will be examined.

But there seems to be another exception to this measure, as conflicting with the powers of the general government, which partly affects the question as a tax, and partly as a regulation of commerce. It is, that the tax was imposed on a vessel before the passengers were landed, and while under the control of the general government. So far as it relates to the measure as a tax, the exception must be regarded as applying to the particular place where it is collected, in a vessel on the water *though after her arrival within a port [*537 or harbor. It would seem to be argued, that, by some Constitutional provision, a State possesses no power in such a place. But there is nothing in the taxing part of the Constitution which forbids her action in such places on matters like this. If forbidden at all, it must be by general principles of the common, and of national law, that no State can assess or levy a tax on what is without the limits of its jurisdiction, or that, if within its territorial limits, the subject matter is vested exclusively by the Constitution in the general government.

It will be seen, that, if the first exception be valid, it is not one connected with the Constitution of the United States, and hence not revisable here. It was not, and could not properly be, set up as a defense in the court of a State, except under its own constitution, and hence not revisable in this court by this writ of error. But as it may be supposed to have some influences on the other and commercial aspect of the objection, it may be well to ascertain whether, as a general principle, a vessel in a port, or its occupants, crew, or passengers are in fact without the limits and jurisdiction of a State, and thus beyond its taxing power, and are exclusively for all purposes under the government of the United States. One of the errors in the argument of this part of the cause has been an apparent assumption that this tax —considered as a tax—was collected at sea, before the voyage ended, and was not collected within the limits and jurisdiction of the State.

But, ex concesso, this vessel then was in the harbor of Boston, some miles within the limits of the State, and where this court itself has repeatedly decided that Massachusetts, and not the general government, has jurisdiction. First, jurisdiction to punish crimes. See in Waring v. Clarke, 5 Howard, 441; Ibid. 628; Coolidge's case, 1 Wheat. 415; Bevan's case, 3 Wheat. 336; 1 Wood & M. 401, 455, 481, 483. Next, the State would have jurisdiction there to enforce contracts. So must she have to collect taxes, for the like reason, 5 Howard, 441; because it was a place within the territorial limits and jurisdiction of the State. Chief Justice Marshall, in 12 Wheat. 441, speaks of "their [the States] acknowledged power to tax persons and property within their territory." Ibid. 444.

The tax in this case does not touch the passenger in transitu on the ocean, or abroad—never till the actual arrival of the vessel with him in port. An arrival in port, in other acts of Congress using the term, is coming in, or anchoring within, its limits, with a view to discharge the cargo. 2 Sumner, 419; 5 Mason, 445; 4 Taunton, 662, 722; Toler v. White, Ware, 277.

538*] *For aught that appears, this vessel before visited, had come in and was at anchor in the port. The person so going into port abroad is considered to have "arrived," so as to be amenable to his consul, and must deposit his papers. He has come under or into the control of shore power, and shore authority, and shore laws, and shore writs, and shore juries; at least concurrently with other authorities, if not exclusively. In common parlance, the voyage for this purpose at least is not interrupted; for then it has ended and the State liabilities and powers begin, or the State becomes utterly imbecile. Hence, speaking of a country as distinguished from the sea and of a nation as a State. Vattel (B. 1, Ch. 23, sec. 290), says: "Ports and harbors are manifestly an appendage to, and even a part of, the country, and consequently are the property of the nation. Whatever is said of the land itself will equally apply to them, so far as respects the consequences of the domain and of the empire." If the ports and harbors of a State are intra fauces terræ, within the body of a country, the power of taxation is as complete in them as it is on land, a hundred miles in the interior. Though on tide waters, the vessels are there subject for many purposes to State authority rather than federal, are taxed as stock in trade, or ships owned, if by residents; the cargo may be there taxed; the officers and crew may be there taxed for their polls, as well as estate; and, on the same principle, may be the master for the passengers, or the passengers themselves. Persons there, poor and sick, are also entitled to public relief from the city, or State. 4 Metcalf, 290, 291. No matter where may be the place, if only within the territorial boundaries of the State, or, in other words, within its geographical limits. The last is the test, and not whether it be a merchant vessel or a dwelling-house, or something in either, as property or persons. Unless beyond the borders of the State, or granted, as a fort or navy yard within them, to a separate and exclusive jurisdiction, or used as an authorized instrument of the general government, the State laws control and can tax it. United States v. Ames, 1 Wood. & M. 76, and cases there cited.

It is true there are exceptions as to taxation which do not affect this question; as where something is taxed which is held under the grants to the United States, and the grants might be defeated if taxed by the State. That was the point in McCulloch v. Maryland, 4 Wheat. 316; Weston v. City of Charleston, 2 Peters, 449; Bobbins v. Commissioners of Erie County, 16 Peters, 435; Osborn v. Bank of the United States, 9 Wheat. 738. But that is not the question here, as neither passengers nor the master of the vessel can be considered as official instruments of the government.

*In point of fact, too, in an instance [*539 like this, it is well known that the general jurisdiction of the States, for most municipal purposes within their territory, including taxation, has never been ceded to the United States, nor claimed by them; but they may anchor their navies there, prevent smuggling, and collect duties there, as they may do the last on land. But this is not inconsistent with the other, and this brings us to the second consideration under this head—how far such a concurrent power in that government, for a particular object, can, with any propriety whatever, impair the general rights of the States there on other matters.

These powers exist in the two governments for different purposes, and are not at all inconsistent or conflicting. The general government may collect its duties, either on the water or the land, and still the State enforce its own laws without any collision, whether they are made for local taxation, or military duty, or the collection of debts, or the punishment of crimes. There being no inconsistency or collision, no reason exists to hold either, by mere construction, void. This is the cardinal test.

So the master may not always deliver merchandise rightfully, except on a wharf; nor be always entitled to freight till the goods are on shore; yet this depends on the usage, or contract, or nature of the port, and does not affect the question of jurisdiction. Abbott on Shipping, 249; 4 Bos. & Pull. 16. On the contrary, some offenses may be completed entirely on the water, and yet the State jurisdiction on

land is conceded. United States v. Coombs, 12 Peters, 72.

So a contract with the passenger may or may not be completed on arriving in port, without landing, according as the parties may have been pleased to stipulate. Brig Lavinia, 1 Peters, Adm. 126.

So the insurance on the cargo of a ship may not in some cases terminate till it is landed, though in others it may, depending on the language used. Reyner v. Pearson, 4 Taunton, 602, and Levin v. Newnham, Ib. 722. But none of these show that the passengers may not quit the vessel outside the harbor in boats or other vessels, and thus go to the land, or go to other ports. Or that, if not doing this, and coming in the same vessel within the State limits, they may not be subject to arrests, punishments, and taxation or police fees, or other regulations of the State, though still on board the vessel. Nor do any of them show that the vessel and cargo, after within the State limits, though not on the shore, are not within the jurisdiction of the State, and liable, as property of the owner, to be taxed in common with other stock in trade.

540*] *I will not waste a moment in combating the novel idea that taxes by the States must be uniform, or they are void by the Constitution on that account; because clearly that provision relates only to taxes imposed by the general government. It is a fallacy, also, to argue that the vessels, crews, and passengers, when within the territory of a State, are not amenable to the State laws in these respects, because they are enrolled as belonging to the United States, and their flag is the flag of the United States. For though they do belong to the United States in respect to foreign nations, and our statistical returns and tables, this does not prevent the vessels at the same time from being owned by citizens of the State of Massachusetts, and the crew belonging there, and all, with the passengers, after within her limits, from being amenable generally to her laws.

If taking another objection to it as a tax, and arguing against the tax imposed on the vessel, because it may be abused to injure emigration and thwart the general government, it would still conflict with no particular clause in the Constitution or acts of Congress. It should also be remembered that this was one objection to the license laws in 5 Howard, and that the court held unanimously they were constitutional, though they evidently tended to diminish importations of spirituous liquor and lessen the revenue of the general government from that source. But that being only an incident to them, and not their chief design, and the chief design being within the jurisdiction of the States, the laws were upheld.

It is the purpose which Mr. Justice Johnson thinks may show that no collision was intended or effected. "Their different purposes mark the distinction between the powers brought into action, and while frankly exercised they can produce no serious collision." Gibbons v. Ogden, 9 Wheat. 235. "Collision must be sought to be produced." "Wherever the powers of the respective governments are frankly exercised *with a distinct view* to the end of such powers, *they may act on* the same subject, or use the same means, and yet the powers be kept perfectly distinct." p. 239; see 1 Wood. & M. 423, 433.

The next delegation of power to Congress, supposed by some to be inconsistent with this statute, is argued to be involved in the ninth section of the first article of the Constitution. This they consider as a grant of power to Congress to prohibit the migration from abroad of all persons, bond or free, after the year 1808, and to tax their importation at once and forever, not exceeding ten dollars per head. See 9 Wheat. 230, by Mr. Justice Johnson; 15 Peters, 514. The words are: *"The mi- [*541 gration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." But it deserves special notice, that this section is one entirely of limitation on power rather than a grant of it; and the power of prohibition being nowhere else in the Constitution expressly granted to Congress, the section seems introduced rather to prevent it from being implied except as to slaves, after 1808, than to confer it in all cases. 1 Brockenbrough, 432.

If to be implied elsewhere, it is from the grant to regulate commerce, and by the idea that slaves are subjects of commerce, as they often are. Hence, it can go no further than to imply it as to them and not as to free passengers.

Or if to "regulate commerce" extends also to the regulation of mere navigation, and hence to the business of carrying passengers, in which it may be employed it is confined to a forfeiture of the vessel and does not legitimately involve a prohibition of persons, except when articles of commerce, like slaves. 1 Brockenbrough, 432. Or finally, however far the power may extend under either view, it is still a power concurrent in the States, like most taxation and much local legislation as to matters connected somewhat with commerce, and is well exercised by them when Congress does not, as here, legislate upon the matter either of prohibition or of taxation of passengers. It is hence that, if this ninth section is a grant of the power to prevent the migration or importation of other persons than slaves, it is not an exclusive one, any more than that to regulate commerce, to which it refers; nor has it ever been exercised so as to conflict with State laws, or with the statute of Massachusetts now under consideration. This clause itself recognizes an exclusive power of prohibition in the States until the year 1808. And a concurrent and subordinate power on this by the States, after that, is nowhere expressly forbidden in the Constitution nor is it denied by any reason or necessity for such exclusiveness. The States can often use it more wisely than Congress in respect to their own interests and policy. They cannot protect their police or health or public morals without the exercise of such a power at times and under certain exigencies, as forbidding the admission of slaves and certain other persons within their borders. One State, also, may require its exercise, from its exposures and dangers, when another may not. So it may be said, as to the power to tax importation,

if limited to slaves, the States could continue to do the same when they pleased if men are not deemed "imports."

542*] *But to see for a moment how dangerous it would be to consider a prohibitory power over all aliens as vested exclusively in Congress, look to some of the consequences. The States must be mute and powerless.

If Congress, without a co-ordinate or concurrent power in the States, can prohibit other persons as well as slaves from coming into States, they can of course allow it, and hence can permit and demand the admission of slaves, as well as any kind of free person, convicts or paupers, into any State, and enforce the demand by all the overwhelming powers of the Union, however obnoxious to the habits and wishes of the people of a particular State. In view of an inference like this, it has therefore been said that, under this section, Congress cannot admit persons whom a State pleases to exclude. 9 Wheaton, 230, Justice Johnson. This rather strengthens the propriety of the independent action of the State, here excluding conditionally, than the idea that it is under the control of Congress.

Besides this, the ten dollars per head allowed here specially to be collected by Congress on imported slaves is not an exclusive power to tax, and would not have been necessary or inserted, if Congress could clearly already impose such a tax on them as "imports," and by a "duty" on imports. It would be not a little extraordinary to imply by construction a power in Congress to prohibit the coming into the States of others than slaves, or of mere aliens, on the principle of the alien part of the Alien and Sedition Laws, though it never has been exercised as to others, permanently; but the States recommended to exercise it, and seventeen of them now actually doing it. And equally extraordinary to imply, at this late day not only that Congress possesses the power, but that, though not exercising it, the States are incapable of exercising it concurrently, or even in subordination to Congress. But beyond this, the States have exercised it concurrently as to slaves, no less than exclusively in respect to certain free persons, since as well as before 1808, and this as to their admission from neighboring States no less than from abroad. See cases before cited, and Butler v. Hopper, 1 Wash. C. C. 500.

The word "migration" was probably added to "importation" to cover slaves when regarded as persons rather than property, as they are for some purposes. Or if to cover others, such as convicts and redemptioners, it was those only who came against their will, or in a quasi servitude. And though the expression may be broad enough to cover emigrants generally (3 Madison State Papers, 1429; 9 Wheat. 216, 230; 1 Brockenbrough, 431), and some thought 543*] it might cover convicts (*5 Elliot's Deb. 477; 3 Madison State Papers, 1430), yet it was not so considered by the mass of the Convention, but as intended for "slaves," and calling them "persons" out of delicacy. 5 Elliot's Deb. 457, 477; 3 Ib. 251, 541; 4 Ib. 119; 15 Peters, 113, 506; 11 Ib. 136; 1 Bl. Com. by Tucker, App. 290. It was so considered in the Federalist soon after, and that view regarded as a "misconstruction" which extended it to "emigration" generally. Federalist, No. 42. So afterwards thought Mr. Madison himself, the great expounder and framer of most of the Constitution. 3 Elliot's Deb. 422. So it has been held by several members of this court (15 Peters, 508); and so it has been considered by Congress, judging from its uniform acts, except the unfortunate Alien Law of 1798, before cited, and which, on account of its unconstitutional features, had so brief and troubled an existence. 4 Elliot's Deb. 451.

In the Constitution, in other parts as in this, the word "persons" is used, not to embrace others, as well as slaves, but slaves alone. Thus, in the second section of the first article, "three fifths of all other persons" manifestly means slaves; and in the third section of the fourth article, "no person held to service or labor in one State," etc., refers to slaves. The word "slave" was avoided, from a sensitive feeling; but clearly no others were intended in the ninth section. Congress so considered it, also, when it took up the subject of this section in 1807, just before the limitation expired, or it would then probably have acted as to others, and regulated the migration and importation of others as well as of slaves. By forbidding merely "to import or bring into the United States, or territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of color as a slave, or to be held to service or labor," it is manifest that Congress then considered this clause in the Constitution as referring to slaves alone, and then as a matter of commerce; and it strengthens this idea, that Congress has never since attempted to extend this clause to any other persons, while the States have been in the constant habit of prohibiting the introduction of paupers, convicts, free blacks, and persons sick with contagious diseases no less than slaves; and this from neighboring States as well as from abroad.

There was no occasion for that express grant, or rather recognition, of the power to forbid the entry of slaves by the general government, if Congress could, by other clauses of the Constitution, for what seemed to it good cause, forbid the entry of everybody, as of aliens generally; and if Congress could *not do [*544 this generally, it is a decisive argument that the State might do it, as the power must exist somewhere in every independent country.

Again, if the States had not such power under the Constitution, at least concurrently, by what authority did most of them forbid the importation of slaves from abroad into their limits between 1789 and 1808? Congress has no power to transfer such rights to States. And how came Congress to recognize their right to do it virtually by the first article and ninth section, and also by the Act of 1803? It was because the States originally had it as sovereign States, and had never parted with it exclusively to Congress. This court, in Groves v. Slaughter, 15 Peters, 511, is generally understood as sustaining the right of States since 1808, no less than before, to prohibit the bringing into their limits of slaves for sale, even from other States, no less than from foreign countries.

From the very nature of State sovereignty over what is not granted to Congress, and the

power of prohibition, either as to persons or things, except slaves after the year 1808, not being anywhere conferred on, or recognized as in, the general government, no good reason seems to exist against the present exercise of it by the States, unless where it may clearly conflict with other clauses in the Constitution. In fact, every slave State in the Union, long before 1808, is believed to have prohibited the further importation of slaves into her territories from abroad (Libby's case, 1 Wood & M. 235; Butler v. Hopper, 1 Wash. C. C. 499); and several, as before stated, have since prohibited virtually the import of them from contiguous States. Among them may be named Kentucky, Missouri, and Alabama, as well as Mississippi, using, for instance, as in the constitution of the last, such language as the following: "The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." See Constitutions of the States, and 15 Peters, 500.

Coming by land or sea to be sold, slaves are equally articles of commerce, and thus bringing them in is an "importation or migration of persons;" and if the power over that is now exclusive in Congress, more than half the States in the Union have violated it. If a State can do this as to slaves from abroad or a contiguous State, why not, as has often been the case, do it in respect to any other person deemed dangerous or hostile to the stability and prosperity of her institutions? They can, because they act on these persons when within their limits, and for objects not commercial, and doing this is not disturbing the voyage, which 545*] brings them in as passengers, nor *taxing the instrument used in it, as the vessel, nor even the master and crew, for acts done abroad, or anything without her own limits. The power of the State in prohibiting rests on a sovereign right to regulate who shall be her inhabitants—a right more vital than that to regulate commerce by the general government, and which, as independent or concurrent, the latter has not disturbed, and should not disturb. 15 Peters, 507, 508.

But the final objection made to the collection of this money by a State is a leading and difficult one. It consists in this view, that, though called either a police regulation, or a municipal condition to admission into a State, or a tax on an alien visitor, it is in substance and in truth a regulation of foreign commerce, and, the power to make that being exclusively vested in Congress, no State can properly exercise it.

If both the points involved in this position could be sustained, this proceeding of the State might be obliged to yield. But there are two answers to it. One of them is, that this statute is not a regulation of commerce; and the other is, that the power to regulate foreign commerce is not made exclusive in Congress.

As to the first, this statute does not eo nomine undertake "to regulate commerce," and its design, motive, and object were entirely different.

At the formation of the Constitution, the power to regulate commerce attracted but little attention, compared with that to impose duties on imports and tonnage; and this last had caused so much difficulty, both at home and abroad, that it was expressly and entirely taken away from the States, but the former was not attempted to be. The former, too, occupies scarce a page in the Federalist, while the latter engrosses several numbers. A like disparity existed in the debates in the convention, and in the early legislation of Congress. Nor did the former receive much notice of the profession in construing the Constitution till after a quarter of a century; and then, though considered in the case of Gibbons v. Ogden, 9 Wheaton, 1, as a power clearly conferred on Congress, and to be sustained on all appropriate matters, yet it does not appear to have been held that nothing connected in any degree with commerce, or resembling it, could be regulated by State legislation; but only that this last must not be so exercised as to conflict directly with an existing act of Congress. See the text, and especially the mandate in 9 Wheat. 239, 240. On the contrary, many subjects of legislation are of such a doubtful class, and even of such an amphibious character, that one person would arrange and define them as matters of police, *another as matters of taxation, and [*546 another as matter of commerce. But all familiar with these topics must know, that laws on these by States for local purposes, and to operate only within State limits, are not usually intended, and should not be considered, as laws "to regulate commerce." They are made entirely diverso intuitu. Hence, much connected with the local power of taxation, and with the police of the States as to paupers, quarantine laws, the introduction of criminals or dangerous persons, or of obscene and immoral prints and books, or of destructive poisons and liquors, belongs to the States at home. It varies with their different home policies and habits, and is not either in its locality or operation a matter of exterior policy, though at times connected with, or resulting from, foreign commerce, and over which, within their own borders, the States have never acted as if they had parted with the power, and never could with so much advantage to their people as to retain it among themselves. 9 Wheaton, 203. Its interests and influences are nearer to each State, are often peculiar to each, better understood by and for each, and, if prudently watched over, will never involve them in conflicts with the general government or with foreign nations.

The regulation and support of paupers and convicts, as well as their introduction into a State through foreign intercourse, by vessels, are matters of this character. New York v. Miln, 11 Peters, 141; License Cases, 5 Howard; Baldwin's Views, 184. Some States are much exposed to large burdens and fatal diseases and moral pollution from this source, while others are almost entirely exempt. Some, therefore, need no legislation, State or national, while others do and must protect themselves when Congress cannot or will not. This matter, for instance, may be vital to Massachusetts, New York, Louisiana, or Maryland; but it is a subject of indifference to a large portion of the rest of the Union, not much resorted to from abroad; and this circumstance indicates, not only why those first named States, as States, should, by local legislation, protect themselves from supposed evils from it where deemed necessary or expedient, but that it is not one of those incidents to our foreign commerce in most of the Union which, like duties, or imposts, or taxes on tonnage, require a uniform and

universal rule to be applied by the general government.

A uniform rule by Congress not being needed on this particular point, nor being just, is a strong proof that it was not intended Congress should exercise power over it; especially when paupers, or aliens likely to become paupers, enter a State that has not room or business for them, but they merely pass through to other places, the tax would not be needed to 547*] *support them or help to exclude them; and hence such a State would not be likely to impose one for those purposes. But considering the power to be in Congress, and some States needing legislation, and that being required to be uniform, if Congress were to impose a tax for such purposes, and pay a ratable proportion of it over to such a State, it would be unjust. If, to avoid this, Congress were to collect such a tax, and itself undertake to support foreign paupers out of it, Congress would transcend the powers granted to her, as none extend to the maintenance of paupers, and it might as well repair roads for local use and make laws to settle intestate estates, or, at least, estates of foreigners. And if it can do this because passengers are aliens and connected with foreign commerce, and, this power being exclusive in it, State taxes on them are therefore void, it must follow that State laws are void also in respect to foreign bills of exchange, a great instrument of foreign commerce, and in respect to bankrupt laws, another topic connected with foreign commerce—neither of which, but directly the reverse, is the law.

"To regulate" is to prescribe rules, to control. But the State by this statute prescribes no rules for the "commerce with foreign nations." It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter, one in which she, as a State, has the deepest interest, and one arising after the voyage has ended, and not a matter of commerce or navigation, but rather of police, or municipal, or taxing supervision.

Again, it is believed that in Europe, in several instances of border states, so far from the introduction of foreigners who are paupers, or likely soon to be so, being regarded as a question of commerce, it is deemed one of police merely; and the expenses of alien paupers are made a subject of reclamation from the contiguous government to which they belong.

This view, showing that the regulation of this matter is not in substance more than in words to regulate foreign commerce, is strengthened by various other matters, which have never been regarded as regulating commerce, though nearer connected in some respects with that commerce than this is. But like this, they are all, when provided for by the States, regulated only within their own limits, and for themselves, and not without their limits, as of a foreign matter, nor for other States. Such are the laws of the States which have ever continued to regulate several matters in harbors and ports where foreign vessels enter and unload. Vanderbilt v. Adams, 7 Wendell, 349. The whole jurisdiction over them when within the headlands on the ocean, though filled 548*] with salt water and *strong tides, is in the States. We have under another head already shown that it exists there exclusively for most criminal prosecutions, and also for all civil proceedings to prosecute trespasses, and recover debts, of the owners of the ship or cargo, or of the crew or passengers, and whether aliens or citizens. And though the general government is allowed to collect its duties and enforce its specific requirements about them there, as it is authorized to do, and does, under acts of Congress, even on land (Gibbons v. Ogden, 9 Wheat. 1; United States v. Coombs, 12 Peters, 72), yet it can exercise no power there, criminal or civil, under implication, or under a construction that its authority to regulate commerce there is exclusive as to matters like these. No exclusive jurisdiction has been expressly ceded to it there, as in some forts, navy yards, and arsenals. Nor is any necessary. Not one of its officers, fiscal or judicial, can exert the smallest authority there in opposition to the State jurisdiction, and State laws, and State officers, but only in public vessels of war, or over forts and navy yards ceded, or as to duties on imports, and other cases, to the extent specifically bestowed on them by constitutional acts of Congress. And to regulate these local concerns in this way by the States is not to regulate foreign commerce, but home concerns. The design is local; the object a State object, and not a foreign or commercial one; and the exercise of the power is not conflicting with any existing actual enactment by Congress.

The States also have and can exercise there, not only their just territorial jurisdiction over persons and things, but make special officers and special laws for regulating there in their limits various matters of a local interest and bearing, in connection with all the commerce, foreign as well as domestic, which is there gathered. They appoint and pay harbor masters, and officers to regulate the deposit of ballast, and anchorage of vessels (7 Wendell, 349), and the building of wharves; and are often at great expense in removing obstructions. 1 Bl. Com. by Tucker, 249.

These State officers have the power to direct where vessels shall anchor, and the precautions to be used against fires on board; and all State laws in regard to such matters must doubtless continue in force till conflicting with some express legislation by Congress. 1 Bl. Com. by Tucker, 252. I allude to these with the greater particularity, because they are so directly connected with foreign commerce, and are not justified more, perhaps, under police, or sanatory, or moral considerations, than under the general principle of concurrent authority in the States on many matters granted to Congress—*taking care not to attempt to regulate [*549 the foreign commerce, and not to conflict directly and materially with any provision actually made by Congress—nor to do it in a case where the grant is accompanied by an express prohibition to the States, or is in its nature and character such as to imply clearly a total prohibition to the States of every exercise of power connected with it. To remove doubts as to the design to have the power of the States remain to legislate on such matters within their own limits, the old Confederation, in article ninth, where granting the power of regulating "the trade and managing all affairs with the

Indians, not members of any of the States," provided that "the legislative right of any State, within its own limits, be not infringed or violated." The same end was meant to be effected in the new Constitution, though in a different way; and this was, by not granting any power to Congress over the internal commerce, or police, or municipal affairs of the States, and declaring expressly, in the tenth amendment, that all powers not so granted were reserved to the people of the States.

It follows from what has been said, that this statute of Massachusetts, if regarded as a police measure, or a municipal regulation as to residents or visitors within its borders, or as a tax or any local provision for her own affairs, ought not to be considered as a regulation of commerce; but it is one of those other measures still authorized in the States, and still useful and appropriate to them. Such measures, too, are usually not conflicting with that commerce, but adopted entirely diverso intuitu, and so operating.

Conceding, then, that the power to regulate foreign commerce may include the regulation of the vessel as well as the cargo, and the manner of using the vessel in that commerce, yet the statute of Massachusetts does neither. It merely affects the master or passengers after their arrival, and for some further act than proposed to be done. And though vessels are instruments of commerce, passengers are not. And though regulating the mode of carrying them on the ocean may be to regulate commerce and navigation, yet to tax them after their arrival here is not. Indeed, the regulation of any thing is not naturally or generally to tax it, as that usually depends on another power. It has been well held in this court, that under the Constitution the taxing of imports is not a regulation of commerce, nor to be sustained under that grant, but under the grant as to taxation. Gibbons v. Ogden, 9 Wheat. 201. Duties may, to be sure, be imposed at times to regulate commerce, but oftener are imposed with a view to revenue; and therefore, under that head, duties as taxes were prohibited to the States. 9 Wheat. 202, 203.

550*] *It is a mistaken view to say, that the power of a State to exclude slaves, or free blacks, or convicts, or paupers, or to make pecuniary terms for their admission, may be one not conflicting with commerce, while the same power, if applied to alien passengers coming in vessels, does conflict. Slaves now excepted, though once not entirely, they are all equally and frequently passengers, and all oftener come in by water in the business and channels of ocean commerce than by land. But if the transit of persons coming into the States as passengers, by water, is a branch of commerce, so is their coming in by land; and this, whether from other nations on our land frontier, or from other States. And if Mississippi and Ohio can rightfully impose prohibitions, taxes, or any terms to such coming by land or water from other States, so may Massachusetts and New York, if thus coming from foreign nations by water. Congress, also, has like power to regulate commerce between the States, as between this country, and other nations, and if persons coming in by water as passengers belong to the subject of commerce and navigation on the Atlantic, so do they on the Lakes and large rivers; and if excluding or requiring terms of them in one place interferes with commerce, so it does in the other.

Again, if any decisive indication, independent of general principles, exists as to which government shall exercise the taxing power in respect to this support of paupers, it is that the States, rather than the general government, shall exercise it (9 Wheat. 206, 216); and exercise it as such a power, and not, by a forced construction, as a power "to regulate commerce." The States have always continued to exercise the various powers of local taxation and police, and not Congress; and have maintained all paupers. And this, though the general authority to regulate commerce, no less than to lay taxes, was granted to Congress. But police powers and powers over the internal commerce and municipal affairs of States were not granted away; and under them, and the general power of taxation, States continued to control this subject, and not under the power to regulate commerce. Nor did Congress, though possessing this last power, ever attempt to interfere, as if to do so was a branch of that power or justifiable under it, because in terms using language connected with commerce. Thus, in the Kentucky constitution, and substantially in several others, it is provided that the Legislature "shall have full power to prevent slaves from being brought into this State as merchandise," and Congress sanctioned that constitution, and the rest, with such provisions in them.

These affairs are a part of the domestic economy of States, *belong to their interior [*551 policy, and operate on matters affecting the fireside, the hearth, and the altar. The States have no foreign relations, and need none, as to this. 1 Bl. Com. by Tucker, App. 249.

The fair exercise of such powers rightfully belonging to a State, though connected often with foreign commerce, and indirectly or slightly affecting it, cannot therefore be considered in any point of view, hostile, by their intent or origin, as regulations of such commerce. See in point, Gibbons v. Ogden, 9 Wheat. 203; 11 Peters, 102.

In this view, it is immaterial whether this tax is imposed on the passenger while in the ship, in port, or when he touches the wharf, or reaches his hotel. All these places, being within the territory, are equally within the jurisdiction of the state for municipal purposes such as these, and not with a view to regulate foreign commerce; it being conceded that a tax may be imposed on a passenger after quitting the vessel and on the land, why may it not before, when he is then within the limits of the State? In either instance, the tax has no concern with the foreign voyage, and does not regulate the foreign commerce; whereas, if otherwise, it might be as invalid when imposed on land as on water.

Much of the difficulty in this case arises, I apprehend, from a misconception, as if this tax was imposed on the passenger at sea and before within the territorial limits of the State. But this, as before suggested, is an entire misapprehension of the extent of those limits, or of the words and meaning of the law.

If, then, as is argued, intercourse by merchants in person, and by officers in their vessels, boats, and wagons, is a part of commerce,

and the carrying of passengers is also a branch of navigation or commerce, still the taxing of these after the arrival in port, though Congress there has power to collect its duties as it has on land, is not vested at all in Congress; or, if at all, not exclusively.

Who can point to the cession to the United States of the jurisdiction, by Massachusetts or New York, of their own ports and harbors for purposes of taxation, or any other local and municipal purpose?

So far from interfering at all here with the foreign voyage, the State power begins when that ends and the vessel has entered the jurisdictional limits of the State. Her laws reach the consequences and results of foreign commerce, rather than the commerce itself. They touch not the tonnage of the vessel, nor her merchandise, nor the baggage or tools of the aliens; nor do they forbid the vessels carrying 552*] passengers. *But as a condition to their landing and remaining within the jurisdiction of the State, enough is required by way of condition or terms for that privilege, and the risk of their becoming chargeable, when aliens (though not chargeable at the time), to cover in some degree the expenses happening under such contingency. This has nothing to do with the regulation of commerce itself—the right to carry passengers to and fro over the Atlantic Ocean—but merely with their inhabitancy or residence within a State so as to be entitled to its charity, its privileges, and protection. Such laws do not conflict directly with any provision by the general government as to foreign commerce, because none has been made on this point, and they are not in clear collision with any made by that government on any other point. When, as here, they purport to be for a different purpose from touching the concerns of the general government—when they are, as here, adapted to another local and legitimate object—it is unjust to a sovereign State, and derogatory to the character of her people and Legislature, to impute a sinister and illegitimate design to them concerning foreign commerce, different from that avowed, and from that which the amount of the tax and the evil to be guarded against clearly indicate as the true design. Hence, as before remarked, Mr. Justice Johnson, in the same opinion which was cited by the original defendants, says the purpose is the test; and if that be different, and does not clash, the law is not unconstitutional.

So Chief Justice Marshall, in 9 Wheat. 204, says, that Congress for one purpose, and a State for another, may use like means, and both be vindicated. And though Congress obtains its power from a special grant, like that of the power "to regulate commerce," the State may obtain it from a reserved power over internal commerce or over its police. Hence, while Congress regulates the number of passengers to the size of the vessel, as a matter of foreign commerce, and may exempt their baggage and tools from duties as a matter of imposts on imports, yet this is not inconsistent with the power of a State, after passengers arrive within her limits, to impose terms on their landing, with a view to benefit her pauper police, or her fiscal resources, or her municipal safety and welfare. And the two powers, thus exercised separately by the two governments, *may, as Mr. Justice Johnson says, "be perfectly distinct."* So, in the language of Chief Justice Marshall, "if executed by the same means," "this does not prove that the powers themselves are identical."

The measures of the general government amount to a regulation of the traffic, or trade, or business, of carrying passengers, and of the *imposts on imports; but those of the [*553 States amount to neither, and merely affect the passengers or master of the vessel after their arrival within the limits of a State, and for State purposes, State security, and State policy.

As we have before explained, then, if granting that the bringing of passengers is a great branch of the business of navigation, and that to regulate commerce is to regulate navigation, yet this statute of Massachusetts neither regulates that navigation employed in carrying passengers, nor the passengers themselves, either while abroad in foreign ports, or while on the Atlantic Ocean, but merely taxes them, or imposes conditions on them, after within the State. These things are done, as Mr. Justice Johnson said in another case, "with a distinct view." And it is no objection that they "act on the same subject" (9 Wheat. 235); or, in the words of Chief Justice Marshall, "although the means used in their execution may sometimes approach each other so nearly as to be confounded." p. 204. But where any doubt arises, it should operate against the uncertain and loose, or what the late Chief Justice called "questionable power to regulate commerce" (9 Wheat. 202), rather than the more fixed and distinct police or taxing power.

In cases like this, if, amidst the great complexity of human affairs, and in the shadowy line between the two governments over the same people, it is impossible for their mutual rights and powers not to infringe occasionally upon each other, or cross a little the dividing line, it constitutes no cause for denouncing the acts on either side as being exercised under the same power or for the same purpose, and therefore unconstitutional and void. When, as is seldom likely, their laws come in direct and material collision, both being in the exercise of distinct powers, which belong to them, it is wisely provided, by the Constitution itself, and consequently by the States and the people themselves, as they framed it, that the States, being the granting power, must recede. 9 Wheat. 203; License Cases, 5 Howard; United States v. New Bedford Bridge, 1 Wood. & M. 423. Here we see no such collision.

There are other cases of seeming opposition which are reconcilable, and not conflicting, as to the powers exercised both by the States and the general government, but for different purposes. Thus hides may be imported under the acts of Congress taxing imports and regulating commerce; but this does not deprive a State of the right, in guarding the public health, to have them destroyed if putrefied, whether before they reach the land or after. So as to the import of gunpowder by the authority of one government, and the prohibition *by [*554 the other, for the public safety, to keep it in large quantities. 4 Metcalf, 294. Neither of these acts by the State attempts to interfere with the commerce abroad, but after its arrival here, and for other purposes, local and sanatory, or municipal.

In short, it has been deliberately held by this court, that the laying a duty on imports, if this was of that character, is an exercise of the taxing power, and not of that to regulate commerce. Gibbons v. Ogden, 9 Wheat. 201, by Chief Justice Marshall. And if, in Brown v. Maryland, 12 Wheat. 447, the tax or duty imposed there can be considered as held to violate both, it was because it was not only a tax on imports, but provided for the treatment of goods themselves, or regulated them as imported in foreign commerce, and while in bulk.

But if the power exercised in this law by Massachusetts could, by a forced construction, be tortured into a regulation of foreign commerce, the next requisite to make the law void is not believed to exist in the fact that the States do not retain some concurrent or subordinate powers, such as were here exercised, though connected in certain respects with foreign commerce. Beside the reasons already assigned for this opinion, it is not opposed to either the language or the spirit of the Constitution in connection with this particular grant. Accompanying it are no exclusive words, nor is the further action of the States, or anything concerning commerce, expressly forbidden in any other way in the Constitution. But both of these are done in several other cases, such as "no State shall coin money," or no State "engage in war," and these are ordinary modes adopted in the Constitution to indicate that a power granted is exclusive, when it was meant to be so.

If this reasoning be not correct, why was express prohibition to the States used on any subject where authority was granted to Congress? The only other mode to ascertain whether a power thus granted is exclusive "is to look at the nature of each grant, and if that does not clearly show the power to be exclusive, not to hold it to be so." We have seen that was the rule laid down by one of the makers and great expounders of the instrument. Federalist, No. 82; see, also, 14 Peters, 575.

It held out this as an inducement to the States to adopt the Constitution, and was urged by all the logic and eloquence of Hamilton. It was, that a grant of power to Congress, so far from being ipso facto exclusive, never ousted the power of the States, previously existing, unless "where an exclusive authority is in express terms granted to the Union, or where a particular authority is granted to the Union and the exercise 555*] *of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible."

This rule has been recognized in various decisions on constitutional questions by many of the judges of this court. 2 Cranch, 397; 3 Wheat. 386; 5 Wheat. 49; Wilson v. Black Bird Creek Marsh Company, 2 Peters, 245; Prigg v. Pennsylvania, 16 Peters, 627, 655, 664; New York v. Miln, 11 Peters, 103, 132; Groves v. Slaughter, 15 Peters, 509; Holmes v. Jennison, 14 Peters, 579. So by this court itself in Sturges v. Crowninshield, 4 Wheat. 193. And also by other authorities entitled to much respect. 4 Elliot's Deb. 567; 3 Jefferson's Life, 425–429; 3 Serg. & Rawle, 79; Peck's Trial, 86, 87, 291–293, 329, 404, 434, 435; Calder v. Bull, 3 Dall. 386; 1 Kent's Com. 364; 9 Johns. 568.

In other cases it is apparently contravened. 9 Wheat. 209; 15 Peters, 504, by Mr. Justice McLean, and 511, by Mr. Justice Baldwin; Prigg v. Pennsylvania, 16 Peters, 543; New York v. Miln, 11 Peters, 158, by Mr. Justice Story; The Chusan, 2 Story, 465; Golden v. Prince, 3 Wash. C. C. 325.

But this is often in appearance only, and not in reality. It is not a difference as to what should be the true rule, but in deciding what cases fall within it, and especially the branch of it as to what is exclusive by implication and reasoning from the nature of the particular grant or case; or in the words of Hamilton, "where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible."

Thus, in the celebrated case of Sturges v. Crowninshield, the rule itself is laid down in the same way substantially as in the Federalist, namely, that the power is to be taken from the State only when expressly forbidden, or where "the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress." 4 Wheat. 122, 193, by Chief Justice Marshall; Prigg v. Commonwealth of Pennsylvania, 16 Peters, 626, by Chief Justice Taney, and 650, by Mr. Justice Daniel.

And Chief Justice Marshall on another occasion considered this to be the true rule. That was in the case of Wilson v. Black Bird Creek Marsh Company, 2 Peters, 245, though a commercial question. And Judge Story did the same in Houston v. Moore, 5 Wheat. 49,—a militia question. So, many of the other grants in this same section of the Constitution, under like forms of expression, have been virtually held not to be exclusive; such as that over weights and measures; that over bankruptcy, (Sturges v. Crowninshield, 4 Wheat. 122); *that over taxation (see cases already [*556 cited); and to regulate the value of foreign coins; that to discipline the militia (Houston v. Moore, 5 Wheat. 1; 3 Story's Com. on Constitution, sec. 1202; 15 Peters, 499; Rawle on the Constitution, ch. 9, p. 111); that "to provide for the punishment of counterfeiting coin" (Fox v. State of Ohio, 5 How. 410); and robbing the mail when punished as highway robbery (5 Wheat. 34). Why, then, hold this to be otherwise than concurrent?

There are still other grants, in language like this, which never have been considered exclusive. Even the power to pass uniform naturalization laws was once considered by this court as not exclusive (Collet v. Collet, 2 Dallas, 296); and though doubt has been flung on this since by the United States v. Villato, 2 Dall. 372, Chirac v. Chirac, 2 Wheat. 269, and by some of the court in 5 Howard, 585, and Golden v. Prince, 3 Wash. C. C. 314; and though these doubts may be well founded unless the State naturalization be for local purposes only in the State, as intimated in Collet v. Collet, and more favorable than the law of the United States, and not to give rights of citizenship out of the State (1 Bl. Com. by Tucker, App. 3, 4, 255, 296), which were the chief objections in 3 Wash. C. C. 314; yet this change of opinion does not impugn in prin-

ciple the ground for considering the local measure in their case as not conflicting with foreign commerce. The reasoning for a change there does not apply here.

So, it is well settled that no grant of power to Congress is exclusive, unless expressly so, merely because it may be broad enough in terms to cover a power which clearly belongs to the State; e. g., police, quarantine, and license laws. They may relate to a like place and subject, and by means somewhat alike, yet, if the purposes of the State, and of Congress are different and legitimate for each, they are both permissible and neither exclusive. See cases before cited, 4 Wheat. 196; 3 Ell. Deb. 259; Baldwin's Views, 193, 194.

This very grant of the power "to regulate commerce" has also been held by this court not to prevent bridges or ferries by the States where waters are navigable. Wilson v. Black Bird Creek Marsh Company, 2 Peters, 245. So elsewhere. Corfield v. Coryell, 4 Wash. C. C. 371; 1 Wood. & M. 417, 424, 425; 9 Wheat. 203; see, also, Warren Bridge case, 11 Peters, 420; 17 Conn. 64; 8 Cowen, 146; 1 Pick. 180; 7 N. H. 35. And it has been considered elsewhere not to confer, though in navigable waters, any right or control over the fisheries therein, within the limits of a State. 4 Wash. C. C. 383; see, also Martin v. Waddell, 16 Peters, 367; 3 Wheat. 383; Angell on Tide Waters, 105. So 557*] the *States have been accustomed to legislate as to pilots, and Congress has concurred in it. But if the acts of the States alone as to pilots are not valid, on the ground of a concurrent power in them, it is difficult to see how Congress can transfer or cede to the States an authority on this which the Constitution has not given to them. Chief Justice Taney, in 5 Howard, 580. The real truth is, that, each possessing the power in some views and places, though not exclusively, Congress may declare it will not exercise the power on its part, either by an express law or by actual omission, and thus leave the field open to the States, on their reserved or concurrent rights, and not on any rights ceded to them by Congress. This reconciles the whole matter, and tends strongly to sustain the same view in the case now under consideration.

Nor has it ever been seriously contended, that, where Congress has chosen to legislate about commerce and navigation on our navigable waters as well as the sea coast, and to introduce guards against steam explosions and dangers in steam vessels, the law is not to be enforced as proper under the power to regulate commerce, and when not in conflict with any State legislation. This power in Congress is at least concurrent, and extends to commerce on rivers, and even on land, as well as at sea, when between our own States or with foreign countries. Whether this could be done as to vessels on waters entirely within any one State is a different question, which need not be here considered. See Waring v. Clark, 5 Howard, 441.

As a general rule of construction, then, the grants to Congress should never be considered as exclusive, unless so indicated expressly in the Constitution by the nature or place of the thing granted, or by the positive prohibition usually resorted to when that end is contemplated, as that "no State shall enter into any treaty," or "coin money," etc.; "no State shall, without the consent of Congress, lay any imposts or duties on imports," etc. Art. 1, sec. 9; United States v. New Bedford Bridge, 1 Wood. & M. 432.

It is also a strong argument, after using this express prohibition in some cases, that, when not used in others, as it is not here, it is not intended. Looking at the nature of this grant, likewise, in order to see if it can or should be entirely exclusive, we are forced to the same conclusions.

There is nothing in the nature of much which is here connected with foreign commerce that is in its character foreign, or appropriate for the action of a central and single government; on the contrary, there is matter which is entirely local—something which is seldom universal, or required to be *either gen- [*558 eral or uniform. For though Congress is empowered to regulate commerce, and ought to legislate for foreign commerce as for all its leading incidents and uniform and universal wants, yet "to regulate commerce" could never have been supposed by the framers of the Constitution to devolve on the general government the care of anything except exterior intercourse with foreign nations, with other States, and the Indian tribes. Everything else within State limits was, of course, to be left to each State, as two different in so large a country to be subjected to uniform rules, too multifarious for the attention of the central government, and too local for its cognizance over only general matters.

It was a difference between the States as to imposts or duties on imports and tonnage which embarrassed their intercourse with each other and with foreign nations, and which mainly led to the new Constitution, and not the mere regulation of commerce. 9 Wheat. 225. It was hence that the States in respect to duties and imposts were not left to exercise concurrent powers, and this was prevented, not by merely empowering Congress to tax imports, but by expressly forbidding the States to do the same; and this express prohibition would not have been resorted to, or been necessary, if a mere grant to Congress of the power to impose duties or to "regulate commerce" was alone deemed exclusive, and was to prevent taxation of imports by the States, or assessing money by them on any kind of business or traffic by navigation, such as carrying passengers.

Congress, in this way, resorted to a special prohibition where they meant one (as to taxes on imports); but where they did not, as, for example, in other taxation or regulating commerce, they introduced no such special prohibition, and left the States to act also on local and appropriate matters, though connected in some degree with commerce. Where, at any time, Congress had not legislated or preoccupied that particular field, the States acted freely and beneficially, yielding, however, to Congress when it does act on the same particular matter, unless both act for different and consistent objects. Gibbons v. Ogden, 9 Wheat. 204, 239. In this way much was meant to be left in the States, and much ever has been left, which partially related to commerce, and an expansive, and roving, and absorbing construc-

tion has since been attempted to be given to the grant of the power to regulate commerce, apparently never thought of at the time it was introduced into the Constitution. When I say much was left, and meant to be left, to the States in connection with commerce, I mean, concerning details and local matters, in-
559*] separable in *some respects from foreign commerce, but not belonging to its exterior or general character, and not conflicting with anything Congress has already done. Vanderbilt v. Adams, 7 Wendell, 349; New Bedford Bridge case, 1 Wood. & M. 429. Such is this very matter as to taxation to support foreign paupers, with many other police matters, quarantine, inspections, etc. See them enumerated in the License Cases, 5 Howard.

The provisions in the State laws in 1789, on these and kindred matters, did not therefore drop dead on the adoption of the Constitution, but only those relating to duties expressly prohibited to the States, and to foreign and general matters which were then acted on by Congress. Chief Justice Marshall, in Sturges v. Crowninshield, 4 Wheat. 195, considered "the power of the States as existing over such cases as the laws of the Union may not reach."

So far as reasons exist to make the exercise of the commercial power exclusive, as on matters of exterior, general, and uniform cognizance, the construction may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons, and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear, the exclusiveness should halt. In such case, emphatically, cessante ratione, cessat et ipsa lex.

It nowhere seems to have been settled that this power is exclusive in Congress, so that the States can enact no laws on any branch of the subject, whether conflicting or not with any acts of Congress. But, on the contrary, the majority of the court in the License Cases, 5 Howard, 504, appear to have held that it is not exclusive as to several matters connected in some degree with commerce. The case of New York v. Miln, 11 Peters, 141, seems chiefly to rest on a like principle, and likewise to hold that measures of the character now under consideration are not regulations of commerce.

Indeed, besides these cases, and on this very subject of commerce, a construction has at times been placed, that it is not exclusive in all respects, as will soon be shown, and if truly placed, it is not competent to hold that the State legislation on such incidental, subordinate, and local matters is utterly void when it does not conflict with some actual legislation by Congress. For the silence of Congress, which some seem to regard as more formidable than its action, is, whether in full or in part, to be respected and obeyed only where its power is exclusive, and the States are deprived of all authority over the matter. The power must first be shown to be exclusive before any inference can be drawn that the silence of Congress
560*] *speaks, and a different course of reasoning begs the question attempted to be proved. In other cases, when the power of Congress is not exclusive and that of the States is concurrent, the silence of Congress to legislate on any mere local or subordinate matter within the limits of a State, though connected in some respects with foreign commerce, is rather an invitation for the States to legislate upon it—is rather leaving it to them for the present, and assenting to their action in the matter—than a circumstance nullifying and destroying every useful and ameliorating provision made by them.

Such, in my view, is the true rule in respect to the commercial grant of power over matters not yet regulated by Congress, and which are obviously local. In the case of Wilson v. The Black Bird Creek Marsh Co., Chief Justice Marshall not only treated this as the true rule generally, but held it applicable to the grant to Congress of the power "to regulate commerce," and that this grant was not exclusive nor prohibitory on the action of the States, except so far as it was actually exercised by Congress, and thus came in conflict with the laws of the States. These are some of his words: "The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States, a power which has not been so exercised as to affect the question." 2 Peters, 252.

The Chief Justice in another case held that a power being vested in Congress was not enough to bar State action entirely, and that it did not forbid by silence as much as by action. He says: "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States." Sturgess v. Crowninshield, 4 Wheaton, 195, 196. And in 16 Peters, 610, Justice Story admits "that no uniform rule of interpretation can be applied to it [the Constitution], which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses."

Hence, if the power "to regulate commerce" be regarded by us as exclusive, so far as respects its operations abroad, or without the limits of the country, because the nature of the grant requires it to be exclusive there, and not exclusive so far as regards matters consequent on it which are within the limits of a State, and not expressly prohibited to it nor conflicting with anything done by Congress, because the nature of the grant does not require it to be so there, we exercise *then what ap- [*561
pears to be the spirit of a wise conciliation, and are able to reconcile several opinions elsewhere expressed, some as to the concurrent and some as to the exclusive character of the power "to regulate commerce." It may thus be exclusive as to some matters and not as to others, and everything can in that aspect be reconciled and harmonious, and accord, as I have before explained, with the nature and reason of each case, the only constitutional limits where no express restrictions are imposed. I am unable to see any other practical mode of administering the complicated, and sometimes conflicting, relations of the federal and State governments, but on a rule like this. And thus deciding the cases as they arise under it, according to the nature and character of each case and each grant, some indicating one to be

exclusive, and some indicating another not to be exclusive; and this, also, at times, as to different kinds of exercise of power under one and the same grant. See Justice Johnson, 9 Wheat. 235–239. There is another view of this question which leads to like results. If the opposite opinions mean only that the States cannot, after express grants to the general government, legislate on them for and in behalf of the general government, and not simply for themselves in local matters—cannot legislate for other States without their own limits, extra territorium, or as to general uniformity, general conduct, or the subject matter over the whole country, like naturalization and bankruptcy—then there is no difference between the spirit of those opinions and my own. But if they are construed to mean, that after such a grant, with no express prohibition on a State to act for itself alone on the matter, and none implied from their relations to the general government and the nature of the subject, a State cannot make such regulations and laws for itself, and its own people, and local necessities, as do not violate any act of Congress in relation to the matter, I do not think they are supported either by sound principle or precedents.

Necessities for a different course have existed, and ever must exist, in the complex movements of a double set of legislators for one and the same people.

They may crowd against each other in their measures slightly and doubtingly, but that, as before shown, is not sufficient to annul and override those of the States, as there must be for that disagreeable consequence a direct conflict, a plain incompatibility. 3 Stor. Com. on Const. 434; New Bedford Bridge case, 1 Wood. & M. 417, 418; 9 Wheaton, 238.

This circumstance shows, also, that the argument to avoid State legislation is not sufficient 562*] when it discovers some different *spirit or policy in the general measures of the states from that in the general government. The States have a right to differ in opinion—some are very likely often to differ. But what clause in the Constitution makes such an instance of independence a nullity, or makes a different object an illegitimate one? To be a nullity, it must oppose what has been actually done or prescribed by Congress, and in a case where it has no reserved power to act differently from Congress. We have already seen that an indirect reduction of the revenue of the general government by the license laws, when passed under a legitimate power, and with a different legitimate view, did not render them unconstitutional, nor does this, under like circumstances, though it may indirectly operate in some measure against emigration.

If it did, a law by a State to favor the consumption of its own products would be pronounced void, and so would be a high tax by a State on wharves or stores, as all these would somewhat embarrass and render more expensive the business connected with foreign commerce. So this condition imposed on passengers after their arrival might in some degre affect the business and commerce of carrying them to that State, when the alien passengers are taxed before they are permitted to land.

There are two classes of grants to which this rule now under consideration is applicable, and the force of it will be more striking when they are examined separately. One includes grants where Congress has acted, and continues to act, in relation to them; and the other, where it has never acted, or, if it has once acted, has ceased to do so.

Now, the vindication for the States to act in the last class is, that, unless each State is considered authorized still to legislate for itself, the subject matter will be without any regulation whatever, and a lawless condition of things will exist within the heart of the community, and on a matter vital to its interests. Such is now the case as to weights and measures, Congress never having legislated to produce uniformity concerning them, though the power is expressly granted to it in the Constitution.

Now, on the construction that such a grant of power is exclusive, and, whether exercised or not, it is unconstitutional for any State to legislate on the subject for itself; and, moreover, that Congress does in truth regulate by its silence as much as by its action, and when doing nothing about it virtually enacts that nothing shall be done about it by any of the States, it will follow that not only all the legislation by the States on weights and measures since 1789 is illegal and void, but all their legislation *now existing on matters of [*563 bankruptcy, and in respect to the disciplining of the militia, and imposing taxes on land, is also void. For the powers over all these are expressly ceded to Congress, and are not now regulated by any existing acts of Congress, though all except weights and measures once have been. The argument alluded to, if sound, would thus be strong, that Congress, having once acted on these and ceased to, means that nothing more shall be done.

On this exclusive principle, though the action of the States on them is not forbidden expressly in the Constitution, nor impliedly beyond what grows out of any express grant, all the States in the Union are disarmed from any action whatever on such matters, and all their laws on these topics, so essential to their domestic industry and trade, their public security and political existence by means of revenue, are to be considered null and void.

The catastrophe which would follow on such a construction has led this court, as heretofore explained, to hold that the States still possess a concurrent power to act on matters of bankruptcy, the discipline of the militia, taxation of land, and some subjects of commerce; and like considerations would undoubtedly lead them, when the cases arise, to hold, that, notwithstanding such grants, the laws of the States, not conflicting with any passed by the general government on many other such topics, must be considered valid. Indeed, it seems conceded by some of the members of the court in this case, that the States are, by some power co-ordinate or subordinate, rightfully legislating on weights and measures, pilots, bankruptcy, the militia, etc. But if they have not this power without any grant or license by Congress, they cannot have it by any such grant, because Congress is not empowered by the Constitution to grant away powers vested in it by the people and the States; and how can it

hereafter, by legislation, give any power to them over this subject if not having it now?

Again, in the other class of cases, where Congress has already legislated, and still legislates, some time elapsed before it passed laws on any subject, and years before it acted at all on some of them; and in almost the whole, its first legislation was only a beginning and in part, doing more and more from time to time, as experience and the exigencies of the country seemed to require. It is not necessary to repeat here several detailed illustrations and cases on this collected in the case of the United States v. New Bedford Bridge, 1 Wood. & M. 430. In the mean time, the States continued to exercise their accustomed powers, and have ever since done it on all matters not forbidden expressly in the Constitution, not exclusive in 564*] *their nature, and not conflicting with actual provisions in relation to them already made under the general government. 14 Peters, 594.

To show, further, that these grants of power are not always and necessarily exclusive, and that legislation on them by Congress to any extent is not as prohibitory on the States where it is silent as where it enacts, the States have not only continued to punish crimes which Congress could punish, but they have, in numerous instances, regulated matters connected, locally at least, with commerce abroad, and between the States, and with the Indians.

In so large a territory as the jurisdiction of the general government embraces, in so many and so diversified topics as come before it, and in the nature of its supervisory powers on certain subjects, requiring action only on what is general and foreign, and to produce uniformity merely as to that, it becomes almost inevitable that many local matters and details must be left to be regulated by some local authorities. Yet, as explained in the License Cases, like the by-laws of corporations, made by them and not the Legislature, they must not conflict with the general regulations or laws prescribed by the paramount power. But, so far from being exclusive, even while it is exercised, and much less while it is dormant or unexercised, the paramount power summons to its aid, in order to be effective, the contemporaneous and continued action of others. Thus not only moneyed corporations, but towns and cities, must make numerous by-laws in order to enforce the general provisions laid down by the legislation of the State. Thus, too, this court must make numerous rules to carry into effect the legislation of Congress in respect to it; and the War and the Navy departments must compile and enforce volumes of regulations of a like kind and for a like purpose, taking care, as all subordinate power in such cases must, not to violate any general law prescribed on the subject. See 1 Wood. & M. 423.

The condition of this whole country, when colonies of England, furnishes another illustration of the relation and character of such powers. The parent government at home was sovereign, and provided general regulations, either in acts of Parliament or charters, but still left the several colonies (and surely our *States* have as much power as they) to legis*late as to details*, and introduce any regulations *suited to their own* condition and interests, not conflicting with the general provisions made by the paramount power at home. 1 Bl. Com. by Tucker, App. 109, 110.

Indeed, what becomes of the whole doctrine of concurrent powers on this hypothesis of exclusiveness in all mere grants, *and of [*565 the usage that the States may act in such concurrent cases or local matters till their measures conflict directly with those of Congress? Ibid. 179. Where is the line of distinction between a measure by the State which is void, whether it conflict or not, and one which is not void till it comes into actual collision with some law passed by the general government? What becomes of the idea, that the power to regulate foreign commerce is exclusive, and Congress may prohibit the introduction of obscene prints under it, and yet the States may do the latter also, but touch nothing connected with commerce? Is not the introduction of these connected with it? Cannot the States, too, patronize science and the arts in various ways, though a like power is conferred on Congress by means of patents and copyrights? Livingston v. Van Ingen, 9 Johns. 572.

Nor do I understand the words of Mr. Justice Johnson, in the case of Gibbons v. Ogden, in the sense attributed to them by some. "The practice of our government," says he, "has been, on many subjects, to occupy so much only of the field open to them as they think the public interests require." 9 Wheat. 234. It is argued that this means to exclude State action, where Congress has not occupied the field, as well as where it has. Yet it seems plainly to be inferred, from other words connected, that he considers "the power of the States must be at an end so far as the United States have by their legislative act taken the subject under their immediate superintendence." This means the subject then under consideration. But where have they so taken the subject of the admission of alien passengers into States, and the terms of it, "under their immediate superintendence?" They may have regulated the manner of their coming here, but where their maintenance here when sick or poor, or likely to be poor? Where their taxation here?

They have regulated also their naturalization in this country, but not under the grant of the power "to regulate commerce," or impose imposts on imports; but, knowing it was not involved in either, a separate and express grant was wisely inserted in the Constitution to empower Congress to make uniform rules on this subject.

It will be seen, that, where Congress legislates about foreign commerce or passengers as connected with it, that legislation need not, and does not, forbid the States to legislate on other matters not conflicting. Thus all will harmonize, unless we interpolate, by mere construction, a prohibitory clause either in the law or in the Constitution. You may, if you please, call the power so exercised by Congress exclusive in one sense or *to one extent, [*566 but it is not in others. It may be considered as exclusive so far as it goes, and still leave the rest of the field concerning them open to the States. Thus the right to regulate the number of passengers in vessels from abroad in proportion to the tonnage has been exercised by Con-

gress, and may be deemed the use of a legitimate authority. 3 Statutes at Large, 448; 9 Wheat. 216. So has it been exercised to exempt their personal "baggage" and "tools" from imposts, not, as some seem to suppose, their goods or merchandise. 1 Statutes at Large, 661. But this statute of Massachusetts conflicts with neither. So Congress provides for uniform naturalization of aliens, but this statute does not interfere with that. So Congress does not forbid passengers to come from abroad; neither does this statute.

Again, Congress nowhere stipulates or enacts, or by the Constitution can do it, probably, as before suggested, that passengers shall not in their persons be taxed on their arrival within a State, nor terms be made as to their residence within them. Again, the objection to this view involves another apparent absurdity—that, though the regulation of commerce extends to passengers, it is not entirely exclusive in the general government if they come with yellow fever and the cholera, and that they are then subject to State control and its quarantine expenses and fees; but are not, if they come with what the State deems equally perilous. That is, if they endanger the health of the body, the power over them is not exclusive in Congress, but if they endanger only the police of the State, its pauper securities, and its economy, morals, and public peace, the power is exclusive in Congress, and goes to strip the State of all authority to resist the introduction of either convicts, slaves, paupers, or refugees. If these last only come in the tracks of commerce in vessels from abroad, and are enrolled as passengers, the States cannot touch them, but may seize on them at once if their bodies are diseased. It would be useful to have that clause in the Constitution pointed out which draws such a novel line of discrimination.

In holding this measure to be a regulation of commerce, and exclusive, and hence void, wherever the power of Congress over commerce extends, a most perilous principle is adopted in some other respects; for that power extends over the land as well as water, and to commerce among the States and with the Indian tribes, no less than to foreign commerce. See art. 1, sec. 8. And if it can abrogate a tax or terms imposed by States in harbors over persons there, it may do so whenever the power over commerce goes into the interior, and as to matters connected with it, and also between States.

567*] *On this reasoning, passengers there in vessels, boats, wagons, stages, or on horseback, are as much connected with commerce as if they come in by sea; and they may consist of paupers, slaves, or convicts, as well as of merchants or travellers for pleasure and personal improvement; and thus all the laws of Ohio, Mississippi, and many other States, either forbidding or taxing the entrance of slaves or liberated blacks, will be nullified, as well as those of almost every Atlantic State, excluding paupers coming in from without their limits.

Congress has sanctioned at least five constitutions of States exercising a power to exclude slaves, and the introduction of them as merchandise and for commerce. And how can this be reconciled by those who would reverse the judgments below, on the ground that the commercial power is exclusive in Congress, and not either concurrent in one view or independent in another, in some particulars, in the States.

Another consequence from the opposite doctrine is, that, if Congress by regulating commerce acts exclusively upon it, and can admit whom it pleases as passengers, independent of State wishes, it can force upon the States slaves or criminals, or political incendiaries of the most dangerous character. And furthermore, that it can do this only by admitting their personal baggage free, as doing that, it is argued here by some, shows the owner must come in free, and neither be excluded nor taxed by the State after within her limits.

This makes the owner of the personal baggage a mere incident or appurtenant to the baggage itself, and renders, by analogy, any legislation as to taxing property more important than taxing the person, and, indeed, overruling and governing the person as subordinate and inferior. So, if Congress by making baggage free exonerates passengers from a State tax, it exonerates all the officers and crews of vessels from State taxes; for their personal baggage is as free as that of passengers. They, too, are as directly connected with commerce as the passengers; and by a parity of reasoning, the absurdity follows, that, by admitting American vessels free of tonnage duties, the owners of them are also made free from State taxes.

Every person acquainted with the tariff of the general government knows that specially declaring a box or chest of apparel "free" does not exonerate anything else or any other article, much less can it any person, if taxed by a State law. On the contrary, all things not specially taxed, nor specially declared "free," have a duty imposed on them by Congress as non-enumerated articles, and so would passengers, if imports, and if Congress had a right to tax them. And if saying nothing about passengers would imply that they were free from *taxes of the United States, much more [*568 of the States, why is it necessary to declare in terms any article "free," when silence would make is so? The real truth rather is, that Congress has no right to tax alien friends, or exclude them, and hence the silence. This statute, then, contravenes no act of Congress on this matter of passengers.

And while all the legislation of Congress as to passengers operates on them at sea during the voyage, except imposts being forbidden on their baggage, which is solely within the jurisdiction of Congress, all the legislation of Massachusetts operates on them after their arrival in port, and without any attempt then to impose any duty on their baggage. The former legislation by Congress, regulating their number in proportion to the tonnage, is, as it should be, extra territorium; the latter, as it should be, infra territorium; and thus both are proper, and the jurisdiction over either is not exclusive of that exercised by the other, or conflicting materially with it.

Having considered the different general grounds which can be urged in support of this

statute, and the objections made in opposition to them, I shall proceed, before closing, to submit a few remarks on some miscellaneous topics relied on to impeach its provisions. One is a supposed conflict between this statute and some treaties of the general government.

I am aware that a tax or fee on alien passengers, if large, might possibly lead to collision with those foreign governments, such as Great Britain and Prussia, with whom we have treaties allowing free ingress and egress to our ports. See 8 Stat. at Large, 116, 228, 378. But neither of them complains in this instance, and I do not consider this law as conflicting with any such provisions in treaties, since none of them profess to exempt their people or their property from State taxation after their arrival here.

If such a stipulation were made by the general government, it would be difficult to maintain the doctrine, that, by an ordinary treaty, it has power to restrict the rights and powers of the several States any further that the States have by the Constitution authorized, and that this has ever been authorized. But it has not here been attempted; and these particular treaties are subject to the ordinary laws of the States, as well as of the general government, and enable the citizens of those countries merely to have free ingress and egress here for trade (see Treaty of 1794, art. 3; 8 Stat. at Large, 117), having no relation to their coming here as passengers to reside or for pleasure. Nor can they apply in the present case at all, as the record now stands, finding only that the master was a British subject or his vessel British, but not that his passengers belonged to Great 569*] Britain. *The Prussian Treaty does not appear to contemplate anything beyond the establishment of reciprocal duties, and a treatment in other respects like "the most favored nations." 8 Stat. at Large, 164.

And who ever thought that these treaties were meant to empower, or could in any moral or political view empower, Great Britain to ship her paupers to Massachusetts, or send her free blacks from the West Indies into the Southern States or into Ohio, in contravention of their local laws, or force on the States, so as to enjoy their protection and privileges, any persons from abroad deemed dangerous, such as her felon convicts and the refuse of her jails? Again, so far as regards the liberty of commerce secured to British subjects in Europe by the fourteenth article of the Treaty of 1794, it does not apply to those coming from the British Provinces in America, as did this vessel (8 Stat. at Large, 124), and by the eighteenth article of that treaty was to last only ten years. p. 125. And while it did last, it was expressly made "subject always, as to what respects this article, to the laws and statutes of the two countries respectively." p. 124.

Besides this, the whole of the Treaty of 1794, including the third article, probably was suspended by the war of 1812, and exists now only as modified in that of 1815, which gives to British subjects no higher rights than "other foreigners." Art. 1; 8 Stat. at Large, 228. The old Articles of Confederation contained a clause *which indicated* in a different form like views *as to what was* proper in treaties, and indicates a wise jealousy of power exercised in hostility to the policy of a State. That policy is never intended to be thwarted by any arrangements with foreign nations by reciprocal treaties, as they relate merely to the imposts on tonnage and cargoes by the national governments, requiring them to be equal, and do not concern the port and harbor fees or expenses imposed by the local authorities for local purposes. The best security that these fees and taxes will never be unreasonably high and injurious to foreigners is the tendency they would then have to drive trade to other ports or countries contiguous, where they might be lower.

The same right exists also in States to impose conditions on the selling of certain articles by foreigners and others within their limits, as a State may prefer to encourage its own products, or may deem the use of some foreign articles of bad influence in other respects. Grotius on the Rights of Peace and War, B. 2 ch. 2 sec. 20; License Cases, 5 Howard.

Nor can I see, as has been urged, any collision between this statute and the act of Congress to carry into effect our commercial arrangement *of 1830 with Great Britain. [*570 4 Stat. at Large, 419. The intention of that act does not in any respect seem to go beyond that of the treaties just referred to, and in some respects is to have matters stand as they did before. Each side imposed charges and duties. They existed in England and her colonies, as well as with us; but this arrangement sought only to have them not unequal nor prohibitory of trade, and not to discriminate against each other by general legislation. See 1 Commerce and Navigation, State Papers, 158; 4 Stat. at Large, 419.

A few remarks as to some objections urged against the large amount and the motive of this tax, and I have done.

If the payment was to be vindicated under the general taxing power alone, it is clear that the amount could not affect the question of the constitutionality of the tax. And if it was very high, considering its professed object "for the support of foreign paupers," and was applied in part to other objects, that is a matter within the discretion of the State, and if it proved oppressive, and thus diverted this kind of business to the ports of other States, it would, like all high taxes, react, and be likely in time to remedy in a great degree the evil. But viewed as a police measure, the amount of the payment and the application of it, may, in my view, have an important bearing.

Thus a State is authorized to impose duties on imports sufficient to defray the expenses of her inspection laws, but not an amount disproportionate to them, nor to apply the money thus collected to other purposes.

It would seem that the same rule would govern her assessments to enforce her quarantine laws, and it could hardly be tolerated, under the right to enforce them and demand sufficient to defray their charges, that they should be justified to collect enough more for other purposes, and thus apply the quarantine funds to make roads or maintain schools.

In such events in these cases, either this court would be obliged to declare void assessments which were clearly perverted and improperly

collected and applied, or Congress could direct the excess to be paid into the treasury of the general government. 3 Elliot's Deb. 291. Congress is in the Constitution especially empowered to revise and control the sums collected by the States to defray the expenses of their inspection laws. Art. 1, sec. 10.

A mere pretext in a law colorably for one object, but really for another, as in condemning lands for public purposes when the true object was different, though not to be presumed to be done by any sovereign State, must, if 571*] clearly proved, be difficult *to uphold. West River Bridge v. Dix, 6 Howard, 548. But here the amount of the tax, compared with the burden flung on the State by foreign paupers, does not look so much like a wish to prohibit entirely the entrance of alien passengers, and thus disclose a covert design, hostile to the policy of the general government, as like a wish to obtain enough to cover the expenses and trouble of maintaining such of them as, though not paupers, are likely to become so in the ordinary course of human events. This is a highly important consideration in judging whether the law throughout looked really to the subject of pauperism, and not to hostility towards emigration, nor, under the third section, to revenue from foreign commerce, independent of the pauper system. It is unjust to regard such provisions as intended to conflict with foreign commerce, when there is another and local matter which they profess to reach, and can and do honestly reach.

It is, therefore, too broad in some cases to say that the object and motive of the State in requiring the payment, or the amount demanded, is of no importance; because, though the great question is a question of power, yet the object and motive may bring it within some existing power, when a different object or motive would not. The different purpose in a State often shows that there is no collision or wrong, and justifies the measure. 4 Wheat. 196; 9 Wheat. 335; Baldwin's Views, 193.

So, as to the amount demanded, it might be sufficient only for a legitimate State object, and hence might be unconstitutional, as, for instance, to pay the expenses of inspection laws, when a much larger amount would not be permissible, if too much for the particular object deemed constitutional. But in this case, as no excess is shown on the record, a conclusive opinion on this point is unnecessary.

This construction of the Constitution, upholding concurrent laws by a State where doubts exist and it is fairly open for adoption, has much to commend it in this instance, as the States, which singly become feebler and weaker daily as their number and the whole Union increases, being now thirty to one, instead of thirteen to one, will not thus be rendered still feebler, and the central government, daily becoming more powerful and strong, will not thus be rendered still stronger. So the authority of the latter will not thus, by mere construction, be made to absorb and overwhelm the natural and appropriate rights of sovereign States, nor mislead them by silence. Leaving this matter also to each will not conflict with any existing ation of the general government, but promote and sustain the peaceful operations of both in their appropriate spheres.

*It will operate justly among the [*572 States, no less than between them and the general government, as it will leave each to adopt the course best suited to its peculiar condition, and not leave one helplessly borne down with expenses from foreign sources while others are entirely free, nor draw the general government, in order to remedy such inequalities, into a system of police and local legislation, over which their authority is doubtful, as well as their ability to provide so well for local wants as the local governments, and those immediately interested in beneficial results.

A course of harshness towards the States by the general government, or by any of its great departments—a course of prohibitions and nullifications as to their domestic policies in doubtful cases, and this by mere implied power—is a violation of sound principle, will alienate and justly offend, and tend ultimately, no less than disastrously, to dissolve the bands of that Union so useful and glorious to all concerned.

"Libertas ultima mundi,
Quo steterit, ferienda loco."

In conclusion, therefore, I think that, in point of law, the conduct of the State in imposing this condition or payment on alien passengers can be vindicated under its police rights to provide for the maintenance of paupers, and under its authority as a sovereign State to decide on what conditions or terms foreigners, not citizens of any of the United States, shall be allowed to enjoy its protection and privileges, and under its concurrent powers of taxation over everything but imports and tonnage. I think, too, that this power in the State is not taken away by the authority ceded to Congress, either to tax imports and tonnage, or to prohibit the importation of persons (usually limited to slaves), or to regulate commerce.

Orders.

Smith v. Turner.

This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and the Correction of Errors of the State of New York, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the statute law of New York, by which the health commissioner of the city of New York is declared entitled to demand and receive, from the master of every vessel from a foreign port that should arrive in the port of said city, the sum of one dollar for each steerage passenger brought in such vessel, is repugnant to the Constitution and laws of the United States, and therefore void. Whereupon, it is now here ordered *and ad- [*573 judged by this court, that the judgment of the said Court for the Trial of Impeachments and the Correction of Errors be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Court for the Trial of Impeachments and the Correction of Errors, in order that further proceedings may be had therein, in conformity to the aforesaid opinion and judgment of this court.

Norris v. City of Boston.

This cause came on to be heard on the transcript of the record of the Supreme Judicial

Court of Massachusetts, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the third section of the Act of the Legislature of the Commonwealth of Massachusetts of the 20th of April, 1837, entitled, "An Act relating to alien passengers," under which the money mentioned in the record and pleadings was demanded of the plaintiff in error, and paid by him, is repugnant to the Constitution and laws of the United States, and therefore void. Whereupon, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Judicial Court of Massachusetts be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Supreme Judicial Court, in order that further proceedings may be had therein in conformity to the aforesaid opinion and judgment of this court.

JOHN TYLER, who is a Citizen of Virginia, President of the United States, and Successor in office of Martin Van Buren, and Trustee for the Use of the Orphan Children provided for in the Nineteenth Article of the Treaty with the Choctaws, of September, 1830, Plaintiff in Error,

v.

JOHN H. HAND, John Huddleston, and Thomas G. Blewett, Defendants in Error.

Action of debt by President on bonds made for use of orphan children provided for, in treaty with Choctaw Indians—demurrer not sustained—form of—effect of.

A general demurrer by the defendant, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer, which is an objection for defects in form.

In this case, none of the reasons are valid as objections to a matter of form, but the court, nevertheless, will examine them as if brought forward to sustain a general demurrer.

Where bonds were given to the President of the United States, and his successors in office, for the use of the orphan children of certain Indians, and the declaration so averred, it was not a good cause of demurrer to allege that they were taken without authority of law. They were valid instruments, though voluntarily given and not prescribed by law; and as the demurrer admitted the facts stated in the declaration, the defendant was estopped from contesting the right of the obligee to sue.

574*] *So, also, it was not a valid reason to say, in support of the demurrer, that the bonds were given without consideration; and if there was any illegality in the transaction, it should have been pleaded in bar.

Where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff.

So, also, it is not a good ground for the defendant to say that the plaintiff has shown no title to the bonds. It is not a good objection to a matter of form or substance.

Nor was it a good ground of demurrer to say that the cestui que use was not named in the declaration. The demurrer admits that the recital of the use in the declaration was correct, and it was not necessary for the plaintiff to set out the individual uses, when the uses were general in the bonds.

THIS cause was brought up by writ of error from the District Court of the United States for the Northern District of Mississippi.

The circumstances were these:

By the Treaty of Dancing Rabbit Creek, of the 27th September, 1830, the Choctaw nation ceded to the United States the entire country they owned and possessed east of the Mississippi River. The nineteenth article, 7 Stat. at Large, 336, 337, allowing certain reservations to be made, by its sixth section provides as follows:

"Sixth. Likewise, children of the Choctaw nation, residing in the nation, who have neither father nor mother, a list of which, with satisfactory proof of parentage and orphanage, being filed with the agent in six months, to be forwarded to the War Department, shall be entitled to a quarter section of land, to be located under the direction of the President; and with his consent the same may be sold, and the proceeds applied to some beneficial purpose for the benefit of the said orphans."

The number of orphans entitled to the provision above recited was one hundred and thirty-four; and the lands having been selected, the same were sold in quarter-sections at public sale in 1838, by Mr. Aaron V. Brown, under the direction of President Van Buren, for a sum amounting to upwards of one hundred and thirty-five thousand dollars. The purchasers were entitled to a credit of two, four, and six years, were to give security for the payment of the purchase money, with interest, and no title was to be given until the whole amount of principal and interest was paid. Thomas G. Blewett became a purchaser of several pieces of the land, and, together with John H. Hand and John Huddleston, executed joint and several bonds to "Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830." The bonds bore the *following dates, and were for [*575 the following sums of money, viz.:

1838,	May	28,	$300	1838,	May	28,	$250
"	"	"	300	"	June	6,	300
"	"	"	300	"	"	"	300
"	"	"	300	"	"	"	350
"	"	"	600	"	"	"	450

The bonds were given as security for the payment of the interest upon certain notes for the principal, which last mentioned notes were recited in the above ten bonds.

In May, 1843, John Tyler, as President of the United States, brought an action of debt upon these bonds in the District Court for the Northern District of Mississippi, which exercised the jurisdiction of a circuit court.

The declaration contained a count for each separate bond, the first of which was as follows, viz.:

"John Tyler, who is a citizen of Virginia, President of the United States, and successor in office of Martin Van Buren, and trustee for the use of the orphan children provided for in the nineteenth article of the Treaty with the

Choctaws of September, 1830, by attorney, complains of Thomas G. Blewett, John Huddleston, and John H. Hand, citizens of the State of Mississippi, being in the custody of the marshal, etc., of a plea that they render unto him the sum of thirty-four hundred and fifty dollars, which to him they owe, and from him unjustly detain; for that, whereas, the said defendants, by the way and style of Thomas G. Blewett, John Huddleston, and J. H. Hand, heretofore, to wit, on the 28th day of May, A. D. 1838, at, to wit, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now here to the court shown, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, jointly and severally acknowledge themselves to be held and firmly bound to Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830, in the sum of three hundred dollars, to be paid to the said Martin Van Buren, President as aforesaid, and his successors in office, in good and lawful money of the United States; and the said plaintiff avers that he is President of the United States, and a successor in office of Martin Van Buren, which said writing obligatory was and is subject to a condition thereunder written, to wit, that whereas the said Thomas G. Blewett, on the 28th day of May, 1838, at a public sale of the Choctaw orphan lands, had and held in the town of 576*] Columbus, *became and was the purchaser of northwest quarter of section thirty-two, township twenty-three, range eight east, for which the said Thomas G. Blewett has executed his three several notes with Thomas McGee, John Huddleston and John H. Hand, his security, to Martin Van Buren, President of the United States, for the use of the Choctaw orphan children provided for in the nineteenth article of the Treaty with the Choctaws of September, 1830, to wit, one note dated the 28th day of May, 1838, and due the 28th day of May, 1840, for two hundred and fourteen dollars and twenty-six cents; one other note of same date and amount, due the 28th day of May, 1842; and one other note of the same date and amount, due the 28th day of May, 1844. All of said several bonds or notes, by the terms of said purchase, are to bear interest from their date at the rate of six per cent. per annum. Now, if said Thomas G. Blewett shall pay or cause to be paid interest at the rate of six per cent. per annum on said several notes at the expiration of each and every year from the date of the same, in good and lawful money of the United States, at the office of the Commissioner of Indian affairs, in Washington city, then this obligation to be void, otherwise to be good and binding, as by the said writing obligatory, and the condition thereof will more fully and at large appear.

"Nevertheless," etc. (setting out the breach).

To this declaration, the defendants filed the following demurrer, viz.:

"And said defendants, by attorney, come and defend the wrong and injury, when, etc., and say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the declaration and matter therein contained are insufficient in law for the plaintiff to maintain his aforesaid action thereof against them, and that they are not bound by law to answer the same, and this they are ready to verify; wherefore, they pray judgment, and that the plaintiff be barred from having or maintaining his aforesaid action thereof against them, and according to the statute they state and show the following causes of demurrer, viz.:

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit.

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same.

"3d. That the parties for whose use the suit is brought (who *by the laws of Mis- [*577 sissippi, are the real plaintiffs, and responsible for costs) are not named in the record.

"4th. That said bonds sued on were taken without authority of law, the said Martin Van Buren, President of the United States, having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office and not given by law.

"5th. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The plaintiffs joined in demurrer, and in December, 1844, the case was argued upon the demurrer, which was sustained by the court.

To review this judgment, a writ of error brought the case up to this court.

It was argued at the preceding term, and held under a curia advisare vult.

It was argued, on the part of the plaintiff in error, by Mr. Clifford, then Attorney-General, and on the part of the defendants in error, by Mr. Eaton and Mr. Foote, with whom were Mr. S. Adams and Mr. Bibb.

The Attorney-General, for the plaintiff in error, stated the facts in the case, and proceeded as follows:

For error it is assigned—

1st. That the suit was well brought in the name of John Tyler, a citizen of the State of Virginia.

2d. That the plaintiff, as the successor of President Van Buren, had title to the bonds sued on.

3d. That there was no necessity that the parties for whose use the suit was brought should be named in the record.

4th. That the bonds sued on were lawfully taken to Mr. Van Buren, as President, and his successors in office.

6th. That Mr. Van Buren had authority to dispose of the lands, and that there was no failure of consideration.

I. The declaration avers, that John Tyler, the plaintiff, is a citizen of the State of Virginia, President of the United States, and successor in office of Martin Van Buren. This is the usual mode of averring citizenship, and meets the requirements of the Constitution and the Judiciary Act on the subject.

578*] *II. The declaration avers that the bonds were taken payable to Martin Van Buren, President of the United States, and his successors in office. If Mr. Van Buren had any title to the bonds in question while President, and as President, then Mr. Tyler, as his successor, had the same title. The title was not in Mr. Van Buren individually, but in him as President. The bonds were executed to him as President of the United States, and his successors; and the suit is well brought in the name of Mr. Tyler, who was in office at the time it was commenced. No principle is better settled than the one which asserts that no suit could be commenced in the name of Mr. Van Buren after he had retired from the office of President, and of course it must be brought in the name of his successor, according to the terms of the bond. This is the law and the contract. The point is destitute of all merit, as it seems to me, and need not be further examined.

III. There is no law requiring a plaintiff who sues as trustee to name in the record the parties for whose use the suit is brought; and if there were, it could not apply to a case like the present. It is presumed the demurrer is based upon the thirtieth section of the Process Act of Mississippi, which falls far short of sustaining the position assumed by the defendants. It provides that, "if any suit or action shall be commenced in any court of record in this State, in the name of any person for the use and benefit of another, the same shall not abate by the death of the nominal plaintiff, but shall progress to final judgment, and execution may be awarded thereon in like manner as if brought in the name of the person for whose use or benefit such suit or action was instituted, who shall be liable for the costs of suit as in other cases." H. & H. Miss. Laws, 584.

The act nowhere makes any such requirement as is supposed by the demurrer. It authorizes the suit to progress, notwithstanding the death of the nominal plaintiff; and in such cases costs are allowed.

This action is therefore well brought in the name of the trustee, who must hold whatever may be recovered, subject to the disposition which the law authorizes and directs, for the benefit of the cestui que trust. The point, being unaffected by the Mississippi act, stands upon general principles, which are clearly against the defendants.

The description given of the cestuis que trust in the declaration follows the language of the bond, and is therefore sufficient. It might, however, have been wholly omitted, and, being entirely immaterial, may be rejected as surplusage, and cannot embarrass the suit.

579*] *IV. That these bonds were lawfully *taken,* and made payable to the President for *the time being,* and to his successors in office, there can be no doubt. To take securities for the lands sold, if it should be deemed most advantageous for the interests of the Indian orphans that they should be sold on credit, was not only an incident to the power to make the sale, but an obvious duty incumbent on the President. It was no more than an act of common prudence to see that the securities were executed in such form that payment could be enforced, if delayed beyond the period when he might expect to retire from office, and to leave the trust reposed in him in the hands of a successor. United States v. Tingey, 5 Peters, 115; Lord v. Dall, 12 Mass. 115; Dugan v. United States, 3 Wheat. 172; Commonwealth v. Wolbert, 6 Binney, 292.

V. The fifth ground of demurrer raises the main question involved in the case. The defendants contend that the bonds were given without any actual consideration; the President having, as they allege, no authority to dispose of the lands.

The first question is, Can this point be raised on the record as it stands? The declaration does not state of whom the purchase was made, or by what authority the sale took place. Until it otherwise appears, it must be presumed that it was made by virtue of a lawful authority. A bond under seal imports a consideration without its being expressed; and a want or failure of consideration is not sufficient at law to avoid a specialty. Vrooman v. Phelps, 2 Johns. 177; Dorlan v. Sammis, Ib. 179; Dorr v. Munsell, 13 Johns. 430. A note in Petersdorff's Abridgment, Vol. IV. p. 613, cites a number of cases to the same effect, and defines the true rule on the subject.

It is a very great error, as it seems to me, to suppose that there is any want of consideration in these bonds appearing on the face of the record and pleadings. It is a familiar principle that the demurrer admits everything that is well pleaded; and under this rule the point is not open to the defendants even by the Mississippi statute, which requires a special plea to authorize a party "to impeach any writing under seal, or to go into the consideration of the same." H. & H. Miss. Laws, 589.

But was it competent for the President to direct the sale of these lands? It is contended, on the part of the defendants, that he had no such authority, but that the Indian orphans took a fee-simple estate under the treaty, as tenants in common, and that they were in all respects competent to dispose of the lands thus vested in them, subject only to the consent of *the President for the time being. It [*580 is, however, insisted for the plaintiff, that the terms of the provision do not in the least degree countenance any such construction of the treaty. It might, perhaps, be considered a sufficient answer to this proposition of the defendants, to ask the attention of the court to the fact, that no particular Indian, for whose benefit the lands were to be reserved and selected, is named in this provision. Even the number entitled was unknown, and had to be subsequently ascertained in virtue of the stipulation under which this pretension is set up.

The true intent and purpose of the provision seems to me to be apparent. It was to create a trust for the benefit of the orphans, of which the President of the United States was de-

clared to be the trustee, and which he was to execute. The object of the trust was to create a fund for the benefit of the orphans, in which all were to participate equally. This is the leading idea in the provision. The construction contended for on the other side would defeat the end intended to be accomplished. The language of the provision is not, it is admitted, precise, but its true meaning and intention cannot well be mistaken. When the number of orphans entitled had been ascertained in the manner prescribed, and the list of them forwarded to the War Department, the lands were to be located under the direction of the President, and with his consent sold, and, with the like consent, the proceeds were to be applied for some beneficial purpose for the benefit of the orphans. The legal title to the lands in question was vested in the United States, and was held by them in subordination to this provision, giving authority to the President to sell and invest the proceeds for some beneficial object in accordance with the trust. That the legal title to the whole lands of the Choctaw nation east of the Mississippi became vested in the United States is clear, not only from the third article by which the cession is made, but from the fourteenth, which provides for reservations to such Choctaws as were desirous to become citizens of the United States, and especially from the provision which stipulates that grants in fee-simple should issue from the United States to this class of Indians. The other reservations in the nineteenth article are to certain parties by name, and to certain classes of the Indians who had made improvements, and furnish no argument to illustrate this case. These reservations stand on a very different footing from those of the orphans. They were ascertained and certain, and constituted the homes in which the Indians lived. But in the case of the orphans, the lands had no identity, and, when selected, were to be sold to raise a fund for their benefit.

581*] *Mr. Eaton and Mr. Foote, for the defendants in error, rested their argument upon the point that the President had no power to order the sale, that the treaty secured to him no such authority, and that if he could be considered in the character of trustee, even then he was incapable by law to delegate the trust to another, and being so delegated, the act and everything under it were void. This point was illustrated with great particularity.

Mr. Adams contended that the court below did not err in sustaining the demurrer, and that the judgment should be affirmed: 1st. For the reasons that the President had no authority to sell, had no title in himself, nor obligation upon others to make title; that he was not a trustee with power to sell for the benefit of the Indians, or otherwise; and that the contract is void for the want of proper parties and consideration. 2. That the fee is still in the reservees, who cannot be deprived of it but by their own act, with the consent of the President, or the law. 3d. For the reasons assigned in the first, second, third, and fourth special causes of demurrer.

Mr. Justice Wayne delivered the opinion of the court:

This suit is brought upon ten bonds payable to Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaw Indians of September, 1830.

The principal and interest due upon the bonds are demanded, and the plaintiff in the action, John Tyler, sues as successor of Martin Van Buren and trustee for the orphan children.

The defendants have demurred to the plaintiff's declaration, pursuing the usual form of a general demurrer, and have added thereto several special causes of demurrer. There is a joinder in demurrer. Upon these pleadings, the court below sustained the demurrer of the defendants. It is that judgment which is now before this court by writ of error.

In our opinion there is error in the judgment. We shall reverse it, with an order to the court below to enter up a final judgment for the plaintiff.

The cause is not before us on the grounds upon which it was placed in argument by the counsel of the defendants, except as to the insufficiency of the facts averred in the plaintiff's declaration to entitle him to recover, or to enable the defendants to sustain their demurrer.

A demurrer is an objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for *some defect [*582 in law in the pleading. It admits the facts, and refers the law arising thereon to the court. Co. Lit. 71. b; 5 Mod. 132. The opposite party made demurrer when his opponent's pleading is defective in substance or form, but there can be no demurrer for a defect not apparent in the pleadings. This being so, the question now is, whether or not, notwithstanding the objections in substance and form which the defendants have made to the plaintiff's declaration, sufficient matter appears in the pleadings, upon which the court may give judgment according to the very right in the case. Five special causes of demurrer are assigned; they were of course meant to be objections for defects in form, as none other can be assigned in a special demurrer. A general demurrer lies only for defects in substance, and excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception.

Our first remark, then, is, that neither of the special causes of demurrer alleged in this case is for a matter of form. They are as follows:

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit.

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same.

"3d. That the parties for whose use the suit is brought (who, by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the record.

"4th. That said bonds sued on were taken

without authority of law, the said Martin Van Buren, President of the United States, having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office, and not given by law.

"5th. That the said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The case, then, is before the court upon a 583*] general demurrer, *in which must be considered the whole record, and judgment should be given for the party who on the whole appears to be entitled to it. Le Bret v. Papillon, 4 East, 502. It cannot be better shown in this case for whom the judgment should be, than by showing that the special causes of objection assigned, supposing them to have been made as matters of substance, are not sufficient in law to prevent a recovery by the plaintiff. We will first speak of the fourth and fifth, because they are the chief reliance of the defendants to show that no judgment can be rendered against them.

The fourth is, that the bonds given by the defendants were taken without authority of law. The fifth is, that it appears from the face of the pleadings they were given without any actual consideration. Either of these points can be raised in this case by a demurrer. As to the first of the two, it was not necessary to aver in the declaration that the bonds were taken with the authority of law—nor is it so averred. The bonds are made to the President of the United States and his successors in office, for the use of the orphan children provided for in the nineteenth article of the Treaty with the Choctaw Indians of September, 1830. They are so recited in the declaration, and are admitted by the defendants to have been given by them. In point of law, then, they are valid instruments, though voluntarily given, and not prescribed by law. United States v. Tingey, 5 Peters, 115. It is not the case of a bond given contrary to law, or in violation of law, but that of bonds given voluntarily for a consideration expressed in them to a public officer, but not happening to be prescribed by law. Nor does it matter that they are made to the President of the United States and his successors in office, if the political official character of the President is recognized in them, and is so averred in the declaration. This cause of demurrer, whether well taken or not, admits the fact that the bonds were given, and estops the defendants from denying it as a matter of form, or from contesting by a demurrer the right of the obligee and his successors in office to sue the obligors at law. As to the alleged want of consideration for these bonds, as stated in the fifth special cause of demurrer, that affords no ground for a demurrer, as a bond cannot be avoided at law either for a want or failure of consideration, and anything illegal in the consideration can only be pleaded in bar to the action. Fallowes v. Taylor, 7 T. R. 475.

But it is said that these bonds were given without any actual consideration, the President, as it is alleged, having no authority to dispose of the land. What of that? The declaration does not state of whom the purchase was made, or by *what authority the [*584 sale took place. The defendants admit that a sale did take place, that they were purchasers of the lands, and that they gave the bonds voluntarily, according to the terms of sale. Neither of these questions, then, can be raised under the demurrer of the defendants, and could not have been the foundation of the judgment given in their favor.

Having disposed of the fourth and fifth special causes of demurrer, we will now inquire, in their order, whether or not the judgment which was given can be sustained upon either of the other alleged grounds.

The first is, "That there is no sufficient averment in the proceedings showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain this suit." This cannot justify the judgment, because it is demurring in abatement. In such a case the plaintiff is entitled to final judgment. If the matter of abatement be extrinsic the defendant must plead it. If intrinsic, the court will act upon it upon motion, or notice it of themselves. Dockminique v. Davenant, Salk. 220. But it does not follow, because a demurrer in abatement cannot be available for the defendant, that it is to be rejected altogether from the pleading, if tendered in proper time. It will be received, but being erroneously put in, it entitles the plaintiff to final judgment, so that for this reason the judgment of the court below would have to be reversed.

Perhaps the best exposition of this point of pleading anywhere to be found is that given in Furniss et al. v. Ellis and Allen, in 2 Brockenbrough's Reports, 17, by Chief Justice Marshall. He says: "The cases quoted to show that the demurrer is not good, do not show that even in England it ought not to be received, if tendered in proper time. In 5 Bac. Abr. 459, it is said, if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement. This does not prove that the demurrer shall be rejected, but that it shall be received, and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Salk. 220, is quoted by Bacon, and is to the same purport, indeed in the same words. These cases show that a demurrer, being in its own nature a plea to the action, and being even in form a plea to the action, shall not be considered as a plea in abatement, though the special *cause alleged for demurring be mat- [*585 ter of abatement. This court will disregard these special causes, and, considering the demurrer independently of them, will decide upon it as if they had not been inserted in it." And

then the Chief Justice adds, in respect to the particular case then in hand, that "these cases go far to show that the court would overrule the demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings."

The second ground of special demurrer is, that the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain an action on the same. Neither fact stated is a matter of form, and cannot therefore be a cause for a special demurrer. But taking them as matters of substance, the insertion of them in the plaintiff's declaration is not necessary to show his right to sue and recover upon these bonds, or material for the defendants in their plea. This objection will not avail to sustain the judgment.

The remaining objection to be considered is the third in order stated, and may be as briefly and as satisfactorily disposed of as some of the rest have been. It is, that the parties for whose use the suit is brought are not named, who by the laws of Mississippi are the real plaintiffs, and responsible for costs. We remark, that for whose use the bonds were taken is not recited as personal to any of the Choctaw orphans, but as an aggregate for all such as were entitled to lands under the nineteenth article of the treaty. The demurrer admits that the bonds were so made by the defendants, and that the recital in the declaration is as the fact is expressed in the bonds. The inquiries, then, into who are individually the orphan children residing in the Choctaw nation, or who by name are entitled to a quarter-section of land, or any such averments in the plaintiff's declaration, were not necessary to entitle him to recover, and could not be shown either as a cause of special demurrer, or be urged under a general demurrer to prevent a recovery in this case.

All of us are of the opinion, that there is nothing in the causes of demurrer which were shown in argument, or in the special causes assigned, to sustain the demurrer, and thinking, as we all do, that nothing has been shown to lessen the obligation of the defendants to pay these bonds, or their liability to be sued for them at law, we shall direct the judgment of the court below to be reversed, with costs, and shall order the cause to be remanded to the District Court, with directions to that court to enter judgment in this case (principal and interest) for the plaintiff in that court.

586*] *Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with directions to that court to enter judgment in this case for both principal and interest for the plaintiff in that court.

JOSHUA KENNEDY'S EXECUTORS et al., Plaintiffs in Error,
v.
LESSEE OF JONATHAN HUNT, John Hagan et al., Defendants in Error.

Alluvion, right to, determined by local law.

Forbes and Company obtained a grant of land in 1807 from Morales, Intendant-General under the Spanish government, which land was adjacent to Mobile, in West Florida. This grant purported to be, in part, the confirmation of a concession granted in 1796 and surveyed in 1802. The survey terminated at high-water mark upon the river.

The grant of 1807 included the land between the then bank of the river and the high-water mark of 1802.

This grant of 1807 was excepted from the operation of the Act of Congress passed on the 26th of March, 1804, which annulled all Spanish grants made after the 1st of October, 1800, and was recognized as a valid grant by the Act of 8d March, 1819.

An act of March 2d, 1829, confirmed an incomplete Spanish concession, which was alleged to draw after it, as a consequence, certain riparian rights conflicting with those claimed under the grant of 1807.

A decision of a State court, giving the land covered by these riparian rights to the claimants under the grant of 1807, was only a construction of a perfected Spanish title, and cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. It did not draw in question an act of Congress or any authority exercised under the Constitution or laws of the United States.

THIS case was brought up from the Supreme Court of the State of Alabama by a writ of error issued under the twenty-fifth section of the Judiciary Act.

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

It was argued by Mr. John O. Sargent and Mr. Johnson for the plaintiffs in error, and by Mr. Underwood and Mr. Sargeant for the defendants in error.

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

"The action was ejectment brought [*587 by plaintiffs below in the Circuit Court for Mobile County, to recover a piece of ground and ground covered with water, on Mobile River.

Plaintiffs gave in evidence the Spanish Orange Grove grant of 1807 to Forbes & Co., and the Act of Congress entitled, "An Act adjusting the claims to land, and establishing land offices in the districts east of the island of New Orleans," passed 3d March, 1819. 3 Stat. at Large, 528.

Defendants gave in evidence a Spanish concession of 1798 to Thomas Price, and an act of Congress of 2d March, 1829, entitled, "An Act confirming the reports of the register and receiver of the land offices for the district of St. Stephens, in the State of Alabama, and for other purposes," confirming said title by United States with surveys, location, certificate, report, and patent by United States to Joshua Kennedy, and the mesne conveyances from Price to defendants. 4 Stat. at Large, 358.

NOTE.—Alluvion, or accretions, and relictions; right to and ownership of; by what law title to is determined. Rule of division among riparian owners.

A river ran between two lordships and the soil on one side together with the river belonged entirely to one of the lordships, and the river by very slow degrees did encroach upon the soil of the opposite lordship, but so very deliberately, that it

I. The right of the defendants to the land in controversy was asserted under the Act of 1829, and the decision of the court below was against that right. This brings the case clearly within the twenty-fifth section of the Judiciary Act.

In 1798 Price prayed Governor Gayoso to grant him a tract of twenty arpents by thirty, bounded on the east by the lots in the town of Mobile, and the river of said town. The donation was ordered accordingly, November 10, 1796.

In 1806 it was confirmed by the commandant, according to a plan accompanying his petition, and the deputy-surveyor was ordered to survey the tract and make the boundaries, according to a "copy from the surrounding survey."

This tract, thus bounded, was confirmed by the Act of 1829.

The patent, plan, survey, etc., all show that the confirmation contemplated the original boundaries; one of which, on the east, was the River Mobile.

Defendants insist that they are still entitled to go to the river, as one of their eastern boundaries; that the Act of 1829 operated to confirm the title of price to the tract described in the concession of 1798.

The decision of the court below was against the title or right set up under this act.

II. The court below charged the jury that the construction of the plaintiffs' (Forbes & Co.) grant as confirmed would authorize them to go to the channel of the river; and that the boundaries of the plaintiffs' grant must be run and continued eastwardly till they reach the channel of the river.

Defendants excepted.

The grounds of exception are not specifically 588*] stated. It is *supposed that the exception lets in all legal objections of which the defendants could have availed themselves below. They appear in the record certified from the Supreme Court, and are alluded to in the opinion of the court. They set up the Act of March 2, 1819, entitled, "An Act to enable the people of the Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," as a bar to the plaintiffs' claim, by establishing an outstanding title to the land in controversy in the State of Alabama. This is supposed to be a perfect defense. If the United States, on the 2d of March, 1819, dedicated the shore of Mobile River to Alabama, they could not grant it subsequently to an individual, or confirm an invalid Spanish grant to make it so operate. The court below decided, in effect, that the act in question did not vest the shore in Alabama, and that Congress could grant it to an individual. It is apparent on the record, that the construction of this statute was called in question, and that the judgment of the State court would not have been what it is, if there had not been a misconstruction of this statute to the injury of the defendants below, or a decision against the validity of the right, title, or privilege, or exception set up under it; or, in other words, the question is necessarily involved in the decision, and the State court could not have given the judgment or decree which they passed without deciding it. 3 Pet. 398; 16 Pet. 285.

III. The court below refused to charge, that, if the jury believed the line of division between the Forbes and Price grants was drawn by authority of the United States, and surveyed and patented to Price's assigns, and being a United States survey and location of both tracts, such survey was binding on the plaintiffs, and the said two titles would cease where such survey ceased to the east, and the riparious rights would commence where such survey ceased, according to the front of each.

Defendants excepted.

The court below charged that the grant of the plaintiffs, being confirmed by the Act of 1819 as a complete title, it could not be affected or limited by any survey made by the authority of the United States, and that the jury should find without any regard to any such survey.

Defendants excepted.

Defendants insist that the surveys in evidence were made by authority of the United States, under the acts of 1819 and 1829, and of other acts providing for the survey and location of claims to land in the township of Mobile.

*They further insist, that, by their [*589 charge, and their refusal to charge as requested, and their rejection of the United States surveys,

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was impossible to perceive an immediate alteration. Therefore, by this imperceptible increase the land relicted became the property of the first lord. 22 Liber assisarum (Year Books, part V.) pl. 93; Schultes on Aquatic Rights, 136, 137.

Where land is relicted, if such grounds were gained by slow and imperceptible means the subject shall have them; but if they have been left to the shore suddenly, and in any large quantity, then they belong to the king. Britton, Tit. Purchase, 86; Abbott of Ramsay, Dyer, 326; Ventris 188; Schultes on Aq. Rights, 187.

All islands, sandbeds, or other particles of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction, or other aqueous means, belong to the owners of the neighboring estates. Schultes' Aq. Rights, 138.

The increase per alluvionem, according to Sir Matthew Hale, is, where the sea, by casting up sands and earth, by degrees increases the land, and shuts itself out further than the ancient bounds went. Hale de Jure Maris, part 1, ch. 4, sec. 2.

Where the increase arises from the sudden recession of the water, the ground which is termed derelict land will go to the crown or public, and not to the adjoining owner. But where the accretion is made so gradually and imperceptibly, that *no one can perceive* how much is added in any moment of time, then the increase goes to the owner of the adjoining land, though the right to the shore may remain in the sovereign. Rex v. Yarborough, 3 Barn. & Cress. 91; S. C. 5 Bing. 163; 10 Eng. Com. L. R. 19; same case affirmed, 2 Bligh N. S. 147; 1 Dow N. S. 176.

Alluvion is defined by the French law to be an "increase of land which is made by degrees (peu à peu) on the shores of the sea, of navigable and other rivers, by the earth which the water brings there." Guyot's Repertaire Universelle, 113.

According to the definition which has been given of alluvion, an imperceptible accretion means one which is imperceptible in its progress, and not one which is imperceptible after a lapse of time; and, therefore, although the quantity of land gained from the sea may eventually be very great, the sovereign or the public will not be entitled to it if it was added insensibly and by slow degrees. By alluvion, as is used in law, is meant such slow, gradual and insensible accretion that it cannot be shown at what time it occurred. Trustees of Hopkins Academy v. Dickinson, 9 Cush. 551.

This is the rule of the civil law, as well as of the common law. The former gives it as follows: "That ground which a river has added to your estate by alluvion becomes your own by the law of nations; and that is said to be alluvion which is added so gradually that no one can judge how

the court ruled against the validity of an authority exercised under the United States.

IV. Both parties claim under acts of Congress; the defendants below under that of 1829, confirming the concession to Price; the plaintiffs under that of 1819, confirming the invalid Spanish grant to Forbes & Co. The decision could not but be against the right set up by the defendants under the one statute, if it was in favor of the right set up by the plaintiffs under the other.

The record sets out the title on each side, together with the facts and the charge of the court; from which it appears, that the decision of the State court of Alabama was opposed to the right of the plaintiffs in error, the judgment of the Circuit Court having been affirmed. The construction and application are called for of the acts of Congress on which the controversy depends.

In the City of Mobile v. Eslava, 16 Peters, 249, Mr. Justice Catron cites Matthews v. Zane, 4 Cranch, 382, Ross v. Barland, 1 Peters, 664, Wilcox v. Jackson, 13 Peters, 509, Pollard's Lessee v. Kibbe, 14 Peters, 353, as establishing the doctrine, that where both sides claim under acts of Congress, and come to this court under the twenty-fifth section for their construction, the court proceed upon the whole case, and for either side.

On the whole, it is manifest from the record that the judgment of the court below could not have been what it is, if there had not been a decision against the right and title set up by the defendants below under the Act of 1829; or against the defense they set up under the Act of the 2d of March, 1819; or against the validity of an authority exercised under the laws providing for the survey and location of claims in the township where the land in controversy lies.

The counsel cited the following authorities in support of the jurisdiction of the court:

Pollard's Lessee v. Kibbe, 14 Peters, 360; Wallace v. Parker, 6 Peters, 687; Owings v. Vorwood's Lessee, 5 Cranch, 344; Harris v. Dennie, 3 Peters, 298; Davis v. Packard, 6 Peters, 48; Wilson v. Black Bird Creek Marsh Company, 2 Peters, 250; Martin v. Hunter's Lessee, 1 Wheat. 355; Miller v. Nicholls, 4 Wheat. 311; Williams v. Norris, 12 Wheat. 117; Mobile v. Eslava, 16 Peters, 249; Craig v. State of Missouri, 4 Peters, 427; Chouteau v. Eckhart, 2 How. 372; Matthews v. Zane, 4 Cranch, 382; Ross v. Barland, 1 Peters, 664; Wilcox v. Jackson, 13 Peters, 509.

*Mr. Justice Catron delivered the [*590 opinion of the court:

This case comes here by writ of error to the Supreme Court of Alabama, under the twenty-fifth section of the Judiciary Act of 1789, and the first question made by the defendants in error is, whether any matter presented by the record will authorize this court to exercise jurisdiction under the twenty-fifth section. And to ascertain how far, if at all, the powers of this court can be called into exercise, the facts and the laws bearing on them must be stated in something of detail; as in this case, in common with many others, it is found much more difficult to settle the question of jurisdiction, and how far it extends, than it would have been to decide the merits of the controversy had the cause been brought here by writ of error to a court of the United States.

Hunt, Hagan, and others, sued in ejectment Kennedy's executors and other tenants in possession, for about ten acres of land lying in the city of Mobile, in the State Circuit Court. The plaintiffs claimed title to the premises sued for under a grant made to John Forbes & Co. in 1807, by Morales, Intendant-General under the Spanish government in the province of West Florida, Spain being then in possession of the province and exercising jurisdiction. The grant, by its recitals, purports to be, in part, the confirmation of a concession, and survey founded on it, of earlier dates; say 1796 and 1802, in favor of Panton, Leslie & Co. to which firm Forbes & Co. were successors. The concession was surveyed in 1802 by Collins, an authorized surveyor under the Spanish government, and its eastern boundary terminated on the bank of the Mobile River, at high water-mark; the survey contained two hundred and sixty-three acres, equal to about three hundred arpents. To the extent of Collins' survey there is no controversy, but Forbes & Co. solicited the Intendant-General in 1807 to grant them the

much is added in each moment of time." Coop. Inst. tit. 2, sec. 1; Angell on Water-courses, sec. 53; Tyler's Law of Boundaries, 83, 84; Harg. Tracts. De Jure Maris, cap. 1; 2 Black. Com. 262; 2 Bract. lib. 2, cap. 2, sec. 2; Schultes, 118; Puff. 4, 7. 12; Code of Napoleon, 556, 561; Phear Rights of Water, 12.

Where the change is so gradual as not to be perceived in one moment of time, the proprietor whose land is on the bank of a river, or lake, or the sea, is thus increased, is entitled to the addition. Halsey v. McCormick, 18 N. Y. 147.

Lands formed by accretion belong to the riparian proprietor and cannot be granted by the State as a vacancy. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122; Pulley and Erwin v. Municipality No. 2, 18 La. 278; Patterson v. Gelston, 23 Md. 432; Morgan v. Scott, 26 Penn. 51; City Council of Lafayette v. Holland, 18 La. 286; Krant v. Crawford, 18 Iowa, 549; Gerrish v. Clough, 48 N. H. 9; St. Louis Public Schools v. Risley, 40 Mo. 356; 3 Kent's Com. 428, marg. p.; Emans v. Turnbull, 2 Johns. 322; Smith v. St. Louis, 30 Mo. 290; Jones v. Johnston, 18 How. 150; Barrett v. New Orleans, 18 La. Ann. 105; Johnston v. Jones, 1 Black, 209; Jones v. Soulard, 24 How. 41; Banks v. Ogden, 2 Wall. 57; Schools v. Risley, 10 Wall. 91; Mayor of New Orleans v. United States, 10 Pet. 662. 717.

If by some artificial structure or impediment in the stream, the current should be made to impinge more strongly against one bank, causing it imperceptibly to wear away, and causing a corresponding accretion on the opposite bank, the riparian owner would be entitled to the alluvion thus formed, especially as against the party who caused it. Tyler's Law of Boundaries, 85; Halsey v. McCormick, 18 N. Y. 147, 150; Wetmore v. Atlantic White Lead Co. 37 Barb. 70; Sauset v. Shepherd, 4 Wall. 502.

The ordinary rule (as laid down in New Hampshire) for dividing the alluvion among the riparian owners entitled to it, is to ascertain the length of the old shore line, and the part of it belonging to each proprietor, then measure off for each proprietor a part of the new shore line in proportion to what he held in the old shore line; and then draw lines from the boundaries at the ancient bank to the points of division on the new shore as thus ascertained. In this way, if such land is formed in the bend of a river, and the new shore line is just one half the length of the old one, each proprietor will take of the new shore line just one half the extent of his former shore. Batchelder v. Kenisten, 51 N. H. 496; S. C. 7 Alb. Law J. 317.

In Massachusetts, the following rule was adopted: 1. To measure the whole extent of the ancient line on the bank of the river, and compute how

flowed land lying east of the eastern boundary of the survey, and between the same and the channel of the river, and which the Intendant proceeded to do, in the following terms: "And as the distance that is observed in the map from the river to the boundary lines of the land, which was left vacant at that time in consequence of its having been impassable, has since become of great use to the claimants, having constructed levels and the necessary drains, in consideration of which it has been granted to them as a compensation for their labor thereon invested, with the reserve such as necessary to allow a free passage along the bank of the river, without altering the figure of the tract on either of the other sides. Wherefore, using and exercising the powers which the king our lord —God preserve him!—has con- 591* ferred on me, I do *in his royal name confirm and ratify to the aforesaid John Forbes & Co. the possession of the three hundred and ten arpents, seventy-seven perches and one eighth, already mentioned, and which are contained in the map (No. 1809), with the corrections made by the Surveyor-General, in order that they may own and possess the same, sell and alienate the land at their own and entire pleasure, without prejudice to any third person who may have a better right, on condition that they should observe and fulfill the requisitions of the land regulations formed and published by the intendancy on the seventeenth of July, 1799, as far as the local situation and quality of the land will permit."

According to Spanish usages and regulations, the grant to Forbes & Co. was a perfect title, and as such binding on the government of Spain, although made in 1807, after that government had parted with its power to grant, according to our construction of the Treaty of 1803, the limits of which were claimed by this government to extend east to the River Perdido, and which claim has been upheld and established by the political and judicial departments of the United States. The first conclusive step was taken by Congress as early as 1804, when, by the Act of March 26th of that year, it was declared that all grants made by the Spanish authorities after the 1st day of October, 1800 (the date of the Treaty of St. Ildefonso), should be held and deemed to be void. But the act excepted from its operation "any bona fide grant made agreeably to the laws, usages, and customs of the Spanish government, to an actual settler on the lands so granted for himself and for his wife and family;" and also excepted "any bona fide act or proceeding done by an actual settler agreeably to the laws, usages and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the 20th day of December, 1803." Some restrictions were imposed on acutal settlers in regard to quantity, that have no application to the grant of Forbes & Co.

The Spanish grant recites that Forbes & Co. had been settled on the land granted, and that it had been occupied and cultivated by them since the year 1796, and up to the date of the grant, and such was the proof made before our commissioner, and therefore the "proceeding" by which the imperfect title of Forbes & Co. was completed was within the second exception of the Act of 1804. That the grant made by the Intendant-General Morales, in 1807, was in itself, unaided by the sanction of Congress, a valid title, we do not assert; *but being [*592 reported on by the commissioner as a title complete in form, according to the usages and laws of Spain, and recognized and sanctioned by Congress as a perfect title by the Act of 1819, the courts of justice are concluded by the action of the Political Department, and bound to pronounce the grant to Forbes & Co. a perfect title in substance as well as form, because the claim was within the exclusive jurisdiction of the Political Department in 1819, when Congress acted on it. Such is the well established doctrine of this court, as will be seen by the cases of Chouteau v. Eckhart, 2 How. 344; Mackay v. Dillon, 4 Ib. 421, and especially that of Les Bois v. Bramell, 4 Ib. 461.

Nor did the grant of Forbes & Co. require any further step to perfect its boundary. This being the prima facie condition of Forbes & Co.'s grant, the next inquiry is whether those claiming under Kennedy's title were in a condition, on the trial in the State court, to call the plaintiff's title in question.

The defendants below claimed by virtue of an act of Congress, passed March 2, 1829, confirming an incomplete Spanish concession made

many feet each riparian proprietor owned on this line. 2. Divide the newly formed river line into equal parts and appropriate to each proprietor as many of these parts as he owned feet on the old line; when, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The general line ought to be taken, and not the actual length of the line as that margin, if it happens to be elongated by deep indentations or sharp projections. In such case it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river. Deerfield v. Ames, 17 Pick. 45, 46.

The effect of this rule is to give to each proprietor a length of the new water-line proportioned to his length on the old water-line, whether the one be longer or shorter than the other. Trustees of Hopkins Academy v. Dickinson, 9 Cush. 544, 553; King v. Smith, Doug. 441.

The Supreme Court of the United States have adopted the same rule laid down in 17th Pickering in a case, where Mr. Justice Swayne says: "With the qualification stated, it may be considered *as embodying* the views of this court upon the subject." *Johnston* v. Jones, 1 Black. 200, 223; see, also, Jones v. Johnston, 18 How. 150; Emerson v. Taylor, 9 Greenl. 44; Newton v. Eddy, 23 Vt. 319; Kennebec Ferry Co. v. Bradstreet, 28 Me. 374; Delord v. New Orleans, 11 La. Ann. 699; O'Donnell v. Kelsey, 10 N. Y. 412; Attorney-General v. Boston Wharf Co. 12 Gray, 553; Stockham v. Browning, 18 N. J. Eq. 390; Nott v. Thayer, 2 Bosw. 10; Thornton v. Grant, 10 R. I. 477.

In Clark v. Campan, 19 Mich. 325 it was held that the boundary line between adjoining riparian owners is to be determined by extending a line from the boundary of the shore perpendicularly to the general course of the stream opposite that point. See, also, Rust v. Boston Mill Corp. 6 Pick. 158; Sparhawk v. Bullard, 1 Metc. 95; Knight v. Wilder, 2 Cush. 199; Ipswich Pet'rs, 13 Pick. 431; Banks v. Ogden, 2 Wall. 57; Lorman v. Benson, 8 Mich. 18; Rice v. Luddiman, 10 Mich. 125; Jones v. Soulard, 24 How. 41; Seneca Nation v. Knight, 23 N. Y. 489; Steamer Magnolia v. Marshall, 39 Miss. 109; Stone v. Boston Steel and Iron Co. 14 Allen, 280; Delaware, Lack. & West. R. R. Co. v. Hannon, 37 N. J. Law, 276; Bay City Gaslight Co. v. The Industrial Works, 28 Mich. 182; Munson v. Munson, 14 Allen, 71; Newton v. Eddy, 23 Vt. 319; People v. Court Appraisers, 12 Wend. 555.

to Thomas Price. By the fourth section of the Confirming Act of 1829, it is provided, "that the confirmations of all the claims provided for by this act shall amount only to a relinquishment forever, on the part of the United States, of any claim whatever to the tracts of land and town lots so confirmed, and that nothing herein contained shall be construed to affect the claim or claims of any individual or body politic or corporate, if any such there be."

And by the fifth section of said act, the register and receiver of the land office at St. Stephens were invested with power, within their district, to direct the manner in which all claims to lands and town lots which have been confirmed by that act should be located and surveyed; having reference to the laws, usages, and customs of the Spanish government on the subject, and also to the mode adopted by the government of the United States, pursuant to the Act of March 3, 1803. And by section sixth, certificates of confirmation and patents were ordered to be granted for all lands and town lots confirmed by the act.

According to the act, the claim of Joshua Kennedy (representative of Thomas Price) was duly surveyed on the 2d of February, 1836, and in May, 1837, a patent was taken out by Kennedy for the land described in the survey. The calls in the patent, having any connection with the present controversy, are as follows: "Thence north, 69° 5′ east, 15 chains 44 links, to the ancient margin of the River Mobile, 593*] being *34½ links west of the south angle of St. Louis and Water streets; thence north, 66° west, nine chains and seventy-six links, to the southeast corner of the Orange Grove tract granted to John Forbes & Co." The next line runs north, 82° west, with the southern boundary of Forbes & Co.'s tract.

The southeast corner of the Orange Grove tract is an iron-bound stake, well known, and from which the Spanish survey made by Collins runs due north, and from that line east to the channel of the river the land was added by the grant of the Intendant-General Morales, in 1807.

The line of Kennedy's grant fronting towards the river runs 66 degrees west of north, and it is contended that Kennedy, as a front proprietor, is entitled to claim a riparian right to the channel of the river, according to lines drawn at right angles to the front line and from each terminus thereof, unless some other claim shall interfere; and it is insisted that the addition made to Forbes & Co.'s grant in 1807 cannot hinder the assertion of Kennedy's riparian right, because the addition was made after Spanish authority ceased, and for so much the grant of 1807 is void, and being out of the way, Forbes & Co. can only claim as front proprietors, riparian rights in like manner that Kennedy himself claims; and to extend Forbes' southern line east, and Kennedy's lines at right angles, as above stated, would produce a conflict of riparian rights incident to the respective grants, the lines crossing each other at the iron-bound stake, forming an acute angle at the stake, and widening towards the channel of the river; and this angle, it is assumed by those claiming under Kennedy's grant, should be divided between the two grants, but in what proportions we are not informed. This assumption the State court rejected, and held that Forbes & Co.'s grant took all the land to the channel of the river north of a direct extension of its southern boundary, and thereby cut off the pretension of Kennedy to the incident of alluvion.

Suppose it to be true that the addition made to Forbes & Co.'s grant in 1807 was void, for want of authority in the Spanish government, or for any other reason, and that Kennedy's grant was entitled to divide the alluvion as an incident to it, and that the State court improperly rejected his claim, and wrongfully adjudged the land to Forbes & Co.—conceding all these assumptions, can this court revise and reverse the decision of the State court? The controversy respecting the alluvion drew in question no act of Congress, nor any authority exercised under the Constitution or laws of the United States, and therefore the decision of the State court could not be opposed either to the laws, or to any authority exercised under the laws, *of the United States. For the [*594 established construction and application of the twenty-fifth section of the Judiciary Act, we refer to the cases of Crowell v. Randell, 10 Peters, 391, 398, McKinney v. Carroll, 12 Peters, 68, and Armstrong v. Treasurer of Athens County, 16 Peters, 284. In this case, as in that of McDonough v. Millaudon, 3 How. 693, the State courts were called on to construe a perfected Spanish title, and to settle its limits by applying the local law, and having done so, this court has no authority to revise the judgment; nor can we see how the case would have been different had Forbes & Co.'s grant been an elder patent emanating from the United States directly; as in such a case a controversy concerning the incidents of alluvion would not have drawn in question an act of Congress, or a survey made according to an act of Congress. We deem it useless to examine in detail the instructions proposed by the defendants below, and rejected by the court. The only one worthy of notice was that which rejected Weakly's survey of Forbes & Co.'s grant, made and approved in 1835. It could not change the grant, nor affect its validity in any degree, and could only be read to establish boundary as a matter of fact; and neither its admission nor rejection, when offered for such purpose, could give this court jurisdiction, no matter which side should be injured; and so this court, in effect, held in the case of Mackay v. Dillon, 4 How. 447. The survey was an ex parte proceeding for the purposes of the land office, and immaterial to Forbes & Co.'s title.

On careful examination, we are of opinion that no one question was raised and decided in the State courts that gives this court jurisdiction to revise such decision, and that therefore the case must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel; on consideration whereof, it is now her ordered and adjudged by this court, that this cause be, and the same is hereby dismissed for want of jurisdiction.

595*] *JACOB HUGG and John M. Bandel, Plaintiffs,
v.
THE AUGUSTA INSURANCE AND BANKING COMPANY OF THE CITY OF AUGUSTA.

Marine Insurance—on freight of memorandum article warranted free from average, must be loss in specie, to render insurer liable—damage to vessel, when amounts to loss on such articles.

In an insurance upon freight, there is no total loss of a memorandum article as long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to their destined port, no matter what may be the extent of the damage.

If, however, the articles are not capable of being carried, in specie, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel; or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss.

In construing the contract of insurance upon freight, the interest of the insured, or of the underwriters of the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and insurers of the cargo to sell it at the port of distress.

If so sold, the insured cannot recover for a total loss of freight.

But although it is the duty of the owner of the vessel, either to repair his own or to procure another at the port of distress to carry on the cargo, yet, if it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged conditions, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then became the duty of the master to sell the goods for the benefit of whom it might concern.

A policy of insurance upon "freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, to the amount of $5,000, upon all lawful goods, etc., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid," upon which a greater premium was paid than was usual for the outward voyage alone, must not be construed as a policy upon the round voyage.

The insurers were, therefore, not entitled to a deduction for the outward freight.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Maryland.

The Reporter finds the following statement prefixed to the opinion of the court, as delivered by Mr. Justice Nelson:

This is an action upon a policy of insurance on the freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, with liberty to touch and stay at any intermediate port in case of stress of weather, or for the purpose of transacting business. The amount, $5,000; premium, $158.25.

The policy contained the usual memorandum, enumerating various articles warranted free from average, and all others that were perishable in their own nature.

About four hundred tons of jerked beef were shipped on board the vessel at Montevideo, which were to be delivered in good order at the port of Matanzas or Havana to the consignees, *they paying freight. The bill of lad- [*596
ing was signed the 25th of April, 1842.

The vessel sailed from Montevideo on the 29th of April, and, after being out some forty-seven days, encountered a storm, and was driven on Gingerbread Ground, where she received considerable damage; the rudder was broken and unshipped, and as the extent of the damage could not be ascertained, it was deemed prudent, on consultation with the captain of a wrecking vessel and Bahama pilot, to go into Nassau for the purpose of a survey and repairs. The wind was fair for that port, but strong ahead in the direction of Matanzas. The vessel was taken in charge of one of the wreckers, and arrived at Nassau on the second day, about the 20th of June, and grounded on the bar while entering the harbor, and under the charge of the king's pilot, and sustained a good deal additional damage.

A part of the beef had been thrown overboard to lighten the vessel while on the Gingerbread Ground; and a much larger quantity while on the bar at Nassau. She had leaked while on the ground in the former place, so that it was necessary to work the pumps every half hour; and at the latter, there was seven or eight feet of water in the hold, while some fourteen men at the pumps.

The beef was so much damaged by the seawater that the board of health at Nassau refused to allow but about one hundred and fifty tons to be landed. The rest was ordered to be carried outside the bar, and thrown into the sea, for fear of disease; it was wet and very much heated, some of it so changed as to become green, and all emitting an offensive stench. The portion allowed to be landed was wet and heated, and not in a fit condition to be shipped; and the board of health recommended to the authorities, that it should be removed as soon as conveniently could be.

The vessel was surveyed after the cargo was discharged, and it was found that the rudder was entirely broken off, the forefoot gone, and the keel greatly shattered and damaged; and it appears to be conceded that she could not have been repaired at that port so as to have carried on the cargo, and that, if she could, it would have cost more than half her value. She was repaired sufficiently to bring her home in ballast. It also appears that there was no vessel in port that could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped.

The salvors libeled the vessel and cargo for salvage services in the Vice-Admiralty Court of the Bahamas on the 30th of June, 1842, to which the master put in an answer on the 7th *of July, insisting that the libelants [*597
were entitled to compensation for pilotage only, and not for salvage.

The court, on the 18th of July, decreed $2,100 salvage to the libelants, for services rendered to the vessel and cargo. Appraisers of the vessel and cargo taken on shore had

NOTE.—Memorandum articles in policy. See note to 4 L. ed. U. S. 75.
What is a total loss. See note to 22 L. ed. U. S. 210.

been previously appointed; and, on an examination of the cargo, it was found to be so much damaged, and in such a condition, that they advised an immediate sale, as it was deteriorating in value daily.

The master assented to a sale, accordingly, which was ordered by the court on his application on the 1st of July. The net proceeds amounted to $2,664.92. The time occupied in an ordinary voyage from Nassau to Matanzas is three days, and to Balitmore ten.

It was proved by several masters of vessels, that the navigation at the place where the Margaret Hugg first grounded, and was visited by the pilots, was very hazardous, and that, under similar circumstances, they would have considered it their duty to have carried their vessel into the harbor at Nassau.

The regular premium for insurance of freight of the cargo covered by the policy for the outward voyage was about one and one-eighth per cent.

Upon this state of facts appearing at the trial, the following questions were raised, and presented to the court, viz.:

1. It being admitted that the loss is to be adjusted according to the terms of the Baltimore Insurance Company, if the jury find that jerked beef was a perishable article within the meaning of the policy, are the defendants liable as for a total loss of freight, unless the entire cargo was so totally destroyed that no part of it could have been carried to the port of destination even in a deteriorated and valueless condition?

2. If the jury find that, from the condition of that portion of the cargo sold at Nassau (occasioned by the disasters stated in the testimony), it was for the interest of the insured and insurers upon the cargo that it should be so sold, and not transported to Matanzas, is the plaintiff entitled to recover for a total loss of freight, provided his own vessel could have been repaired in a reasonable time, so as to perform the voyage in safety, or he could have procured another vessel, and have transmitted to the port of destination, in its deteriorated state, the portion sold at Nassau? And,

3. Assuming that the plaintiff is entitled to recover, is the policy on the amount mentioned for one entire voyage round, from Baltimore out and home again? And are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo?

598*] *The cause was argued by Mr. Mayer and Mr. Nelson for the plaintiffs, and Mr. David Stewart and Mr. Johnson for the defendants. The following is a very brief sketch of the respective arguments:

Mr. Mayer, for the plaintiffs:

The premium was double what would have been demanded for half the voyage. Some of the beef was thrown out as spoiled, the rest landed, somewhat injured. Then came a libel for salvage, and a decree for it. No funds existing to pay it, or make the necessary repairs with, a sale was ordered. We abandoned, and now claim for a total loss. The policy is a blank cargo policy, filled up with an insurance on freight. Does the claim arise where the articles are not entirely lost? In England the courts of Common Pleas and King's Bench have decided differently. 3 Bos. & Pull. 474; Marshall on Ins. 227, 565; 2 Maule & Selw. 247—that the articles, though not lost, might be deemed extinct; 32 Com. Law Rep. 115; 1 Wheaton, 219, 225—case of memorandum articles; 2 Phillips on Insurance, 485—all the decisions cited; 6 Cowen, 270.

The law was settled in England by the case of Roux v. Salvador, 3 Bing. N. C. 266; S. C. 1 Bing. 526; and there is nothing contradictory in the decisions of this court. The case in 1 Wheaton depended on particular circumstances. If the beef had to be thrown overboard for the sake of health, it could not be considered any longer as beef for all commercial purposes. If the voyage is broken up, there is an end to freight; and it was broken up here by the perils insured against. There is no difference between memorandum and other articles, when a total loss ensues. Marshall on Ins. 585; 12 East, 304; 15 East, 565; 6 Mass. 119, 318, where the cases are cited; 1 Wheat. 219.

The vis major of the claim for salvage broke up the voyage and destroyed the property. The beef was in a fermenting state. The condition of the vessel was hopeless. As to the effect of vis major, 7 Com. Law Rep. 202.

Second question certified.

This involves the discretion of the captain. The owner of the vessel is bound by his contract to carry the goods. If the perils of the sea require a transshipment, it is his privilege and duty to make it. But if there be a difficulty in obtaining a vessel, the master is not bound to pay an excessive freight. 7 East, 44; 7 Com. Law Rep. 364, same as 3 Brod. & Bing. 97; 36 Com. Law Rep. 156, same as 9 Adolph. & Ellis, 314; 4 Johns. Ch. 225; 7 Cowen, 584; 4 Wend. 54; 12 Johns. 107; Abbott on Shipp. 369, 461.

*But if the court should think that it [*599 was the duty of the master to transship, then I say that, if there was ground of abandonment from vis major, the captain became the agent of the insurers, and they must be responsible for his errors. 9 Johns. 28. If half the property is lost, it is not the duty of the master to transship.

The captain is the agent of the adventure, and if the jury justify him as to the vessel or cargo, his acts bind all parties. 5 Peters, 604; 1 Johns. 406. The exigency would have justified a prudent man in acting as he did, if there had been no insurance. He is to act for the general good, mindful of the owners and insurers. 3 Moore, 133, quoted in 2 Phillips, 268. Was not this a judicial sale? The judge ordered it, not upon the petition of the master, but as an order of the court. The opposite party appeared, and did not object to it. 1 Wash. C. C. 530.

The third question relates to the quantum of recovery. The outward cargo belonged to the owners of the vessel, and thus, in fact, no freight was earned. But we are charged with a constructive freight. Suppose the owner could earn freight from himself, this is an open policy, and value must be proved. There is no evidence to show that the value of the outward freight was just half of the whole sum insured. It could not be a round voyage, because the owners sent out an adventure, and only intended to earn freight on the return. In

an open policy, we have only to show that we had that amount of interest when the loss occurred. We paid a premium, double of what we would have been charged for the outward voyage alone. It could not, therefore, have been intended as a round voyage. 3 Caines, 16; 7 Gill & Johns. 293; 12 Wheat. 383; 3 Wend. 283; 2 Wash. C. C. 89; 1 Rawle, 97; 33 Com. Law Rep. 124, or 3 Barn. & Adolph. 198; 4 Peck, 429; 3 Com. Law Rep. 480; 2 Starkie, 573.

Mr. Stewart, for the defendants:

It is proper that some omissions of the opposite counsel should be supplied. In the first place, the captain knew that he was insured; the answer to the libel says so. In the next place, he could have prosecuted his voyage. The answer to the libel says, that "without any assistance from Demeritt and his party, he could have got the bark clear of the Gingerbread Ground, and could, without any other than the ordinary dangers of the sea, have proceeded in the prosecution of their voyage." In the third place, the condition of the cargo was not so bad. The report of the board of health, made on the 29th of June, 1842, says, that "the 600*] quantity of beef *which is housed in the store appears to the board to be in a sound condition, and fit for the purpose for which it was cured." This was made on the 29th. On the 30th, the captain petitioned for a sale, which took place on the 1st of July. In the affidavit to support the motion for a sale, the captain says "he had intended, previous to the commencement of the action, that the sale of such beef should take place in the early part of the present week." What became of the cargo? In fact, it went to the very port of destination. The captain says, in his deposition, that Adderly bought the beef with the intention of shipping it to Matanzas." Strobel, the supercargo, says, "the vessel had no means of her own to make the repairs with, but Mr. Starr, the agent of the underwriters, offered to advance mony for repairs upon bottomry." The libel for salvage was contested, and limited to pilotage, and yet a sale took place.

As to the first question certified. The object of the policy is to protect underwriters by excluding small loses. Partial losses, therefore, are not recoverable, as long as part of the cargo remains not liable at all. 3 Bos. & Pull. 478, does not impugn this doctrine, because the articles were thrown overboard from necessity.

In Roux v. Salvador there was a special verdict, in which the jury found that the hides would have lost their character from putrefaction. The court relied upon this. Of course there was a total loss. The counsel then referred to the following cases: Park, 191, 185; 2 Maule & Selw. 371; 2 Com. Law Rep. 55, or 7 Taunton, 154; 4 Martin, N. S. 640; 16 East, 214; 1 Caines, 196; 3 Caines, 108; 4 Johns. 139; 4 Wendell, 33; 7 Cranch, 415; 8 Cranch, 39; 3 Wash. C. C. 356; 1 Wheat. 59; 3 Mason, 429. From the time of 1 Wheaton to 3 Mason, the question was not mooted, and when it was, it was only upon the authority of 15 East. 5 Meeson & Welsby explains 15 East to have been an insurance upon each parcel. But here a part of the beef was good, and sold for fifty per cent. of its cost. From this loss our contract exempts us. The assured warrant that they will not charge, except for general average. The vessel was within three days' sail of Matanzas, and if the jury find that beef was a perishable article, we cannot be liable.

The second question assumes that the vessel could have been repaired, or that another vessel might have been obtained. Could the act of the captain give the plaintiffs a right to recover in this action? The opposite counsel wish to make the cargo a test of the rule respecting freight; but the cargo is nothing to us. The agency of the captain binds all parties *who are within the contract of in- [*601 demnity, but not those who are beyond it. There was no necessity for a sale, if another vessel could have been had. 1 Johns. 205; 3 Johns. 321; 9 Johns. 21; 2 Pick. 104; 23 Pick. 405; 10 Com. Law Rep. 366. These cases show that, if the captain could transship, it was his duty to cary on the cargo. The expense is nothing to us. It might have cost half the freight. 4 Wendell, 54.

On the third question. Mr. Stewart cited and commented upon 20 Com. Law Rep. 342; 36 Com. Law Rep. 216.

Mr. Johnson, on the same side:

As to the first question. Certain articles are inserted in the memorandum, to guard against frauds upon the underwriters, because no one could tell whether or not the losses arose from the perils insured against. For example, it is impossible to say how far the injury to the beef proceeded from the perils of the sea, or whether or not it would have been putrid, if there had been no storms. Therefore we only insured against a total loss. The question assumes that the master could have carried on the beef in his own or some other vessel—in a valueless condition, it is true. But does this make us liable? We may lay down these two propositions:

1st. The case cited from Wheaton establishes, that, if a vessel arrives at her port, the underwriters are not responsible, unless in case of general average.

2d. Where the vessel could go on, the same rule must be applied as if she had actually gone on. Otherwise, it is in the power of the captain to convert no loss into a total loss. The underwriters are placed completely in his power. In this case, if the vessel had pursued her voyage, the underwriters would not have been responsible. Originally, the doctrine was more extensive upon our side than now, because it was held that, if any article existed at all, the insurers were discharged. The case in 3 Bingham only corrects this in its vicious extent; it only makes the underwriters free, if the cargo arrives consisting of the same articles which composed it before—that is, if flour is still flour, hides are still hides, etc. The question of value is left out of view altogether. The question before us is, not whether the jury must find that the beef had ceased to be beef or not, but only speaks of its value. 1 Wheaton, 219, decides this. It says that the consideration of quantity or value is of no consequence. If, therefore, ever so small a quantity of the article arrives, or ever so much injured, the underwriters are not responsible. The master's duty was to go on. The case of Roux v. Salvador does not *justify the sale at Nas- [*602

sau. The hides in that case would have lost their character as hides.

As to the second question. This assumes that the master could have repaired his vessel. The question of cost is not involved. Was it not his duty to send on the cargo? If the other side are right, it is always in the power of the assured to bind us by stopping short, when we would not have been responsible if the cargo had been carried on. The agency of the master only begins when the liability of the underwriters is absolutely fixed. The law is settled in England, New York, Louisiana, and in this court. If the cargo remains, specifically, the underwriters cannot be held responsible for a total loss upon memorandum articles. 3 Caines. 108; 1 Johns. 305; 3 Johns. 328; 14 Johns. 139, 143, 144, 145; 23 Peck, 405–409, 412, 414–416; 4 Barn. & Cress. 366; 3 Kent's Com. 210, 212, 213; 36 Com. Law. Rep. 157, or 9 Adolph. & Ellis, 314, cites the above from Kent, with approbation; 3 Mason, 429, 440; 16 East, 214, overrules 5 East.

The owner of the cargo is bound to pay freight if the cargo arrives, no matter how much injured it may be. On memorandum articles, the underwriters are not responsible for anything but a total loss. The policy contains such a clause, and no one has a right to strike it out. But the question supposes a discretion to exist in the master, to act for the benefit of all parties. But how can he do so when their interests are contradictory? If he could have gone on, then a loss of freight has occurred, not from the perils of the sea, but from the conduct of the master. If he has acted for the benefit of the owners of the cargo, that is nothing to us. We only insured that freight should be earned, not that it should be actually received. It might have been for the interest of the owner of the ship and the owner of the cargo to terminate the voyage at Nassau. But it was not for our interest, and we cannot be bound by the act.

Third question. Was it a round voyage? We rely on 2 Starkie, 573; 3 Com. Law Rep. 408.

Mr. **Nelson**, for the plaintiffs, in reply and conclusion:

I admit that, if the loss was not total, we cannot recover. But the proposition is a surprising one, which asserts that an article can be totally valueless in point of fact, and yet not be a total loss in point of law. The object of all contracts of insurance is to preserve property, and here its value is admitted to be entirely destroyed. There is no adjudged case which sanctions such a doctrine. I speak not of the language used by courts, but of points decided. It has never been before this court. 603*] *We do not assert that a loss of a part can be considered a total loss. In 7 Johns. Ch. 415, the loss of a part of the hides was held to be a partial loss. This is settled law in the United States. Massachusetts has followed it. But it is not our question. In 8 Cranch, 47, it is said that nothing short of physical extinction or extinction in value will justify an abandonment of memorandum articles; but it is not settled whether extinction in value will be sufficient. 1 Wheaton, 219, is not like our case. The vessel there did not put into any port of distress, but arrived at her destination.

In the New York cases, the language of the judges is strong, but the cases themselves are distinguishable from ours. [Mr. Nelson here remarked upon the case of Griswold v. New York Ins. Co. in 1 Johnson, and again reported in 3 Johnson, and also upon the case in 14 Johnson.]

These New York cases rest upon a dictum of Lord Mansfield, which has been overruled again and again. [Mr. Nelson then examined all the cases in chronological order, viz.: Park on Insurance, 253; same book, 247; Cocking v. Fraser, 4 Doug. 295; 7 T. R. 218—where the first doubt of Cocking v. Fraser was expressed by Lord Kenyon, Park on Ins. 252; Dyson v. Rowcroft, 3 Bos. & Pull. 474—where it is said that Cocking v. Fraser is much shaken; 15 East; 16 East, 214; 17 Com. Law Rep. 408, 409, or 9 Barn. & Cress. 411; and the case of Roux v. Salvador, which came up twice, 27 Com. Law Rep. 481 or 1 Bing. N. C. 526, and 32 Com. Law Rep. 115; 5 Maule & Selw. 447.]

The English authorities appear to settle the point, that, if the value of an article is destroyed, it is a total loss. This opinion is fortified by Stevens and Benecke on Average, p. 435.

The New York cases rely upon Cocking v. Fraser. There is a learned argument on the subject in 14 Conn. Rep. 47.

As to the second question. It is, that, assuming a power to transship when the articles were damaged, whether an insurance upon freight can be recovered, it being granted that the cargo was insured and that it was for the interest of all parties to sell. The opposite counsel says that 23 Pickering closes this case. But I think not. [Mr. Nelson commented on the authority.] The question to be settled is, What ought the master to do? The authorities read by Mr. Mayer have not been answered. They show that where the master is in the double situation of protector of the ship and cargo, he must act with a sound discretion. Another point open upon the record is, that the vessel was in the hands of the law. The vessel entered the port on the 22d of June, and was sold on the 1st of July. The goods were taken from the control of the master and placed in custody *of the law. The sale [*604 was a judicial one, and the captain only did what his duty required.

As to the third question. This very point is decided in 12 Wheat. 383.

Mr. Justice **Nelson** delivered the opinion of the court, after reading the statement prefixed to this report:

The first point certified, upon the assumptions stated, involves the question, whether the underwriter of a policy upon freight of goods warranted free from average is liable, as for a total loss, unless the goods be actually destroyed by one of the perils insured against, so as to be incapable of shipment to the port of destination; or whether a total loss may result at the port of distress from the goods having been so much damaged, that, if sent on, they would become of no value at the time they reached the port of destination; and hence, instead of being sent on, may be sold for the benefit of whom it may concern.

The contract of insurance upon freight is,

that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good.

It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight pro rata itineris.

If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight; and, on the other hand, if the damage happens to the goods, and the ship be in a capacity to proceed, or, if disabled, another can be procured upon reasonable terms, the owner of the ship will still be entitled to perform the voyage and recover his freight, unless the goods have been totally destroyed. In every case, before he can recover of the underwriter, he must 605*] show that *he was prevented by one of the perils insured against from completing the voyage, and, for that reason, had failed to entitle himself to freight from the shippers.

The first point certified to us assumes that the ship was capable of carrying on the cargo to the port of delivery notwithstanding the injuries received; and the only question is, whether the cargo was so much damaged, and in such a condition, as to have dispensed with that duty.

In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against; and where it would be difficult, if not impossible, to distinguish between them. In case of a total loss, consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided as to the origin or nature of the loss.

What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in most of the cases, the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost *their original* character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. The cases are numerous on the subject, and will be found collected in Park on Marine Ins. ch. 6, subd. 13, p. 247; 2 Phillips on Ins. ch. 18, p. 483; and 3 Kent's Com. 295, 296. It would be useless to refer more particularly to them.

The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. But although this has been suggested in several cases in England as a proper qualification, and as coming within the obligation of the underwriter, there is no case to be found in which the suggestion has received the sanction of judicial authority.

In this country the rule has been uniform, that there must *be a destruction of the [*606 article in specie, as will be seen by a reference to the following authorities: Maggrath v. Church, 1 Caines, 196, Neilson v. Col. Ins. Co. 3 Ib. 108; Le Roy v. Gouverneur, 1 Johns. Cas. 226, Griswold v. New York Ins. Co. 1 Johns. 205, Livingston, J., S. C. 3 Ib. 321, Saltus v. Ocean Ins. Co. 14 Ib. 138; Whitney v. N. Y. Firemen Ins. Co. 18 Ib. 208, Brooke v. Louisiana State Ins. Co. 4 Martin, N. S. 640, S. C. 5 Ib. 530, Morean v. U. S. Ins. Co. 1 Wheat. 219, McGaw v. Ocean Ins. Co. 23 Pick, 405. 3 Sumner, 544; 1 Story, 342.

Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial into a total loss.

Mr. Park in speaking of the case of Cocking v. Fraser, 4 Doug. 295, a leading one in the establishment of the rule, observes that the wisdom of the decision is apparent; for, otherwise, it would be a constant temptation to the assured, whenever a cargo of this description was likely to reach the port of destination in an unsound state, to throw the loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they were not liable by the terms of the memorandum. 1 Park, 249.

The rule, it will be observed, as we have stated it, contemplates the arrival of the goods,

or some part of them, in specie, at the port of delivery; or that they were capable of being shipped to that port in specie. And hence, if the commodity be damaged so that it would not be allowed to remain on board consistently with the health of the crew or safety of the vessel, or if permission be refused to land the same by the public authorities at the port of distress for fear of disease, and, for these and like causes, should, from necessity, be destroyed by being thrown overboard, notwithstanding 607*] the article existed *in specie, and might have been carried on in that condition, there would still be a total loss within the meaning of the policy. In the cases supposed, it is as effectually destroyed by a peril insured against, as if it had gone to the bottom of the sea from the wreck of the ship. The same result follows, also, if the goods be so much damaged as to be incapable of reaching the port of destination in their orginal character.

These principles are either stated in, or are fairly deducible from, several cases, but especially from the cases of Dyson v. Rowcroft, 3 Bos. & Pull. 474, and Roux v. Salvador, 3 Bing. N. C. 266, and S. C. 1 Bing. N. C. 526.

In Roux v. Salvador, in the Exchequer, it was observed that the argument rested upon the position, that, if, at the termination of the risk, the goods remained in specie, however damaged, there was not a total loss; and it was admitted that the position might be just, if, by the termination of the risk, was meant the arrival of the goods at their place of destination; but that there was a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea, as the object of the policy is to obtain an indemnity for any loss that the assured might sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of destination.

It was also remarked, that, if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, were, by reason of that damage, in such a state, though the species be not utterly destroyed, that they could not with safety be reshipped into the same or any other vessel—or if it was certain that before the termination of the original voyage the species itself would disappear—in any of these cases, the circumstance of their existence in specie at the forced termination of the risk was of no importance.

The jury had found in that case, that the hides were so far damaged by a peril of the sea that they never could have arrived at the port of destination in the form of hides; and as the destruction was not complete when they were taken out of the vessel at the port of distress, they became, in their then condition, a salvage for the benefit of the party who was to sustain the loss.

In respect to the first point, therefore, the court direct that it be certified to the Circuit Court, that, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, or 608*] that a tital destruction would *have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination.

The second point certified assumes that the vessel, notwithstanding the disaster, was in a condition to carry on the cargo, or that another could be procured, and the question is, whether the plaintiff is entitled to recover, as for a total loss of freight, if it appeared that it was for the interest of the insured and insurer of the cargo, on account of the damaged condition of the portion sold, that it should have been sold, and not carried on to Matanzas, the port of delivery.

Many of the considerations stated in our examination of the first point certified have a direct application to this one; as it there appears that the interest of the insured, or of the underwriter of the cargo, is not taken into the account, nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port.

The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port instead of taking the risk of further deterioration. But, in that case, the owner, or those representing him, must act upon their own responsibility; for, if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate.

It was said in Griswold v. New York Ins. Co. (which was an action on a policy on freight), that whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in, was a question not to be put to the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship or procuring another.

Other considerations may arise as between the owner and insurer of the cargo, but it is not important now to go into them.

On looking into the facts in this case, it will be seen that the portion of the beef landed at Nassau, and sold, was wet and heated; and that the board of health had recommended to the *authorities, that it should be removed [*609 as soon as it conveniently could be without too great a sacrifice of the property. It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel, or to procure another, for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all proba-

bility, occasion a destruction of the article in specie before it could arrive at the port of destination, or from its damaged condition could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern.

The cargo being in a perishable condition, the extent of the repairs, or difficulty of procuring another vessel, and consequent delay attending the same, are material considerations influencing his judgment in deciding upon the necessity of a sale; for it would be unreasonable to require him to subject his owner to this expense, when, at the same time, a strong probability existed that the cargo would not be in a condition to be reshipped. 18 Johns. 208; 6 Cow. 270; 1 Bing. N. C. 526; 3 Ib. 266; 3 Brod. & Bing. 97; S. C. 6 Moore, 288; 6 Taunt. 383; 1 Holt, 48; 3 Kent's Com. 212, 213; 2 Phillips, 331 et seq.

The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel; and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo. 3 Kent's Com. 212; Shipton v. Thornton, 9 Adolph. & Ellis, 314; Searle v. Scovel, 4 Johns. Ch. 218; American Ins. Co. v. Center, 4 Wend. 45; 2 Phillips, 216.

In respect to the second question, therefore, we direct it to be certified to the Circuit Court, if the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the 610*] cargo that it *should have been so sold, and not transported to Matanzas, still, the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transhipped the portion sold in specie to the port of destination.

The third question is, assuming that the plaintiffs are entitled to recover, is the policy on the amount mentioned for one entire voyage round from Baltimore out, and home again; and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo.

The policy provides, that the defendants, in consideration of $156.25, agree to insure the plaintiffs, etc., on freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, etc., to the amount of $5,000 upon all kinds of lawful goods, etc., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid.

It is insisted, on the part of the defendants, that the voyage insured is one entire voyage from Baltimore out to Rio Janeiro, and then to Matanzas, or home; and that they are entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio.

The court are of opinion, that, upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage. This was the construction given to these terms in a freight policy in Davy v. Hallett, 3 Caines, 16, and The Columbia Ins. Co. v. Catlet, 12 Wheat. 383. The insurance was regarded as, in effect, covering freight upon separate voyages out and home, to the amount of the valuation; and in the former case the payment of double premium was deemed a pretty sure index to the intent of the parties that the policy should attach on the outward or homeward freight according to events, and was to be valid and operative as long as there was aliment to keep it alive. All the considerations urged in favor of this construction in the cases referred to apply with equal force to the policy in question.

The court direct, therefore, that it be certified to the Circuit *Court, that, as- [*611 suming the plaintiffs are entitled to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, 1st. That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination. 2d. If the jury find, that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still, that the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable

time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination. And 3. That, assuming the plaintiffs are entitled to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home. Whereupon, it is now here ordered and adjudged, that it be so certified to the said Circuit Court.

612*] *PHILIP PECK and William Bellows, Copartners, trading under the Firm of Philip Peck & Company, Plaintiff in Error,
v.
JOHN S. JENNESS, John Gage, and John E. Lyon, trading under the Name and Firm of Jenness, Gage & Company, Defendants in Error.

Attachment on mesne process in New Hampshire creates a lien, not defeated by discharge in bankruptcy—U. S. District Court, sitting in bankruptcy, no control of suit pending in Common Pleas of New Hampshire.

The proviso of the second section of the Bankrupt Act passed on 19th of August, 1841, preserves all liens which may be valid by the laws of the States respectively.

In some of the States, attachments are issued on mesne process, by which the property seized is held to await the result of the suit. This constitutes a lien, which is saved by the proviso in the Bankrupt Act.

The various kinds of liens explained.

Therefore, where an attachment was issued and the defendants afterwards applied for the benefit of the Bankrupt Act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment.

The fourth section of the statute, if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts; but if the whole statute be construed together, this is not the result.

A rejoinder, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder.

The District Court could not oust the State court of its jurisdiction, which had already attached.

THIS case was brought up from the Superior Court of Judicature for the State of New Hampshire, by writ of error issued under the twenty-fifth section of the Judiciary Act.

Peck and Bellows were residents of the town of Walpole, in the County of Cheshire and State of New Hampshire. Jenness, Gage & Company resided in Boston.

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

It was argued by Mr. Goodrich, on behalf of the defendants in error.

Mr. C. B. Goodrich, for defendants in error:

In October, 1842, the plaintiffs below sued out a process of attachment, upon which estate of the defendants below, real and personal, was attached. This process issues without the sanction of any judicial officer. It issues at the will of anyone who assumes to be a creditor of the party against whom it issues. It is a proceeding in personam and in rem—is available as the one or the other, as the party may elect.

The question for adjudication is whether the original plaintiffs can avail thmeselves of this process as a proceeding in rem. Howland, who is the several assignee of each of the original defendants, is in no proper sense a party to the record. He appears in the names of Peck and Bellows, and relies upon their rights. 5 Stat. at Large, 443, ch. 9, sec. 3.

*Statutes operate upon property, contracts, or persons. The statutes of the United States and those of a State may operate upon the same property, the same contracts, the same persons. Their action is distinct in time, or in purpose, or both. The operation of the two jurisdictions, each within prescribed limits, is independent. [*613

Courts of equity cannot, in this country, in all things, exercise the same power, to the same extent, as do courts of equity in England. Courts of the United States and those of the States have a different origin; their jurisdictions are for different purposes. The one court will exercise its control over the citizen, so as not to impair his ability to yield obedience to the other, when and where such obedience is due. The jurisdiction of the courts of the United States and of the several States can never rightfully come in collision; where the jurisdiction is concurrent, the one which first attaches will retain it. There are only two modes in which a suit rightfully instituted in a State court can be proceeded in, or controlled by, the courts of the United States; the one is by transfer, the other under the twenty-fifth section of the Judiciary Act. The courts of the United States are invested with the exclusive power of construction of the laws and treaties of the United States; courts of the several States construe the laws thereof; the construction of each, within its appropriate sphere, is obligatory upon the other.

When a statute of the United States adopts or engrafts upon itself a statute or law of one of the States, quoad the law adopted, the construction of such law, at the time of its adoption by the highest judicial tribunal of the State whose law is adopted is also adopted. If this be not so, the same law, acting within the same territory and upon the same person, may mean one thing in one court room, something else in another. A State law adopted by the laws of the United States does not cease to be a State law. The jurisdiction of the District Court of the United States, sitting in bankruptcy, over property, is co-extensive with the effect produced by the decree of bankruptcy; which is to pass the property of the bankrupt, cum onere.

The judgment of the court below should be affirmed, and I submit—

I. That the District Court of the United States for the District of New Hampshire acquired no jurisdiction of the several original petitions of Philip Peck and of William Bellows to be declared bankrupt, and its proceedings upon said several petitions are void. This is so, because the pleas do not aver or show that the petitions were verified by oath, *without which oath and verification the petitions were nullities; because the pleas do not aver that the petitioners represented to [*614

said District Court that they owed debts not created in consequence of a defalcation as a public officer, or an executor, administrator, guardian, or while acting in any other judiciary character; because the pleas do not aver or exhibit the notice which was ordered, or which was published, of the time when the several original applications to be declared bankrupt would be considered. 5 Laws U. S. 440, ch. 9, sec. 1; United States v. Marvin, 3 How. 620; Elliott v. Peirsol, 1 Peters, 338; Ex parte Bollman, 4 Cranch, 93; Sharp v. Spier, 4 Hill, N. Y. 76; Sharp v. Johnson, 4 Hill, 92; Bank of Utica v. Rood, 4 Hill, 535; 2 Christian's Bank. Law, 20, 21, 22; Cooper on Bank. Sta. 165; Buckland v. Newsome, 1 Taunt. 477; Sackett v. Andros, 5 Hill, 330; Stephens v. Ely, 6 Hill, 608; Brereton v. Hull, 1 Denio, 75; Varnum v. Wheeler, 1 Denio, 331; Maples v. Burnside, 1 Denio, 332; Thatcher v. Powell, 6 Wheat. 119; Wilcox v. Jackson, 13 Peters, 511, 516, 517; Walden v. Craig's Heirs, 14 Peters, 147; Hickey v. Stewart, 3 How. 762; Wheeler v. Townsend, 3 Wend. 247; Gordon v. Wilkinson, 8 D. & E. 507; 1 Chitty on Plead. 223; Owen on Bank. App. 25; Archbold on Bank. App. 9 and 97; Wyman v. Mitchell, 1 Cow. 316; Frary v. Dakin, 7 Johns. 75; Ex parte Balch, 3 McLean, 221; United States v. Clark, 8 Peters, 444, 445; Garland v. Davis, 4 How. 131.

II. The several rejoinders of the original defendants, and the matters therein set up, amount in law to a departure from their several pleas. 1 Chitty on Plead. 648.

III. The statute of the United States, in relation to bankruptcies, passed Aug. 19, 1841, as to all matters of liens and securities adopts the laws of the States respectively, and exempts from the operation of the decree of bankruptcy all property which, at the time of the decree, might be charged with any duty, lien, or security valid by the law of the State in which the duty, lien, or security might arise.

This position is sustained by the language of the act, and is in consonance with the uniform policy of the United States, which has been to adopt the laws, usages, and modes of proceeding of the several States so far as practicable. 1 Laws, 92, 1789, ch. 20, sec. 34; 1 Laws, 93, 1789, ch. 21, sec. 2; 1 Laws, 276, 1792, ch. 36, sec. 2; 4 Laws, 278, 1828, ch. 68, sec. 1; 4 Laws, 281, ch. 68, sec. 2; 1 Laws, 79, ch. 20, sec. 12; 2 Laws, 123, ch. 32, sec. 3; 1 Laws, 106, ch. 5; 5 Laws, 393, ch. 43, sec. 4; 5 Laws, 394, ch. 47, sec. 1; 5 Laws, 321, ch. 35; 5 Laws, 410, ch. 2, sec. 1.

An attachment on mesne process was known 615*] to the laws of *the United States, as a lien and security, and recognized by its judiciary, prior to the bankrupt statute. 1 Laws, 602, ch. 75, sec. 16; 3 Laws. 33, ch. 16, sec. 28; 3 Laws, 83, ch. 56. sec. 6; 1 Laws, 594, ch. 71, sec. 15: United States v. Graves, 2 Brock. 381; Tyrell's Heirs v. Rountree, 1 McLean, 95; S. C. 7 Peters, 464; Beaston v. Farmers' Bank of Delaware, 12 Peters, 102; Wallace v. McConnell, 13 Peters, 151.

I now recur to the position, that the bankrupt statute adopts liens which are so by the laws of the several States. Its correctness is evident from the proviso in the second section of the act, and from the fact that the act professes to pass only such property as the bankrupt might convey; the act gives him no new right of property, or power over it. Ex parte Christy, 3 How. 316, fully sustains the principle, in which the court say: "There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the State laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy, but they are to be held of equal obligation and validity in the courts of the United States as they would be in the State court." It is not necessary to ascertain what constitutes a lien at common law, in equity or admiralty, or in the civil law. The lien protected is such a one as is known to the law of the State in which the question arises. Savage v. Best, 3 How. 119; Norton v. Boyd, 3 How. 436. How will this court ascertain what constitutes a lien by the laws of New Hampshire? By a resort to the adjudications of its highest judicial tribunal; this course is in conformity with general principles and with the course of this court. Green v. Neal, 6 Peters, 295; Livingston v. Moore, 7 Peters, 542; Jackson v. Chew, 12 Wheat. 153; Shelby v. Guy, 11 Wheat. 361.

IV. An attachment on mesne process, on the 19th of August, 1841, and on the 10th of October, 1842, was a lien or security valid by the laws of the State of New Hampshire.

In support of this, I refer to the laws of New Hampshire, edition of 1830, pp. 58, 59, 101, 105, 106; to Kittridge v. Warren and Kittridge v. Emerson, in manuscript, not yet reported. These cases, and the authorities cited in them, exhibit the law of New Hampshire as it has been recognized from its early history. The principle is sustained by the courts of other States. Kilborn v. Lyman, 6 Met. 304; Hubbard v. Hamilton Bank, 7 Met. 342; Am. Ex. Bank v. Morris Canal Co. 6 Hill, N. Y. 367; Storm v. Waddell, 2 Sandford, Ch. R. 494; Davidson v. Clayland, 1 Harr. & Johns. 546. I refer, also, to an opinion of a distinguished jurist, Hon. Jeremiah Mason, which sustains the views submitted.

*In opposition to the two last posi- [*616 tions, Ex parte Foster, 2 Story, 131, is relied upon. I submit that the authorities relied upon in this case do not support the judgment pronounced. The cases mainly relied upon in Ex parte Foster are Atlas Bank v. Nahant Bank, 23 Pick. 488, Conard v. Atlantic Ins. Co. 1 Peters, 386, 441, 443, Giles v. Grover. 6 Bligh, 279. An examination of them will show that they sustain, so far as applicable, the views which I have presented; the case of Giles v. Grover proceeded entirely upon the ground of prerogative, and it was so regarded in a subsequent case. Godson v. Sanctuary, 1 Nev. & Mann. 52.

The case Ex parte Foster is not sustained by the reasons; our answer to them is complete. A statute lien is exactly what the statute makes it, and it derives no aid from the analogies of other liens. Several of the adjudications of this court, to which I have referred, are in opposition to the doctrines of Ex parte Foster.

V. Assuming that the bankrupt statute adopts the laws of the States respectively as to liens and securities, and that an attachment on

mesne process, as recognized by the laws of New Hampshire, is regarded by such law as a valid lien or security, it results, ex necessitate, that a discharge of the bankrupt does not and cannot defeat a lien or security rightfully created and existing prior to any act of bankruptcy.

Assuming the third and fourth propositions as sound, the one now taken is a necessary deduction from them. It is sustained by the express terms of the proviso. It is so independent of the proviso. The decree of bankruptcy passes the property, and its effect cannot be enlarged or diminished by the discharge, or by a denial of the discharge, to the bankrupt. An attachment is a double aspect; it is a proceeding in personam and in rem; so far as it is in personam, the discharge is a protection; so far as it is in rem the discharge cannot avail to destroy a right which the act protects. It is clearly competent for the court to render a judgment in rem, and thus uphold every part of the act. Wallace v. Blanchard, 3 N. H. 395; Chickering v. Greenleaf, 6 N. H. 51; Buxton v. Marden, 1 D. & E. 80; Steward v. Dunn, 11 Mees. & Welsby, 63; Newton v. Scott, 4 Mees. & Welsby, 434; S. C. 10 Mees. & Welsby, 471. Whether the court of New Hampshire has power to render a conditional judgment where the law and justice require such judgment is a matter exclusively cognizable by that court.

VI. The order of the District Court exhibited in the rejoinders is not an authority, within the meaning of the twenty-fifth section of the Judiciary Act of 1789; and if it be such 617*] *authority, neither Peck nor Bellows claims title under it; for which reasons, the decision of the State court upon the effect of such order cannot be re-examined in this court.

A judgment of a court of the United States must be enforced by itself. If the party relies upon it in a State court, he must be content with such effect as the State court gives to it; otherwise, causes will come here indirectly, which cannot, under the laws of the United States, come here directly. Osborn v. United State, 6 Wheat. 738; Montgomery v. Hernandez, 12 Wheat. 129; Williams v. Norris, 12 Wheat. 117; Crowell v. Randell, 10 Peters, 368; Mackay v. Dillon, 4 How. 447; Owings v. Norwood, 5 Cranch, 334; Hickie v. Starke, 1 Peters, 98.

VII. The District Court had no jurisdiction to make the order which is set up in the several rejoinders of the defendants below. It is an attempt by the District Court, contrary to the provisions of the twenty-fifth section of the Judiciary Act, to exercise appellate jurisdiction over the State court. The property, at the time the order was made, was in custodia legis. Ashton v. Heron, 2 Mylne & Keene, 390; 2 Story's Eq. sec. 891. Ex parte Christy admits that the District Court cannot reach the State courts; if it can reach their offices, the protection is of no value. Ship Robert Fulton, 1 Paine, 620; Hogan v. Lucas, 10 Peters, 403; Brown v. Clark, 4 How. 4; Knox v. Smith, 4 How. 316; Harris v. Dennie, 3 Peters, 294; Ex parte Dorr, 3 How. 103; Ex parte Bellows and Peck, 2 Story, 443; Slocum v. Mayberry, 2 Wheat. 1.

I have assumed, so far, that all the doctrines of Ex parte Christy are to be sustained by this court. I submit, however, "that a suit rightfully instituted in a State court, before the institution of proceedings in a court of the United States, cannot be arrested by injunction from any court of the United States." If this be not so, our complex system of government cannot be upheld. 1 Laws, 334, 335, ch. 22, sec. 5; Annis v. Smith, 16 Peters, 313. This proposition is in harmony with the analogy which may be drawn from the English law of bankruptcy. Ex parte Pease, 19 Ves. 46; Ex parte Heath, Mon. & Bligh, 171; Ex parte Bocherley, 2 Glyn & Jam. 369; Ex parte Tindal, Buck, 305.

VIII. The order of the District Court can have no effect upon the rights of the parties before this court. The defendants in error were not parties to the proceeding before the District Court. The order is, in personam, against the sheriff and his deputy, and does not reach, or in any manner fasten upon, the property. Ramsey v. Eaton, 10 Mees. & Welsby, 22; Bellows and Peck, 3 Story, 428; Marshall v. Beverley, 5 Wheat. *313; Conn [*618 v. Penn, 5 Wheat. 424; Russell v. Clark, 7 Cranch, 69; Aspden v. Nixon, 4 How. 497, 498; Hollingsworth v. Barber, 4 Peters, 475.

IX. The several petitions of Peck and of Bellows to be declared bankrupt do not aver the insolvency or inability of Philip Peck & Co., as a firm, to pay its debts; and the several decrees of bankruptcy do not subject the joint or partnership property to the action of the bankruptcies. The fourteenth section of the bankrupt statutes especially provides for the case of partnerships. Taylor v. Fields, 4 Ves. 396; Ex parte Ruffin, 6 Ves. 126; Young v. Keighly, 15 Ves. 557; Dutton v. Morrison, 1 Rose, 213; Ex parte Farlow, 1 Rose, 421; Shriver v. Lynn, 2 How. 43.

Mr. Justice Grier delivered the opinion of the court:

The defendants in error, Jenness, Gage & Co., instituted this suit against Philip Peck and William Bellows, in the Court of Common Pleas of Cheshire County, New Hampshire, demanding the sum of $2,000, for goods sold and delivered. The action was served according to the practice of that State, on the 10th of October, 1842, by the attachment of the goods, chattels, and lands of the defendants. The cause was continued till April Term, 1844, when Aaron P. Howland, assignee in bankruptcy of each of the defendants, was, on motion, admitted by the court to come in and defend in their names. He pleaded severally their application to the District Court of the United States, at Portsmouth, on the 26th of November, 1842, for the benefit of the bankrupt law; on which they were decreed bankrupts, on the 28th day of December, 1842. That Howland was appointed assignee, and that defendants severally received a certificate of discharge on the 21st of June, 1843.

To these pleas the plaintiffs below replied, that, before the filing of said petitions by the defendants, to wit, on the 8th of October, 1842, the plaintiffs in good faith sued and prosecuted out of the Court of Common Pleas their writ of attachment against the defendants for a just

debt; by virtue of which the sheriff attached and took into his custody and possession, as security for such judgment as the plaintiffs in their said suit might obtain, certain goods and chattels on a schedule annexed, and now retains the custody thereof; and therefore pray judgment to be levied of the same.

To this replication the defendants rejoined, that Howland, the assignee, on the 25th of July, 1843, presented to the District Court of the United States a petition, setting forth the plaintiffs' attachment of the goods, and aver-
619*] ring that such attachment *was not a valid lien on the said goods, and that therefore the sheriff had no right to detain them; and prayed the court to order and decree that the sheriff should deliver the goods to the assignee, or account for their value; and that the court, after notice to the parties and hearing, had decreed accordingly.

To these rejoinders the plaintiffs demurred; and the Court of Common Pleas entered their judgment, as follows: "That the plaintiffs recover against the said Philip Peck and William Bellows $1,818.87, damages and costs of suit; which sums are to be levied only of the goods and chattels and estate of the defendants attached upon the plaintiffs' writ aforesaid, and described in the plaintiffs' said replications, and not otherwise."

This judgment of the Court of Common Pleas was removed by writ of error to the Superior Court of Judicature of the State of New Hampshire, at the instance of the defendants; and, on hearing the judgment of the court below, was affirmed.

The defendants, now plaintiffs in error, then prosecuted their writ of error to this court, under the twenty-fifth section of the Judiciary Act of 1789. As the record shows that the highest court of judicature of the State of New Hampshire has decided against a title claimed under a statute of the United States, it is clearly a proper case for the revision of this court. Various questions have been made on the argument of this case, as to the regularity of the bankrupt proceedings, and the validity of the certificates of discharge set forth in the pleas of the defendants below. But we do not think it necessary to notice them; and shall therefore assume that the bankrupt proceedings are regular, and properly set forth in the pleas.

I. The first question that will present itself for our consideration will be, whether the replication of the plaintiffs below sets forth matter in avoidance of the plea which will entitle them to the judgment prayed for, and afterwards rendered by the court. In order to test its sufficiency, we must first inquire, whether an attachment of property under the process peculiar to New Hampshire and some other States creates a lien or security on the property attached, within the true meaning and intention of the proviso of the second section of the Bankrupt Act.

The words of this proviso are as follows: "And provided, also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or any liens, mortgages, or other securities on
620*] property, real or *personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will not be necessary to give them further attention. Taking the words of the proviso, disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, etc., from any construction of the act that shall in any wise annul, destroy, or impair them; and, furthermore, to test their validity, we are referred to the laws of the States, respectively.

At common law there can be no lien without possession. It is there defined, a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. Hammond v. Barclay, 2 East, 235. In maritime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term "lien" is used as synonymous with a charge or incumbrance upon a thing, where there is neither jus in re, nor ad rem, nor possession of the thing. Hence a judgment which, by virtue of the statute of Westminister 2d (commonly called the Statute of Elegit), is a charge upon the lands of the debtor, is called in courts of equity in England, and in the courts of law of many of these States, a lien, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed "liens" both before and after the property is seized and taken into the custody of the law by its officer. In the case of Waller v. Best, 3 Howard, 111, this court decided that in Kentucky the creditor obtains a lien upon the property of his debtor by the delivery of a fi. fa. to the sheriff, and this lien is as absolute before the levy as after; and that a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor, committed before the levy is made, but after the execution is in the hands of the sheriff; and "it is unnecessary," say the court, "to remark upon the cases which have been decided in other States, or in England, because the question depends altogether upon the law of Kentucky.

It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common law liens, and not statute liens; liens after judgment, and not liens before judgment; or to assert that it is the policy of the Bankrupt Act to save the lien of a factor or bailee, while it annuls that of the judgment or execution creditor.

*It is clear, therefore, that whatever [*621 is a valid lien or security upon property, real or personal, by the laws of any State, is exempted by the express language of the act.

Let us inquire, then, whether an attachment on mesne process is a valid lien or security on the property attached by the laws of New Hampshire, as expounded by her courts.

This species of process is peculiar to the New England States. As early as the year 1650, while New Hampshire was united to the Massachusetts colony, it was enacted, that

"henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged." Charters and Colony Laws, 50. And a proviso was added in 1659, that, when execution was not taken out within one month after judgment, the attachment shall be released and void in law, etc.

The earliest provincial legislation of New Hampshire adopted the same system, which has been continued with some variations to the present day. In 1718, they describe the goods attached as "security to satisfy the judgment" which the plaintiff might recover on the trial. Provincial Laws N. H. 113. In the statute of July, 1822, and of November sessions, 1842, ch. 2, the charge or incumbrance created by an attachment is denominated a "lien."

The mode of proceeding and practice, as at present established, under writs of attachment in the State of New Hampshire, is thus described by the Superior Court of that State, in the case of Kittridge v. Warren:

"In an attachment of personal estate, the sheriff, upon the service of the writ, takes the possession of the goods, and acquires thereby a special property in them, for the purpose of enforcing and protecting the attachment, and the rights of al concerned in the attachment and in the goods. He is then accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor, and the attachment be dissolved; the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved, it fastens itself upon the goods, as a charge or incumbrance, like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment, when recovered. Subsequent attachments may be made upon them by the 622*] same sheriff, and *where there are several attachments, the attaching creditors have a right to priority of satisfaction, so far as those goods are concerned, not by priority of judgment, but by that of the attachment. Poole v. Symonds, 1 N. H. 292, 294; Bissell v. Huntington, 2 Ib. 142; Hackett v. Pickering, 5 Ib. 24; Kittredge v. Bellows, 7 Ib. 428; Clarke v. Morse, 10 Ib. 238."

The statute of elegit has never been adopted in this State, and hence a judgment is not treated as a charge or lien on the lands of the defendant, and the reason would seem to be, because the plaintiff could select his security upon specific property by his attachment at the commencement of his suit, and hold it for thirty days after judgment for the purpose of satisfaction. Hence their courts have denominated the charge or security thus obtained a lien. See Dunken v. Fales, 5 N. H. 538; Kittredge v. Bellows, 7 Ib. 427; Clarke v. Morse, 10 Ib. 238; Burnam v. Folsom, 5 Ib. 568; Kittridge v. Warren; Kittridge v. Emerson, etc.

In Massachusetts, also, the charge or incumbrance created by an attachment is denominated a "lien." See 9 Mass. Rep. 210; Fettyplace v. Dutch, 13 Pick. 392; Arnold v. Brown, 24 Pick. 95; Kilborn v. Lyman, 6 Met. 299, etc. In Connecticut, also, see Carter v. Champion, 8 Conn. 550.

Having thus shown that an attachment on mesne process creates a charge on the property attached in favor of the plaintiff, which is, in the language of the statutes and courts of New Hampshire, called a "security" and a "lien," it will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive features. The mere accidents of the subject cannot alter its essence. It is a statute lien, and therefore as much protected by the general language of the proviso as a common law lien.

II. Could this lien be defeated by the interposition of the plea of bankruptcy as a bar to a judgment in favor of the plaintiff?

By the fourth section of the act, it is declared, that "the certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." And it is contended, as the lien of the attachment was defeasible, and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together.

This conclusion would be undoubtedly correct, if we construe *this section of the [*623 act by itself, and without regard to other provisions of the same act.

But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

The proviso to the second section of this act declares, "that nothing in this act contained shall be construed to annul, destroy, or impair," any liens, etc. Here, then, is an absolute prohibition to the court to construe the general terms of the fourth section so as to defeat the lien saved by the second. It is clear, therefore, that the court, while it grants the defendant the benefit of his discharge, must do it in such a manner as not to impair the rights saved to the plaintiff. All liens, whether by mortgage or judgment, by common law or by statute, are for the purpose of obtaining satisfaction of some debt or claim; and the construction of the fourth section which would treat the bankrupt's certificate as an absolute discharge from all his debts, for every purpose, would be alike destructive of them all. The mortgagee, the factor, or the bottomry lender, is in no

better condition than the judgment or attachment creditor. And an attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of the other, would be judicial legislation—jus dare, not jus dicere. In order, therefore, to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, the mortgagees or other lien creditors shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law.

The judgment rendered in this case has fully attained both these objects. While it discharges the defendant from personal liability, it saves to the plaintiffs below their remedy, and awards their satisfaction out of the property attached, "and not otherwise." The books are full of precedents for such a judgment. When an administrator pleads plene administravit, the plaintiff may admit the plea, and take judgment of assets, quando acciderint. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the 624*] *plea, and have judgment to be levied only of defendant's future effects. 1 Chitty, Pl. 548.

III. The only question that remains to be considered is, whether the rejoinder of the defendants below is a sufficient answer to the replication.

It sets up, by way of avoidance of the attachment pleaded in the replication, that the District Court of the United States, on the petition of the assignee, and on notice to the plaintiff in this suit, had decreed that this attachment was not a lien on the property in the custody of the sheriff, and ordered him to deliver it up to the assignee, or account to him for its value. It does not pretend to show how the proceedings in the Court of Common Pleas had been removed to the District Court, or how its judgment on the cause pending before it could be thus anticipated; nor that the District Court had found any means of enforcing its decree by compelling the sheriff to deliver the property attached to the assignee, and thus, in effect, destroy the lien; but it seems to rely on the decree as a judgment on the question, which should operate by way of estoppel. This necessarily involves the inquiry, whether the District Court was vested with any power or authority to oust the Court of Common Pleas of its jurisdiction over the cause, and supersede its judgment, by this summary proceeding.

The District Court has exclusive jurisdiction "of all suits and proceedings in bankruptcy." But the suit pending before the Court of Common Pleas was not a suit or proceeding in bankruptcy; and although the plea of bankruptcy was interposed by the defendants, the court was as competent to entertain and judge of that plea as of any other. It had full and complete jurisdiction over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was *an independent* tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal. The District Court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this court, under the twenty-fifth section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects, they are to be regarded as equal and independent tribunals.

It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and *whether its decision be correct or [*625 otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy v. The Earl of Cassilis, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

The Act of Congress of the 2d of March, 1793, ch. 66, sec. 5, declares that a writ of injunction shall not be granted "to stay proceedings in any court of a State." In the case of Diggs v. Wolcott, 4 Cranch, 119, the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a State court.

It follows, therefore, that the District Court had no supervisory power over the State court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the Bankrupt Act. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the Bankrupt Court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from

the custody of their officers. On the contrary, it provides that "all suits in law and equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt."

Instead of drawing the decision of the case 626*] into the District *Court, the act sends the assignee in bankruptcy to the State court where the suit is pending, and admits its power to decide the cause. It confers no authority on the District Court to restrain proceedings therein by injunction or any other process, much less to take property out of its custody or possession with a strong hand. An attempt to enforce the decree set forth in the rejoinder would probably have been met with resistance, and resulted in a collision of jurisdictions much to be deprecated.

In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such decree or to execute it, either in direct terms or by necessary implication, from any provisions of the Bankrupt Act; and we are not at liberty to interpolate it on any supposed grounds of policy or expediency.

The plea cannot, therefore, be sustained, and the judgment of the Superior Court of New Hampshire must be affirmed.

Order.

This cause came on to be heard on the transcript of the record of the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

ABRAHAM COLBY, Plaintiff in Error,

v.

JAMES LEDDEN.

The decision of this court in the preceding case of Peck v. Jenness affirmed.

THIS, like the preceding case of Peck v. Jenness, was brought up from the Superior Court of Judicature of the State of New Hampshire, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Ledden was an inhabitant of the Province of New Brunswick, and Colby of the State of New Hampshire. The attachment was issued in 1837.

The case was similar, in its principal circumstances, to that of Peck v. Jenness, and was argued together with it.

C. B. Goodrich, for the defendant in error:

As to the principal question, I rely upon the 627*] argument submitted *in the case of Peck v. Jenness. The attachment in this case was made before the passage of the bankrupt statute. It cannot with much reason be said, that the right which the defendant below acquired by his attachment, legal when made, can be taken from him by subsequent legislation. Every objection, however, can be made in this case, which can be taken in relation to any attachment. The debt is discharged here, to the same extent as any other debt.

As to the objections, that the statute requisites have not been complied with which are essential to constitute an attachment, I submit that the State court is the exclusive judge in this particular, and that its judgment is not open to review in this court.

Mr. Justice Grier delivered the opinion of the court:

This case was argued with the case of Philip Peck et al. v. John S. Jenness et al., and the record presents the same questions which have just been decided in that case.

For the reasons there assigned, the judgment of the Superior Court of New Hampshire is affirmed.

Order.

This cause came on to be heard on the transcript of the record of the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

JOHN L. SHAWHAN, Daniel Shawhan, George H. Perrin, Benjamin Berry, Catharine Snodgrass, and Isaac Miller, Appellants,

v.

PERRY WHERRITT, Assignee of the Bankrupt Estate of Benjamin Brandon.

U. S. Bankrupt Act—decree not impeached collaterally after public notice of proceedings—lien by decree of State Court in suit, instituted after such notice, invalid.

A decree of the District Court of the United States, sitting in bankruptcy, whereby a person proceeded against, in invitum, was declared to be a bankrupt, is sufficient evidence, as against those who were not parties to the proceeding, to show that there was a debt due to the petitioning creditor; that the bankrupt was a merchant or trader within the meaning of the act; and that he had committed an act of bankruptcy.

The first section of the Bankrupt Act declares that the making of any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods, or chattels, is the commission of an act of bankruptcy.

No creditor can, by instituting proceedings in a State Court, after the commission of *an [*628 act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by such fraudulent deed, if he has notice of the commission of an act of bankruptcy by the debtor. It passes to the assignee of the bankrupt for the benefit of all the creditors.

A lien thus acquired is not saved by the proviso of the second section of the bankrupt law. That proviso does not protect liens which are inconsistent with the second and fifth sections of the act, and these sections declare such a lien to be void.

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

On the 6th of April, 1842, Benjamin Brandon executed the following deed:

"This indenture, made and entered into this 6th day of April, 1842, between Benjamin Brandon, of Harrison County and State of Kentucky, of the one part, and William A. Withers, of the county and State aforesaid, of the other part, witnesseth: That the said Benjamin Brandon, for and in consideration of one dollar, to him in hand paid, and for the further consideration hereinafter mentioned, hath given, granted, bargained, sold, released, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, release, convey, and confirm unto the said William A. Withers, his successor or successors, forever, all the estate, real, personal, and mixed, of whatever nature or kind it may consist (except such property only as by law not subject to execution), said estate hereby conveyed consisting of a tract of about 336 acres of land, situated in the State and county aforesaid and the same tract on which said Brandon now resides, and on which is a steam mill and distillery, the boundary of which land is more particularly designated in the several deeds which said Brandon holds for said land; also, five negroes, two wagons and teams, about 400 head of hogs, about 15,000 pieces of cooper's stuff, all his stock of horses, cattle, and sheep, his household and kitchen furniture and farming utensils, his debts and choses in action, of every kind and description; it being the intention of said Brandon, by this deed, to convey to the said Withers and his successors, forever, all his estate, real, personal, and mixed, and choses in action, with the exceptions hereinbefore expressed, whether the same be particularly mentioned and set forth in this instrument or not. To have and to hold all the estate, real, personal, and mixed, and choses in action, hereby conveyed to the said William A. Withers and his successor or successors, forever, in trust, for the following purposes, namely: To collect the debts and choses in action due, payable, or owing to said Brandon, and to sell the real estate hereby conveyed, either all together or in lots, as said trustee may think most advisable, at public auction, to the 629*] highest bidder, on the *following payments: namely, one third of the purchase money to be paid in hand, and the residue in one and two years; and the slaves and personal estate to be sold at public auction to the highest bidder, on a credit of twelve months; and after making to said trustee a just and reasonable compensation for his trouble and expenses in executing this trust, to pay all the money which he may receive as trustee aforesaid, either by the collection of debts or choses in action, from the proceeds of the sale of the trust estate, to all the creditors of said Brandon, ratably, proportionably to the amount of their respective debts or demands; but should any one or more of the creditors of said Brandon become the purchaser or purchasers of any portion of the real or personal estate, or slaves, hereby conveyed, said trustee is authorized and empowered to accept the debt or debts *due or owing* by said Brandon to such pur*chaser or purchasers*, in payment for their respective purchases, so far as said debts may go; and in such cases, if any such should occur, only the residue of the price to be distributed pro rata as aforesaid; and after the payment of all said Brandon's debts, to pay the residue, if any, to said Brandon, his heirs and assigns; and the title to the estate hereby conveyed he doth hereby warrant and defend to said Withers, and his successor or successors, forever, in trust for the purposes aforesaid, against the claim or claims of him, the said Benjamin Brandon, and against all other claims. In testimony of which, the said Benjamin Brandon hath hereunto subscribed his name and affixed his seal, this day and year first above written.

Benjamin Brandon."

On the 3d of May, 1842, John L. Shawhan and others filed a bill in the Harrison Circuit Court of Kentucky, sitting as a court of equity. The bill recited, that the complainants were creditors of Brandon; that he had executed the deed above set forth, "for the purpose of hindering, delaying, and defrauding the creditors of the said Brandon in the collection of their debts;" that the trustee was about to sell and dispose of the property mentioned in the deed; and prayed for an injunction to stop him.

On the same day an injunction was issued, and served upon Brandon and Withers, the trustee.

On the 21st of May, 1842, Brandon and Withers filed separate answers to the bill. Brandon admitted his indebtedness, and the execution of the deed of trust; averred that Shawhan was present while the deed was preparing, and expressed himself satisfied with its provisions; denied most positively that he executed said deed either to hinder, delay or defraud *his creditors, but, on the con- [*630 trary, in good faith, believing that general satisfaction would be given to them. The answer of Withers was to the same effect as that of Brandon.

On the 25th of June, 1842, Withers and Brandon applied for an order to change the venue. It was granted, and the record sent to the County of Bourbon.

On the 24th of September, 1842, John Lail presented a petition to the United States Kentucky District Court, sitting in bankruptcy. It alleged that, on the 6th of April preceding, Brandon had made a fraudulent conveyance with intent to defraud his creditors; and that he had concealed himself to avoid being arrested. It then prayed that the court might declare the said Benjamin Brandon a bankrupt. With the petition were filed several exhibits, which it is not necessary to state particularly.

On the same day an order was passed, setting down the hearing for the 4th of the ensuing November, and, in the mean time, enjoining the defendant and all others from removing or otherwise disposing of the property of the defendant, or which, on the decree, the assignee might be entitled to reclaim and recover.

On the 22d of October, 1842, the Bourbon County Court, before which the suit of Shawhan and others against Brandon and Withers was pending, passed a decree annulling and setting aside the deed of trust, as being, in

point of law, fraudulent and void. The court enumerated many of the creditors, whose claims had been exhibited, and then ordered, that "so much of the personal property, slaves, and real estate mentioned in said deed of trust as may be necessary for the purpose be sold to satisfy the aforesaid debts." Thomas B. Woodyard was appointed to make the sale, according to certain given directions.

On the 22d of November, 1842, the District Court of the United States passed the following order:

"John Lail v. Benjamin Brandon.

"The prayer of the petitioner, that the defendant be declared a bankrupt, having been heard upon the allegations of the petition, and the proofs taken and filed (the defendant having failed to answer), and now having been fully considered:

"It is found and adjudged by the court, that the said Benjamin Brandon, of Harrison County, being a retailer of merchandise, and indebted as in the petition mentioned, did, by making the deed of conveyance and assignment to William A. Withers, of all his property, real, personal and mixed, and rights of property, subject to the payment of his debts 631*] by the *laws of the State, bearing date the 6th day of April, 1842, and on the 7th day of that month and year admitted to record in the clerk's office of the Harrison County Court, and in the petition mentioned, whereof a copy is filed here, now adjudged a fraudulent conveyance and assignment; and by concealing himself to avoid being served with process, whereby a suit had been commenced against him, thereupon became and is a bankrupt.

"Perry Wherritt is appointed the assignee, and required to execute bond in the penalty of $5,000, with two sufficient sureties."

On the 24th of November, 1842, Woodyard, the commissioner appointed by Bourbon County Court, proceeded to sell the personal property of Brandon.

In May, 1843, the commissioner made his report to Bourbon County Court, whereupon another decree was passed, reciting that the former sale was insufficient to pay the debts, and directing that so much of the land comprised in the deed of trust as might be necessary for the purpose should be sold for the payment of the balance of the debts.

On the 14th of July, 1843, the commissioner sold the land, in conformity with the above order, and John L. Shawhan became the purchaser. A writ of possession was issued in his favor, in April, 1844, which will be mentioned again in its proper place.

On the 10th of August, 1843, Wherritt as assignee of the estate of Benjamin Brandon, filed a bill in chancery, in the District Court of the United States for the District of Kentucky, against John L. Shawhan and the other parties named in the caption of this statement. The bill referred to the former proceedings of the court, declaring Brandon to be a bankrupt, and all the other facts in the case. It stated that the assignee had taken possession of the property of the bankrupt, including the land; that Shawhan and others knew of the commission of the act of bankruptcy, but had nevertheless obtained a decree of Bourbon County Court, under the authority of which they had sold the land to Shawhan, who was threatening to disturb the possession of the complainant, and by his threats and false claims of title was preventing the complainant from disposing of the land. It then prayed that Shawhan might be ordered to surrender up, to be canceled, any pretended claim, and that all the parties might answer, etc.

On the 18th of December, 1843, John L. Shawhan, Daniel Shawhan, and Benjamin Berry answered separately. Shawhan admitted the execution by Brandon of the deed of April 6th, 1842, but denied that he [*632 had committed any acts of bankruptcy. It admitted also the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated above; but insisted that by said proceedings he had acquired a lien on the property which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been commenced before those in bankruptcy, could not be affected by those of the District Court of the United States.

It is not material to state the answers of the other defendants. To these answers there was a general replication.

At the April Term, 1844, the Bourbon County Court passed a decree reciting the sale to Shawhan by the commissioner, Woodyard, and proceeding as follows, viz.:

"It is therefore decreed and ordered, that, the said purchases made by the said Shawhans be, and the same are hereby confirmed; that the amounts so decreed to said Shawhans be, and the same are hereby extinguished and satisfied, by the aforesaid purchases made by them, except as to said balance of $149.34, which was decreed to the Shawhans above the amount of their purchases. That a writ of possession issue in favor of said John L. Shawhan, to put him into the possession of said tract of land mentioned in the complainant's bill; that Thomas B. Woodyard, the commissioner herein, convey all the right and title of the defendants, Brandon and William A. Withers, in and to said tract of land, to said John L. Shawhan, by deed of special warranty, warranting the title of the same against the claims of the said Benjamin Brandon and William A. Withers, and all persons claiming by, through, or under them, but not against the claim or claims of any other person or persons whatever."

The decree then proceeded to regulate certain details.

In June, 1844, the bill filed by Wherritt in the District Court of the United States came on for hearing, when the complainant prayed that the defendants might be ordered to pay over the amount of sales of the personal property which had been sold under the authority of Bourbon County Court. A reference took place to a master in chancery, upon the coming in of whose reports the court passed the following final decree, on the 10th of June, 1844.

"This cause having been heard at this term, and argued by counsel, thereupon, on consideration thereof:

It is adjudged by the court, that the complainant was invested with all the estate which

was of said Brandon at the time he became a bankrupt, and that the defendants did not, by their after-commenced suit, and proceedings [*633] therein had *with notice of his act of bankruptcy, obtain a right to have it thereby subjected exclusively, or first, to the satisfaction of their demands; and that the defendants, John L. Shawhan, Daniel Shawhan, George H. Perrin, Benjamin Berry, Catharine Snodgrass, and Isaac Miller, by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and are each of them, liable for his, their, and her proper portion of the proceeds thereof, whereof they thus wrongfully obtain the benefit, and must pay the same, together with the interest thereon, to the complainant, for the purpose of equal distribution required by the statute; and it is adjudged, that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared, and was vested in the complainant as the assignee so appointed; but the said Shawhan, by the assertion of his pretended claims so founded, has and does injuriously embarrass the title of the complainant.

"It is therefore ordered, adjudged and decreed, that the defendant, John L. Shawhan, do, on or before the first day of July next, execute to the complainant, as assignee of the bankrupt estate of Benjamin Brandon, a deed of release of all right, title, and interest claimed by him, Shawhan, in and to the tract of land whereon the said Brandon resided, containing 350 acres, more or less, in the County of Harrison, in the bill and answers mentioned, with covenant of warranty against all persons claiming by, through, or under him.

"And it is adjudged and ordered, that said Shawhan do, on or before the first day of July next, deliver to the complainant the possession of the said land."

The decree then went on to specify the amounts to be paid, etc.

From this decree there was an appeal to the Circuit Court of the United States for the District of Kentucky.

On the 22d of November, 1844, the Circuit Court affirmed the decree of the District Court.

The defendant appealed to this court, and the cause came up on this appeal.

It was argued by Mr. Trimble for the appellants, and Mr. Bibb for the appellee.

The appellants assigned the following causes of error:

I. The Circuit Court erred in affirming the decree of the District Court, and in decreeing costs against the appellants.

[*634] *II. The Circuit Court ought to have reversed the decree of the District Court and dismissed the bill, on the following grounds, to wit:

1. The bill filed by the appellee in the District Court is predicated entirely on the provisions of the English statutes, or the former bankrupt law of the United States, passed in 1800.

2. There is no equity in the bill filed in the court below, when tested by the late bankrupt law of 1841.

3. The bill alleges that the appellee is in possession of the tract of land in contest, and prays the court to quit him and the possession, and protect him against the process of the State court; and the decree directs John L. Shawhan to restore the possession.

4. The decree assumes a fact which is contradicted by the record. John L. Shawhan, etc., commenced their suit in the State court several months before Brandon became a bankrupt, and not afterwards, as is stated in the decree.

5. The principles assumed by the decree are expressly negatived by the bankrupt law of 1841, and can only be sustained by adopting the provisions of the English statutes, or the bankrupt law of 1800.

6. The decree directs the appellants to pay over to the appellee the amount of the sales of the slaves and personal estate of Brandon, when it appears from the record that the commissioner took notes for the purchase money, and the appellants have not received either the notes or the money.

7. The petitioner was not a creditor of Brandon when the petition was filed.

That portion of the argument of the counsel for the appellants, which related to the principal point decided by the court, was as follows, viz.:

By the decree of the District Court, it is said that the complainant in that court was invested with all the estate of Brandon at the time he became a bankrupt, and that the defendants did not, by a suit commenced afterwards, obtain a right to have it subjected to their command, etc. If, by that expression, it was intended to say that, by the decree in bankruptcy, the assignee was invested with all the estate of Brandon, at the time he made the fraudulent deed of trust, the opinion of the court is in direct opposition to the plain and unequivocal words of the third section of the act. That section expressly declared that the estate of the bankrupt shall, from the time of the decree, be deemed to be devested out of the bankrupt, and by force of the decree be vested in the assignee. That provision of the section must be abrogated, and other words *interpo- [*635 lated before the opinion of the District Court can be sustained. It would be a strange perversion of that section, to say that the decree should have relation to an act of bankruptcy, contrary to the express words of the section. If that section had barely said that, by the decree, the estate should be devested out of the bankrupt, and vested in the assignee, without reference to the time when the estate should be so devested, there might have been some room left for construction. But such language has not been used. On the contrary, the words employed have left no room for construction as to the time when the property shall be devested out of the bankrupt, and vested in the assignee.

The same section is equally explicit as to the power of the assignee to sell and dispose of the property of the bankrupt. It provides that the

assignee shall have the same power to sell and dispose of the property which might be exercised by such bankrupt before or at the time of the bankruptcy declared. If, by the decree in bankruptcy, the property was devested out of the bankrupt from the time of making a fraudulent conveyance, he certainly could have no power to sell or dispose of his property at the time of the bankruptcy declared. If Congress had intended that the decree in bankruptcy should have relation to an act of bankruptcy, they would have employed language indicating such an intention. They have not done so, nor even left room for construction on that subject; but the most explicit language has been employed to prevent any such relation by construction. Neither the English statutes, nor the former bankrupt law of the United States, contain any provision similar to that in the third section of the late bankrupt law. The decisions in the English books, and the decisions of the American courts, founded on statutory provisions totally dissimilar, cannot, therefore, have any influence on the question. The statute 13th Eliz. empowers the commissioners in bankruptcy to sell and convey all the lands and tenements which the bankrupt had at the time he became a bankrupt; and further provides, that such conveyance shall be good against the bankrupt, and all other persons claiming by, from, or under him, or by any act after committing the act of bankruptcy. 2 Bl. Com. 285; 2 Phil. Ev. 289.

The statutes of James I. direct the commissioners to assign over to the assignees the whole of the bankrupt's estate, and makes void all acquisitions of property by, from, or under the bankrupt, at any time after committing the act of bankruptcy. A few cases, only, are excepted out of the general prohibition by the same statutes, and by the statute of 19th George II. 2 Bl. Com. 485, 486; 1 W. Bl. 68; 2 W. Bl. 829. The tenth section of the bankrupt law of the United States, passed in 636*] *1800, contains similar provisions. By the express provisions, therefore, of the English statutes, and of the bankrupt law of 1800, the assignment of the commissioners vested in the assignees the whole of the estate of the bankrupt which he had at the time when he committed the act of bankruptcy. It has already been shown, that the late bankrupt law contains no such provision, but that its provisions expressly negative any relation to an act of bankruptcy.

Mr. Bibb's argument upon the same point was as follows:

III. The rights, titles, and authorities of the assignee, when appointed by the court, had relation to the act of bankruptcy committed on the 6th of April, 1842, specified in the decree declaring the bankruptcy, and overreached and avoided the lien claimed by the appellants as the result of their proceedings in the State court, so originated after and with full knowledge of the prior act of bankruptcy.

Such relation is expressly enacted by the second and third sections of the Act of 1841. That the effect of such relation, so enacted by the statute, is to annul all subsequent acts by which the assets of the bankruptcy are attempted to be diverted from the general fund for distribution among the several creditors of the bankrupt, is a doctrine well settled by very many adjudged cases. These precedents may be arranged under four classes.

1st Class. Transactions by and with a bankrupt preceding an act of bankruptcy, but in contemplation of bankruptcy, and for the purpose of preferring a creditor contrary to the spirit of the bankrupt law, and therefore void. Of this class these examples will suffice: Locke v. Winning, 3 Mass. Rep. 325, 326, 329; Harman v. Fishar, 1 Cowp. 117, 123; Rust v. Cooper, 2 Cowp. 629, 632, 633; Alderson v. Temple, 4 Burr. 2238, 2239, 2241; Compton v. Bedford, 1 W. Bl. 362.

2d. Class. Transactions by a bankrupt in themselves acts of bankruptcy, and therefore void. Of this class these examples, out of many others, will suffice. Worsely v. De Mattos, 1 Burr. 468, 476, 484; Wilson v. Day, 2 Burr. 827; Alderson v. Temple, 4 Burr. 2239, 2240; Devon v. Watts and Hassells v. Simpson, 1 Doug. 86, 89, 92; Linton v. Bartlett, 3 Wilson, 47.

3d Class. Transactions by and with a bankrupt after an act of bankruptcy committed, and before commission sued out, void because after an act of bankruptcy. Of this class these examples will suffice: Hussey v. Fidell, 3 Salk. 59; Dyson v. Glover, 3 Salk. 60; King v. Leith, 2 T. R. 141; Vernon v. Hall, 2 T. R. 648; Dias v. Freeman, 5 T. R. 197.

*4th Class. Efforts by process of law, [*637 after an act of bankruptcy, to abduct the property of the bankrupt from the assets for distribution among the general creditors, avoided by the commission after taken out upon the previous act of bankruptcy. Of this class these examples will suffice: Sill v. Worswick, 1 H. Bl. 665; Cooper v. Chitty, 1 Burr. 20; Coppendall v. Bridgen, 2 Burr. 817, 820; Smallcomb v. Cross, 1 Ld. Raym. 252; Rust v. Baker, 2 Strange, 996; Payne v. Teap, 1 Salk. 108; Smith v. Milles, 1 T. R. 475; Ward v. Macauley, 4 T. R. 489, Buller's N. P. 41, 42.

Such must be the relation to the time of the act of bankruptcy, and such the effect thereof, according to the enactments of the third, second, and fifth sections of the bankrupt law of 1841.

I put the third section foremost, because that section declares that the rights, titles, powers, and authorities of the assignee shall relate, not only to the time of the act of bankruptcy committed, but even to a time before the bankruptcy. I refer to the second section for the purposes, first, to show that the time of the decree passed is not the border and foremost faculty given to rights of the assignee (as has been argued for the appellant), when appointed by the court in consequence of the decree, but that the relation thereof to the act of bankruptcy, upon which the decree is founded, is clearly avouched by the second section; second, as explanatory of the sense and propriety of the expression in the third section, "before or at the time of his bankruptcy."

The celebrated maxim of the Rabbins is, "In the law there is no such thing as first or last." For in the law many things are set down, all taking effect, as the one law, at one and the same time. The sages of the law have been used to collect the sense and meaning of the law by comparing one part with another, and by viewing all the parts together as one whole, and

not of one part only by itself—"Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum per legerit." Lincoln College's case, 3 Co. 59, b; Stardling v. Morgan, Plowd. 205; Co. Litt. 381, a.

I do not cite the second section as that which directly invalidates the lien set up by the appellants, but only as explanatory of the third section. The nullity of the lien claimed by the appellants by process of law in the State court, commenced and carried on after the act of bankruptcy, results from the relation of the rights, titles, powers, and authorities of the assignee to the time of Brandon's bankruptcy, committed on the 6th day of April, enacted by the third section, and the system of equality among all the creditors of the bankrupt estab-
638*] lished *by the fifth section. This equality among creditors, without preference or priority, is the soul and spirit of the bankrupt law, to which the second and third sections are but handmaids and auxiliaries.

The English system of bankruptcy having been in use long before the system of bankruptcy was enacted in the United States, our statutes have borrowed the general outlines and phrases from the English statutes and the adjudications thereon. In particular instances expressions are altered to make the principle less dubious, and to enlarge the reach and extent of the statute. It will therefore not be without utility, in conducing to a clear understanding of our statute of 1841, to run a parallel between that and the English statutes.

By the English statute, the process against a bankrupt commenced by the petition of a creditor to the court, alleging the particular act of bankruptcy which the debtor had committed. So by ours. By the English statute and ours of 1800, the proper court, upon the presentation of a petition, appointed, as a matter of course, commissioners to hear and determine the matters of the petition against the debtor, and, if found true, "to declare him or her a bankrupt." By our statute of 1841, the petition is heard by the court, and, if true, the bankruptcy is declared by decree of the court. By the English system, and by our statute of 1800, the debtor had notice of the time and place appointed by the commissioners to hear and determine the matters of the petition, but no notice was given generally to persons interested to show cause against the petition. By our statute of 1841, notice of the time assigned by the proper court for the hearing of the petition is given by a publication in one or more newspapers, at least twenty days before the hearing, "and all persons interested may appear and show cause, if any they have, why the prayer of the petitioner should not be granted."

By the English system, the commission of bankruptcy was liable to be superseded (if improvidently issued) by application to the Court of Chancery. Ex-parte Gayther, 1 Atk. 144; Ex-parte Sydebotham, 1 Atk. 146; Ex-parte Hylliard, 1 Atk. 147. By our statute of 1841, section first, the decrees declaring the bankruptcy, when passed by the proper court, and not re-examined upon the petition of the bankrupt within ten days for a trial by jury, " shall be deemed final and conclusive."

By the English system, the creditors appoint-
ed the assignees to manage the estate and af-
652

fairs of the bankrupt. By our statute of 1841, the assignee is appointed by the court, with power of removal and new appointment, toties quoties.

By the English statute and ours of 1800, the commissioners *made a formal deed of [*639 conveyance and assignment of the property and effects of the bankrupt to the assignee. By our statute of 1841, no deed of conveyance or assignment is made to the assignee appointed by the court, but by the third section the decree of the court is made to stand in the place, and to have the effect, of a formal deed of conveyance and assignment to the assignee, when thereafter appointed by the court.

By the former statutes, the estate and title of the bankrupt were not devested out of him, nor vested in the assignees chosen by the creditors, until the formal deed of conveyances and assignment was executed by the commissioners to the assignees; although the power and authority of the bankrupt over his property was suspended by his act of bankruptcy. So is the law stated to be, in the cases of Cary v. Crisp, 1 Salk. 108; Brassey v. Dawson, 2 Strange, 981, 982; Buller's N. P. 41.

By the first part of the third section of the Act of 1841, "all the property and the rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt," "who shall by the decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be devested out of the bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion," etc. In this the allusion to the former mode of assignment by a formal decree of conveyance is clear, and the decree itself is made to have like effect.

By the former statutes, when the deed of conveyance and assignment was executed, the rights and titles to the property of the bankrupt were in the assignees chosen by the creditors, from the time of the act of bankruptcy committed, by relation or retrospect, according to the numerous cases before cited.

By the after part of the third section of the Act of 1841, the like relation, or retrospect, to the time of the act of bankruptcy committed, is enacted as to the rights, title, and authorities of the assignee when appointed by the court.

The words are: "And the assignee so appointed shall be vested with all the rights, titles, powers, and authorities, to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid."

The word "before" so used has reference to the provisions *of the second section, [*640 whereby acts done "in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any

preference or priority over the general creditors of such bankrupt," etc., "shall be deemed utterly void, and a fraud upon this act." Such acts so done before the act of bankruptcy, but being in contemplation of an act of bankruptcy afterwards committed, and contrary to the spirit of the bankrupt law, are declared void. Therefore, in the third section, the word "before" is introduced, in connection with the words "or at the time of his bankruptcy," so as to make the relation of the title, powers, and authorities of the assignee embrace fraudulent transactions by and with a bankrupt before the act of bankruptcy committed, as well as after the bankruptcy and before the appointment of the assignee.

The decree declaring the bankruptcy devests the title, rights, and authorities of the bankrupt out of him; the appointment and qualification of the assignee vests all the rights, titles, authorities, and powers in the assignee by relation, as fully as they were vested in the bankrupt himself "before or at the time of his bankruptcy." Moreover, this relation, so established by the word "before," extends to frauds and other injuries committed upon the property of the bankrupt, in invitum, before his act of bankruptcy (and before he contemplated bankruptcy), and to all other rights which the bankrupt himself might have asserted, if the misfortune of bankruptcy had not happened to him. So that fraudulent contrivances before or after the act of bankruptcy are within the rights, titles, powers, and authorities of the assignee.

If all the time between an act of bankruptcy committed and the decree pronounced upon the petition, after a notice (by publication of not less than twenty days) of the time assigned for the hearing, had been left as an hiatus, a chasm, not filled by the relation and retrospect of the title, rights, authorities, and payers of the assignee in bankruptcy, when appointed by the court, and thereby omitting all mesne acts contrary to the spirit of the bankrupt law, then, indeed, the statute would have been impotent to protect and secure the funds and assets of the bankruptcy for that just equality and distribution among all the creditors—to every of the creditors bona fide a portion, rate and rate like, according to the quantity of his debt—which are the soul, essence, and spirit of a bankrupt law, and the end designed and enacted by the fifth section.

Without such relation, the filing of the petition against a bankrupt, and the publication of the notice for the hearing, would have been a signal for acquiring priorities and preferences, by levy of executions, attachments, and every 641*] species *of depredation upon the estate, property, and effects of the bankruptcy; the statute would have been but a dead letter. For example, the appellants claim the whole property of the bankrupt by process and decrees in chancery begun after the act of bankruptcy committed, having knowledge thereof, and using the very fact and deed of trust, in itself, a definite act of bankruptcy, as the foundation of their attachment.

But the statute is not so lifeless, so powerless. The legislators who enacted the statute of 1841, using the lessons of former legislation, the wisdom of experience, and profiting by the examples of former times and the adjudications upon former statutes of bankruptcy in England and the United States, comprehended the truth, that the relation of the rights, titles, powers, and authorities of the assignee in bankruptcy to the previous time of the act of bankruptcy committed (and even "before"), was necessary and proper to the end proposed, and so enacted.

[Mr. Bibb then commented at length upon the case of Sill v. Worswick, 1 H. Bl. 665, 694, which he considered very strongly in point.]

Mr. Justice Grier delivered the opinion of the court:

Perry Wherritt, as assignee of Benjamin Brandon, a bankrupt, filed his bill in equity in the District Court of the United States for Kentucky, setting forth that, on regular proceedings in said court, Brandon was deemed and held to be a merchant and trader, within the Bankrupt Act, and found to have committed acts of bankruptcy by making a fraudulent transfer of his property, and by secreting himself to avoid the service of legal process, and was, therefore, decreed a bankrupt, on the 22d of November, 1842; that the complainant was duly appointed his assignee; that, on the 6th of April, 1842, Brandon has made a fraudulent deed of trust of all his property to William A. Withers; that John L. Shawhan and others, the defendants and appellants, with a full knowledge of the acts of bankruptcy, filed their bill in chancery in the Harrison Circuit Court of Kentucky, against Brandon, Withers, and others, charging that the said deed of trust was fraudulent and void; that the court decreed that the deed was void, and ordered the property to be sold for the benefit of Shawhan and the other creditors who had joined in the bill; that, since the decree in bankruptcy, the State court had proceeded to sell the real and personal estate of said Brandon; that Shawhan had purchased a tract of land belonging to Brandon, of 350 acres, of which the complainant had possession, whereby he was prevented from disposing of said land for a fair price; and praying that *Shawhan might be [*642 compelled to surrender and cancel his claim, and for all such equitable relief, general and special, as the merits of the case may require, etc.

The answer of Shawhan admits the execution by Brandon of the deed of the 6th of April, 1842, but denies that he had committed any acts of bankruptcy. It admits, also, the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated in the bill. He insists that by said proceedings he had acquired a lien on the property, which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been commenced before those in bankruptcy, could not be affected by them, etc.

On the hearing of this cause at June Term, 1844, before the District Court, "the complainant prayed as specific relief as to the movable property which was of said Brandon at the time he became brankrupt, and which the defendants afterwards caused to be sold under the decree of the Bourbon Circuit Court, that the defendants be adjudged to pay the amount

of said sales"; and the court referred it to a master to report the amount of the sales of personal property, and afterwards decreed, "that the complainant was invested with all the estate which was of said Brandon at the time he became bankrupt, and that defendants did not, by their after-commenced suit and proceedings therein had (with notice of his act of bankruptcy), obtain a right to have it thereby subjected exclusively or first to the satisfaction of their demands; and that the defendants, John L. Shawhan, etc., by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and are, each of them, liable for their proper portion of the proceeds thereof, whereof they thus wrongfully obtained the benefit, and must pay the same, together with interest, to the complainant, for the purpose of equal distribution as required by the statute; and that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared," and was vested in the assignee so appointed," etc., etc. It was adjudged and decreed, also, that Shawhan should release all his title in the land to the complainant, and the defendants severally pay over to the plaintiff the money received by each of them from the proceeds of the personal property.

From this decree the defendants appealed to 643*] the Circuit *Court of the United States for the District of Kentucky, where the decree of the District Court was affirmed, and the defendants then prosecuted their appeal to this court.

Of the numerous objections to the decree taken on the argument, it will be necessary to notice but two, being those chiefly relied on by the counsel for the appellants.

1. That the decree in bankruptcy was not evidence, as against the defendants, who were no parties to it, either that there was a debt due to the petitioning creditor, or that Brandon was a merchant or trader within the meaning of the Bankrupt Act, or that he had committed an act of bankruptcy. It is a sufficient answer to this objection, 1st. That the thirteenth section of the Bankrupt Act declares, that "the proceedings in all cases of bankruptcy shall be deemed matters of record." 2d. Both parties admit the deed made by Brandon, on the 6th of April, was fraudulent, and the first section of the Bankrupt Act declares the execution of such a deed an act of bankruptcy. 3d. The record before us shows sufficiently that he was a merchant or trader, and therefore liable to be declared a bankrupt. The District Court had, therefore, plenary and exclusive jurisdiction of the subject matter. 4th. The public notice required by the act having been given, the creditors must be treated as having notice of the proceedings, and an opportunity to make their objections to them, and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are *in the nature of* a proceeding in rem, before a court of record having jurisdiction. 5th. Even if the record in the Bankrupt Court be not conclusive as against the defendants, it is at least prima facie evidence that all facts necessary to sustain the decree were proved before the court; and lastly, the record of this case shows sufficient evidence to sustain the decree on all points. Besides, the third section of the act declares, that "all the property, etc., of every bankrupt (except as hereinafter provided), who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be devested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee," etc. As the court had jurisdiction of the subject matter and person of the bankrupt, the decree is thus made conclusive evidence of the title of the assignee.

The English cases can have no application to this question, as there all proceedings in bankruptcy are before commissioners, under a commission issued out of chancery, and the commissioners are not a court of record.

*2d. The chief and important question [*644 involved in this case is whether the appellants, after an act of bankruptcy of which they had full knowledge, could, by proceeding in a State court, obtain a valid lien, and seize the property of the bankrupt to the exclusion of his other creditors, or whether such proceeding be not a fraud on the bankrupt law, and therefore void.

The appellants in their answer deny their knowledge of the act of bankruptcy, and that the defendant was a bankrupt before the decree. But this seems rather a denial of the law than of the fact; for the bill filed by them in the State court alleged that the deed made by Brandon of all his property to a trustee, on the 6th of April 1842, was fraudulent and void. The first section of the Bankrupt Act, in enumerating the acts for which a merchant or trader shall be liable to be declared a bankrupt, by proceedings in invitum, mentions the making of "any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels," etc. By their own showing, therefore, they had knowledge of the fact of bankruptcy. The acts thus enumerated are usually termed acts of bankruptcy, and may be considered as tests of insolvency, showing conclusively the inability of the trader to pay his debts, or carry on his trade. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference, to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably. To prevent these frauds, the English bankrupt laws give the title of the assignee a relation back to the act of bankruptcy, so as to avoid all payments, sales, or contracts made after it. The second section of our Bank-

rupt Act effects the same object, not by establishing the doctrine of relation in direct terms, but by declaring all such payments, transfers, etc., void, and a fraud on the act, and enabling the assignee to recover the money paid, or property transferred, for the use of the creditors. This section declares fraudulent and void, not only "future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving a preference or priority to one creditor over another," but that "all other payments, securities," etc., "to any person whatever, not being a bona fide creditor or purchaser for a valuable 645*] consideration without notice, shall *be deemed utterly void and a fraud on this act"; and the assignee is authorized to sue for, and recover and receive the same, as part of the assets of the bankruptcy.

It avoids, not only payments, securities, etc., made in collusion with a bankrupt in contemplation of bankruptcy, but those obtained by a creditor with notice; and it afterwards defines this notice which is the test of fraud or want of bona fides in the creditor to be "notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." A creditor may always recover payment of his debt, or security for it, from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy; and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt. And if notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a State court after such notice could have no better claim to protection; for notice of the act of bankruptcy to the creditor is the test of the mala fides which vitiates the transaction.

The last proviso of the second section, which saves all "liens, mortgages, or other securities on property, which may be valid by the laws of the States respectively," subjects them, nevertheless, to this condition; that they shall not "be inconsistent with the second and fifth sections of the act." Liens or securities which would be otherwise valid by the State laws, being made void by the second section when obtained after notice of an act of bankruptcy, are, consequently, not saved by this proviso; but the property subject to them vests in the assignee discharged from such lien, and if the property has been sold under process from a State court, the creditor is liable to refund the money thus received to the assignee of the bankrupt. Having obtained this preference mala fide, in fraud of the bankrupt law, he cannot be suffered to retain the fruits of it to the injury of other creditors; otherwise, the whole policy and aim of the law would be frustrated.

We are of opinion, therefore, that the lien obtained by Shawhan upon the property of Brandon by his proceedings in the State court, after notice of the act of bankruptcy, was not saved or protected by the proviso to the second section of the act, and that he and the other appellants, who had appropriated the assets of the bankrupt to their own use, are liable to refund the same to the assignee in this suit; and that the decree of the Circuit Court of the United States for the District of Kentucky should be affirmed.

*Order. [*646

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

WILLIAM and FRANCIS SADLER, Complainants.

v.

THOMAS B. HOOVER, Sylvanus Chambers, and Samuel H. Dinkins, Partners by the Style of Thomas B. Hoover & Company.

Jurisdiction—certificate of division—particular point must be stated.

Where an appeal from a circuit court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as would give this court jurisdiction.

The appeal must, therefore, be dismissed, for want of jurisdiction.

THIS case came up on a certificate of division from the Circuit Court of the United States for the Southern District of Mississippi.

The following is the statement of facts agreed upon in the court below, by the counsel for the respective parties, and sent up with the record.

Wm. Sadler and Francis Sadler v. Thos. B. Hoover and others. } In Chancery.

"In the Circuit Court of the United States for the Southern District of Mississippi.

"The bill states that at May Term, 1839, of the Circuit Court, the defendants, Thomas B. Hoover & Co., recovered judgment against them, and one Francis Ross, their surety, for $3,501.84 debt, and $383.65 damages, with interest thereon from the 17th of May, 1839, and costs of suit; and at the same term, another judgment against them, and one W. D. Henry, as their surety, for $7,881.66, with interest from the 17th of May, 1839, and costs of suit. That executions issued on said judgments, and forthcoming bonds have been given with one Robert Ridley, as security in each case, and that said bonds were returned forfeited to the November Term, 1839, and executions about to issue thereon; that the instruments of writing on which these *judgments are founded [*647 were given by complainants, in consideration

NOTE.—Cases certified on division of circuit court; jurisdiction of United States Supreme Court in. See note to 13 L. ed. U. S. 325.

of certain slaves sold by the firm of Thomas B. Hoover & Co. to them, on the 28th of October, 1836, and for which bills of sale were given; that complainants feel themselves greatly aggrieved by the conduct of Thomas B. Hoover & Co.; that they had an understanding with Hoover, by which they might have been relieved from the contract, but which was not reduced to writing with other parts of the contract, and complainants have thus been deprived of its benefit, and will be greatly injured if relief is not afforded to them on the grounds hereafter stated.

"The complainants allege that the said slaves were introduced into this State by the said Thomas B. Hoover, for himself and partners, but a few weeks previous to such sale, as merchandise, and for sale, without any certificate of character, and were sold without any record of certificate, contrary to the constitution and laws of the State of Mississippi; and that the causes of action, on which the said judgments are rendered, were given in direct exchange for said slaves. That complainants have been advised that this court will interfere to prevent the collection of these judgments if they will submit to act rightly, and not use the occasion to act fraudulently and unjustly. On this principle of equity, complainants submit to a rescission of the contract—offer to deliver up to defendants all the said negroes now alive, and to account for hire of them, including, also, their increase, and to perform whatever they may be required by the court.

"Complainants aver that they were prevented from making this defense at law, by advice of counsel, on account of decisions adverse to it previously made by this court and the circuit courts of the State of Mississippi; and the current of decisions to this effect was not broken into until the decision of this court, at the late November Term (1839), and until then complainants supposed they were not entitled to relief on this ground, and under this belief they entered into forthcoming bonds. That defendants, Hoover & Co., are unwilling to rescind said contract, and are about to enforce the collection of said judgments. The bill prays process, and a perpetual injunction against the judgments.

"On application to the district judge, he granted a flat for an injunction on the 4th of January, 1840, and injunction was issued accordingly.

"Previous to the May Term, 1840, the defendants, Thomas B. Hoover, Samuel H. Dinkins, and Sylvanus Chambers, members of the firm of Thomas B. Hoover & Co., answered.

"Thomas B. Hoover, in his answer, admits 648*] that, as a member *of said firm, and on its behalf, a few weeks previous to the sale, he introduced into the State of Mississippi, as merchandise, and for sale, a number of slaves, without any certificate of character, or record of the same, and that he sold the slaves named in the bill to the complainants, and took their bill of exchange and note therefor, on which the said judgments were rendered. He denies, positively, any arrangement or understanding between him and complainants, by which they were to be relieved from their contract; that *although* these slaves were introduced for sale, *the defendant insists* on the validity of the contract; that even regarding the contract as illegal, the complainants having failed to make this defense on the trials at law, they are now precluded from availing themselves of this ground of relief in chancery; especially that complainants have given forthcoming bonds on which judgments have been rendered.

"As to complainants' offer to rescind the contract and to restore the slaves, this defendant states, that, on a dissolution of the partnership, he transferred the liabilities of complainants to his copartners; he has, therefore, no control of the judgments; that having made the contract of sale, he can state positively that no fraud or imposition of any kind was practiced on complainants; that the contract was fair and honest on his part; that the negroes were, as he believes, sound and healthy, and were sold at the customary prices.

"Samuel H. Dinkins, in his answer, admits that he was a member of the firm of Thomas B. Hoover & Co. He knows nothing personally of the sale of the slaves, and on this point refers to the answer of Thomas B. Hoover, the trading partner. He admits, however, that the slaves were sold to complainants; that, after litigation on the instruments given for them, judgments were rendered against complainants for the sums agreed to be given. He insists on the legality and validity of the contract, and that the complainants, having failed to make this defense at law, cannot now avail themselves of it as a ground of relief. He rejects the offer of the bill to rescind the contract, as being manifestly unjust, since the great change in the value of this property, and because the complainants do not offer to account for the value of the three slaves since dead.

"Sylvanus Chambers states in his answer, that, as to the introduction of the negroes into Mississippi, and their sale, he knows nothing personally. He insists on the validity of the contract, and that, whether originally legal or not, complainants cannot now avail themselves of this ground for relief, having failed to set it up as a defense at law. He rejects, also, the proposition to rescind the contract, for the reason stated in the *preceding answer, [*649 and insists that, as the contract was fairly entered into, without any willful intent to violate the laws of Mississippi, should the court decree it to be void, he and his partners should be compensated also for the value of the three dead slaves, as there is no allegation of their unsoundness; and especially, as he charges, that they died from the cruel treatment of the complainants.

"At May Term, 1840, a motion was made, on the part of defendants, to dissolve the injunction, which motion was afterwards overruled.

"At the May Term, 1844, the cause came to a hearing on bill, answers, and replication, before their Honors, Peter V. Daniel, and Samuel S. Gholson, judges. And the court not being able to agree in opinion, one of the said judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, it was ordered, at the request of counsel on both sides, that the difference of opinion be certified to the Supreme Court of the United States for their decision.

"The foregoing is a correct abstract of the material facts in the above stated cause.

"Lea & Lea, Complainants' Sol.

"W. R. Hill, Defendants' Sol.

"January 8, 1845."

The case was argued (in print) by Mr. Hill for the defendants, but the question of the jurisdiction of this court was not raised, and it is deemed unnecessary to insert the argument of the main point in the case.

Mr. Chief Justice Taney delivered the opinion of the court:

This case comes before us on a certificate of division. But, upon inspecting the record, it appears that the particular point or points upon which the justices of the Circuit Court differed in opinion are not distinctly stated; and the case must therefore be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the 650*] said transcript, that no *point in the case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and decreed by this court, that this cause be, and the same is hereby dismissed, and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

FREDERICK J. and SAMUEL W. BARNARD and Henry Q. Hawley, Appellants, v. JOHN GIBSON.[1]

Appeal does not lie from decree for injunction in patent cause, and reference to take account of profits, not being final.

Where a decree in chancery refers the matters to a master to ascertain the amount of damages, and in the meantime the bill is not dismissed nor is there a decree for costs, the decree is not a final one, from which an appeal will lie to this court, although there is a perpetual injunction granted.

The amount of damage which will follow from restraining a party from using a machine held under a patent right is a proper consideration to be addressed to the Circuit Court, but does not constitute a ground of appeal.

THIS was an appeal from the Circuit Court of the United States for the Northern District of New York.

The question being, whether or not the decree of the Circuit Court was final, the Reporter thinks it proper to insert the whole of that decree, together with the statement of facts, as he finds it prepared by Mr. Justice Nelson.

Circuit Court, United States.

John Gibson v. Frederick J. Barnard and others. } In Equity.

I. W. W. Woodworth conveyed to John Gibson the exclusive right to the Woodworth planing machine in and for the city and County of Albany, with the single exception of two rights in the town of Watervliet, in said county. With this exception, the whole right of the county was in Gibson.

II. The two machines, the right to use which was thus excepted, consisted, first, of a machine in use at the time in said town by Rousseau and Easton, which had been erected under the first term of the patent, and the right to continue which they claimed during any extension of the grant; and, second, of a machine which Gibson had conveyed to Woodworth, and by him to Rousseau and Easton.

III. Woodworth, on the 19th of May 1842, agreed with *Rousseau and Easton to [*651 make an assignment to them by which they would become vested more fully with the right of running the machine in the town of Watervliet, which they claimed under the first term of the patent; and also to assign to them the right to use the other machine which had been conveyed to him by Gibson, of even date with this agreement. In consideration of which Rousseau and Easton paid at the time $200; and, in case the extension should be obtained, and assignment of the two machines, as above stipulated for, made, they would pay, in addition, $2,000, in four equal annual installments.

IV. This agreement of the 19th of May, 1842, was modified by an indorsement on the same, signed by all parties, 26th April, 1843, in which it was recited that Rousseau and Easton had, on that day, executed and delivered to Woodworth eight promissory notes, of $250 each, payable at different periods, the last one 1st July, 1846; in consideration thereof, the said Woodworth agreed that, upon payment of said notes as they became due, he would make the assignments stipulated for in the said agreement referred to.

V. On the 12th of August, 1844, Wooworth assigned all his interest in this contract with Rousseau and Easton in respect to the two machines, and all right and title to the use of the same, to J. G. Wilson, by which he took the place of Woodworth.

VI. On the 13th of November, 1844, Gibson renounced and released all right or claim, if any, to these two machines, to J. G. Wilson, this having been supposed necessary to enable Wilson to sue Rousseau and Easton for breach of their contract, or for an infringement of the Woodworth patent and extension by the use of the machines in the town of Watervliet after refusing to fulfill their contract; Gibson claimed no right to the use of the two machines in said town, as he had already passed to Woodworth all the right which he ever had in the same. The release was given for abundant caution, the

1.—Mr. Chief Justice Taney did not sit in this cause, being indisposed at the time it was argued.

NOTE.—What is a final decree or judgment from which an appeal lies. State and other courts. See notes to 4 L. ed. U. S. 97; 5 L. ed. U. S. 302; 49 L. ed. U. S. 1001; 62 L.R.A. 515.

better to secure to Wilson the right which he had acquired by the assignment from Woodworth.

VII. On the 5th of December, 1845, J. G. Wilson granted to F. J. Barnard & Son a license to construct and use two machines in the town of Watervliet, for which he was to receive $4,000; but it was then and there agreed, that, if the decision of the Supreme Court of the United States, in a case then pending between Wilson and Rousseau and Easton, should be against Wilson, so as to exclude him from the use of the said two machines in the said town, then he was to repay to Barnard & Son $2,000, paid to him on that day in part 652*] *satisfaction of the purchase money; but if the decision should be in favor of Wilson, and Barnard & Son should be put in possession of the right to erect and use the two machines in said town, then they were to pay to Wilson a further sum of $2,000.

VIII. Upon the foregoing state of facts, and upon the pleadings and proofs in the case, it is quite clear, that, down to the time of the grant of Wilson to Barnard & Son, the 5th of December, 1845, Gibson, the complainant, possessed the exclusive right and title to the planing machine in and for the County of Albany, with the exception of the two rights in the town of Watervliet, namely, the right to use one claimed by Rousseau and Easton, under the first grant, and more effectually secured to them by Woodworth, and the one sold and assigned by Gibson to Woodworth, and by him to Rousseau and Easton.

And, further, that Wilson possessed no interest in any right to the use of the planing machine in the town of Watervliet, except in the two so derived from Woodworth by assignment of the 12th of August, 1844, and which had before been sold to Rousseau and Easton, and of which they were in the actual use and enjoyment. Wilson therefore could grant his interest, whatever it might be, in these two rights, and nothing more; and this was all that could pass to Barnard & Son under the grant of the 5th of December, 1845. The terms of that agreement also establish, that it was the interest of Wilson in these two rights which he intended to sell, and Barnard & Son to purchase.

IX. The failure of Rousseau and Easton to fulfill their agreement of purchase with Woodworth, the interest in which belonged to Wilson, did not, of itself, operate to annul and cancel the contract. It was a contract partly executed; $200 of the purchase money had been paid, and promissory notes given for the residue. The machines had been erected, and were in operation; and although a court of equity might have decreed the contract to be delivered up and cancelled upon terms, until then Rousseau and Easton must be deemed in the lawful use and enjoyment of the two rights under the patent. And even assuming the contract to be annulled, and the parties remitted to their original rights, it is clear that Wilson had power to grant but one of the rights in said town of Watervliet, as the other was secured to Rousseau and Easton, under the decision of the court in Wilson v. them.

An injunction was accordingly issued.

On the 11th of April, 1848, the Circuit Court of the United States for the Northern District of New York was in session at Utica, when the following decree was passed:

*"This cause having been brought [*653 on to be heard upon pleadings and proofs, and Mr. William H. Seward having been heard on the part of the plaintiff, and Mr. Marcus T. Reynolds on the part of the defendants, and due deliberation having been had, it is ordered, adjudged and decreed, that the defendants in this cause be, and they hereby perpetually enjoined from any further constructing or using in any manner, and from selling or disposing in any manner, of the two planing machines mentioned in said bill as erected by them in the town of Watervliet, in the County of Albany, or either of said machines, which machines are machines for dressing boards and plank, by planing, tonguing or grooving, or either, or in some separate combination, constructed upon the principle and plan specified and described in the schedule annexed to letters patent issued to Wm. W. Woodworth, administrator of William Woodworth, on the 8th day of July, 1845; which letters were a renewal upon a formal surrender for an imperfect specification of letters patent issued to Wm. Woodworth on the 27th day of December, 1828, and extended on the 16th day of November, 1842, to take effect on the 27th day of December, 1842, and again extended by act of Congress on the 26th day of February, 1845, and from infringing upon or violating the said patent in any way whatsoever.

"And it is further ordered, adjudged and decreed, that it be referred to Julius Rhodes, Esq., of Albany, counselor at law, as a master pro hac vice in this cause, with the usual powers of a master of this court, to ascertain and report the damages which the plaintiff has sustained, arising from the infringement of his rights by the defendants, by the use of the said two machines by them.

"And it is further ordered, that the report of the said master herein may be made, either to this court in term time, or to one of the judges thereof at chambers in vacation; and that either party may, on ten days' notice to the other of time and place, apply, either to this court in term time, or to one of the judges thereof at chambers in vacation, for confirmation of such report.

"And it is further ordered, that either party may at any time, on ten days' notice of time and place to the other, apply to this court in term time, or to one of the judges thereof in vacation, for further directions in the premises.

"And the question of costs, and all other questions in this cause, are hereby reserved until the coming in of the said report.

"And the complainant shall either pay to the defendants, or set off against the damages to be awarded, the sum of two *thousand [*654 dollars, which he offered in his bill to pay them, with interest from the 5th day of December, 1845."

An appeal from this decree brought the case up to this court.

Mr. Seward moved to dismiss the appeal, upon the ground that the decree was not a final one; which motion was opposed by Mr. Taber.

Mr. Seward stated the case, and then said that it was admitted that an appeal would not

lie except from a final decree. The only question is, what is the distinction between final and interlocutory decrees. The same principle may be applied which governs the construction of judgments at law; those are final which grant a remedy upon the whole matter, and dismiss a party from the court. But in equity there is some difficulty, owing to the different nature of the relief which is granted. A final decree in equity may be defined to be one which definitively adjudges the whole subject matter; an interlocutory decree, one which disposes of some parts and reserves others for future decision. 2 Daniel Ch. Pr. part 2, pp. 631, 632, 635, 638, 641, London ed. of 1840. The present decree is not final, when tested by the principles laid down by Daniel.

1. It expressly reserves the question of costs. They do not depend upon any statute, but upon judicial discretion.

2. It does not determine the amount of damages, but refers the subject to a master to ascertain and report.

3. Even if the master decides, still the decree does not adjudge them to be according to the report.

4. It does not settle any principles upon which damages can be computed; whether they are for one machine or two, etc.

5. It reserves a decision upon the rights of the respective parties. The complainant offered, in his bill, to pay $2,000; the decree says he shall do so, but does not say whether it is an extinguishment of the claim, or only a set-off.

6. The bill prays that the machines and their produce may be delivered to the plaintiff; but the decree is silent upon this point. The question is reserved. It may be said that a perpetual injunction is decisive of the rights of the parties. But it is only an order, which the court may revoke at any time. It cannot be pleaded in bar. We think the parties are still in court.

7. The decree does not give all the relief which is prayed for in the bill. Whatever is asked and not granted is left undecided, because the bill is not dismissed as to that.

[Mr. Seward then commented on 10 Wheat. 502; 11 Wheat. 429; 8 Peters, 318; 9 Peters, 655*] 1; 6 Cranch, 51; 15 * Peters, 287; 2 How. 62; 5 How. 51; 6 How. 203; Ib. 208, 209.]

Mr. A. Taber, against the motion:

1. The decree in question is a "final decree," upon a sound construction of the Judiciary Act of 1803, chap. 93, sec. 2. The fundamental purpose of this act was to give an appeal, if required, where the amount in controversy was sufficient, to the end that the substantial rights of parties should not be finally disposed of by circuit courts. Not so of the English statutes of limitations, authorities construing which have been cited on the other side. Their leading object was, not to give or take away an appeal, but to restrict by a short limitation appeals taken pendente lite, allowing a longer one to those taken after the cause was ended. Wherefore, the words "final decree," in these English acts, are justly interpreted to mean one which is a finis of the cause, and in our act, one which is a finis of substantial rights of the parties, which, unless immediately appealed from, would take away property from one and give it to another, or work irreparable mischief. 6 How. 202, 203, 206; 13 Peters, 15; 3 Cranch, 179; 2 Smith's Chan. Prac. 187, 188.

The decree in question would do both. It was intended by the Circuit Court finally to adjudge and determine the patent rights in controversy. It takes them away from the defendants, and vests them in the complainant; and, by the perpetual injunction it directs, immediately renders worse than valueless—an incumbrance upon the ground—the expensive erections of the defendants for their enjoyment.

For the costs of the cause, no appeal would hereafter lie. 4 Russell, Ch. 180; 3 Peters, 307, 319; 2 How. 210, 237. The other matters reserved are merely in execution of the decree already passed. Before these matters could have been adjusted, and an appeal prosecuted to effect, our patent rights would have expired by their own limitation, and nothing remain for the appellate offices of this court but a post mortem examination of our rights for the vindication of abstract law.

The perpetual injunction, the main relief prayed, is a final execution; not the mere extension of a preliminary injunction, which latter has been repeatedly denied in this cause, and is wholly inapplicable to a contest between assignees under the same patent, which is, therefore, no more prima facie evidence for one party than the other. 4 Burr, 2303, 2400; 1 Vernon, 120; Ib. 275; 7 Ves. 1; 3 Meriv. 622; 14 Ves. 130–132; Drewry on Injunctions, 223, sec. 5, 221, sec. 3, 223, sec. 4; Eden on Injunctions, 207.

*2. But if this is not a case for an [*656 appeal under the act above cited, it assuredly must be one of "all other cases," provided for by the seventeenth section of the Patent Act of 1836, chap. 747. In patent causes, evidently for the reasons above alluded to, there is no limitation of an appeal except the safe one, that "the court shall deem it reasonable to allow the same." If the act means this honorable court, this appeal has been allowed by it, by one of its justices at chambers. If, as is more probable, the Circuit Court was intended (6 How. 458, and note, and 477), then Justice Nelson, being a quorum of that court (Laws of 1837, chap. 801, sec. 3), acted as such, judicially, in allowing it at chambers. 1 Brock. 380. Or if error has occurred in the manner of taking this appeal, no statute restriction being in the the way, it should be allowed, in furtherance of justice, to be amended now. Laws of 1789, chap. 20, sec. 32; 16 Peters, 319; 7 Wend. 508. And this, according to the last cited case, would be properly done by simply denying this motion.

3. If it be replied to the last point, that this is not a case arising under the patent law, but under the common law of contracts and assignments, then the Circuit Court never had jurisdiction, the cause being between residents of the same State, and an appeal lies at any time, to reverse its decision already made, and dismiss the cause. 2 How. 244, 3 Ib. 693; 8 Peters, 148; 16 Ib. 97; 3 Dallas, 19.

Mr. Justice McLean delivered the opinion of this court:

This is an appeal from the decree of the Cir-

cuit Court for the Northern District of New York.

The parties claim conflicting interests as assignees of Woodworth's patented planing machine. The cause was submitted to the circuit judge, who decreed, that the defendants below be perpetually enjoined from any further constructing or using in any manner the two planing machines, etc., and the case was referred to a master to ascertain and report the damages which the plaintiff has sustained, arising from the infringement of his rights by the defendants by the use of the said two machines. The report of the master to be made in term time, or to one of the judges at chambers in vacation, and on ten days' notice either party to move for confirmation of the report, etc. The question of costs was reserved until the coming in of the report, etc.

A motion is made to dismiss this appeal, on the ground that the decree is not final.

No point is better settled in this court, than that an appeal may be prosecuted only from a 657*] final decree. The cases are *numerous where appeals have been dismissed, because the decree of the Circuit Court was not final. It is supposed there was a departure from this uniform course of decision, at the last term, in the case of Forgay et al. v. Conrad, 6 How. 201.

In that case the court says: "The decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court." "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury."

The decree in that case would have been executed by a sale of the property, and the proceeds distributed among the creditors of the bankrupt, and lost to the appellants, before the minor matters of account referred to the master could be adjusted and acted on by the court. The course of procedure in the Circuit Court was irregular, and the consequent injury to the defendants would have been irreparable. Effect should not be given to its final orders by the Circuit Court, until the matters in controversy shall be so adjusted as to make the decree final. Any other course of proceeding will, in many cases, make the remedy by an appeal of no value.

The decree in the case under consideration is not final, within the decisions of this court. The injunction prayed for was made perpetual, but there was a reference to a master to ascertain the damages by reason of the infringement; the bill was not dismissed, nor was there a decree for costs. In several important particulars, this decree falls below the rule of decision in Forgay v. Conrad. The execution of the decree in that case would have inflicted on the defendant below an irreparable injury. The bill was dismissed as to the principal matters in controversy, and there was a decree for costs.

It is said that the decree in this case, by enjoining the defendants below from the use of their machines, destroys their value and places the defendants in a remediless condition. That in the course of a few months their right to run the machines will expire, and that no reparation can be obtained for the suspension of a right by the act of the court. It is alleged, too, that many thousands of dollars have been invested in machinery, which by such a procedure becomes useless.

*The hardship stated is an unanswera- [*658
able objection to the operation of the injunction, until all the matters shall be finally adjusted. If the injunction has been inadvertently granted, the Circuit Court has power to suspend it or set is aside, until the report of the master shall be sanctioned. And unless the defendants below are in doubtful circumstances, and cannot give bond to respond in damages for the use of the machines, should the right of the plaintiff be finally established, we suppose that the injunction will be suspended. Such is a correct course of practice, as indicated by the decisions of this court, and that is a rule of decision for the Circuit Court.

The appeal is dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, and it appearing to the court here that the decree of the court below complained of is not a final decree within the meaning of the act of Congress, it is thereupon now here ordered and decreed by this court that this cause be, and the same is hereby dismissed for the want of jurisdiction.

THE UNITED STATES, Appellants,
v.
THE HEIRS OF LOUIS BOISDORE.[1]

Practice—appeal.

The meaning of the forty-third rule of this court is, that, if a judgment or decree in the court below be rendered more than thirty days before the commencement of the term of this court, and the record be not filed within the first six days of the term, the appellee or defendant in error may docket the case, and move for its dismissal as the rule prescribes.

But if the judgment or decree of the court below be rendered less than thirty days before the commencement of the term of this court, the rule does not apply.

THIS was an appeal from the District Court of the United States for the Southern District of Mississippi.

Mr. Fendall moved to dismiss the appeal, upon the grounds stated in the opinion of the court; which motion was opposed by Mr. Toucey (Attorney-General).

1.—Mr. Chief Justice Taney did not sit in this cause.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the decree of the District Court for the Southern District of Mississippi.

659*] *The bill was filed against the United States, under the acts of June 17, 1844, and May 26, 1824, to try the validity of the complainants' claim to certain lands in Mississippi. At the November Term of the District Court, 1847, a decree was entered in favor of the petitioners, and at the same term an appeal to the Supreme Court of the United States was granted by the District Court, on the application of the defendants. An appeal thus allowed requires no notice to the appellee. A motion is now made to dismiss this appeal, on the following grounds:

1. Because the appeal is not made to any specified term of the Supreme Court.

2. Because it is not made returnable to the term of the Supreme Court next following the decree.

3. Because the record is not filed at the term of the Supreme Court next following the decree.

Under the Act of 1824, the party against whom the decree is entered may appeal within one year. On the 14th of March, 1848, a transcript of the record was made out, and it was filed in this court at the present term. From the time this decree was entered, to the commencement of the ensuing session of the Supreme Court, there were less than thirty days. And under such circumstances it appears, by the forty-third rule, that the appellant was not required to file the transcript of the record in this court at the first term.

The rule provides, that, "in all cases where a writ of error, or an appeal, shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record with the clerk of this court within the first six days of the term." If this be not done, the other party, on producing the proper certificate, may have the cause docketed and the appeal or writ of error dismissed.

The rule does not operate where a decree is entered less than thirty days before the term of this court, and consequently the cause is not liable to be docketed and dismissed. The appellants, under the circumstances of this case, are chargeable with no neglect for failing to file the record with the clerk at the first term of the Supreme Court after the decree was entered.

The motion to dismiss is overruled.

Order.

On consideration of the motion to dismiss this cause, made by Mr. Fendall, on a prior day of the present term of this court, to wit, on Friday, the 2d instant, and of the arguments 660*] of *counsel thereupon had, as well in support of as against the motion, it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

THE STATE OF MISSOURI, Complainant,
v.
THE STATE OF IOWA, Respondent.

THE STATE OF IOWA, Complainant,
v.
THE STATE OF MISSOURI, Respondent.

Boundaries between Missouri and Iowa—in suit between States on question of boundary, proper mode of pleading is by bill and cross bill.

The western and northern boundary lines of the State of Missouri, as described in the first article of the Constitution of that State, were as follows: From a point in the middle of the Kansas River, where the same empties into the Missouri River, running due north along a meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel, to the middle of the channel of the main fork of the said River Des Moines, thence, etc., etc.

The Constitution of the State of Missouri was adopted in 1820. But in 1816, an Indian boundary line had been run by the authority of the United States, which in its north course did not terminate at its intersection with the parallel of latitude which passed through the rapids of the River Des Moines, and in its east course did not coincide with that parallel, or any parallel of latitude at all.

Missouri claimed that this north line should be continued until it intersected a parallel of latitude which passed through certain rapids in the River Des Moines, and from the point of intersection be run eastwardly along the parallel to these rapids.

Iowa claimed that this Indian boundary line was protracted too far to the north; that by the term "rapids of the River Des Moines" were meant certain rapids in the Mississippi, known by that name, and that the parallel of latitude must pass through these rapids; the effect of which would be to stop the Indian boundary line in its progress north, before it arrived at the spot which had been marked by the United States surveyor.

There being a bill and a cross bill, each State is a defendant, and this court can pass such a decree as the case requires.

The southern boundary line of Iowa is coincident with, and dependent upon, the northern boundary line of Missouri.

Iowa is bound by the acts of its predecessor, the government of the United States, which had plenary jurisdiction over the subject as long as Iowa remained a Territory; and the United States recognized the Indian boundary line, 1st. By treaties made with the Indians; 2d. By the acts of the general land office; 3d. By Congressional legislation.

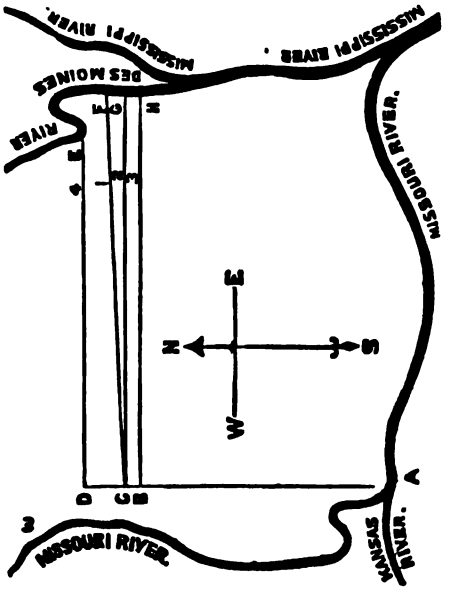
On the other hand, there are no rapids in the River Des Moines so conspicuous as to justify the claim of Missouri.

This court therefore adopts the old Indian boundary line as the dividing line between the two States, and decrees that it shall be run and marked by commissioners.

THE State of Missouri filed a bill against the State of Iowa, in the Supreme Court of the United States, with the consent of the State of Iowa, in order to settle a controversy which had arisen respecting the true location of the boundary line which divided the two States.

The origin of the controversy is so fully stated by Mr. Justice *Catron, in deliv- [*661 ering the opinion of the court, that it is only necessary for the Reporter to explain the pretensions of the respective parties according to the map, without which they cannot be understood. This map or diagram [see next page] is only intended to be illustrative of these claims, without pretending to be geographically accurate.

In July, 1820, the people living in the then Territory of Missouri, in pursuance of an act of Congress, adopted a constitution, in which are described the following boundaries:



"Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude to the St. François River; 662*] * thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

In 1821, Missouri was admitted into the Union with these boundaries.

By an act of Congress approved August 4, 1820, the southern boundary of Iowa was made identical with the northern boundary of Missouri.

In 1816, prior to the passage of these laws, commissioners were appointed on the part of the United States to settle with the Osage chiefs the boundary of the cession which the Osage *tribe had just made* to the United States, and John C. Sullivan was appointed surveyor to run the line which should be thus agreed upon.

Beginning on the bank of the Missouri, opposite the mouth of the Kansas, at A in the diagram, he ran north just 100 miles to the point C; and thence pursued what he thought was a due east course (but which was in fact to the north of east), until he struck the River Des Moines at the point F. This line is marked No. 1, and runs from C to F; the true parallel of latitude being afterwards ascertained to be from C to G.

The State of Missouri alleged, that, at the point E in the River Des Moines, there existed rapids which answered the call in the constitution, and that the parallel of latitude spoken of in that instrument must consequently be a line running from E to D, and that the north line, which commenced at A, must therefore be protracted to D, where it intersected the parallel of latitude called for; that the phraseology used required the "rapids of the River Des Moines" to be in that river, and not in the Mississippi.

*On the other hand, it was alleged [*662 by the State of Iowa, that in the Mississippi River, at the place marked H, there were rapids which were commonly called and known by the name of "the rapids of the River Des Moines," long anterior to the formation of the constitution of Missouri; that the parallel of latitude must run through the head or centre of these rapids, and that the line H B would therefore be the true boundary, the point B being the spot where this parallel of latitude would intersect the line running north from A.

These were the claims of the respective parties. To sustain them, a great mass of evidence was taken on both sides.

The cause was argued by Mr. Gamble and Mr. Green for the State of Missouri, and Mr. Ewing and Mr. Mason for the State of Iowa.

[The Reporter regrets that he cannot give an extended notice of the arguments of the respective counsel. But he is admonished, by the size which this volume has already attained, that he must reduce the cases which are yet to be reported to as small a compass as possible.]

The positions assumed by the counsel respectively are thus stated in the briefs of Mr. Green for Missouri, and Mr. Ewing for Iowa:

Mr. Green:

On the part of the State of Missouri it is insisted—

1st. That the words "rapids of the River Des Moines" constitute the controlling call to determine the northern boundary, and that the natural and obvious import of these words is "rapids of and in the River Des Moines itself."

2d. That the evidence establishes the fact, that there are rapids in the River Des Moines.

3d. That there is no ambiguity in reference to the river of which the rapids are spoken, and none as to the rapids, unless more rapids than one are found in the River Des Moines.

4th. That having established the fact that there are rapids in the River Des Moines, thus satisfying the call of the constitution, no evidence can be introduced to contradict or vary the meaning of the constitution, or to prove that rapids of some other river were intended, different from that which the language indicates and describes.

6th. That the evidence offered does not prove the rapids in the Mississippi River to have been commonly known and called by the name "rapids of the River Des Moines," as alleged by Iowa.

6th. That if it were true that the rapids of the Mississippi were commonly known and *664*] called "raipds of the River Des *Monies," still these rapids could not be taken as the rapids called for, as they do not answer to the description, while those in the Des Moines fulfill exactly the description, and none others will.

7th. But if the constitution be considered ambiguous, as between the rapids of the River Des Moines and rapids of the Mississippi, it serves only to let in proof of intention beyond what the language indicates. And on this point the evidence is clear in favor of Missouri.

From a full examination of all the facts and circumstances, as established by the evidence in connection with the language of the constitution, and by giving to each the weight to which it is entitled, we contend, in behalf of Missouri—

1st. That the old Indian boundary line (marked as line No. 1 on the diagram) cannot be the true northern boundary of Missouri, and the terms of the descriptive call do not allow the adoption of that line.

2d. That the parallel of latitude passing through the old northwest corner of the Indian boundary (marked on the diagram as line No. 2) is neither legally nor equitably the northern boundary of Missouri.

3d. That the parallel of latitude passing through the rapids of the Mississippi River (marked on diagram as line No. 3) will not fulfill the descriptive call of the constitution, and cannot be the northern line of the State.

4th. That the parallel of latitude passing through the rapids of the River Des Moines, at the Big Bend, in latitude 40 degrees 44 minutes 6 seconds north (marked on the diagram as line No. 4) will precisely and accurately satisfy the discriptive call of the constitution, and is the true northern boundary of the State of Missouri, as established by her constitution.

Mr. Ewing, for Iowa:

We will endeavor to show by the evidence, that, at the time of the adoption of the constitution, there was one object, and one only, namely, the rapids of the Mississippi, a few miles above the mouth of the Des Moines River, which was called in English "the rapids of the River Des Moines," and in French "les rapides de la Rivière Des Moines," which object had notoriety by that name; and that its position is every way adapted to satisfy the locative call.

We shall also expect to show by the evidence that there were no rapids in the River Des Moines, then called, or entitled to be called, on account of position or magnitude, "the rapids of the River Des Moines."

"These facts being established, we will in- *665*] sist that the notorious *object bearing the name used in the locative call, and every way satisfying the call, must be taken in law to be the object called for; and that the centre of "the rapids of the River Des Moines" in the Mississippi is the point over which the line of latitude marking the boundary of the State of Missouri must run.

1st. We will show by public acts, and by numerous witnesses, the position of "the rapids of the River Des Moines;" that they are the same with the lower or Des Moines rapids of the Mississippi, and that those rapids were in 1820, and prior thereto, well known by the name of "the rapids of the River Des Moines" in English, and "les rapides de la Rivière Des Moines" in French.

2d. We will infer from the language of the constitution itself, and the then existing knowledge of the country, that "the rapids of the River Des Moines" were called for in the constitution merely to fix the parallel of latitude on which the boundary line was to run, and were not supposed to be touched by that line.

3d. We will show by actual survey, as well as by general evidence, that there are no rapids in the Des Moines entitled to the general descriptive appellation of "the rapids of the River Des Moines."

4th. And we will insist that in 1820 there were no rapids in the Des Moines River known as "the rapids of the River Des Moines."

5th. We will contend, that the State of Missouri has failed to prove a general understanding or opinion in Congress and in the convention counter to what we have shown to be the obvious construction of the act of Congress and of the constitution of Missouri, when taken in connection with the well established facts.

6th. We will contend, that the evidence on the part of Missouri shows that all, or nearly all, of the members of the convention, and other witnesses who supposed, or now think they supposed, the rapids named in the constitution were in the Des Moines River, knew nothing of any particular rapids to which the constitution referred; but that their impression was vague and general, fixing on no actual known or existing object.

7th. We will show that the evidence which tends to give to rapids in the Des Moines River a distinct locality and name is insufficient and unsatisfactory, and that in the aggregate it applies as well to the Sweet Home or the Farmington rapids, as to the rapids of the Big Bend.

8th. We will insist that the rapids at St. Francisville and the rapids at Farmington are each and either of them better *entitled [*666 to the appellation of "the rapids of the River Des Moines" than the rapids at the Great Bend —the first because of its position, the second because it is the greater rapid. And that the rapids at Sweet Home conform better than those at the Great Bend to the locative calls in the constitution, and to contemporaneous opinion and usage. Fall at Great Bend, in 87 rods, 1.80 feet. Fall at Farmington, in 87 rods, 2.05 feet.

9th. If we succeed in maintaining these propositions, we establish as matters of fact, that the lower rapids of the Mississippi were the object, and the only object, which in 1820 bore in English the name used in the constitution, "the rapids of the River Des Moines," and in French the name used in the translation, "les rapides de la Rivière Des Moines." And that, at that time, they had notoriety in both languages by those names, and that they every way satisfy the locative call.

10th. And these facts being established, we

will contend that those rapids are, and must be held in law to be, the object called for; and that the centre of that object, namely, the centre of "the rapids of the River Des Moines" in the Mississippi, is the point over which the line of latitude must be drawn which shall mark the northern boundary of the State of Missouri.

Mr. Justice Catron delivered the opinion of the court:

On the 10th day of December, A. D. 1847, the State of Missouri filed her original bill in this court, according to the third article and second section of the Constitution, against the State of Iowa, alleging that the northern part of said State of Missouri was obtruded on and claimed by the defendant, for a space of more than ten miles wide and about two hundred miles long; and that the State of Missouri is wrongfully ousted of her jurisdiction over said territory, and obstructed from governing therein; that the State of Iowa has actual possession of the same, claims it to be within her limits, and exercises jurisdiction over it, contrary to the rights of the State of Missouri, and in defiance of her authority.

And the complainant prays, that, on a final hearing, the northern boundary line of said State of Missouri (being the common boundary between the complainant and defendant) be, by the order of this court, ascertained and established; and that the rights of possession, jurisdiction, and sovereignty to all the territory in controversy be restored to the State of Missouri; that she be quieted in her title thereto; and that the defendant, the State of Iowa, be forever enjoined and restrained from disturbing the State of Missouri, her officers and people, 667*] *in the full possession and enjoyment of said territory, thus wrongfully held by the State of Iowa.

To this bill the State of Iowa answers. She denies the right claimed by Missouri; alleges that Iowa has the sovereign authority to govern and hold the territory in dispute as part of her territory, the common line dividing the States being the southern part thereof; and also prays that the rights of the parties may be speedily adjudicated by this court, that the relief prayed by complainant may be denied, and that her bill be dismissed.

To the bill of Missouri Iowa files her cross bill, charging Missouri with seeking to encroach on the territorial limits of Iowa to the extent aforesaid, and more; prays, that, on a final hearing, a decree be made by this court, settling forever the true and rightful dividing line between the two States; that Iowa may be quieted in her possession, jurisdiction and sovereignty up to the line she claims; and that the State of Missouri be perpetually enjoined from exercising jurisdiction and authority, and from disturbing the State of Iowa, her officers and people, in the enjoyment of their rights on the north side of the true line.

To this bill the State of Missouri answers, and sets up in defense the same matters set forth by her original bill.

Replications were filed to both answers. On these issues depositions were taken, on which, *together with* much of historical and documentary evidence, the cause was brought on to a hearing, and was heard with a most commendable spirit of liberality on both sides. And we take occasion here to say, on a matter of practice, that bill and cross bill is deemed the most appropriate mode of proceeding applicable to cases like the present, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary, as in this cause it is.

The present controversy originated in 1837, between the United States and the State of Missouri, and was carried on for ten years before Iowa was admitted as a State. Previous to the controversy, and after Missouri came into the Union, in 1821, many acts had been done by both parties most materially affecting the controversy, and tending to compromit the claims now set up, on the one side as well as the other. The new State of Iowa came into the Union, December 27th, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new boundary on the north, as was done on the west; and so, likewise, Iowa is bound by the *acts and admissions of [*668 the United States, tending indirectly to confirm and establish a particular line as the northern boundary of Missouri. And to ascertain how far the United States government was admitted by acts to a particular line, a brief historical notice is necessary, showing how jurisdiction has been exercised in the country west of the Mississippi River. It was acquired in 1803, and in 1804 the Territory of Orleans and the District of Louisiana were divided, the latter then embracing what is now the State of Missouri, and much more. In 1805, the District of Louisiana was erected into a separate territorial government, the name of which was changed to Missouri, on the State of Louisiana being created, in 1812, that State having adopted the name of Louisiana. In 1819, the Territory of Arkansas was formed from the southern part of the Missouri Territory; the lines of division being the same that now divide the States of Missouri and Arkansas.

In 1818, the inhabitants of Missouri Territory petitioned Congress that it might be admitted into the Union as an independent State. They set forth the boundaries which they desired that the new State should have, with the reasons favorable to the boundaries desired. They alleged that the petitioners resided in that part of the territory which lies between thirty-six degrees and thirty minutes and forty degrees north, and between the Mississippi River east, and the Osage boundary line west; and they prayed to be admitted into the Union of the States within these limits. The petitioners further declared, that "the boundaries which they solicit for the future State they believe to be the most reasonable and proper that can be devised. The southern limit will be an extension of the line that divides Virginia and North Carolina, Tennessee and Kentucky. The northern will correspond nearly with the north limit of the territory of Illinois, and with the Indian boundary line, near the mouth of the River Des Moines. A front of three

and a half degrees upon the Mississippi will be left to the South, to form the Territory of Arkansas, with the River Arkansas traversing its centre. A front of three and a half degrees more, upon a medium depth of two hundred miles, with the Missouri River in the centre, will form the State of Missouri. Another front of equal extent, embracing the great River St. Pierre, will remain above, to form another State at some future day. The boundaries, as solicited, will include all the country to the north and west to which the Indian title has been extinguished. They will include the body of the population."

The two Indian boundary lines referred to (as "the Osage or Indian boundary") were run 669*] in pursuance of a treaty made *in 1808, between the United States and the Great and Little Osage nations, by which it was stipulated that the Osage boundary should begin at Fort Clark, standing on the south bank of Missouri River, about twenty-three miles below the mouth of the Kansas, thence running due south to the Arkansas River, and with it to its mouth; thereby ceding to the United States all lands lying east of said line, and north of the southwardly bank of the Arkansas. The treaty also ceded "all lands belonging to the Osages situated northwardly of the River Missouri." The boundary lines were to be run and marked as soon as the circumstances and convenience of the parties would permit. And the Great and Little Osages promised to depute two chiefs from their respective nations to accompany the commissioner or commissioners who might be appointed by the United States to settle and adjust the said boundary. The war of 1812 seems to have hindered a survey of the lines, as, in 1815, by another treaty, peace was re-established between the contracting parties, and former treaties were renewed, and in 1816 John C. Sullivan was sent by the United States to run the lines north of the Missouri River. The Osages, by the treaty of 1808, having surrendered all claim to territory north of the Missouri River, it became necessary that they should show to the United States what part of that country they owned, so that it might be separated, by a defined boundary, from other Indian territories. Sullivan, the surveyor, commenced his first line on the north bank of the Missouri, opposite to the middle of the mouth of the Kansas, and ran north one hundred miles, made a corner, and then ran east to the River Des Moines, about one hundred and fifty miles more, west of the first line, and north of the second. The entire country was then claimed, and partly occupied, by different nations of Indians. In 1816, also, Joseph C. Brown ran the line from Fort Clark south to the Arkansas River, in execution of the Treaty of 1808. And the lines run by Brown and Sullivan are "the Indian boundary" referred to in the foregoing petition of the inhabitants of Missouri Territory.

In March, 1818, the petition was referred to a select committee; and on March 6th, 1820, an act of Congress was passed, pursuant to the petition, authorizing the people of Missouri Territory to form a constitution and State government within the limits designated by the act; that is to say, "Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude to the St. François River; thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and *thirty [*670 minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

According to this law, the people of the territory, in 1820, proceeded to form a constitution, by which the boundary prescribed by the act of Congress was adopted; and by resolution of March 2, 1831, the State was admitted to enter the Union on certain conditions, to which she assented in June, 1821. On the north and west, as already stated, the new State bordered on Indian territory, over which the general government exercised that modified jurisdiction which existing Indian rights would allow, and had the exclusive power to extinguish the Indian title. The boundaries were therefore common to the two governments, and the acts of either, when exercising jurisdiction with respect to the common boundary, become proper subjects of consideration in the present controversy, as either government might bind itself to a practical line, although not a precisely true one, within the foregoing description. And in pursuing this branch of the subject, our first inquiry will be, how far the general government has committed itself to the old Indian boundary. Its action has been, first, through the Indian department; second, through the surveyor's department; and third, by the exercise of civil jurisdiction in the territorial form of government on the north of Sullivan's line, embracing the territory now in controversy.

And, first, as to Indian treaties. The earliest one materially bearing on the question was that of August 4, 1824, with the Sac and Fox tribes. They ceded to the United States all the title and claim that they had to any lands within the limits of the State of Missouri, "which are situated, lying, and being between the Mississippi and Missouri rivers, and a line running *from the Missouri, at the en- [*671 trance of the Kansas River, north one hundred miles to the northwest corner of the State of Missouri, and from thence east to the Mississippi; reserving to the half-breeds of said tribes the small tract in the fork between the Mississippi and Des Moines river, and south of the

said line." The Indian tribes admitted that the land east and south of the given lines belonged to the United States, and that none of their people should be permitted to settle or hunt on it. Although the Osages had, in part, ceded the same country in 1808, still the Sacs and Foxes set up a claim to part of it, and the Treaty of 1824 was made to quiet their claim.

June 3, 1825, the Kansas tribe also ceded to the United States all claim they had to any lands in the State of Missouri, and further ceded and relinquished all other lands which they then occupied, or to which they had title or claim, "lying west of the said State of Missouri, and within the following boundaries: Beginning at the entrance of the Kansas into the Missouri River; from thence north to the northwest corner of the State of Missouri," thence north and west. Of course, the northwest corner here referred to was the one made by Sullivan in 1816, as none other was then claimed by Missouri herself, nor known to the United States or the Indians.

In February, 1831, the State of Missouri, by a memorial from the Legislature to Congress, petitioned the United States for an addition of the country west of the line running from the mouth of the Kansas north, and between said line and the Missouri River, alleging that it was a small slip of land that had been acquired, by the Treaty of June 3d, 1825, from the Kansas Indians. The petition declared, that the line from the mouth of the Kansas north was about one hundred miles long; that the country was settled, and rapidly settling, to its utmost verge; and that, as the Missouri River was the only great highway of this region, and could not be reached through a country inhabited by Indians, and being without roads, a cession of it to that State was necessary and proper.

June 7, 1836, Congress acceded to the request of Missouri, and granted to that State all jurisdiction over the lands lying between its then western line and the Missouri River, making the river the western boundary. But the accession was not to take effect until the Indian title to the country was extinguished.

By the Treaty of July 15, 1830, ten confederated tribes conjointly ceded a large tract of country to the United States, the boundary of which began near the head of the Des Moines River, and passed westwardly to the north of the principal rivers falling into the Missouri, and down Calumet River to the Missouri, and down the same to the Missouri State line at the 672*] *mouth of the Kansas; thence along said State line to the northwest corner of the State; and then northwardly and eastwardly by various courses to the place of beginning. And within this boundary the tribes were to be located and superintended by the United States, pursuant to a policy now generally prevailing, and by which the Indians east of the Mississippi River have been removed west of it. By this treaty, the neck of land between the Missouri River and the then western line of Missouri was appropriated for the benefit of these tribes. To remove this impediment, and gratify the request of the State to have her limits enlarged, a treaty was made on the 17th of September, 1836, with the Iowas, Sacs, and *Foxes, reciting the facts*, so far as the Indians were interested, and also that it was desirable and necessary that the country should be attached to the State of Missouri; and thereupon these Indian tribes (being part of the ten) did cede and relinquish to the United States all their right and interest to the lands lying between the State of Missouri and the Missouri River; and the United States were exonerated from the guaranty imposed on them by the Treaty of 1830, known as the Treaty of Prairie du Chien. And on the 27th of September, 1836, another band of the Sac and Fox tribes made a similar cession. And on the 15th of October, 1836, various bands of the Sioux, by another treaty, also assented to the cession, but in more definite terms: they gave a quitclaim to the United States of their interest in the lands "lying between the State of Missouri and the Missouri River, and south of a line running due west from the northwest corner of the State to the Missouri River." The country having been disencumbered of the Indian title, the President, by proclamation of March 28, 1837, declared that the Act of Congress of June 7, 1836, should take effect; and thereby the ceded territory became a part of the State of Missouri.

There are, in all, fifteen Indian treaties referring to the Osage boundary of 1816, as run by Sullivan, each of which recognizes that boundary as the Missouri State line; and all of which treaties were made after Missouri was admitted into the Union, and before Iowa became a State. And as the treaties were drawn by authority of the United States, they must be taken as recognitions, on the part of the general government, that the Missouri boundary and the old Indian boundary are identical.

In the second place, it is proper to inquire how far the general government has recognized the Indian boundary line of 1816 in its land department. By the Act of February 17, 1818, the Howard District was established. This extended west to the old Indian boundary, and ran with it from the *mouth of the [*673 Kansas north, through its whole length, and thence east with Sullivan's line to where it intersected the range line ten west from the principal meridian; extending on the east line about four fifths of its length.

In 1823 this district was divided, and a western one established fronting on the two lines.

To the eastern part of Sullivan's line, next to the Des Moines River, the St. Louis District extended until 1824, when the Salt River District was established, running west to the range line between ranges 13 and 14; thence north to the northern boundary line of the State of Missouri; thence east with the State line to the River Des Moines, and down the same with the State line.

By the Act of August 29, 1842, the western land district was divided, and that part of it lying north of the Missouri River had attached to it the Platte country; that is to say, the country annexed to Missouri by the Act of Congress of 1836, lying west of the old Indian boundary, and next to the Missouri River.

When acting through the surveyor's department of public lands, on the Missouri side, the general government has never recognized on the north, nor, until the Platte country was attached, on the west, any boundary as belong-

ing to that State other than the two Indian lines run by Sullivan in 1816, so far as they extended.

The country north of the State of Missouri was for a time attached to the Territory of Michigan, and then to the Territory of Wisconsin. By the Act of June 12, 1838 (ch. 96), it was formed into a separate territorial government, by the name of Iowa. And by another act of the same date (ch. 100), the territory was formed into two land districts, the southern one embracing the country in dispute.

And on the Iowa side, the public surveys were executed, and lands were sold, up to Sullivan's northern line. Nor had the Surveyor-General of Illinois and Missouri any jurisdiction to go beyond it north; nor the surveyor's department of Iowa, to cross it by surveys to the south. From the time that Missouri became a State to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands.

And third, Congress, as early as 1834, organized a territorial government bounded by said line; laid off counties bounded by it on the south, as early as 1836; and governed the territory for ten years up to that line—all the time recognizing it as the proper northern boundary of Missouri.

674*] *From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and cannot now be heard to disavow the old Indian line as her true southern boundary.

The State of Iowa, by her cross bill, alleges that Missouri also treated the old Indian boundary as her true northern line, until about the year 1836; and that said line, at its western extremity, is about six miles north of the parallel of latitude which is the proper dividing line between the two States, and that, at its eastern extremity, it is about ten miles north of the same; that the parallel of latitude on which the line should run is found at a point opposite the middle of the rapids in the Mississippi River known as "the Des Moines Rapids." This rapid begins about three miles above the mouth of the Des Moines River, and extends up the Mississippi about fourteen miles. It is a highly notorious geographical object, and a very proper one to govern a national boundary; but the name called for in the Act of Congress of 1820, and in the constitution of Missouri, is "the rapids of the River Des Moines." Then, and ever since, the great rapid in the Mississippi River has been known by a different name. It is therefore left uncertain whether the rapid in the Mississippi was the one referred to; and the obscurity is greatly increased by a most embarrassing disagreement among the witnesses testifying on this head.

The name given in the act of Congress, taken in connection with its context, would assuredly apply to a rapid in the Des Moines River, if a notorious one existed, as the Mississippi River is not mentioned in the call, and the Des Moines is; nor was the Mississippi River to be reached by that line. Then, again, the rapid is fourteen miles long, and no part of it is called for as an opposite point to found the line upon.

It therefore follows, that the claim of Iowa to come south to the middle of the rapid throws us on a doubtful and forced construction of the instrument under consideration; and such a construction we are not willing to adopt, even if Iowa could at this day set up a claim to its adoption, which, for the reasons above stated, we think she cannot be allowed to do.

The State of Missouri, by her bill, disavows the old Indian boundary, and utterly denies that the great Des Moines rapid in the River Mississippi is the object called for in her constitution. She insists that the true rapids are found in the Des Moines, and that her northern line has been run and marked *from [*675 the true rapids, west to the Missouri River. The history of this line is as follows: In December, 1836, the Legislature of Missouri passed an act requiring the northern boundary of that State to be surveyed and marked under the direction of the executive; and in June, 1837, the governor appointed three commissioners to execute the law, who acted under special instructions from the executive. The commissioners appointed Joseph C. Brown their engineer and surveyor, and commenced the work in July following; and after having examined the Des Moines, from a point nearly one hundred miles up the river, downwards to its mouth, to ascertain the true rapids called for in the State constitution, determined on the proper place where, in their judgment, the line should begin; and from that place the line was run and marked due west to the Missouri River; and this is known as Brown's line. It lies about ten miles north of the old Indian boundary. And, by an act of the Legislature of Missouri, passed 11th February, 1839, the line so run and marked by Brown was declared to be the northern boundary line of said State, and has been claimed by her as such since that time.

On the rapids selected by the commissioners, and on Brown's line, the bill of complaint of the State of Missouri is altogether founded; and if she fails in establishing the proper place of beginning, she has no case, and must go out of court as a complainant, and can have no relief further than an injunction to restrain Iowa from obtruding on her jurisdiction south of the true line, wherever it may be found, should Iowa attempt to go south of such line.

The main question arising on the original bill of the State of Missouri therefore is, whether any rapid exists in the Des Moines River of such a prominent character as to correspond to the call in her constitution of "the rapids of the River Des Moines." On this branch of our inquiries we are furnished with highly satisfactory evidence. By the Act of August 8, 1846, the Iowa Territory had granted to it, by Congress, every alternate section of land not then disposed of, lying in a strip of five miles wide on each side of the Des Moines River, for the improvement of the same from its mouth to a long distance up, and which grant was to accrue to the benefit of the State when she should come into the Union.

To carry into effect the act of Congress, a board of public works was organized for the improvement of the river. They employed an engineer to survey and level it with a view to slack-water improvements, and it was surveyed from its mouth for ninety-three miles upwards. The engineer had every advantage of suitable instruments, low water, and ice in 676*] the winter, and no doubt exists of *his accuracy when performing the field operations and in making the levels.

The first ripple he came to, worthy of notice here, was twenty-four miles from the mouth of the river; and on eighty rods of its greatest descent, he found .73 foot fall.

On the 26th mile is "Sweet-home Ripple." There was found a fall of .85 foot in eighty rods.

On the 34th mile, at Farmington, he found a fall of 2.27 feet in ninety-six rods, and in eighty rods 1.89 feet.

On the 42d mile, he found a ripple (near Benton's Port) of 1.26 feet fall in sixty rods, and 1.68 in eighty rods.

On the 51st mile, being at the great bend, where Brown's line commences, the engineer found a fall of 1.75 feet in eighty rods—that is to say, twenty-one inches. Brown had also taken a level there of a space of some sixty rods, in August, 1837, and found a fall in that distance of 1 foot 9½ inches; but his instruments were not so reliable. The bottom of the river is rock at that place, and there is a thin stratum at one point, over which the water breaks when the river is low.

On the 53d mile, a fall was found in eighty rods of 1.75 feet by the engineer of Iowa.

On the 55th mile, a fall of 1.81 feet was found in eighty rods.

On the 93d mile, a fall was found in eighty rods of 2.10.

A line extended due west from this greatest fall would lie about twenty miles north of Brown's line, the river being very crooked. From this point downwards, it was examined by the commissioners of Missouri in 1837.

The shoals on the 34th mile, at Farmington, on the 42d, at Benton's Port, and at the great bend at Van Buren, on the 51st mile, where Brown's line begins, and the descents on the 53d and 55th miles, are of about equal magnitude; neither reach to so much as two feet ascent in eighty rods, and are not perceptible at all when the water is three feet higher than when at its lowest stage in dry weather. In 1820 these shoals were nameless, and are so slight that some of them are now nearly obliterated by the accidents of dams thrown across the river for milling purposes. Either one of the five might have been selected by the commissioners of Missouri for the proper place of beginning with almost equal propriety. They searched the river from the Appannoose Fall, at the 93d mile, to its mouth, in a pirogue, before they selected their starting point, obviously depending on such examination for a selection of the particular place of beginning, and not on any notorious rapid pointed out by public reputation. There is none such in the Des Moines River, and therefore Brown's line cannot be upheld, nor the claim of Missouri be supported.

677*] *This court is, then, driven to that call in the constitution of Missouri, which declares that her western boundary shall correspond with the Indian boundary line; and, treating the western line of a hundred miles long as a unit, and then running east from its northern terminus, it will supply the deficiency of a call for an object that never existed. Nor has Missouri any right to complain. She herself, for ten years and more after coming into the Union, recognized the Indian lines west and north as her proper boundary; her counties were extended up to these lines before the present controversy arose; and so counties in the territory north were established up to this recognized line without objection on the part of Missouri. And when Congress ceded to Missouri the country west of Sullivan's line, both parties to that cession acted on the assumption, that the ceded territory next the Missouri River was bounded on the north by a line that should be run due west from the northwest corner of the old Osage boundary. To this extent the Indian title was extinguished, and to no other extent did the United States cede that country. Nor could this court act otherwise than to reject the claim of Missouri, without doing palpable injustice to the United States on the western part of the line.

We are therefore of opinion that the northern boundary of Missouri is the Osage line, as run by Sullivan in 1816, from the northwest corner made by him to the Des Moines River; and that a line extended due west from said northwest corner to the Missouri River is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges of his court.

Decree.

On this 13th day of February, A. D. 1849, the cause of the State of Missouri against the State of Iowa, on an original bill, and also on a cross bill of the State of Iowa against the State of Missouri, constituting part of said cause, came on to be heard before the honorable the judges of the Supreme Court of the United States in open court, all of the judges of said court being present. And said cause was heard on the original bill, and the answer thereto, and the replication to said answer; and also on said cross bill, and the answer thereto, and the replication to said answer; and on the proofs in said cause, consisting of depositions, documents, and historical evidences; when it appeared to the court, that, in the year 1816, the United States caused to be run and marked two lines, as part of a boundary between the United States and the Great and Little Osage nations of Indians, in execution of a treaty made *with said [*678 Osages in 1808, the first line of the two beginning on the eastern bank of the Missouri River, opposite the middle of the north of the Kansas River, and extending north one hundred miles, where a corner was made by John C. Sullivan, the surveyor and commissioner, acting on behalf of the United States and the Osage nations; and that from said corner a second line was then run and marked by said surveyor, under said authority, which was intended to be run due east, on a parallel of latitude, but which line, by mistake, varied about two and one half degrees towards the north of a due

east and west line. And it further appeared, that the first named line is the one to which the descriptive call in the constitution of the State of Missouri refers as the Indian boundary line, and to which the western boundary of said State was to correspond. And it also appeared, that said two lines had, at all times since Missouri came into the Union as a State, been recognized by the United States as the true western and northern boundaries of the State of Missouri, as called for in her constitution; and that the State of Missouri had also recognized these lines as a part of her boundary for the first ten years of her existence, if not more; but that, in the year 1837, she caused another line to be run, and marked as her northern boundary, from the River Des Moines due west to the Missouri River, lying about ten miles north of said line run by Sullivan in 1816, which line of 1837 embraced part of a territory then governed by the United States, and which was inhabited by citizens of the United States, and which territory continued to be so governed by the United States until the 29th day of December, 1846, when the jurisdiction over the same was conferred upon the State of Iowa. It further appeared that the State of Missouri claims to exercise jurisdiction up to said line, as run and marked in the year 1837, on an assumption that the descriptive call in her constitution for a parallel of latitude "passing through the rapids of the River Des Moines" was gratified by a rapid found in said river, at a place known as the Great Bend, and from which said line was begun and extended west. And this court finds that there is no such rapid in the River Des Moines as that called for in the constitution of the State of Missouri; and that she was not justified in in causing the line run and marked in 1837 to be extended as her northern boundary.

And the court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said State, by her cross bill, assumes to do; because her predecessor, the United States, by many acts, and by uniform assumptions, up to the time when 679*] *Iowa was created, in December, 1846, recognized and adopted Sullivan's line as the proper northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption.

And it further appeared, that that portion of territory lying west of Sullivan's first line, and between the same and the Missouri River, was added to the State of Missouri by force of an act of Congress of June 7th, 1836, which took effect by the President's proclamation of March 28th, 1837; and that a line prolonged due west from Sullivan's northwest corner, on a parallel of latitude, to the middle of the Missouri River, is the true northern boundary of the State of Missouri, on this part of the controverted boundary.

And this court doth therefore see proper to decree, and doth accordingly order, adjudge and decree, that the true and proper northern boundary line of the State of Missouri, and the true southern boundary of the State of Iowa, is the line run and marked in 1816, by John C. Sullivan, as the Indian Boundary, from the northwest corner made by said Sullivan, extending eastwardly, as he run and marked the said line, to the middle of the Des Moines River; and that a line due west from said northwest corner to the middle of the Missouri River is the proper dividing line between said States west of the aforesaid corner; and that the States of Missouri and Iowa are bound to conform their jurisdictions up to said line on their respective sides thereof, from the River Des Moines to the River Missouri.

And it is further adjudged and decreed, that the State of Missouri be, and she is hereby perpetually enjoined and restrained from exercising jurisdiction north of the boundary aforesaid dividing the States; and that the State of Iowa be, and she hereby is also perpetually enjoined and restrained from exercising jurisdiction south of the dividing boundary established by this decree.

And it is further ordered, that Joseph C. Brown, of the State of Missouri, and Henry B. Hendershot, of the State of Iowa, be, and they are hereby appointed commissioners to find and re-mark the line run by said Sullivan in 1816, extending eastwardly from said northwest corner to the Des Moines River; and especially to find and establish said northwest corner, and to mark the same as hereinafter directed; and also to run a line due west, on a parallel of latitude, from said corner, when found, to the Missouri River, and to mark the same as hereinafter directed.

And said commissioners are hereby commanded to plant at said northwest corner a cast iron pillar, four feet six inches *long, and squaring twelve inches at its [*680 base, and eight inches at its top; such pillar to be marked with the word "Missouri" on its south side, and "Iowa" on the north, and "State Line" on the east side; which marks shall be strongly cast into the iron. And a similar pillar shall be by them planted in the line near the bank of the Des Moines River, with the mark of "State Line" facing the west. And also a similar one, near the east bank of the Missouri River, shall be planted by the said commissioners in the said line, the mark of "State Line" facing the east.

And it is further ordered, that pillars or posts of stone or of cast iron, shall be planted at every ten miles in the line extending east, from the northwest corner aforesaid to the Des Moines River; and also at the end of every ten miles on the due west line, extending to the Missouri River from said corner. These latter line posts to be of such description as the commissioners may adopt, or as the parties to this suit, acting jointly, may direct the commissioners to use, except that said line posts shall be of stone or iron.

And it is further ordered, that a duly certified copy of this decree shall be forwarded to the chief magistrate of the State of Missouri, forthwith, by the clerk of this court; and that a similar copy shall, in like manner, be forwarded to the chief magistrate of the State of Iowa. And the commissioners of this court hereby apointed are directed to correspond with said chief magistrates respectively, though their secretaries of State, requesting the co-operation and assistance of the State authorities in the performance of the duties imposed on said commissioners by this decree.

And it is further ordered, that the clerk of this court forward to each of the said commissioners a copy hereof, duly authenticated, without delay.

And it is further ordered, that said commissioners make report to this court, on or before the first day of January next, of their proceedings in the premises, with a bill of costs and charges annexed.

And it is further ordered, that, should either of said commissioners die, or refuse to act, or be unable to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint other commissioners to supply vacancies; and, if it be deemed advisable by the Chief Justice, he may increase the commissioners, by appointment, to more than two; and he is authorized to act on such information in the premises as may be satisfactory to himself.

And should any other contingencies arise in 681*] executing this *decree, the Chief Justice, in vacation, is further and generally authorized to make such orders and give such instructions as this court could do when in session. Copies of all orders and instructions and acts done in the premises by the Chief Justice shall be filed by the clerk of this court, together with the petitions, papers, and documents on which they are founded. And reports of the commissioners, if made in vacation, shall be filed with the clerk also, for safe keeping thereof, until presented in open court for its action thereon.

And it is further ordered and adjudged, that the costs of this suit, including the original bill, cross bill, and the proceedings thereon, and all costs incident to establishing and marking the dividing line, and all other costs and charges of every description, shall be paid by the States of Iowa and Missouri equally.

In the case of Missouri v. Iowa, and of Iowa v. Missouri, in the Supreme Court of the United States:

Having received information of the death of Joseph C. Brown, one of the commissioners appointed by the decree of the Supreme Court in the above mentioned cases to run and mark the boundary line between the States of Missouri and Iowa, I hereby, pursuant to the duty enjoined upon me by the said decree, appoint Robert W. Wells, of the State of Missouri, a commissioner for the purposes aforesaid, in the place of the said Joseph C. Brown, deceased.

R. B. Taney,
Chief Justice of Supreme Court of U. S.

Baltimore, April 6, 1849.

THOMAS Ap CATESBY JONES, Plaintiff in Error,
v.
THE UNITED STATES.

Liability of deputy-postmaster's sureties—default—application of payments.

Where a running account is kept at the Postoffice Department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments as they are successively made, to the extinguishment of preceding balances.

This the creditor has a right to do in the absence of instructions from the debtor.

The English decisions and those of this court examined.

The Act of Congress of 1825 (4 Stat. at Large, 102), which exonerates the sureties if balances are not sued for within two years after they occur, does not apply to this case, because, by this mode of keeping the account, the balance due from the postmaster is thrown upon the last quarter.

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

It was a suit brought by the United States upon a postmaster's bond against Walter F. Jones (the postmaster at Norfolk, in Virginia), and Thomas Ap Catesby Jones and Duncan *Robertson, his sureties. Judgment [*682 went by default against the postmaster and Robertson.

The act of Congress upon which the defense rested was the following, viz.:

The Act of the 3d March, 1825 (4 Statutes at Large, 102), is entitled "An Act to reduce into one the several acts for establishing and regulating the Postoffice Department," and in its third section enacts—

"That it shall be the duty of the Postmaster-General, upon the appointment of any postmaster, to require and take of such postmaster bond, with good and approved security, in such penalty as he may judge sufficient, conditioned for the faithful discharge of all the duties of such postmaster required by law, or which may be required by any instruction or general rule for the government of the department: Provided, however, That if default shall be made by the postmaster aforesaid, at any time, and the Postmaster-General shall fail to institute suit against such postmaster and said sureties for two years from and after such default shall be made, then and in that case the said sureties shall not be liable to the United States, nor shall suit be instituted against them."

Jones was postmaster from 1830 to August, 1839, during which time a running account was kept up with him at the Postoffice Department, with only one rest, namely, in August, 1836, when the account was added up and a balance transferred to a new account. The following is the debit side of the account:

To balance transferred from old account,	$ 345.50
To balances due the United States on his quarterly returns as postmaster, viz.:	
From July 1 to Sept. 30, 1836	2,073.77
" Oct. 1 to Dec. 31, 1836	2,488.16
" Jan. 1 to March 31, 1837	2,746.04
" April 1 to June 30, 1837	2,634.93
" July 1 to Sept. 30, 1837	2,187.79
" Oct. 1 to Dec. 31, 1837	2,298.13
" Jan. 1 to March 31, 1838	2,450.65
" April 1 to June 30, 1838	2,422.47
" July 1 to Sept. 30, 1838	2,233.48
" Oct. 1 to Dec. 31, 1838	2,618.26
" Jan. 1 to March 31, 1839	2,829.60
" April 1 to April 3, 1839	53.11
	$27,881.89
To balance	5,515.89

To interest from August, 1839, to

*The credit side of the account ran [*683 on continuously as in the following, which is the conclusion of the account:

NOTE.—Application of payments.—See note to 8 L. ed. U. S. 126.

1838.		By amount brought over			$18,198.64
Dec.	4,	By draft	No.	8448	62.54
"	4,	"	"	8452	42.94
"	4,	"	"	8455	77.19
"	4,	"	"	8465	98.57
"	15,	"	"	8745	50.26
"	15,	"	"	8746	43.64
"	17,	"	"	8768	132.79
"	31,	"	"	8967	88.52
"	31,	"	"	8968	206.48
1839.					
Jan.	19,	"	"	9100	45.00
Feb.	19,	"	"	9702	750.00
"	20,	"	"	9801	863.29
Mar.	13,	"	"	271	46.04
"	13,	"	"	274	38.56
Aug.	31,	" cash			1,121.54
		Balance			5,515.89
					$27,381.89

The substance of the pleadings in the court below, and the prayers of the respective counsel, are given in the opinion of this court, and need not be here repeated.

It was argued by Mr. Walter Jones for the plaintiff in error, and by Mr. Toucey (Attorney-General) for the United States.

Mr. Jones contended, that although no quarterly balances were struck, yet an analysis of the account would show that the postmaster was in default continually.

Thus, on the 30th of September, 1836 (the end of the first quarter after the date of the bond), the balance against him was....	$1,804.27
On the 31st December, 1836, it was....	1,793.43
On the 31st March, 1837, it was....	3,027.47
On the 30th June, 1837, it was....	3,866.40
On the 30th September, 1837, it was....	6,020.84
On the 31st December, 1837, it was....	5,446.18
On the 31st March, 1838, it was....	3,509.70
On the 30th June, 1838, it was....	3,937.98
On the 30th September, 1838, it was....	4,530.05
On the 31st December, 1838, it was....	5,297.61
And on the 31st March, 1839, it was....	6,384.32

The sureties were therefore discharged under the operation of the Act of Congress above recited.

684*] *Mr. Justice Daniel delivered the opinion of the court:

The case in the Circuit Court was an action of debt, instituted to recover the amount of a default claimed by the United States of Walter F. Jones, as postmaster of the Borough of Norfolk, in the State of Virginia. The said Walter F. Jones, having been appointed postmaster of Norfolk, executed, on the 8th day of August, in the year 1836, his bond, with the plaintiff in error and one Duncan Robertson as his sureties, in the penalty of ten thousand dollars, conditioned for the faithful performance of the duties of his office. In the year 1839, Walter F. Jones removed from office, the United States claiming against him a balance of $5,515.89 as due from him on the 31st of August in the year last mentioned; and to recover this balance, the action on his official bond was instituted in the Circuit Court against him and his sureties. After the institution of the suit, it was abated as to Walter F. Jones by his death; Rebertson made default in the case, and as to him a writ of inquiry of damages was executed; the plaintiff in error alone appeared and made defense, upon four several pleas, as to each of which replication and issue were taken. The first plea interposed was that of condition performed generally. The second and third pleas, presenting substantially the same defense, rely upon the Act of Congress of the 3d of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the Postoffice Department," and particularly upon that portion of the act which prescribes that the Postmaster-General shall obtain from the postmasters their accounts and vouchers for their receipts and expenditures once in three months or oftener, with the balances therein arising in favor of the general postoffice; and that, if any postmaster, or other person authorized to receive the postage of letters, etc., shall neglect or refuse to render his accounts, and pay over to the Postmaster-General, the balance due by him at the end of every three months, it shall be the duty of the Postmaster-General to cause a suit to be commenced against the person so neglecting or refusing; and if default be made by the postmaster at any time, and the Postmaster-General shall fail to institute suit against such postmaster and sureties within two years after such default shall be made, then and in that case the said sureties shall not be held liable to the United States, nor shall suit be instituted against them. These pleas further aver, that, subsequently to the execution of the bond of Walter F. Jones on the 8th of August, 1836, and during the year 1837, sundry defaults were made by him in failing to pay over money received by him as postmaster, and that these defaults were permitted to remain unclaimed by suit up to the 12th of March, *1840, [*685 the period at which this suit was instituted; a length of time from the occurrence of those defaults comprising an interval of more than two years.

The fourth plea of the defendant below is simply a general averment, that the causes of action in the declaration mentioned did not occur within two years next before the institution of the suit.

The only evidence adduced in this case on behalf of the plaintiffs below, was the account certified under the act of Congress from the Treasury Department against the postmaster, brought down to the 31st of August, 1839, exhibiting a balance in favor of the United States, at that date, of $5,515.89; and all the evidence on behalf of the defendant was a letter to him from the Postmaster-General, dated on the 10th of December, 1837, announcing the fact that a draft had been drawn on the defendant in favor of the Treasury Department, for the sum of $5,000 in specie, and requesting the deposit of that sum with the Bank of Virginia, at Richmond, as the agent for the treasury. Upon the aforegoing pleadings and evidence, the following prayers were made, and instructions given at the trial.

The attorney for the United States moved the court to instruct the jury, "that all payments made by the postmaster, Walter F. Jones, to the general postoffice, after the execution of his official bond, on the 8th of August, 1836, and subsequently to any default at the end of a quarter, without any direction by him or by the Postmaster-General as to the application of said payments, should be applied in the first instance to extinguish each successive default in the order in which it fell due; and if, by such application of said payments, the jury shall believe from the evidence that all of the defaults which occurred two years before the institution of this suit were extinguished within two years after the same were respectively

committed, that the act of Congress, which limits the institution of suits against the sureties of a postmaster to two years after the default of the principal, has no application to this case, and cannot affect in any degree the plaintiffs' right to recover in this action."

And the counsel for the defendant moved this court to instruct the jury, "1st. That if the jury shall find that the said deputy-postmaster, Walter F. Jones, committed any default or defaults in office at any time or times more than two years before the commencement of this suit, and that such default or defaults were then known to the Postmaster-General; and, further, that the said deputy-postmaster continued in default to an equal or greater amount thenceforth, until he was discharged 686*] *from office; that the Postmaster-General failed to institute, or cause to be instituted, a suit against the said deputy-postmaster and his sureties for two years from and after such default or defaults were made—then the defendant, Thomas Ap Catesby Jones, one of the sureties of the said deputy-postmaster, is not liable to the United States, nor can any suit be maintained against him on the official bond of the said deputy-postmaster, wherein the defendant was bound as one of the sureties for any default or defaults committed by said deputy-postmaster.

"2d. That as this suit was commenced on the 12th of March, 1840, the jury should inquire whether any default was committed by the said deputy-postmaster, Walter F. Jones, in not duly paying over any balance or balances of money which became due from him on account of collections by him officially made before the end of the quarter next preceding the 12th of March, 1838, namely, the quarter ending on the 31st of December, 1837. And if the jury shall find that the said deputy-postmaster was so in default in not duly paying over such balances or balance due from him on account of collections by him officially made before the end of the quarter ending the 31st of December, 1837, and that such default was then known to the Postmaster-General, then they should apply, towards the discharge of such balances or balance, all such payments made by the said deputy-postmaster during his continuance in office subsequently to the 31st of December, 1837, as they shall find to have been made out of moneys officially collected by him before that date, or out of his private funds; and they should apply all other payments made by him after that date, and during his continuance in office, towards the discharge of the balances or balance which became due from him on account of moneys by him officially collected after the 31st of December, 1837, during his continuance in office.

"3d. And that, as to the payment of $1,121.54, which was made by the said deputy-postmaster after he was discharged from his office, the jury should inquire whether that payment was made by him out of moneys remaining in his hands on account of collections officially made by him before the 31st of December, 1837, or out of his own private funds; or whether that payment was made out of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837; and if the jury shall find that that payment was made, and of moneys remaining in his hands of collections by him officially made prior to the 31st of December, 1837, or out of his own private funds, then the jury should apply that payment towards the discharge of the balance *which was [*687 due from him on the 31st of December, 1837; but if the jury shall find that that payment of $1,121.54 was made by the said deputy-postmaster out of money officially collected by him during his continuance in office subsequently to the 31st of December, 1837, then they should apply the said payment towards the balance that accrued and became due from him on account of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837."

"Whereupon, the court gave the said instruction prayed by the attorney for the United States, and refused to give the said instructions prayed by the counsel for the defendant; to which opinion of the court the defendant by his counsel excepted, and prayed the court to sign and seal this bill of exceptions; which is done accordingly."

The jury found a verdict for the United States, assessing their damages to the sum of $4,387.09, with interest thereon from the 31st day of August, 1839, till payment; and upon this verdict a judgment was entered for the sum of $10,000, the penalty of the bond, to be discharged by the damages and interest by the jury assessed, and the costs of suit.

It is apparent that the only question of law raised in this cause is the question of an appropriation of payments by debtor and creditor, it being insisted, in behalf of the United States, and being so ruled by the court below, that when, at the end of a quarter, there might be a default on the part of a postmaster, it was competent for him to supply such default, or to extinguish the debt then due from him, by payments made posterior to the end of the quarter; and that, in the event of an omission by the postmaster to appropriate the payments so made by him, it was the right of the government to apply them at its discretion to the extinguishment of previous balances; and that if, by such application, all defaults occurring within two years previously to the institution of the suit had been extinguished, the act of Congress did not affect the plaintiff's right of recovery.

On behalf of the defendants below, it is insisted that the receipts by the postmaster, within a given quarter, should be applied, exclusively or primarily, to the debt due from the postmaster for that quarter; and that, if there should have existed any balances for previous quarters, these should not be extinguished by subsequent receipts; and that, if permitted to remain for the space of two years without being claimed (as such balances) by suit on the part of the government, the omission should operate a complete exoneration of the sureties. With respect to the position contended for as above, it may be *remarked, that a construc- [*688 tion of the act of Congress which, in numerous instances, would interpose in the way of a debtor obstructions to the voluntary payment of his own debt, and compel the creditor to resort to a reluctant, dilatory, and expensive litigation for its recovery, would never be adopted

except under the influence of some controlling principle of necessity, rendering such a proceeding unavoidable; and no such principle or necessity can be perceived where a creditor is willing to receive his money, the debtor is willing to pay it, and the surety assents to, or acquieces in, the payment. We cannot therefore approve an interpretation of the act of Congress like that assumed in the defense, which would require that quarterly balances should at all events, and in opposition to the will of the parties, justly inferred from their conduct, remain open and unsatisfied, to become the subjects of future contest.

Upon the question of the appropriation of payments, some diversity, and even contrariety, may be found in the doctrines of the courts; yet nothing of the kind, it is thought, can be deduced from them which should embarrass the adjudication in this case. In the general proposition upon this subject, all the courts agree. It is this: "That the party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent, the law must decide." With the third branch of this proposition, the most fruitful of uncertainty and embarrassment namely, the decision which the law would make in the silence or entire forbearance of the parties, we are here not particularly called on to deal, the subject here being more immediately the right of the creditor to make an appropriation of payments, and the limitations upon that power resulting from the delay or lapse of time, from the character of the transactions between the debtor and creditor, and the rights of third persons which may be affected by those transactions. In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be, that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor nonfeasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable. Such is the rule established in the cases of The United States v. January and Patterson, 7 Cranch, 572, and of The United States v. Eckford's Executors, 689*] *1 How. 250. The case before us is free from any embarrassment of conflicting interests between separate sets of sureties. In this case there is but one bond; it presents the instance of an appropriation of payments between a single debtor and creditor. Upon the question, as understood in this form and with this limitation, there is not a perfect uniformity in the decisions either in England or in this country. The opinion of Sir William Grant in Clayton's case, 1 Merivale, pp. 604 et seq., has often been referred to as a high authority in favor of the restriction of the right of the creditor to make the application to the exact period of time at which the payment was made. A close examination of the opinion of this able judge, however it may show the inclination of his mind on this subject, can hardly be received as an express adjudication upon the point in support of which it is adduced. In Clayton's case, page 605, speaking of the right of appropriation in the creditor in the absence of express direction, Sir Wm. Grant says: "There is certainly a great deal of authority for this doctrine; with some shades of distinction, it is sanctioned by the cases of Goddard v. Cox, 2 Strange, 1194, of Wilkinson v. Sterne, 9 Mod. 427, of Newmarch v. Clay, 14 East, 239, and of Peters v. Anderson, 5 Taunt. 596." He proceeds: "There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of Meggott v. Mills, 1 Ld. Raym. 287, and Dowe v. Holdworth, Peake's N. P. 64. The cases then set up two conflicting rules—the presumed intention of the debtor, which, in some instances at least, is to govern, and the ex post facto election of the creditor, which, in other instances, is to prevail. I should therefore feel myself a good deal embarrassed, if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favor." Again, on page 609, we find the following statement from this same judge, namely, that the creditor received his account drawn out by his debtor, the banker who kept the account, and made no objection to it whatever, and the master stated in his report that the silence of the customer (the creditor), after the receipt of his banking account, is regarded as an admission of its being correct. "Both creditor and debtor must therefore," says the judge, "be considered as having concurred in the appropriation." This case has been adverted to somewhat at length, although it is often referred to as high and express authority, with the view of showing that it does not adjudge directly the point [*690 of the creditor's discretion in the appropriation of payments, however strongly it may intimate the inclination of the Master of the Rolls as to that question. Later decisions in the English courts would seem to be wholly irreconcilable with the remarks of Sir William Grant in Clayton's case. Thus, in Simpson v. Ingham, decided in 1823, and reported in 2 Barn. & Cress. 65, Bayley, Justice, speaking of the right of creditors to appropriate payments, uses this language: "It has been insisted, that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering the account; but entries made by a man for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time, he has the right to apply the payments as he thinks fit." Holroyd, Justice, in the same case, says: "The persons paying the money not having made any direct application of it, the right of making such application devolved

on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that, although they did not apply it at the moment of payment, they would have the right to make the application at a subsequent period. The question therefore is, whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, these entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payment had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect." Still later (in 1834), in the case of Philpot v. Jones, 2 Adolph & Ellis, 41, Denman, Chief Justice, says: "The defendant made no application of that payment; the plaintiff therefore may elect at any time to appropriate it to this part of his demand." And so Taunton, Justice, in the same case: "Here the £17 were paid without any application to the particular items of the account. The plaintiff then might apply that payment to the items in question; and he was not bound to tell the defendant at 691*] the time that he *made such application; he might make it at any time before the case came under the consideration of the jury." In Smith v. Wigler and Turnicliffe, 3 Moore & Scott, 175, Tindall, Chief Justice, said that the creditor must make the appropriation at the time the money comes into his hands. Yet, in Mills v. Fowkes, 5 Bingham's New Cases, 455, the same Chief Justice said, that, in conformity with the rule in Simpson v. Ingham, the creditor may make the application at any time before action brought. Bosanquet, Justice, said, in the same case, that the receiver might appropriate the payment, if the debtor had not, at any time before action commenced; and Coltman, Justice, that, notwithstanding the doubt expressed by the Master of the Rolls in Clayton's case, the more correct view seemed to be, "that the creditor is not limited in point of time."

In the case of The Mayor of Alexandria v. Patton, reported in 4 Cranch, 320, Chief Justice Marshall said, in pronouncing the decision: "It is a clear principle of law, that a person owing money on two several accounts, as upon a bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make the election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or the simple contract." So, too, Justice Story, in delivering the decision in the case of Kirkpatrick v. The United States, 9 Wheaton, 724, says: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor *may make it; if* both omit it, the law will apply *the payments* according to its own notions of justice. It is certainly too late for either party to claim a right to make an application after the controversy has arisen, and a fortiori at the time of the trial." The two cases last cited, with those of The United States v. January, and of the United States v. Eckford's Executors, comprise the substance, it is believed, of all that has been ruled by this court upon the subject of the appropriation of payments. There are several State decisions upon this subject, which are not adverted to; but amongst these, if examined, there will be found some contrariety. An attempt to reconcile any discrepancies, either real or apparent, amongst either the English or American cases, would seem to be at least useless here, inasmuch as, with regard to the only principle connected with the appropriation of payments which we deem to be involved in this case, all the decisions concur. There is not even a decision to be found which denies to the creditor, where the debtor has been quiescent, the right to appropriate payments at *the periods at [*692 which they shall be made; and the concession of this restricted right we hold to be decisive of the character and fate of the transaction under review. That transaction exhibits one general account of debit and credit continued from its commencement to its close, when, and at no prior time, the balance is struck. On the due side of the account are presented the amounts received by the postmaster for postages within the periods there stated, and on the other side are entered to his credit the sums paid by him, either in cash or in drafts from the Postmaster-General, in an exact conformity with the dates at which the transactions occurred. By this application any balance which may have existed at the end of a previous quarter was extinguished, and sometimes overpaid, and the account thus brought down to the final balance. To this mode of application no just objection can be perceived; the parties interested in the payments were the same throughout and equally liable for all; the payments being made generally, and without any appropriation by the debtors who were thus liable it was the undoubted right of the creditor to apply them to any sums antecedently due. Indeed, in the case of The United States v. Kirkpatrick, this court say, that in long running accounts, where debits and credits are perpetually occurring and no balance otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time." In this case they have been so applied, and in strict conformity with the times at which such payments were made.

We conclude our view of this question in the language of Justice Hopkinson, in the case of The Postmaster-General v. Norvell, Gilpin, 134: "The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before; on the contrary all the balances antecedent to the last quarter were extinguished by the successive payments and the final balance falls on the last quarter." A contrary result could be attained only by changing the manner in which the accounts have

been kept, and by arranging the actual transactions as they have occurred between the parties—a proceeding which we think is required neither by the letter nor the objects of the act of Congress.

The judgment of the Circuit Court should therefore be, and is hereby affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of 693*] the United States for the Eastern *District of Virginia, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

BENJAMIN D. HARRIS, Plaintiff in Error,
v.
JAMES D. WALL.

Depositions——notice of—defects in certificate —agreements of attorneys.

The conditions under which a party is permitted and a magistrate authorized to take a deposition de bene esse by the thirtieth section of the Judiciary Act are—

1st. That the witness lives at a greater distance from the place of trial than one hundred miles.

2d. Or is bound on a voyage to sea.

3d. Or is about to go out of the United States.

4th. Or out of such district to a greater distance from the place of trial than one hundred miles before the time of trial.

5th. Or is ancient or very infirm.

And to entitle himself to read the deposition upon the trial, the party must show—

1st. That the witness is dead.

2d. Or gone out of the United States.

3d. Or to a greater distance than one hundred miles from the place where the court is sitting.

4th. Or that by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof.

Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States.

The service of the notice upon the opposite party should be certified by the magistrate as well as the marshal.

When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition.

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

In February, 1839, the following sealed note was executed:

$10,391.06. Clinton, Miss., February, 1839.

On or before the first day of January, eighteen hundred and forty, we or either of us promise and bind ourselves, our heirs, etc., to pay to Benjamin D. Harris, his heirs or assigns, the sum of ten thousand three hundred and ninety-one dollars and six cents, with eight per cent. interest thereon from the date hereof.

Given under our hands, and seals, the day and date above written.

T. W. Winter. [Seal.]
Jas. M. Wall. [Seal.]

*Suit was brought upon this note at [*694 May Term, 1840. Judgment went against Winter by default, and it is not necessary to notice him further.

Wall put in three pleas. The first two were substantially the same, and were, that the introduction of slaves into Mississippi, as merchandise, after the first day of May, 1833, was prohibited by the constitution of that State, and the contract for their purchase and sale, therefore, void. These pleas averred that the note was given for the purchase of slaves so introduced. To these pleas the plaintiff took issue.

The third plea was, that the slaves were above the age of fifteen years, and were introduced into the State of Mississippi from one of the United States as merchandise, and sold to Winter by the plaintiff, without having complied with the fourth and fifth sections of an act entitled "An Act to reduce into one the several acts concerning slaves, free negroes, and mulattoes," passed June 15th, 1822. To this plea the plaintiff demurred.

In November, 1844, the cause came on for trial, issue having been joined upon the first two pleas, and a joinder in demurrer having been filed as to the third. The jury found a verdict for the defendant upon the issue upon the first two pleas, and the record did not show any judgment of the court upon the demurrer.

In the course of the trial, the plaintiff, Harris, took four exceptions to opinions of the court.

1st. As to the admissibility in evidence of the deposition of William S. Rayner.

2d. As to the admissibility in evidence of parts of the deposition of Benjamin G. Sims.

The 3d and 4th were, that Wall had filed a bill in chancery against Harris, which Harris had answered; and that Wall could not, in a trial at law, introduce evidence to contradict Harris's answer.

1st. exception, as to Rayner's deposition.

The following is the notice and certificate attached to the deposition:

"Jackson, May 1, 1843.

"Mr. B. D. Harris, or Messrs. Rives & Shelton, his attorneys at Law:

"Take notice, that on Wednesday next, the third day of May, A. D. 1843, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, between the hours of eight o'clock A. M., and three o'clock P. M., at the town of Jackson, I shall take the deposition of William S. Rayner (about to depart the State), to be read on the part of the *defendant de bene esse [*695 in a certain action at law, depending in said court, wherein said Harris is plaintiff, and Winter and Wall defendants; where you can attend. Yours, etc.

"Geo. W. Miller, U. S. Commissioner."

"Marshal's return: Executed by handing Wm. M. Rives a copy between the hours of eleven A. M., and twelve M., May 1, 1843.

"Anderson Miller, Marshal,
"By Z. P. Wardell, D. M."

"The deposition of William S. Rayner, taken before the undersigned commissioner of affidavits in and for the Southern District of Mississippi, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, in the town of Jackson, between the hours of eight o'clock A. M., and three P. M., on the 3d day of May, A. D. 1843, according to a notice by me issued and hereunto annexed; said deposition to be read as evidence on the part of the defendant de bene esse in the trial of a certain action at law, depending and mentioned in the Circuit Court of the United States for the Southern District of Mississippi, wherein Benjamin D. Harris is plaintiff, and Winter and Wall defendants."

Then follows the deposition, to which is attached the following certificate:

"United States of America, Southern District of Mississippi, sct.:

"I, George W. Miller, commissioner of affidavits, etc., in and for the Southern District of Mississippi, do hereby certify that the foregoing deposition of William S. Rayner was taken, subscribed, and sworn to before me, and by me reduced to writing in the presence of said witness, at the time and place mentioned in the caption thereof, at the time of which I was attended by James M. Wall, one of the defendants, and William M. Rives, Esq., attorney for plaintiff, who declined putting any interrogatories to said witness. I further certify that I am not a counsel for either party, or interested in the event of said cause.

"Given under my hand and seal at Jackson, this 3d day of May, A. D. 1843.

"Geo. W. Miller, U. S. Commissioner."

The court allowed the deposition to be read in evidence, to which the plaintiff excepted.

2d. exception, respecting the deposition of Sims.

This deposition had upon it the following indorsement, viz.:

696*] *"When sworn to, it is agreed this deposition of B. G. Sims may be used in the cause stated in the caption as evidence.

"Rives and Shelton & Thompson, for Plaintiff.

"Mayes & Clifton, for Defendant Wall."

After the defendant had read to the jury the deposition of Benjamin G. Sims, which was done subject to exceptions, the plaintiff moved the court to exclude from the jury that part of said deposition which proved or tended to prove said plaintiff to be a negro trader; but the court overruled said motion, on the ground that the counsel of the plaintiff had agreed in writing on said deposition, that the same might be read in evidence.

This opinion of the court constituted the second exception.

The third and fourth exceptions were abandoned by the counsel for the plaintiff in error, and need not be further noticed.

The clause was argued by Mr. Nelson for the plaintiff in error, and Mr. Clifton for the defendant in error.

Mr. Nelson:

The first exception relates to the admissibility in evidence of the deposition of William S. Rayner, and is grounded on the insufficiency of the notice, under the Act of September 24th, 1789, sec. 30.

That act authorizes the taking of the deposition of a witness de bene esse "who shall live at a greater distance from the place of trial than one hundred miles," or "is bound on a voyage to sea," or "is about to go out of the United States," or "out of such district (in which a cause may be depending) and to a greater distance from the place of trial than one hundred miles," upon proper notice to the adverse party.

Now, the notice given in regard to this deposition does not bring the case within the act of Congress, because, whilst it states that the witness was about to depart the State, it does not allege that he was about to go to a greater distance than one hundred miles from the place of trial, and it might well have been that the witness would leave the State, and yet be within reach of the process of the court.

To show the strictness with which the act of Congress in question has been construed, reference is made to the cases following: Bell v. Morrison, 1 Peters, 355, The Samuel, 1 Wheaton, 9, The Patapsco Ins. Co. v. Southgate, 5 Peters, 604, The Thomas and Henry, 1 Brockenbrough, 373.

The second exception regards the admissibility in evidence of part of the deposition of Benjamin G. Sims, which the court below suffered to go to the jury, because of the agreement of counsel appended to it.

"It is submitted that the court erred [*697 in this, since the true construction of that agreement is, that the deposition was to be received in evidence only in so far as the matters contained in it were legally admissible in support of the issues joined in the cause; and it being conceded, as indeed it cannot be denied, that the portion of the deposition excepted to was not in itself evidence, the agreement could not make it admissible. It is like the case of a witness examined on the stand, whose statements improperly made in the hearing of the jury will be excluded by the court at any time during the trial.

The third and fourth exceptions, which relate to the admissibility of the answer in chancery, are believed to be untenable.

But, independently of these exceptions, the plaintiff in error insists that the judgment of the court below must be reversed, because the record shows that nothing has been found to justify that judgment.

The issues passed upon the jury, as the court will perceive, are wholly immaterial the existence or non-existence of the facts involved in them in no wise affecting the rights of the parties to the controversy.

They put the defense in the action exclusively on the ground of the consideration of the bill sued upon, which was, that it had been given for slaves introduced by the plaintiff into the State of Mississippi after the 3d day of May, 1833.

Now, that this consideration was a good one, has been over and over again settled by this court. Groves v. Slaughter, 15 Pet. 449; Harris v. Runnels, 5 How. 135; Truly v. Wanzer, 5 How. 141; Sims v. Hundley, 6 How. 1.

In the last of these cases, on page 6, Chief Justice Taney says: "It is the settled law in

this court, that contracts of this description, made at the time when these notes bear date, were valid, and not prohibited by the constitution of Mississippi."

This being the law of the case, it is clear that the plaintiff below might have treated these pleas as nullities, and, as far as they were concerned, have signed judgment for the want of a plea.

But he inadvertently took issue upon them, and the jury decided the facts against him; and in that state of the case it is equally clear that he might have moved the court for judgment non obstante veredicto.

This he omitted to do, and now the inquiry is whether that omission precludes him from availing himself of the insufficiency of the judgment in this court.

That it does not, the plaintiff in error thinks is clear upon principle as well as upon authority.

698*] *That the issue was not material, see 2 Saunders, 319 (No. 6).

That the defect is error, for which the judgment will be reversed, it is respectfully submitted will be conclusively shown by the following cases: 6 Cranch, 221, 223, 225; Kirby, 139; 2 Root, 4, 204; 2 T. R. 759; 2 Archibold's Practice, 758; 1 Mason, 62; 4 Howard, 131.

In the case last cited, the question was elaborately examined, and the principle and practice settled, under circumstances much less strong than those which are disclosed in the record in this case.

But it is supposed by the counsel for the defendant in error, that the judgment rendered in the court below must be sustained because it is said to be a general judgment, and that the third of the pleas of the defendant below set up a sufficient defense to the action.

To this it is answered, in the first place, that there was no judgment rendered in the court below upon that plea, and this is manifest from the whole record.

The plea was in bar, and, if good, furnished a full defense to the plaintiff's action. Yet a jury was called to decide the issues of fact, wholly unnecessary to be passed upon if the plea in question had been adjudged good.

Nor does the judgment profess to be rendered on the demurrer—it is on the verdict.

As to the form of a judgment on demurrer, see 2 Saunders, 300 (No. 3); 2 Archibold's Practice, 11; Archibold's Arms, 306; Tidd's Practical Forms, 200.

Even, however, if it were otherwise, and judgment had been rendered on the demurrer, it could not have been supported.

This plea was framed on the Act of Mississippi of the 18th of June, 1822, 4th and 5th sections, Howard and Hutchinson's Digest, 156.

The first mentioned of these sections (the fourth) prescribes the mode and manner in which slaves may be imported as merchandise into Mississippi; the fifth, what shall be done when such slaves are sold.

The sixth section of the same act imposes a penalty of $100 for every slave sold without a compliance with the provisions of the fourth and fifth sections.

Now, it is apprehended, that, upon the true construction of this act, the non-compliance by the seller with the provisions of the sections mentioned does not invalidate a sale made by him. On the contrary, the sixth section of the act, by its terms, recognizes the validity of such sales.

*The plea does not allege any combi- [*699 nation or collusion between the plaintiff and defendant in regard to the introduction of the slaves sold into Mississippi. Can it, then, be doubted, that, under the provisions recited, the defendant acquired a title to the slaves in question under his purchase? And if so, is it not equally clear, that, though liable to the penalty denounced by the sixth section of the act in question, the plaintiff is competent to enforce his contract against the defendant? It can hardly be that the defendant has acquired a title to the property purchased, and yet is not answerable for its price.

Questions of this character have been frequently considered and decided. See 11 Wheat. 258; 4 Burr. 2069; 6 T. R. 410; 3 T. R. 418; 1 Bos. & Pull. 295; 7 Taunt. 246; 4 N. H. 290; 8 Wheat. 357; 12 Peters, 70; Walker, 293; 1 Litt. 16, 19.

In any view, therefore, which may be taken of this act of Mississippi (assuming it to be in force though some intimation is given in the notes of the defendant's counsel, that it has been repealed) it is submitted that it cannot avail to defeat the recovery by the plaintiff of his demand. But it is insisted that the question does not arise in this case, the record showing that the demurrer, at the time of the trial of the issues before the jury, was undisposed of, and that the judgment was rendered on the verdict alone.

Mr. C. R. Clifton, for defendant in error, in reply:

1. The act of 1789, which authorizes the taking of the deposition of a witness de bene esse, nowhere requires that the notice should show that the case was within the provisions of the act. The decisions cited by the counsel for the plaintiff only established what has never been controverted, that the party who offers a deposition taken de bene esse must show that the case provided for by the act existed, and that there had been a full compliance with its requisitions.

In this case the counsel of the opposite party attended the examination.

When the deposition was offered, in open court, the party offering it proved, that, at the time it was taken, the witness was on his way to the republic of Texas—that is, he was "about to go out of the United States"—and that he then, at the time of offering it, resided in that republic. These facts having been proved by evidence aliunde, the certificate of the commissioner showed every other fact required by the act of Congress to render the deposition competent, and we insist there was a compliance with all its provisions.

The only object of the notice was to secure the attendance *of the counsel at the [*700 examination. He attended, and pleads in abatement to the notice, that it was insufficient —his presence refuting his plea.

2. The deposition of Sims ought not to have been excluded. The issue was as to what was the consideration of the bond sued on; it being averred on the one side that it was for slaves introduced into the State of Mississippi and

sold in the year 1836, and denied on the other. The deposition contains several circumstances conducing to show the truth of this averment; and among these is the one objected to—that is, that the plaintiff had carried slaves to Mississippi for sale, and was, in fact, engaged in the avocation of a "negro trader." How far the defendant would have been permitted to go in making this proof, in opposition to the will of the plaintiff, it is not now needful to inquire, since no such opposition was made. This fact was proved in a deposition, which the plaintiff agreed should be read as evidence to the jury; and he cannot now ask the appellate court to reverse the judgment, because the court below held him to his own agreement.

The counsel then proceeded to the discussion of the point involving the construction of the constitution of Mississippi, and arising on the issues found by the jury for the defendant; but was arrested for the moment by the Chief Justice, who, after conference with the other members of the court, said that this question had been repeatedly settled by this court, and the court could not consent to consider it an open question, and hear it again argued. The counsel acquiesced with manifest reluctance, and, being asked by a member of the court if there was any other point in the case, said:

There is a special plea founded upon the fourth and fifth sections of the Act of the 18th of June, 1822, which, if not repealed by the provision of the constitution of Mississippi as to the introduction of slaves, presents a valid defense to the action. It is demurred to.

In Mississippi, these sections have been considered as repealed, upon the ground that the constitution, which is the supreme law, prohibits the introduction of slaves absolutely, and therefore repeals all laws permitting them to be imported upon condition.

This court, adhering to its former decisions, cannot regard these sections as repealed, because, if the constitution did not prohibit their introduction from the 1st day of May, 1833, the law which specified the conditions upon which they might be imported and sold remained in full force.

The language of these sections is: "It shall not be lawful for any person or persons to im- 701*] port into this State, from any of *the United States, or the territories thereof, as merchandise, any slave or slaves, either negro or mulatto, or of any other description whatever, above the age of fifteen years, without having previously obtained a certificate, signed by two respectable freeholders in the county of the State or territory from whence such slave or slaves is or are brought; which certificate shall contain a particular description of the stature and complexion of such slave or slaves, together with the name, age, and sex of the same; and, furthermore, that the slave or slaves therein mentioned and described have not been guilty of murder, burglary, arson, or other felony, within their knowledge or belief, in such State or territory; which certificate shall be signed or acknowledged before the clerk of the county of the State or territory where the same is given, and certified by said clerk, specifying therein that the persons whose signatures are affixed thereto are respectable freeholders of the county and neighborhood in which they reside.

"Any person, who shall sell any slave or slaves brought into this State as merchandise, shall cause to be registered with the register of the Orphans' Court of the county where such slave or slaves are, or are first sold, every certificate as aforesaid, the seller previously swearing that he believes the contents of such certificate or certificates to be just and true; which oath said register is hereby authorized and required to administer; for which service he shall receive the sum of one dollar for each certificate so registered." See How. & Hutch. Digest, 156, and Hutchinson's Mississippi Code, 513. The sixth section of the act imposes a penalty of $100 for every slave sold without a compliance with the said fourth and fifth sections, recoverable in any court of competent jurisdiction.

The facts stated in this plea are confessed on the record. The judgment of the court for the defendant is general.

This court will inspect the entire record, and give judgment for that party who may appear to be entitled to it; and if the plea interpose a good defense to the action, the judgment of the court below, according to familiar principles, will not be disturbed.

The counsel on the other side assumes, that, even if this were so, the defense disclosed by that plea is not a valid one; and he refers to a variety of cases for the purpose of sustaining that position.

The first of these is that of Armstrong v. Toler, from 11 Wheaton, which, as it is understood by me, cannot be tortured into any authority for the plaintiff. On the contrary, it decides, that, where a contract grows out of an illegal act, a court of justice will not lend its aid to enforce it. The selling of a *slave, [*702 without a previous compliance with the requisitions of the law, which could alone make such sale legal, was an illegal act; and this, therefore, is an authority for the defendant.

The case from 4 Burrow was an action on a bond given by the defendant to the plaintiff, to repay to the plaintiff the one half of a sum of money which the plaintiff had previously paid, for himself and the defendant, to a third party, in relation to a transaction forbidden by act of Parliament; and it was said by the court to be a fair and honest transaction between these two, and not in violation of the act.

That from 6 T. R. 410, Booth v. Hodgson, is an authority for the defendant.

In delivering the opinion in 3 T. R. 418, Lord Kenyon expressly declares that none of the provisions of the act were infringed.

1 Bos. & Pull. decides, that, if the contract be stained by anything illegal, the plaintiff shall not be heard in a court of law. Simpson v. Bloss, 7 Taunt. 246, holds that no action can be founded on an illegal contract, and furnishes a test for determining what is an illegal contract, which is decisive against this.

The case from 4 N. Hamp. 290, is an express authority for the defendant. It decides, that, when a statute inflicts a penalty for the doing of a particular act, that act is, by implication, prohibited and illegal. "Where an illegal contract is made between parties who are in pari delicto, the contract is void, and neither party can maintain any action which requires for its support the aid of such illegal contract."

The other cases seem to me to have no ver[illegible]

Howard v.

direct application to the question, and certainly furnish no support to the idea that a party can successfully assert a right in a court of justice, to which he has entitled himself by a violation of law.

Indeed, I had supposed, if there was a universal and uncontroverted proposition in the common law, as it is known and understood in England and in this country, it was, that no act done in violation of the laws of the land, or in disregard or contravention of its principles, can be the foundation of a claim which can be enforced at law or in equity. And this has been the rule from Lord Holt to the present time, as can be shown by an unbroken series of decisions. In truth, this principle is much older than the common law, and was incorporated into that system from the civil law, whence it comes to us, clothed with the sanction of many centuries.

Where the law, as in this case, declares it shall not be lawful to do a particular thing, unless under certain conditions and limitations, no action can be maintained upon a contract 703*] growing *out of the doing of that thing, unless those conditions and limitations have been complied with. To declare an act unlawful, and at the same time to give a remedy to the person guilty of doing it, founded on his illegal act, would be to make the law as a house divided against itself. The law was never guilty of the absurdity of giving a legal action for an illegal act.

In Bartlett v. Vinor, Carth. 251, Chief Justice Holt says: "Any contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflict a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute." The same is held in Bensley v. Bignold, 5 Barn. & Ald. 335, Drury v. Defontaine, 1 Taunt. 136, 14 Mass. 322; Holt's N. P. Cas. 435. This rule is now applied as well to cases mala prohibita as mala in se. 2 Bos. & Pull. 374, 375; 5 Barn. & Ald. 341; 2 Wilson, 351; 17 Mass. 281.

"The policy of a penal statute may be enlarged, not for the purpose of inflicting the penalty, but to avoid the contract." Dwarris on Statutes, 752; Mitchell v. Smith, 1 Binney, 110-118; 4 Yeates, 34-54; 4 Serg. & Rawle, 151.

No recovery can be had for printing a newspaper, whose publisher does not first make the affidavit directed by the act, though the act does not, in terms, avoid the contract. Marchant v. Evans, 8 Taunt. 142; Roby v. West, 4 N. H. 285.

The 17 Geo. III. ch. 42, sec. 1, declares, all bricks made for sale shall be 2½ inches thick and 4 wide, and the second section imposes twenty shillings for every thousand bricks so made of less dimensions, as a penalty. Held, that bricks of less dimensions could not be recovered for, though there was nothing in the act declaring the sale void. Law v. Hodgson, 2 Camp. 147.

And in the case of Sprergean v. McElwain, 6 Ohio, 442, it is decided, that where the statute forbids the keeping of a ninepin alley, under a penalty, a carpenter who builds one, knowing the object, cannot recover the price of building.

It would be useless to multiply authorities on this point. The courts of England and this country, with a rare uniformity, have held that every contract made in violation of the laws of the land, or without complying with its provisions, or which is made in disregard or contravention of the statute or common law, is void, and cannot be enforced in law or in equity. 1 Leigh's N. P. 6-13; 2 Peters, 539; 2 Carr. & Payne, 472; 4 T. R. 466; 3 Ib. 454; Cowper, 191; 2 Doug. 698; 1 Maule & Selw. 593; 5 Barn. & Ad. 887; 4 Peters, 410; 5 Johns. 320; 1 Randolph, 76; 3 Ib. 214; 1 Barn. & Cress. 192; 5 Ib. 887.

*Mr. Justice Grier delivered the opin- [*704
ion of the court:

On the trial of the issues of fact in this case before the Circuit Court, the defendant offered to read the deposition of William S. Rayner, which had been taken de bene esse, under the thirtieth section of the Judiciary Act. It was objected to by the plaintiff's counsel, as not coming within the conditions prescribed by that act. The court admitted the deposition, and sealed a bill of exceptions, which is the foundation of the first assignment of error.

A notice was served on the plaintiff's counsel, signed by the commissioner or magistrate, and stating the time and place at which it was intended to be taken, and that, "I shall take the deposition of William S. Rayner, (about to depart the State), to be read on the part of the defendant, de bene esse," etc.

When the deposition was offered, the defendant proved to the court, that "when said deposition was taken, said Rayner was on his way to the republic of Texas, to reside there, and that he was a citizen of, and resided in, said republic."

It has been decided by this court, in the case of Bell v. Morrison, 1 Peters, 351, that "the authority to take depositions in this manner, being in derogation of the rules of common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible."

The conditions under which a party is permitted, and a magistrate authorized, to take depositions de bene esse, under this act, are, 1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or is bound on a voyage to sea; 3d, or is about to go out of the United States; 4th, or out of such district to a greater distance from the place of trial than one hundred miles, before the time of trial; 5th, or is ancient or very infirm.

The magistrate is required also to deliver to the court, together with the depositions so taken, a certificate of the reasons of their being taken, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show, that, at the time of the trial, 1st, either the witness is dead; 2d, or gone out of the United States; 3d, or to a greater distance than one hundred miles from the place where the court is sitting; 4th, or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

Now, assuming that the defendant has

brought himself within the conditions which would enable him to read a deposition regularly taken and certified according to the requisitions of this act, the question is, whether this depositions was so taken and certified.

705*] *The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. The act of Congress requires them to be certified by the magistrate. It would be reasonable, also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is "about to depart the State," not that he is bound on a voyage to sea, or about to go out of the United States, or a hundred miles from the place of trial.

This notice is appended or annexed to the deposition, with a return of service by the marshal; but the service is not certified by the magistrate, nor does he certify, as required by the act, "the reasons" for taking the deposition. The presence of the plaintiff's attorney, who declined to take any part in the proceedings, cannot affect the case, or amount to a waiver of any objection to the want of authority apparent on the face of this certificate.

We are of opinion, therefore, that the court erred in admitting this deposition to be read to the jury.

The third and fourth exceptions have been abandoned on the argument, and the second does not appear to be well taken. When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for not excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them.

The record in this case does not show that any judgment was given by the court below on the demurrer. If a defendant plead several pleas in bar, either of which is a defense to the whole action, and one be found in his favor, he is entitled to judgment. For this reason the parties may have considered it unnecessary to pray the judgment of the court on the plea demurred to, as the issues on the other pleas had been found in favor of the defendant, and judgment rendered thereon for him. And the plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. The validity of the defense set up in that plea is consequently not before this court, and cannot be noticed. But as the trial of these issues below took place before the decision in this court of the cases of Harris v. Runnels, 5 How. 135,

706*] *and Sims v. Hundley, 6 How. 1, and as these cases show that the issues of fact are immaterial, though found for the defendant, *the defense* will probably turn wholly on the *decision of the point* raised by the demurrer.

The judgment of the Circuit Court is reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

THOMAS TOWNSEND, Plaintiff in Error, v. ROBERT JEMISON.

Judgment on verdict—several counts—not erroneous because of demurrer to special plea to part of counts—Mississippi law.

Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of this case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled.

The thirty-second section of the Judiciary Act (1 Stat. at Large, 91) forbids a reversal of the judgment on account of the omission of the clerk to record such waiver or overruling.

The statutes of jeofails examined.

Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of. A statute of Mississippi, where the case was tried, allows one good count to sustain a judgment.

Where the plea was bad, and the demurrer was to a replication to this bad plea, the first fault in pleading was committed by the defendant, and judgment against him was properly given.

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

It was a suit brought by Jemison against Townsend, to recover a sum of money which Jemison had paid for him to the Mississippi Union Bank, at Macon. The consideration appears to have been, that Townsend should take up a note at the Commercial Bank of Columbus, for which he, Townsend, was bound for one John B. Jones; but in what manner Townsend's taking up the latter note would benefit Jemison did not appear from any part of the record.

*On the 21st of May, 1842, the suit [*707 was commenced by issuing a summons, which was indorsed as follows:

"This action of assumpsit is brought to recover the sum of $4,000, with interest at 10 per cent. (paid for defendant), from 27th January, 1840, to Mississippi Union Bank; defendant agreed to pay for plaintiff same amount in the Commercial Bank of Columbus, Mississippi, in consideration that plaintiff would pay same amount for him to the Mississippi Union Bank at Macon; this action is brought to recover said sum of money, defendant having failed to comply with his promise.

"Harris & Harrison,
"Plaintiff's Attorneys."

The declaration originally filed was amended, and on the 6th of December, 1842, the amended declaration was filed, which contained three special counts and the general money counts. The first of the three special counts was as follows, the other two being similar in substance.

"Robert Jemison, who is a citizen of the State of Alabama, by leave of the court for that purpose first had and obtained, by attorney, complains of Thomas Townsend, who is a citizen of the Northern District of the State of Mississippi, and who was summoned to answer the said plaintiff of a plea of trespass on the case in assumpsit. For that whereas, heretofore, to wit, on the 20th day of March, A. D. 1840, at, to wit, in said district, in consideration that the said defendant was then and there bound, and liable by note in writing, to the Commercial Bank of Columbus, Mississippi, for one John B. Jones, as his security for about the sum of nine thousand eight hundred and six $\frac{60}{100}$ dollars, besides interest thereon; and was also indebted to the Mississippi Union Bank, at its branch in Macon, in the County of Noxubee, about the sum of three thousand dollars, on a note of four thousand dollars, executed by the said defendant and others, payable at Jackson, at the banking house of the said Mississippi Union Bank, at Jackson; and in consideration that the said plaintiff would take up the said last mentioned note to the Mississippi Union Bank, and would also take up the note of the said Jones in the Commercial Bank of Columbus, Mississippi, on which the said Townsend was liable as security as aforesaid, except an amount equal to the amount of said Townsend's liability to the said Mississippi Union Bank, and release the said Townsend from the balance of his said liability to the said Commercial Bank, he, the said defendant, then and there agreed with the said plaintiff, to pay on his said liability, in the said Commercial Bank of Columbus, Mississippi, the same amount which the said plaintiff might take up for him, the said Townsend, 708*] in the said Mississippi Union Bank. *And the said plaintiff avers, that afterwards, to wit, on the 10th day of May, in the year 1840, he did take up the said Townsend's note, in the said Mississippi Union Bank above stated, according to the said agreement, amounting to the sum of three thousand and ninety $\frac{60}{100}$ dollars. And the said plaintiff further avers, that he did then and there, to wit, on the same day and year last named, at, to wit, in said district, take up the notes of the said John B. Jones, in the said Commercial Bank of Columbus, Mississippi, on which the said Townsend was security as aforesaid, according to his said agreement. And the said plaintiff in fact says," etc., etc.

The subsequent pleadings were as follows:

"And the said defendant, by attorney, comes and defends the wrong and injury, when, etc., and says he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, etc.

"Cocke, Smith & Gholson,
"for Defendant."

"And the plaintiff doth the like.

"Harris & Harrison,
"Plaintiff's Attorneys."

"And for further plea in this behalf, the said defendant, as to the first, second, and third counts of the said declaration, says, that the said plaintiff ought not to have or maintain his action, because he says that, by an act to prevent frauds and perjuries, it is enacted, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of any other person, unless such promise or agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. And the said defendant avers, that the said plaintiff hath brought his action to charge the defendant for the debt of John B. Jones, and for no other purpose whatever; and that there is no agreement in writing touching the promise of the said defendant, as alleged in said counts of said declaration, to answer for the debt of the said John B. Jones, or any memorandum or note thereof signed by the said defendant, or any other person by him thereunto lawfully authorized. And this he is ready to verify, wherefore he prays judgment, etc.

"Cocke, Smith & Gholson,
"for Defendant."

Plaintiff's replication to defendant's above stated pleas, filed at December Term, 1842, in the words and figures following, to wit:

"The United States of America, Dis- [*709
trict Court for Northern District of Mississippi, December Term, 1842.

"Robert Jemison
v. } No. 108.
"Thomas Townsend.

"And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, said, that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him, the said defendant, because he says that he, the said plaintiff, hath not brought his action to charge the said defendant for the debt of John B. Jones, and for no other purpose whatever; but that the said action is brought to charge the said defendant upon his said several original promises and undertakings, founded upon the said several new and sufficient considerations in the said count of said declaration stated and set forth; and this he prays may be inquired of by the country.

Harris & Harrison,
"Plaintiff's Attorneys."

Defendant's demurrer to plaintiff's replication, filed at December Term, 1842, in the words and figures following, to wit:

"And the said defendant saith, that the said replication of the said plaintiff to the said second plea of the said defendant is not sufficient in law for the said plaintiff to have or maintain his action aforesaid; and this he is ready to verify; wherefore he prays judgment, etc.

"Gholson & Smith,
"for Defendant."

In this condition of the pleadings, it appeared by the record that the parties went to trial, when the jury found a verdict for the plaintiff, assessing his damages at $3,451.88.

The trial took place on the 12th of December, 1842.

An execution was issued upon the judgment, then an alias, a pluries, and an alias pluries.

On the 5th of June, 1845, a writ of error was sued out, which brought the case up to this court.

It was argued by Mr. Cocke for the plaintiff in error. His argument was as follows:

This is a writ of error to the Circuit Court of the United States for the Northern District of Mississippi. The facts may be briefly stated to be these: Jemison, the defendant in error, instituted an action of assumpsit in the court below against Townsend, to recover the sum of three thousand and ninety dollars and forty-one cents, which Jemison paid for Townsend to the Mississippi Union Bank, upon the agree-*710] ment of Townsend *to pay the same amount for Jemison to the Commercial Bank of Columbus, Mississippi, upon a note of one John B. Jones, upon which Townsend was indorser for Jones. In the declaration filed at June Term of said court, 1842, there is a special count, to which is added the usual money counts. There is a demurrer to the special count, 1st, because there is no legal cause of action set out; 2d, because no legal breach is designated; and to the money counts non assumpsit was pleaded. The court below made no disposition of the demurrer, but gave leave to the parties to amend their pleadings at the next term. Jemison filed an amended declaration, containing three special counts on the above facts, placing them under different phases, and also adding the usual money counts; non assumpsit was pleaded to the money counts, and to the special counts was pleaded the statute of frauds and perjuries. There was a special replication to the last plea pleaded, to which the defendant demurred, and the court below tried the cause without making any disposition of the demurrer, and permitted the plaintiff below to proceed to final judgment over the demurrer. The case being tried in Mississippi, it is believed the rule governing such cases in that State should prevail. The regularity of these proceedings being the subject of inquiry on behalf of the plaintiff in error, we maintain, 1st. That the statute of frauds and perjuries pleaded is a full and conclusive defense to the matters alleged in the declaration. 2d. That the demurrer to the replication raised the question of the sufficiency of the matters contained in the whole declaration in law to charge the defendant upon the agreement set out; and it was error in the court below to have permitted the plaintiff to proceed to final judgment while the demurrer was pending and undetermined. 3d. That the defendant was entitled to his judgment in the court below upon his demurrer. Let us examine, first, the three several counts contained in the declaration. The first count is as follows, in substance: In consideration that defendant was liable, by note, as security for one John B. Jones, to the Commercial Bank of Columbus for about $9,806.50, and was indebted to the Mississippi Union Bank about $3,000 on a note of $4,000, and in consideration that plaintiff would take up said last note to the Union Bank, and would also take up said Jones's in the Commercial Bank, except an *amount equal to* the amount of defendant's *liability to the Union Bank*, and relieve de-

fendant from the balance of said debt to the Commercial Bank, defendant agreed with and promised plaintiff to pay, on his, defendant's, liability to the Commercial Bank, the amount which plaintiff might take up for him, defendant, in the Union Bank; and that plaintiff did *take up defendant's note in the [*711 Union Bank, to the amount of three thousand and ninety $\frac{41}{100}$ dollars, and did take up said note to the Commercial Bank, and defendant has never paid plaintiff nor the Commercial Bank. To this count the defendant pleaded that the plaintiff's action was brought to charge him upon a promise to pay him the debt of John B. Jones, and that the statute of frauds and perjuries—How. & Hutch. Miss. Digest, 370, 371—barred any such action on such promise. To this plea the plaintiff repleaded, and, by his replication, denies that the count is on a promise to pay Jones's debt. To which the defendant demurs, and for good cause; for the defendant's promise to pay so much of Jones's debt, contained in the declaration, is clearly a promise to pay the debt of another person, within the statutes of frauds and perjuries aforesaid. The replication denies that the count is brought on any such promise, and thus the replication denies the count itself, and is as good a defense as the defendant could have desired. What better defense could he ask than that the plaintiff should, by his own pleadings, deny the cause of action set out in the count? For this reason, the demurrer was well taken, and should have been sustained. But again, in support of the demurrer, the plaintiff shows that he himself took up the whole debt to the Commercial Bank, when the contract set out was that he was to take up a part thereof only, and was to leave such part as was equal to the amount paid to the Union Bank by plaintiff, to be paid by defendant to the Commercial Bank. Townsend's promise was to pay that amount to the Commercial Bank upon Jones's debt, and not to pay the plaintiff by taking up the whole of Jones's debt to the Commercial Bank. Plaintiff put it out of the defendants power to pay the Commercial Bank. He relates the contract set out, and then seeks to recover damages of defendant for a breach which was brought about by his own breach of the contract first committed. Again, it was Jones's debt that plaintiff took up. Thus, in direct violation of the agreement, Jones was the principal in the note at the Commercial Bank, and, as such, was, under the statute of this State, first liable directly for the payment of the note, either to the bank or the plaintiff. Townsend being a mere accommodation security for Jones, the bank could not hold Townsend responsible for the money until Jones had been pursued to insolvency; and if the bank cannot, how can Jemison hold Townsend responsible, until he first fail to collect it from Jones? The count shows that Townsend was a mere indorser for Jones, and Jones being first directly liable to pay the Commercial Bank debt, for aught that appears to the contrary he may have paid the plaintiff the whole amount of said note. As *the [*712 plaintiff voluntarily took that amount of the Commercial Bank debt, which, by his contract, he was bound to have left to be paid by the defendant, he has placed it out of the power

of the defendant to comply; let him seek his remedy on the note, and not bring his action to recover damages for a breach which he himself was the cause of. The demurrer was good as to the replication and first count, and yet the plaintiff passed the demurrer in the court below unnoticed, and the court permitted him to proceed to judgment without joinder in the demurrer, and without making any disposition of it. If the demurrer was well taken, judgment should have been for the defendant; if not, a judgment of respondeat ouster ought to have been entered by the action of the court; the defendant below could not take issue on the replication. See How. & Hutch. Digest, 616; Revised Code of Mississippi, 120; Walker v. Walker, 6 How. Miss. 500; Bright v. Rowland, 3 Ib. 415; Davis v. Singleton, 2 Ib. 681; Brown v. Smith, 5 Ib. 387. The second count states, that, in consideration that the defendant was bound to the Commercial Bank, by note, as security for Jones, and was also indebted to the Mississippi Union Bank in the sum of three thousand dollars on a note for four thousand dollars, and in consideration that the plaintiff would take up the note in the Union Bank, defendant promised plaintiff to pay same amount on said note in said Commercial Bank, and plaintiff did take up said note of defendant in said Union Bank, and paid the sum of three thousand and ninety $\frac{40}{100}$ dollars; yet defendant has not yet paid the Commercial Bank on said note of John B. Jones, on which defendant is liable as aforesaid. To this the above plea was pleaded, also that the promise declared on was to pay the debt of another, and that the statute of frauds and perjuries aforesaid was a bar. And to said plea plaintiff also repleaded, and by the replication denied that the promise declared on was a promise to pay the debt of Jones; and thus the plaintiff denies his own second count. And thereupon, the defendant demurs, as well he might. The defendant could have no better defense than the denial of the plaintiff of his own cause of action; and upon such denial, the defendant rightfully demurred to any further answer. See the same authorities. Again, has plaintiff ever sustained any injury by reason of defendant's failure to pay Jones's debt? It is a matter of no moment to plaintiff whether defendant paid or whether Jones paid, or whether Jones's debt was paid at all; he shows no affinity between himself and Jones, or Jones's debt, whereby the payment would have been an advantage, or the nonpayment a disadvantage, to plaintiff. How could the failure of defendant to pay a debt to Commercial 713*] Bank, for which he, as *the security of Jones, owed said bank, affect the plaintiff, who was a stranger to said debt? The Commercial Bank is competent to take care of its own matters; and the declaration does not show that plaintiff was guardian or trustee for said bank, or that he was in any wise interested in the payment of a debt due to it. If the plaintiff has taken up defendant's note to the Union Bank, let him sue on the note, and not seek to recover damages when he could not possibly sustain any, by reason of the nonpayment by defendant to Commercial Bank of said note to Jones. The third count states that defendant, in consideration that he was indebted to the Union Bank by several notes, and in consideration that he was liable for John B. Jones to Commercial Bank for about $9,806.50, and in consideration that plaintiff would take up any or all of said notes in the Union Bank, agreed with plaintiff to pay to the credit of defendant's note in the Commercial Bank, on which he was security for Jones, whatever sum plaintiff should pay to the Union Bank in taking up the liabilities of said defendant in the Union Bank; and the plaintiff has taken up defendant's liabilities to the Union Bank to the amount of $8,000, and yet the defendant has not paid the Commercial Bank same amount of money, but refuses to pay same. If defendant has refused to pay the Commercial Bank, is plaintiff injured thereby? If he has not paid, he is still bound to pay; and whatever he has paid or has not paid, or is bound or is not bound, does not in any wise affect the plaintiff. The Commercial Bank may have forgiven the debt, or cancelled the notes, or Jones may have paid it; and whether the bank forgave the debt or not, or whether it be cancelled or not, in no wise affects the plaintiff. If defendant had paid the Commercial Bank, as he was already bound to do as the security of Jones, Jemison would not have been any better off; and if defendant has not paid the Commercial Bank, it is the bank's own affair whether it is ever paid, and to Jemison it matters not whether it is ever paid. The three counts are wholly void of any cause of action; if the plaintiff has paid money for defendant, let him sue for it, but not seek to recover damages for the breach of a promise to pay the Commercial Bank a debt which the defendant was already bound to pay by his promissory note, and to pay which a promise to Jemison, who was a perfect stranger as to the debt due to the Commercial Bank, creates no new obligation. As to the other counts for money had and advanced, money paid, laid out, and expended, and for money had and received, they do not sustain any action, because plaintiff hath appended thereto no bill of particulars, except a promissory note made by defendant, and others to the Union Bank. Plaintiff can give nothing in *evidence, under the [*714 common counts, except what is contained in his bill of particulars. See Statutes of Mississippi, How. & Hutch, Digest, 590. And he cannot give his note in evidence under said count, because it is a note given to the Union Bank by defendant and others, and, by the act of the Mississippi Legislature, the bank could not assign this note. See Laws of 1840, p. 16; 3 Smedes & Marsh. 661. Here, by virtue of this law, Jemison could get no such interest in the note as to authorize him to sue him in his own name; for, in fact, no title passed to him in the note; the note is not negotiable nor assignable or transferable hereby. Then the court could not permit him to practice a fraud upon the law by waiving his action on the note, and use it in evidence to sustain a right of action against the defendant, where he holds the note itself in direct and known violation of the statute; this note is still the property of the Union Bank. There being no bill of particulars filed by plaintiff, except this note, and not being lawfully possessed of it, it was not properly introduced into the bill of particulars,

and for the want of such a bill of particulars as the law requires, the common-counts in the declaration are wholly void of any right of action; and it was error to admit the note under the money counts; the bank could not assign the note, because it is against the law of the State. The Supreme Court will reverse a judgment obtained upon a contract entered into in violation of the statutes of the State. See 2 Peters, 539. Suppose Townsend had paid the note, he is bound to know the law, that the bank could not assign his note, and could recover the amount of the debt again of him, if he pays it to the plaintiff. See, also, 4 Peters, 410. We therefore contend that the judgment should be reversed, and judgment rendered for Townsend on his demurrer.

Mr. Justice Woodbury delivered the opinion of the court:

The original action in this case was assumpsit. Though the declaration contained several counts, some one a special promise and some for money paid and received, it was indorsed on the original summons, that the action was "brought to recover the sum of $4,000 and interest at ten per cent. paid for defendant, from 27th of January, 1840, to Mississippi Union Bank," etc., etc.

There was a demurrer and other pleadings as to this declaration, which it is not necessary to repeat, as leave was given to amend throughout; and on the 6th of December, 1842, a new declaration was filed, consisting of three special counts and the usual money counts, all of which must of course be for the original cause of action.

On the 9th of December, 1842, the defendant [*715] pleaded the *general issue of non assumpsit to the whole declaration; and, for further plea to the three special counts, averred, that the suit was brought to charge him for the debt of John B. Jones, and for no other purpose, and that, there being no evidence of his promise in writing, the suit was barred by the statute of frauds and perjuries. To this the plaintiff replied, that the suit was not so brought, but on original promises made by the defendant. The latter filed a general demurrer to this replication.

On the 12th of December, the general issue joined as to the whole declaration appears to have been tried, and a verdict returned for $3,451.88, for which sum, at the same term, judgment was rendered and execution issued.

Nothing further took place till June 5th, 1845, when this writ of error was brought to reverse the judgment, assigning as the ground for it, that the demurrer to the replication should first have been disposed of, and that the statute of frauds pleaded in the preceding plea was a full defense to the matters alleged by the original plaintiff.

This case presents some questions of practice and of pleading which possess no little difficulty. They must be settled chiefly by the reasons which may be applicable to them; and when precedents in this court are not found for a guide in aid of those reasons, they may be strengthened by analogies established in the State courts or in England, where the systems of pleading and practice are somewhat similar. *It seems proper, and is conceded, that, in a*

cause where several pleas are filed, as here, and some terminate in a demurrer and others in an issue to the jury, they should all, as a general rule, unless waived or withdrawn, be in some way disposed of by the court. The leading inquiry, then, is, if enough appears in all the proceedings here to render it probable that the issue, in law no less than in fact, was in some way disposed of, though this is not, eo nomine, mentioned in the record. Assuredly, it is usual in this country, as a mater of practice, when there is an issue of fact and another of law in the same action, to have the question of law heard and decided first. Green v. Dulany, 2 Munf. 518; Muldrow v. McLelland, 1 Litt. 4; Co. Litt. 72, a; Com. Dig. Pleader, Demurrer, 22. The 28th rule for the circuit courts accords with this, by directing that, in such cases, "the demurrer shall, unless the court shall, otherwise, for good cause, direct, be first argued and determined," because a decision on that, if one way, that is, if in favor of the demurrer, will frequently dispose of the whole cause, and supersede the expense and necessity of a jury trial of the other issue, as well as give an opportunity to move for an amendment. 5 Bac. Abr. Pleas and Pleading, No. 1; Tidd's Prac. 476; Dubery v. Paige, 2 D. & E. 394. Yet this course *being a matter of sound discre- [*716 tion in the court rather than of fixed or inflexible right, it cannot always be absolutely presumed to have been pursued. See 28th Rule, ante, and cases before cited; 2 D. & E. 394; 1 Saunders, 80, note. But as it is usual, and the defendant in this case did not file any exception, as if there had been a refusal by the court to decide first on the demurrer, the presumption does not seem so strong that there had been a refusal or neglect to do it, as that the demurrer had been waived by the defendant, or, if not waived, had been decided, and the particular minute of this on the record omitted by a mistake of the clerk. Several other circumstances exist, which, in connection with these, contribute to strengthen this last presumption, and to justify us on legal grounds in inferring that one of the above events, either a waiver or decision of the demurrer, actually took place here. First, as to those in favor of the position that the demurrer was waived. Only one cause of action existed here, though set out in several counts. This is stated not only, as before mentioned, in the summons by the original plaintiff, but by the defendant in his special plea, and in the argument of his counsel. The general issue, which was joined and tried, went to the whole declaration; and under that, at the trial, any parol evidence offered in its support could have been objected to as within the statute of frauds, which seems to have been the whole defense, as well as under the special plea setting up this statute against the special counts. This is clear from the books of practice. 1 Chit. Pl. 515; 2 Leigh's N. P. 1066; 1 Tidd's Prac. 646. Though, to be sure, it could be pleaded specially, also, and this may now be necessary under the new rules of court in England. 1 Bingh. N. C. 781; 2 Crompt. Mees. Rosc. 627. Hence, from abundant caution lest this objection might not be admissible under the general issue, the special plea here was probably at first filed. But before the trial came on, which was three days after, it is likely that the defendant had

become convinced that it was admissible, under the general issue, and therefore went to trial without having the demurrer first argued and decided, or event joined, but waived it. If, on the contrary, he concluded to try the issue to the jury first, and then, if not allowed there to make his objection as to the statute, to argue the demurrer afterwards, the inference would be equally strong, that he was allowed to urge the objection at the trial, and had a decision on it there, and therefore waived his special plea and demurrer, and a separate and unnecessary decision on them, afterwards. Such was the presumption in the case of Bond v. Hills, 3 Stewart, Alabama, 283, more fully explained hereafter. It was held likewise in Morrison v. 717*] Morrison, 3 Stewart, *444, that if a demurrer and an issue of fact were to the same matter, and the latter was tried first, it must be presumed that the other had been waived.

In Dufan v. Couprey's Heirs, 6 Peters, 170, a writ of error was brought, for the same general cause as here, that one of the pleas intended for the court did not appear by the record to have been decided. But the court sustained the judgment below; the other plea, on examination, as will soon be shown to be the case here, being found immaterial after the finding of the jury. Where one material issue is decided going to the whole declaration, it is of no consequence how an immaterial issue going only to a part of it is found, if no injury be done by it to either party. 6 Missouri, 544. And by parity of reasoning, it would be of no consequence whether it was decided at all or not, if enough else is decided to dispose properly of the whole case.

What fortifies these views is the fact that the defendant never procured a joinder to his demurrer by the plaintiff. As he interposed this defense in a special plea, and filed the demurrer to the replication, it would be material for him, if wanting a decision on them, to get the pleadings finished. He should have moved for a joinder, or got a rule for one (1 Chit. Pl. 628), and should likewise have moved for a decision on them, if desired, before a final judgment was rendered on the verdict. It is true that some books appear to consider it the duty of the plaintiff to join in a demurrer soon after it has been tendered by the defendant. But this, it is believed, generally depends on a positive rule of court, which may exist, to require it. 33d Rule of Practice for Courts of Equity, 1 How. 43; William's case, Skinner, 217. And without such rule, as in this case, he may need and take time to decide on making a motion to amend, before joining; and the harshest penalty proper for delay in the joinder would seem to be, that the demurrer may be considered, when requested by the party making it, though no formal joinder has taken place. 3 Levinz, 222; Skinner, 217. The omission of the defendant, then, to obtain a joinder, to which he was by law entitled (1 Chit. 647; Barnes, 163), the omission to add one himself, which is sometimes permissible (5 Taunt. 164, and 1 Pike, Ark. 180), and the omission to request a decision without any joinder, as he may after much delay (Skinner, 217), all appear on the record, and look not only like a waiver of a decision on the demurrer by the defendant, but a neglect of his own duties on the subject. A waiver of a demurrer often takes place, and is, by law, permissible. 1 Tidd's Pr. 710; 1 East, 135; 2 Bibb, 62; 1 Burrow, 321; 2 Strange, 1181. Quilibet renuntiare potest jure pro se *introducto. The [*718 want of a decision would, in this aspect of the subject, seem to be by his own consent; and consensus tollit errorem. The course of the defendant appears to have been, practically and substantially, if not formally, an abandonment of a wish for any separate decision on the demurrer. See cases of this kind. Wright et al. v. Hollingsworth, 1 Peters, 165; Bac. Abr. Error, K. 5; Vaiden v. Bell, 3 Randolph, 448; Patrick v. Conrad, 3 Marsh. 613; 2 Marsh. 227; Casky v. January, Hardin, 539. As a plea of the general issue, while a demurrer is pending undisposed of, is considered a waiver of it. Cobb v. Ingalls, Breese, 180.

In another view of the subject, looking to the defendant's own neglect as the cause, a party cannot be allowed to take advantage of his own wrong or inattention. Thus it has been decided, that a writ of error will not lie for one's own neglect or irregularity. 1 McCord, 205; 1 Pike, Ark. 90; Kincaid v. Higgins, 1 Bibb, 396; 2 Blackf. 71; 3 McCord, 302, 477; Kyle v. Hayle, 6 Missouri, 544. It strengthens these conclusions, that the original defendant seems to have long acquiesced in what he now excepts to—that he does not appear to have asked for a decision on the demurrer, to have made any complaint at the time of the demurrer not being decided, to have filed any motion about it, offered any bill of exceptions, or even brought any writ of error, till after the lapse of nearly three years. So much as to the waiver of the demurrer. But if the demurrer was not, in truth, waived or withdrawn by the defendant, or cannot be now so considered, from all which appears on the record, the presumption from all is evident, that the demurrer and special plea were actually decided on by the court, and the omission to enter it on the record may be cured by the statute of jeofails. Such a decision would have been its ordinary and proper course of proceeding.

This court has held, in a state of things much like this, as will soon be more fully explained, that it was bound to presume that "justice was administered in the ordinary form." 4 How. 167. And hence, in 3 Stewart (Alabama), 447, 448, where a decree was averred in the record, but not its form, it was presumed to have been in the ordinary form. The court could not properly have decided and given judgment for the plaintiff in this case, as it did, and, as must be presumed, properly, in the first instance, if the demurrer had not been waived or settled in favor of the plaintiff. Nor was the defendant likely to have acquiesced in the judgment without putting an exception on the record, unless one of these circumstances had occurred. This question has arisen in several of the States, and been decided in conformity with these views. In the case of Cochran's Executors *v. Davis, 5 Litt. 129, the court [*719 very properly adopt a like principle, saying: "To this plea there was a demurrer, and although there is no order of record expressly disposing of the demurrer, yet, as the court

gave judgment for the plaintiff on the whole record, it must be taken that the demurrer was sustained and the plea overruled." So in substance, it was held in McCollom v. Hogan, 1 Alabama, 515, and in Bond v. Hills, 3 Stewart, 283, where, as in this case, there was a plea, amounting to the general issue, or containing what was admissible under it, and it did not appear distinctly to have been disposed of, but the general issue was tried, it was held to be presumed that the defendant had the full benefit of the objection on the trial, and error will not lie. It is true that where one issue in a cause is found one way and another on a matter entirely distinct is not disposed of, it may not be proper always to consider it as decided. Pratt v. Payne, 5 Missouri, 51. But here the questions involved in both issues were the same; both related to the same cause of action, and both to the same defense. The cases on this subject are so much more numerous in the States than in England or in this court, that we oftener find it necessary to resort to them for analogies in support of our reasoning as to what should, under all the facts, be presumed. But in this court, at this very term, we have a strong illustration of the correctness or truth of such a presumption, in the case of Harris v. Wall; where, on similar findings by a jury on some pleas and a demurrer to others, and a judgment for the defendant without any entry made specifically that the demurrer was disposed of, it happens, in point of fact, that it was decided, and the judge on that circuit, now present, has with him his written opinion, which he delivered when deciding it. So in Stockton et al. v. Bishop, 4 Howard, 167, in a writ of error, where a verdict appeared and a judgment, but not for any particular sum, with several other important omissions, this court, by Catron, Justice, remarked: "Still we are bound to presume, in favor of proceedings in a court having jurisdiction of the parties and subject matter, that justice was administered in the ordinary form when so much appears as is found in this imperfect record."

Again, on a writ of error, many things will always be presumed or intended, in law as well as fact, to have happened, which are not ipsissimis verbis or substantially so set out on the record, but are plainly to be inferred to have hapened from what is set out. Cro. Eliz. 467; 4 Howard, 166. Thus, in this case, numerous circumstances stated on the record, and already referred to, indicate that the demurrer and special plea, if not withdrawn or waived, 720* were actually disposed of. Among *them, raising a strong presumption that way, is the fact that three days elapsed after the pleas and demurrer were filed, before the trial of the other issue; that within this period the court had time to hear the question of law argued; that it is the usual practice to hear such a question before going to a trial of the facts; and hence, unless the demurrer was waived, that the court, before the trial, did probably hear and decide the demurrer against the defendant. Again, the court would have been still less likely to have proceeded to final judgment without first disposing of the question of *law, unless* waived or settled either before, at, or after the trial. Such, too, being the duty of the court, they are to be presumed, till the contrary appears, to have done their duty. Wilkes v. Dinsman, ante, 89. Nor is such a presumption here, as some have suggested, against the record; because the record says nothing on the subject. But it is consistent with everything that is there said, and with what is fairly to be inferred from the whole record, carrying with us the probable idea, in that event, of some omission or misprision by the clerk in noting all which happened.

The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, would be merely a clerical mistake; and it is well settled at common law, that a misprision by a clerk, if the case be clearly that alone, though it consist of the omission of an important word or expression, is not a good ground to reverse a judgment, where substance enough appears to show that all which was proper and required was properly done. Willoughby v. Gray, Cro. Eliz. 467; Weston's case, 11 Mass. 417. The statutes of jeofails usually go still further in remedying defects after verdicts and judgments. Considering this, under those statutes, as a case of defect or want of form in the entry by the clerk, and not of error in the real doings of the court, the statute of jeofails of the United States, curing all defects or want of form in judgments, is explicit against our reversing this for such a cause. Sec. 32 of Judiciary Act of 1789, 1 Stat. at Large, 91. If the State laws are to govern, the words of the statute of jeofails are equally explicit and more minute in Mississippi, in curing such defects, resembling more the English statutes. Hutchinson's Code for Mississippi, 841. It is not a little singular, that the unwillingness in England to have judgments disturbed by writs of error for defects in them or in the prior pleadings, where a verdict of a jury has been rendered for a plaintiff, is such, that something like five or six acts of Parliament were passed before our ancestors emigrated hither, and several more since, to prevent writs of error from being maintained for defects in form, as well as to empower amendments *in such cases. See those [*721 in 1 Bac. Abr. Amendment and Jeofails; O'Driscoll v. McBurney, 2 Nott & McCord, 58. Some of the defects cured seem to be very near as strong as the present case. 11 Coke, 6, b; Act of 32 Hen. VIII. c. 30. The difficulty is in deciding "what is substance and what is form," and that is governed by no fixed test, but is laid down that it "must be determined in every action according to its nature." 1 Bac. Abr. Amendment and Jeofails, E. 1; 1 Saund. 81, note.

At common law, defects in collateral pleadings, or other matters not preceding the verdict, and not to be proved in order to get a verdict, were not cured by it. Yet those were cured which related to matter necessary to be shown to get a verdict, and hence, after it, are presumed to have been shown. Renner v. Bank of Columbia, 9 Wheat. 581; Com. Dig. Pleader, Count, c. 87; Carson v. Hood, 4 Dall. 108; 1 Sumn. 314; 1 Gall. 261; 1 Wils. 222; Burr. 1725; Cotterel v. Cummins et al. 6 Serg. & Rawle, 348; 1 Sumner, 319; 16 Conn.

586; 11 Wendell, 375; 7 Greenleaf, 63. But these defects in collateral matters, as here, when they relate to form, are as fully cured by the statutes of jeofails as those connected with the verdict are by intendment at common law. Stennel v. Hogg, 1 Saunders, 228, note; Dale v. Dean, 16 Conn. 579. Any omission like this would certainly be amendable below, and some cases have gone so far as to hold, in error, that any defect amendable below will be considered as actually amended. Cummings v. Lebo, 2 Rawle, 23.

In conclusion on this point, this court, by Catron, Justice, in the writ of error before named, of Stockton et al. v. Bishop, 4 How. 164, stated, that "it must be admitted that Congress acted wisely in declaring that no litigant party shall lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that, to save the parties' rights, the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance."

After this, it would seem hypercritical, and contrary to the whole spirit of the statutes of jeofails, both of the United States and of Mississippi, to allow an exception so contrary to legal presumption as this to be sustained. Nor does it promote the ends of justice to let parties lie by and not take exceptions, and afterwards reverse judgments for omissions, which, if noticed at the time, would have been corrected. McCready v. James, 6 Wharton, 547. And this court, where the issues were three, and the verdict and judgment not separate on each, but general on all, and the objection was [*722 taken on the writ of error, in *Roach v. Hulings, 16 Peters, 321, said, by Daniel, Justice: "Objections of this character, that are neither taken at the usual stage of the proceedings nor prominently presented on the face of the record, but which may be sprung upon a party after an apparent waiver of them by an adversary, and still more after a trial upon the merits, can have no claim to the favor of the court, but should be entertained only in obedience to the strictest requirements of law;" and they were in that case accordingly overruled or considered as cured.

Another ground for affirming the judgment, which the plaintiff in error cannot easily overcome, is, that if the three counts to which the special plea is filed cannot be sustained, the defendant in error has obtained a verdict on all the counts; thus showing, at least, that there was no valid defense to the others. And if those three were conceded to be bad, the others are good, and, notwithstanding a verdict and judgment on all, the latter must not in such case be reversed on error. By an express statute in Mississippi, passed June 28th, 1842, one good count, though others are bad, will sustain a judgment. Hutch. Code for Miss. ch. 5, art. 1. This is not a peculiarity confined to Mississippi, but a like rule prevails in several other States. 2 Bibb, 62; 2 Litt. 100; 2 Bay, 204; 2 Hill, 648; 1 Blackf. 12; 1 Stewart, 384; 2 Conn. 324. And though in some it is otherwise, 1 Caines, 347; 11 Johns. 98; 9 Mass. 198 and is otherwise in England, Grant v. Astle, Doug. 703, yet it has been regretted by some of her eminent jurists as "inconvenient and ill-judged."

If this provision, then, in Mississippi, should be regarded as a rule of practice, it existed there when the last process act, of May, 1828, passed, and hence, by acts of Congress and the rules of our circuit courts, binds them; but if it be a right conferred by her statute, it equally must govern us, by the Judiciary law of 1789, in all cases tried like this in that State. 16 Peters, 89, 303.

But, besides these reasonings and views, to some of which a portion of the court except, there exists another ground for affirming the judgment below, which appears to us fully established both on principle and adjudged cases. The first fault in the pleadings connected with the demurrer seems to have been committed by the defendant himself, and no reason appears on the whole record why the original judgment should not have been rendered against him on that ground. His only defense set up was the statute of frauds and perjuries. This statute was pleaded specially; but, on the facts and the law, it does not seem to have been applicable to the case. The case was a transaction of money paid by the plaintiff on account of the defendant, *and must have been consid- [*723 ered by the court and jury as done under an original undertaking to repay it in a particular way, which the defendant had not fulfilled, and which was not within the provisions of the statute. The defendant was misled, by the mode of payment being special and to a third person, into an impression that the original promise was to a third person. The suit is not brought by the third person, to whom the original plaintiff owed a debt, nor was the promise made to a third person; but it is brought by the person who advanced money on account of the defendant, on a consideration moving from him alone, and on the promise made to him alone for its payment in a particular manner. See, on this, Read v. Nash, 1 Wilson, 305; 2 Leigh's N. P. 1031; King v. Despard, 5 Wendell, 277; Towne v. Grover, 9 Pick. 306; Hodgson v. Anderson, 3 Barn. & Cress. 842.

This was virtually, therefore, an undertaking by the defendant to pay his own debt, but simply specifying a particular manner of doing it; and unless it was found at the trial that the statute of frauds did not apply, it is to be presumed that a recovery would not have been had before the jury, where it was competent to make this an objection.

The matter of the plea, then, having been clearly bad, it appears to be well settled, that, when a demurrer is filed to a replication, if the plea is bad, judgment ought to be given for the plaintiff. Anon. 2 Wilson, 150; Semble, Moor, 692; Com. Dig. Pleader, Proceedings in Error, 3 B. 16; 1 Levinz, 181. The whole record connected with the demurrer is open on the writ of error, and judgment goes against the earliest fault. Breese, 207; Morgan v. Morgan, 4 Gill. & Johns. 395.

In regard to the suggestion that the demurrer might have applied to some other objection than the statute of frauds, either in the plea, or, going back to the declaration, some defect there (as the first defect bad on general de-

murrer is the fatal one, 1 Chit. Pl. 647), it is enough to say that no other appears, then or now, to have been pointed out, and none is intimated in the argument for the plaintiff in error.

It is very doubtful, also, if, in this particular case, a defect in the declaration would be considered at all on this demurrer, as the general issue is pleaded to all of the declaration covering these three special counts. And an issue in fact and a demurrer cannot both be allowed to reach the same count. Bac. Abr. Pleas and Pleading, note; 2 Blackf. 34; 5 Wendell, 104. If there be an exception to this rule, it must be by some local law or practice not existing here. 1 Litt. 4; 4 Munford, 104.

From the whole record, therefore, it appears that the judgment below in favor of the plain-
724*] tiff was probably correct, even *if the demurrer had not been waived, and in this event, it is clear that the judgment should not, on this writ of error, be reversed. Hobart, 56; Com. Dig. Pleader, Demurrer, Q. 2; Saunders v. Johnson, 1 Bibb, 322; 6 Monroe, 295, 606; Phelps v. Taylor, 4 Monroe, 170; Semble, 3 Bibb, 225; McWaters v. Draper, 5 Monroe, 490; Hardin, 164. In Foster v. Jackson, Hobart, 56, the opinion says: "It is the office of the court to judge the law upon the whole record." The other cases cited show, that in writs of error, as well as demurrers, the same rule prevails.

The propriety of our conclusions in this case becomes more manifest when we consider that a reversal of the judgment would be of no use to the original defendant; because, if reversed, the order here could not be to render judgment for the defendant, but to have a record made of the waiver or decision of the demurrer, if either occurred, and if not, then a joinder in demurrer, and an opinion below on the question presented by it, and which opinion, as already shown, must probably be for the plaintiff, and then the same judgment be entered again on the verdict which exists now. McGriffin v. Helson, 5 Litt. 48; 2 Strange, 972; Jackson v. Runlet, 1 Wood. & M. 381.

Finally, so far as any presumptions or doubts on any of these considerations should operate against either party in forming our conclusions, we are unable to see anything in the acquiescent conduct of the original defendant before the judgment, or in the merits of his original defense, or in his writ of error, brought after such an uninterrupted silence and assent for years, which entitle him to any peculiar favor.

The plaintiff in error, likewise, must always make out his case clearly and satisfactorily, as every reasonable intendment should be in favor of a judgment already rendered. Fentriss v. Smith, 10 Peters, 161; Lander v. Reynolds, 3 Litt. 16; La. Code of Prac. 909, note, and cases there cited: 3 Martin, N. S. 29; 15 La. 480, etc.

This not having been done in the present case, we think that the judgment below must be affirmed.

Mr. Chief Justice Taney:

I think the judgment of the District Court may be supported, on the ground that the decision on the demurrer had become immaterial after the verdict on the general issue. The special plea out of which the demurrer arose applied only to three counts. There was a fourth count, to which no defense was made except by the plea of the general issue; and according to the law and practice of Mississippi, one good count is sufficient to support the judgment when there are several counts in a declaration, and the others bad. And after the verdict on the *general issue, the [*725 decision of the demurrer was immaterial, and the judgment must still have been for the plaintiff even if the demurrer was decided for defendant. The omission to dispose of an immaterial issue is not a ground for reversing a judgment, as the decision of such issue could not influence the judgment of the District Court. But I do not concur in the other portions of the opinion, and think that many of the positions taken in it cannot be supported.

Mr. Justice Catron concurs with the Chief Justice.

Mr. Justice Daniel:

Regarding the opinion just delivered as in direct opposition to the very canons of pleading at law, I feel constrained to declare my dissent from it. I cannot subscribe to, and can hardly comprehend, a doctrine of presumptions, which, in proceedings at law and on questions of pleading, infers that the parties or the court have acted in direct contravention of the facts apparent upon, and standing prominently out upon, the record, operating by such presumption a false feature of the record itself. In this case the defendant has tendered an issue in law to the replication to the third plea; the record discloses the fact that this issue has never been tried; it is therefore undeniable that there is a chasm in the proceedings, and that the court has not passed upon the whole case. If presumption can be admitted to warrent the conclusion that this demurrer was withdrawn, where shall such presumption end? Would it not be equally regular to presume that any other plea or issue on the record had been withdrawn? Then, if any other source than the record itself can be resorted to in order to ascertain what was in truth involved in the trial, conjecture or evidence aliunde must be introduced to determine; and that which, by legal intendment, is the only evidence or proof of the proceedings, the record, becomes the weakest of all proof, or rather becomes no proof at all. I think the judgment should be reversed, and the cause remanded for a trial on all the issues of law and of fact.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs, and damages at the rate of six per cent. per annum.

726*] *WILLIAM HARDEMAN and Henry R. W. Hill, Complainants,
v.
BENJAMIN D. HARRIS.

Silence in answer to bill in equity concerning immaterial fact, no ground for exception.

If an exception be taken to an answer in chancery upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant.

If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled.

Therefore, when a bill charged that certain notes were given for the purchase of slaves introduced into the State of Mississippi, as merchandise and for sale, after the first day of May, 1833, and the answer omitted to notice the allegation, such omission was not a good ground for an exception.

This court has repeatedly decided that the fact stated is no defense to a suit at law. Still less can it be a defense in equity.

Where an allegation in the bill was, that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants.

THIS case came up from the Circuit Court of the United States for the Southern District of the State of Mississippi, on a certificate of division in opinion between the judges thereof.

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

It was argued by Mr. Nelson on behalf of the respondent, Harris; no counsel appearing for the complainants.

Mr. Nelson contended that neither of the exceptions was well taken.

The first, because the allegation to which it refers was wholly immaterial, and not therefore required to be answered.

The second, because the allegations therein referred to, contained in said bill, if at all material, which is denied, have been substantially responded to by said answer.

In support of the first proposition it is submitted—

That to justify an exception to an answer in chancery upon the ground of insufficiency, it is necessary to show that the omission alleged is material to the purpose and object of the complainants' bill. 2 Dan. Chan. Prac. 261; Welford's Equity Plead. 368; Hare on Disc. 160; 1 McClellan & Younge, 334. In Hirst v. Peirce, 4 Price, 136; 2 Eng. Exch. Rep. Chief Baron Richardson says: "There is great mistake in general in this court as to what is a material exception. The true way of arguing and considering such an exception is by ascertaining whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff. If it would, it must be answered; if not, it is not material."

And in Bally v. Kenrick, 13 Price, 294; 6 Eng. Exch. Rep. 99, Sir William Alexander, 727*] Chief Baron, says: "The *materiality of the exception will depend on this—whether the interrogatory be of such a nature, without reference to the objectionable part of the answer, as that the answer to it might, if it were answered simply as it is put, so far contribute to support the equity of the plaintiff's case as to contribute to induce the court to give him the relief sought by the bill."

This being the clear and well settled rule, it remains to inquire, whether the omission referred to in this exception be material to the object of the complainants' bill.

That it is not is unquestionably clear. Groves v. Slaughter, 15 Pet. 449; Harris v. Runnels, 5 How. 135; Truly v. Wanzer et al. 5 How. 141; Sims v. Hundley, 6 How. 1.

In support of the second proposition in the defendant's brief, it is insisted—

That the omission alleged in the complainants' second exception does not in fact exist to the extent therein stated, and if it did, it is wholly immaterial.

That Hardeman, one of the complainants, was a mere surety in the note sued upon at law, is substantially admitted by the defendant, and will be apparent upon the examination of the answer, wherein he states the sale of slaves, for which the note was given, to have been originally made to James M. Smith, on credit, and that he "received in payment therefor the notes or bonds of said James M. Smith and of the said William Hardeman." That upon one of said bonds or notes a judgment was obtained, as stated in the bill, and that the note or bond sued on, upon which the judgment enjoined was recovered, was given in satisfaction of the first mentioned bond or note and judgment.

Now, all that is necessary for a defendant to do, in a case like the present, is to answer substantially the allegations of the bill. Welford's Equity Pleadings, 261.

As to the objection, that the allegation of the insolvency of James M. Smith's estate is not answered by the defendant, it is sufficient to say that the fact is nowhere so alleged in the bill as to require any answer. There is no such averment in the bill, the only suggestion being that "it seems that nothing can be found," etc.

But if it were otherwise, it is indisputably clear that the allegations are wholly immaterial; that, however answered, the complainants could not be aided in the purpose of their bill; and that therefore, upon the authority of the cases already referred to, the omissions furnish no sufficient grounds for an exception.

Mr. Chief Justice Taney delivered the opinion of the court:

In this case, the complainants filed a bill in the Circuit Court *for the Southern Dis- [*728 trict of Mississippi, praying a perpetual injunction against a judgment at law which had been obtained against them. The bill, among other things, states that the note upon which the judgment was awarded was given for the purchase money of certain slaves brought by the defendant into the State of Mississippi, as merchandise and for sale, after the first day of May in the year 1833, and sold in the State to a certain James M. Smith, in violation of the constitution and laws of the State; that the complainant Hardeman was surety for Smith; that a judgment was afterwards obtained against him, and an execution issued and levied upon his property, and that, to prevent it from being sold, he executed a forthcoming bond with the other complainant, Hill, as his security, which

bond had become forfeited, and therefore had the form and effect of a judgment against the complainants; and that Smith, for whom he was security, was dead, and his estate insolvent.

The defendant answered; and upon the coming in of the answer, the following exceptions were taken to it by the complainants:

"1st. The bill charges that the slaves mentioned in complainants' bill, sold by the defendant, Harris, to James M. Smith, and which constitute the consideration of the note upon which the judgment at law enjoined in this cause was rendered, were introduced into the State of Mississippi by the said defendant, Harris, for sale and as merchandise, after the first day of May, 1833. This allegation has not been answered, admitted, or denied.

"2d. It is alleged in the bill, that complainant Hardeman was only surety in the note sued upon at law, and that C. P. Smith, executor of James M. Smith, was principal, and that the estate of James M. Smith is insolvent, etc. These allegations are neither answered, admitted, nor denied."

And upon the hearing of these exceptions, the judges were divided in opinion upon the point whether they were well taken and should be sustained, or not, and therefore ordered the question to be certified for decision to this court.

It is very clear that neither of these exceptions can be maintained. It has been repeatedly decided in this court, that the fact stated in the first is no defense at law, and still less can it be a ground of relief in equity after a judgment at law.

And as regards the second, certainly the insolvency of the principal debtor is no defense to the surety, either at law or in equity.

If, therefore, the defendant had admitted in the most explicit terms the allegations mentioned in the exceptions, they would not have contributed in any degree to support the claim 729*] of the *complainants to the relief they ask. And consequently, the omission to answer (if the answer be open to that objection) furnishes no ground of exception. It is not a sufficient foundation for an exception, that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to give the relief sought by the bill.

The exceptions ought, therefore, to have been overruled, and we shall direct it to be so certified to the Circuit Court.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whether, it is the opinion of this court, that the exceptions by the complainants were not well taken, and ought to have been overruled. *Whereupon*, it is now here ordered and decreed, *that it be so certified to the said Circuit Court.*

730

PLINY CUTLER, Appellant,
v.
WILLIAM A. RAE.

U. S. courts no jurisdiction in admiralty, of libel by the ship owners against consignee of cargo, to recover share due in general average —ship lost in saving cargo.

Where a vessel was run on shore by the captain in order to save the lives of those on board, and for the preservation of the cargo, by which act the vessel was totally lost, but the cargo saved and delivered to the consignee a libel in personam, filed by the owner of the vessel against the consignee of the cargo (and the result would be the same if filed against the owner of the cargo), for a contribution by way of general average, cannot be sustained in the admiralty courts of the United States.

Those courts have jurisdiction wherever the vessel or cargo is subject to an absolute lien, created by the maritime law; and will follow property subject to such a lien into the hands of assignees. The lien, in such cases, does not depend upon possession.

But in cases of general average, the lien is a qualified one, depends upon the possession of the goods, and ceases when they are delivered to the owner or consignee.

Whatever may be the liability of the owner after he has received his cargo, it is founded upon a implied promise to contribute to the re-imbursement of the owner of the lost vessel, which promise is implied by the common law, and not by the maritime law.

The case is, therefore, beyond the jurisdiction of courts of admiralty, and the libel must be dismissed.

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

It was a libel filed in the District Court, as a court of admiralty *and maritime juris- [*730 diction, by Rae, the owner of a vessel called the Zamora, against Cutler, in a cause of contribution or general average, civil and maritime.

The facts in the case are set forth by Mr. Chief Justice Taney, in delivering the opinion of the court, to which the reader is referred.

The District Court decreed that Rae should recover $2,500 from Cutler, which decree was affirmed in the Circuit Court.

It was submitted upon printed arguments in this court by Mr. Loring for the libelant below, and Mr. Fletcher and Mr. Curtis for the respondent and appellant.

The Reporter would be gratified if he could insert the whole of these arguments, but want of room forbids it.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a proceeding in admiralty, and the point first to be considered is the question of jurisdiction.

The appellee filed a libel in personam against the appellant, in the District Court of the United States for the District of Massachusetts, setting forth that he was the owner of the bark Zamora, which sailed from New Orleans for Boston, on the 6th of November, 1845, with an assorted cargo, a part of which consisted of 154 bales of cotton, consigned to the appellant; that she was overtaken by a storm in Massachusetts Bay, and was run on shore by the captain, in order to save the lives of those on board, and for the preservation of the cargo, which, together with the vessel, were in imminent danger of being totally lost; that by this

voluntary stranding, the vessel was totally lost, but the cotton was saved; and that the appellant had saved the value of it, to wit, $5,400; and that the appellee is entitled to contribution from the owners of the cargo and the appellant, to indemnify him for the loss of his vessel.

The appellant answered, admitting the ownership of the vessel as alleged in the libel; that she was wrecked in Massachusetts Bay, and that the cotton had come to his hands in a damaged state; but denies that the appellee is entitled to the general average he claims, and insists that he is not liable to contribute on account of the cotton, to indemnify the owner for the loss of his bark.

Upon this libel and answer, the parties proceeded to take testimony to show the circumstances under which the vessel had been stranded; and upon the hearing, a decree was passed in the District Court in favor of the appellee for $2,500, which was affirmed in the Circuit Court, and from which last mentioned decree the present appeal to this court was taken.

731*] *Upon the face of the proceedings, therefore, the question arises, whether the District Court had jurisdiction, as a court of admiralty, to try the matter in dispute. And it is unnecessary to state more fully the pleadings and testimony until this question is disposed of.

It is true, the counsel for the appellant has waived all objections on that score. But the consent of parties cannot give jurisdiction to the courts of the United States, in cases where it has not been conferred by the Constitution and laws. And if the proceedings show a case which the District Court was not authorized to try, it is the duty of this court to take notice of the want of jurisdiction, without waiting for an objection from either party.

The Court of Admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law. And where the lien is attached to the vessel or cargo, it will, until it is discharged, adhere to the property in the hands of third persons, and will follow the proceeds, in certain cases, in the hands of assignees. And in such cases, the lien may be enforced in a court of admiralty, by a proceeding in personam, against the party who holds the property or proceeds. This doctrine was recognized in this court in the case of Sheppard v. Taylor, 5 Pet. 675. In that case, the holders of the proceeds of a ship which had been condemned in a Spanish tribunal, and the value of the vessel afterwards paid to the owners by the Spanish government, were held liable for seaman's wages, in a proceeding in personam, although they held them as assignees of the owners in payment of a bona fide pre-existing debt. And in deciding that case, the court said, that, in cases of prize, bottomry, and salvage, as well as seaman's wages, the party entitled to the lien may proceed in admiralty in personam against the party holding the proceeds of property to which the lien had attached.

But in the cases mentioned by the court, the maritime law attaches an absolute and unconditional lien upon the property. The possession is not necessary to its validity. Indeed, in cases of seaman's wages and bottomry, the party entitled to the lien never has possession; and the same is most commonly the case where salvage services are rendered.

But it is otherwise in general average. The party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute. The captain has a right to retain them until the general average with which they are charged has been paid or secured. And as he may do this for the security of the party entitled, he must be regarded as his agent in this respect, and exercising his rights. This right *of retainer, therefore, is a quali- [*732 fied lien, to which the party is entitled by the maritime law. But it depends on the possession of the goods by the master or ship owner, and ceases when they are delivered to the owner or consignee. It does not follow them into their hands, nor adhere to the proceeds. This is the doctrine not only in England, but on the Continent also. It is unnecessary to refer to the various authorities on this point, as the principal ones are collected in Abbott on Shipping, 507 (margin), Perkins's edition, and 3 Kent's Com. 244.

In the case before us, the goods, with the bill of lading, were delivered to the consignee, and not to the owner. We do not, however, propose to inquire, whether, upon the facts stated in the libel, the consignee would be liable for the contribution in any form, but whether a court of admiralty can try the question. And treating the case as if the consignee stood in the place of the owner, and was liable to the same extent, we think it was not within the jurisdiction of the Court of Admiralty. The owner is liable, because, at the time he receives the goods, they are bound to share in the loss of other property by which they have been saved; and he is not entitled to demand them until the contribution has been paid. And as this lien upon his goods is discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods. Indeed, this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty.

It is very much to be regretted, that the jurisdiction of the Court of Admiralty in this country is not more clearly defined. It has been repeatedly decided in this court, that its jurisdiction is not restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted. But there is no case, nor any principle recognized by this court, that would justify us in extending it to a subject like the one now before the court. Whether the Court of Admiralty might not have proceeded in rem to enforce the maritime law before the goods were delivered, is a question which does not arise in this case, and upon which, therefore, we express no opinion. But the case, as presented in the record, we think, is not within the admiralty jurisdiction, and

the judgment must therefore be reversed, and the case remanded to the Circuit Court, with directions to dismiss the libel.

733*] *Mr. Justice Wayne:

I regret that this case has been sent to this court upon the printed arguments of the counsel in the court below, and still more regret that this court has decided an important constitutional question of admiralty jurisdiction, without either oral or printed argument.

It is the first time in this court that such a result has happened; and it was a sufficient reason, in my mind, to restrain this court from action, until after the point had been argued.

As I gather the facts of the case from the record, the question of jurisdiction was not argued either in the District or Circuit Court; though, in making up the record for this court, the point was suggested by the counsel for the respondents. It is a curious incident in the history of our jurisprudence, that a constitutional point should have been ruled here, which had neither been argued at the bar in this court, nor elsewhere; and I think it will be thought so much so, that it will not occur again. Such a silent and uncontested judicial disposition of a question arising under the Constitution is at variance with the interest hitherto shown by our courts, and by the public, in such matters, and does not partake of that watchful and patient inquiry concerning constitutional powers, which has been so much the characteristic of the American mind, when either of the departments of our government has been called upon to exercise them.

I think, too, that this decision should not have been made at this time; for though a full court was present in our consultation upon this case, one of the judges, Mr. Justice Catron, refused to deliberate with us upon it, stating as his reason for not doing so, that important points, constitutional and otherwise, were involved, and that the case was only before us upon printed arguments upon the latter. I think he did so with great propriety, and I agree with him, that the rule of the court permitting cases to be sent here upon printed arguments was not meant to embrace cases involving constitutional questions. That it was not meant to do so, I infer from this being the first case in which it has been done with the practical acquiescence of this court, and from our use, in having hitherto avoided the decision of such questions except upon oral argument before a full court.

Mr. Justice Catron's withdrawal left eight of us to act upon the case, and we were for some time equally divided upon this point of jurisdiction. It was ultimately disposed of as it has been by a majority of the court, rather by our acquiescence in what was thought to be English authorities against the jurisdiction, than from a close and searching scrutiny into 734*] the practice and *jurisdiction of courts of admiralty, and how far they were comprehended within our constitutional extension of judicial power to all cases of admiralty and maritime jurisdiction.

Under such circumstances, with every inclination to carry out without further inquiry the *decisions of this* court, and with unfeigned re*spect for all of* the judges who have made this decision, I hope I shall not be considered as doing anything at variance with either, if I shall hear argument upon this point of jurisdiction, should such a case occur before me upon the circuit, or if I shall ask, should it ever arise here again, that we may hear argument from counsel upon a point which we had not an opportunity to hear when it was decided.

But my objections to the ruling of the point is greater than to the circumstances under which it has been made.

I think that the case is within our constitutional admiralty and maritime jurisdiction, and that it has been so decided by this court.

An attempt has been made to take it out of the case of Sheppard v. Taylor, 5 Peters, 675, by making a distinction between cases of absolute and unconditional maritime lien, and such as are now called qualified cases of lien, to which a party is entitled by the maritime law. And it is said, "in general average, that the party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute; but that the captain has a right to retain them until the general average with which they are chargeable has been paid or secured."

Besides, not having been able to find, in the books and cases which I have read, any such distinction (now, I believe, for the first time made), I have always thought that a lien given by the maritime law, of whatever kind it may be, is one which can be enforced in a maritime court, for the purpose of consummating, for the benefit of all concerned, the equity which raised or created it. For instance, that if a master of a vessel gets a lien upon the saved cargo, in a case of jettison, or voluntary stranding of his vessel, and he is in any way dispossessed of any part of it, either by a freighter or other person, he may bring a possessory action in a maritime court to regain it, or a petitory libel, if the goods saved have got into the hands of a third person, who claims a right of property in them against the freighter. And further, that if the freighters, in a case of jettison or voluntary stranding of a vessel, disagree as to what should be their respective contributions, and there is no fixed rule for ascertaining it without suit in the country where the said cargo may happen to be, either the captain having the cargo in possession, or the freighters, or either of them, may go into a maritime court, to have it judiciously *determined. And that a party inter- [*735 ested in such lien may file his libel in personam, in a maritime court, against a freighter for his contribution, if he has got possession of his part of the saved cargo, and has removed it beyond the sovereignty in which the court is, so that it may not be sequestrated or put under arrest, to answer the court's decree. And it matters not whether the freighter's possession of the saved goods has been obtained by the delivery of it to him by the master, or otherwise. A lien or right given to the master "to retain the goods, until the general average with which they are chargeable has been paid or secured," as this court says the master has, has nothing in it of the character of a personal agency, which the master may throw off at his will, for neither in its beginning nor in its

continuance has it a voluntary appointment; but it is a trust, which the maritime law casts upon him, from the necessity of the case, in virtue of his official relation to the vessel and cargo, and to those who are the owners of them, It is a lien given to the captain by the maritime law, for the purposes of a high equity, produced by necessity, and it cannot be taken from the jurisdiction of a maritime court by any act of a party interested in it, short of what that equity demands; though the parties interested may themselves determine and receive from each other what they may think that equity gives to each of them.

And the foundation of this jurisdiction of a court of admiralty in such cases, both in rem and in personam, is not on account of the locality of the jettison or stranding, or that it is a thing done at sea; but because, happening at sea, the peril producing it makes new and involuntary relations between the freighters, where there were none before, and for which the interests of commerce require a tribunal, into which, by the law of its creation, all the parties interested may be brought together for settlement. Of course, in what I have said, I have had no reference to the admiralty jurisdiction in England since the time of Charles II., but to that of the maritime courts upon the Continent, and as the practice in them continues to be, and also to what had been the ancient practice and jurisdiction in England on admiralty, until the reign of James I., notwithstanding the statutes of 13 Richard II., ch. 5, and 15 Richard II., ch. 3; for we know historically, that, until the time of James, the statutes of Richard operated rather to restrain the usurped jurisdiction of the Court of Admiralty in England, than to limit it, in what rightfully belonged to its cognizance.

When, then, we are referred to Abbott on Shipping and to Kent's Commentaries, and to the cases cited by them, in support of the conclusion to which this court has here come, con-736*] cerning *the want of jurisdiction, in an American court of admiralty, of a libel in personam to enforce a right in a maritime lien which cannot be enforced in rem, in consequence of the removal of the subject matter of the lien beyond the reach of the court's monition and attachment, it will be found, by a perusal of Abbott and Kent upon General Average, and the cases cited by those writers, that neither of them is discussing at all the jurisdiction of a court of admiralty, even in England; but that each only states—and one from the other—what are the remedies in England for the recovery of the contributions of a general average. The language in Abbott is: "In case of dispute, the contribution may be recovered, either by a suit in equity only, or by an action at law, instituted by each individual entitled to recover, against each party that ought to pay for the amount of his share." Sec. 14, p. 610. And it is admitted that the English jurisdiction in admiralty was not meant by the framers of the Constitution, when the judicial power was extended "to all cases of admiralty and maritime jurisdiction." The language of the court now is: "It has been repeatedly decided in this court, that its jurisdiction is not restricted to the subjects of which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted." We must, therefore, in all cases, whether or not there has been an occasion in our courts for the exercise of jurisdiction in a particular case, look to the maritime courts on the Continent, and to works on admiralty jurisdiction, to determine whether the case in hand is embraced by our constitutional provision.

Nor can I partake of the regret just expressed, that the jurisdiction of the Court of Admiralty in this country is not more defined. I know at one time it was thought so, but subsequent investigations of it by our judges and jurists, I believe, have given a very general impression to American lawyers, that the constitutional clause, "all cases of admiralty and maritime jurisdiction," is as well and as definitely expressed, for the purpose meant, as it can be, and that it leaves nothing doubtful, except as to some cases of which the Admiralty Court in England took jurisdiction, which had been there exclusively within the cognizance of the courts of common law, and also of other cases in the Continental maritime courts, which did not relate to "things done upon the sea, or to contracts, pleas, and quarrels which were not maritime." Among the latter is certainly not a case of general average, and, except in England, I believe, the jurisdiction of the maritime courts has always embraced, both in rem and in personam, "all cases of *freight, charter-parties, mariners' [*737 wages, debts due to material men for the building and repairing of ships," and all accidents upon the sea, affecting the rights of those having any interest in the cargo of a vessel, or who are in any way connected with her. I do not think that there is anything doubtful in the terms used in the Constitution. "To all cases of admiralty and maritime jurisdiction," means all cases arising or happening on the sea, growing out of war or commerce, and all cases strictly of maritime contracts—admiralty jurisdiction meaning originally those cases of which the admiral took cognizance in virtue of his office upon the sea, and maritime, these also, with all others arising out of the perils or accidents upon the sea; trespasses upon it of all kinds; contracts relating to commerce in which a sea service was to be rendered; contracts for building and repairing of ships, and for money loaned upon bottomry. Now, it having been repeatedly ruled by this court, that its admiralty jurisdiction was not limited by what was the jurisdiction in England when the Constitution was adopted, the principal difficulty in the way of interpreting the words of the Constitution relating to it has been overcome. And if we will but rid ourselves of those doubts in respect to what are cases for a maritime court caused by the limitation of them in England, I do not think we shall ever be at a loss to determine what cases are within the admiralty jurisdiction of the courts of the United States; and I believe the whole of them will be found to make no trespass upon, or interference with, the jurisdiction of the other courts of the United States, or with those of the States, either as to the modes of proceeding in them, or as to the suits of which they have cognizance.

Mr. Justice Catron:

On the question of jurisdiction, for want of which this cause has been dismissed, I am not satisfied either way, and therefore give no opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is the opinion of this court, that neither the said Circuit Court, nor the District Court from which this case was removed to the said Circuit Court, had jurisdiction of this cause, and that consequently this court has not jurisdiction but for the purpose of reversing the decree of the said Circuit Court. Whereupon, it is now here ordered and decreed by this court, that the decree of the said Circuit Court, entertaining jurisdiction 738*] *in this cause, be, and the same is hereby reversed for the want of jurisdiction in that court; and that this appeal be, and the same is hereby dismissed for the want of jurisdiction; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

HEZEKIAH SMITH, Plaintiff in Error,

v.

WILLIAM HUNTER, Treasurer of Butler County, James B. Cameron, Auditor of Butler County, and The President and Trustees of Miami University.

Jurisdiction—no right, title or exemption set up.

Where a complaint alleged that a school tax, which was levied upon his land, was contrary to the spirit and meaning of a law of the State of Ohio which exempted his property from all State taxes, and conflicted also with the terms and conditions of the leases by which he held his land, and the State Court dismissed the bill, this decision of the State Court cannot be reviewed by this court by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The rules which regulate cases brought up to this court under that section again examined and affirmed.

THIS case was brought up from the Supreme Court of Ohio, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts are these:

By the fourth section of the Act of Congress of the 3d of March, 1803, to enable the State of Ohio to form a State constitution (2 Statutes at Large, 226), a township of land, to be laid off in the Cincinnati land district, was granted to the State of Ohio for the purpose of establishing an academy.

On the 17th of February, 1809, the Legislature of the State of Ohio passed an act entitled "An Act to establish the Miami University." Pamphlet Acts of 1809, page 184.

That act incorporated the university, provided for its support, government, etc. Section tenth vested the above mentioned township in the corporation, for the use and support of the university, and authorized the corporation to divide the township into lots, and lease them out for the term of ninety-nine years, renewable forever, subject to a valuation every fifteen years. The thirteenth section exempts the township from all State taxes. It reads in these words: "That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors, and other officers, students, and servants of the university, and any buildings appertaining thereto, and also the dwelling-house and other buildings which may be built and erected on the lands, *shall be exempt [*739 from all State taxes." Under this act the university lands were divided into lots and leased out, the plaintiff in error being the lessee of a part of them.

On the 16th of March, 1839, the Legislature of Ohio passed an act entitled "An Act providing for the levying of a school tax at Oxford township, in Butler County." Local Laws of Ohio, p. 235 of Pamphlet Acts.

The township here named is the university township. The first section of the act directs the county commissioners of that county to appoint appraisers in the township of Oxford "to appraise the lands held under permanent leases in said township at their true value in money, considered in their natural state," taking into view the rent incumbrance upon the same, payable to the university.

The second section of the act is in these words: "Said commissioners shall, in addition to the levying of a tax on personal property in said township, authorize the levying of a school tax annually upon the ad valorem amount of appraisement in said township, the property of blacks and mulattoes excepted, not exceeding one mill on the dollar, which assessment shall be made by the county auditor, and collected by the county treasurer, in the same manner as other county, township, or State taxes are levied and collected."

The third section provides, that "the taxes so levied and collected under the provisions of this act shall be appropriated exclusively for the support of common schools in the respective districts in the township of Oxford; and in the disbursement of the same, the provisions of the act entitled 'An Act for the support and better regulation of common schools, and to create permanently the office of superintendent,' passed March 7th, 1838, shall be conformed to, at least so far as it is practicable to carry out the objects of this act, having in view the support of common schools in the said township of Oxford."

Under this last named act, a tax for the support of common schools in Butler township was levied on the university lands, and, among others, on the lands of the plaintiff in error.

Whereupon he filed his bill in chancery in the Court of Common Pleas for said County of Butler, setting out in substance the facts as above stated, and praying that the treasurer

NOTE.—Jurisdiction of U. S. Supreme Court where a federal question arises or where is drawn in question statutes, treaty of Constitution of U. S. See notes to 2 L. ed. U. S. 654; 4 L. ed. U. S. 97; 6 L. ed. U. S. 571.

Nature of decision as affecting right of review. See note to 63 L.R.A. 53.

and auditor of the county might be enjoined from collecting said tax, on the ground that it was imposed in contravention of the terms of his lease, and of the Act of 17th of February, 1809, to establish the Miami University.

The defendants demurred to this bill, and on the hearing the demurrer was sustained and the bill dismissed. From this decree of the Common Pleas the plaintiff appealed to the 740*] Supreme *Court of Ohio, where, upon hearing on the demurrer, the bill was again dismissed. From this last decree the plaintiff sued out a writ of error into this court.

It was argued by Mr. Schenck for the plaintiff in error, and Mr. Vinton for the defendants in error.

Mr. Schenck contended that the case was drawn into the jurisdiction of this court—

1st. Because it arises under a law of the United States. It presents, in fact, a question as to the effect and objects of a grant of lands made in pursuance of an act of Congress for the purposes of education, and how far the same may be interfered with and controlled by State legislation.

2d. Because it is claimed that the Act of the Legislature of Ohio, of 1839, taxing these lands, conflicts with a former act of the Legislature in 1809, exempting them from taxation, and, being in violation of the rights of lessees (of whom the complainant is one) under that Act of 1809, is a law impairing the obligation of contracts.

Mr. Vinton denied the jurisdiction of this court, and contended also that State taxes in Ohio were clearly distinguished from county and road and school and bridge taxes, which were entirely local, and not included in the exemption from State taxes.

Mr. Justice Daniel delivered the opinion of the court:

This is a writ of error to the Supreme Court of Ohio, prosecuted under the twenty-fifth section of the act to establish the judicial courts of the United States, and arises out of the following facts and proceedings:

By the fourth section of an act of Congress of the 3d of March, 1803, 2 Statutes at Large, 226, a township of land in the Cincinnati land district was granted to the State of Ohio for the purpose of establishing a university.

On the 17th of February, 1809, the Legislature of Ohio, by law, incorporated and established the Miami University, and, by the tenth section of this law, vested the township above mentioned in the corporation, for the support of the university, and authorized it to divide the township into lots, and to make leases of these lots for the term of ninety-nine years, renewable forever, but subject to a valuation at intervals of fifteen years. The thirteenth section of the law contains the following provision: "That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors, and other officers, students, and servants of the university, and 741*] any buildings *appertaining thereto, and also the dwelling-house and other buildings which may be built and erected on the lands, shall be exempt from all the State taxes." Under the authority of this law of Ohio, the lands vested in the university were divided into lots and leased out, and the plaintiff in error became the lessee of a part of them. On the 16th of March, 1839, the Legislature of Ohio passed an act entitled "An Act providing for the levying of a school tax in Oxford township, in Butler County." The township of Oxford is the same which was vested in the Miami University by the law of the 17th of February, 1809. The first section of the law of 1839 provided that the county commissioners of Butler County should appoint one or more appraisers in the township of Oxford, whose duty it should be to appraise the lands held under permanent leases in said township at their true value in money, considered in their natural state, and that, in making such appraisement, they should take into view the rent incumbrance upon the same annually or otherwise payable to the Miami University by reason of the condition of the leases under which such lands are holden. The third section of the Act of 1839 appropriates the taxes thereby ordered to be assessed and levied on the lands in Butler County exclusively to the support of the common schools in the school districts of the township of Oxford, and directs the disbursement of the amount of these taxes in conformity with the provisions of a statute of Ohio for the regulation of common schools, passed on the 7th of March, 1838. The lease under which the plaintiff in error claims sets out specially the extent of his tenure, with the privilege of perpetual renewal, and, in general terms, refers to all the privileges and immunities granted to the lessees of the university by the several acts and laws of the State. In consequence of a demand made by the auditor and treasurer of Oxford township for the taxes assessed on the lands held by the plaintiff for the use of the common schools of that township, the plaintiff filed his bill in the Court of Common Pleas of Butler County, making defendants thereto the auditor and treasurer of the township and the trustees of the Miami University, and praying that the auditor and treasurer and their successors might be perpetually enjoined from collecting of the plaintiff any taxes whatsoever enacted by the State and imposed on the lands held by him under leases from the president and directors of the Miami University. The plaintiff claims an exemption from the payment of all taxes, under the provision of the tenth section of the Act of 1809, and insists that the law of 1839 is inconsistent with the privilege or exemption secured to him by the former law. The bill was demurred to by the defendants; the demurrer was sustained by the Court of Common *Pleas, and the [*742 bill directed to be dismissed; and upon an appeal to the Supreme Court of the State, the decree of the Court of Common Pleas was in all respects affirmed.

In considering this case, a difficulty meets us at the threshold in the question of jurisdiction. This being neither an appeal from, nor writ of error to, a court of the United States, but a case brought hither under the twenty-fifth section of the Judiciary Act, it must fall within some of the categories prescribed by that section, in order to justify the cognizance of it by this court; and this must appear, too, in the modes, and to the extent, which this

court has repeatedly and distinctly announced. It is contended, in the argument on behalf of the plaintiff in error, that the Act of the Legislature of Ohio, of March 6th, 1839, is an invasion of his right to exemption from taxes, or rather from all taxation, alleged to have been conferred by the Act of 1800, and therefore an infringement of that portion of the tenth section of the first article of the Constitution of the United States which prohibits the passing of laws by the States impairing the obligation of contracts. On the other hand, it is insisted for the defendants, that the phrase "State taxes," contained in the law of 1809, was and is applicable to a well known distinction between taxes for general revenue, and payable as a portion of the public fisc, and county or township dues levied by local power, and applicable only to purposes which were local and limited in their character. The latter would seem to be the interpretation adopted by the courts of Ohio of the two laws in question; they must have been regarded as reconcilable and consistent with each other, to justify the dismission of plaintiff's bill on the merits. But whether these statutes of Ohio be reconcilable with each other, or in conflict with themselves and with the above cited article of the Constitution, is a matter into which, according to the record before us, we do not think it material to inquire. The pleadings in this cause nowhere allege any right, title, or interest derived from or under any authority of the United States, nor the violation of any right, title or interest so derived, nor any violation of the Constitution, nor of any right guaranteed thereby. Nothing of this kind is apparent either on the face of the decree of the Court of Common Pleas, or of that of the Supreme Court of Ohio. The course of decision here, as to the requisites apparent upon the record to invest this court with jurisdiction under the twenty-fifth section of the Judiciary Act, would seem too clear, and too well established, to be misunderstood; but whether understood or regarded by parties or by counsel, this court cannot permit the disturbance of a settled rule of practice, whereby great confusion and incon- [*743] venience would of necessity be induced. Some of the positions ruled by this court, upon the subject of jurisdiction, under the twenty-fifth section, will be here adverted to. In Montgomery v. Hernandez, 12 Wheat. 129, it is said that "the Supreme Court has no jurisdiction under the twenty-fifth section of the Judiciary Act, unless the right, title, privilege, or exemption under a statute or commission of the United States be specially set up, by the party claiming it, in the State court, and the decision be against the same." In the case of Crowell v. Randell, 10 Peters, 392, the court, after reviewing all the previous cases touching the question of jurisdiction under the twenty-fifth section of the Judiciary Act, some of which cases were calculated to shed doubt upon the meaning of the statute, lays down these clear and well defined propositions: That to give this court jurisdiction, two things should have occurred and be apparent on the record —first, that some one of the questions stated in the section did arise in the court below; and *second*, that a decision was actually made *thereon by the* same court, in the manner required by the section. That if both these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable, that they did exist, and were decided. In the case of McKinney v. Carroll, 12 Peters, 66, it is said, two things must be apparent on the record, to give the Supreme Court jurisdiction under the twenty-fifth section of the Judiciary Act; first, that some one of the questions stated in that section did arise in the State court; and second, that a decision was actually made thereon in the manner required by the section.

The same positions are ruled, almost in the identical words, in the cases of Coons v. Gallaher, 15 Peters, 18, and of Fulton v. McAffee, 16 Peters, 149.

In the last case which will be here cited, that of Armstrong v. The Treasurer of Athens County, reported in 16 Peters, 281, this subject of jurisdiction under the 25th section of the Judiciary Act appears to have been still more elaborately treated than it had been previously done, and the law concerning it propounded in a series of six plain propositions; they are as follows: That to give jurisdiction, it must appear on the record itself that the case is one embraced by the section—first, either by express averment or by necessary intendment in the pleadings in the case; second, by directions given by the court, and stated in the exceptions; or, third, when the proceedings are according to the laws of Louisiana, by the statement of the facts, and of the decision as is usually made in such cases by the [*744 court; fourth, it must be entered on the record of the proceedings of the appellate court, in cases where the record shows that such a point may have arisen and may have been decided, that it was a fact raised and decided, and this entry must appear to have been made by order of the court or by the presiding judge by order of the court, and certified by the clerk as part of the record in the State court; or, fifth, in proceeding in equity, it may be stated in the body of the final decree of the State court; or, sixth, it must appear from the record, that the question was necessarily involved in the decision, and that the State court could not have given the judgment and decree without deciding it.

Thus, with respect to the construction proper to be given to the twenty-fifth section of the Judiciary Act, and with respect also to the modes of presenting upon the records from the State courts the questions arising under that section, which can properly draw the decisions of those courts within the cognizance of this tribunal, we find a series of adjudications embracing and settling the law as to both these subjects. The rules and principles settled by those adjudications are entirely approved, and could not be disturbed without much inconvenience and mischief. Recurring to the record of the case under consideration, and regarding it as deficient in all the requisites to give jurisdiction, according to the express demands of the authorities cited, we therefore adjudge and order, that the writ of error in this case be dismissed.

Howard J.

Order.

This cause came on to be heard on the transcript of the record of the Supreme Court of the State of Ohio and was argued by counsel; on consideration whereof, and it appearing to the court here, from an inspection of the transcript of the record, that there is nothing upon its face to give this court jurisdiction in the case, it is thereupon now here ordered and adjudged by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

745*] *WILLIAM McDONALD, Administrator of Duncan McArthur, Deceased, Plaintiff in Error,

v.

MATTHEW HOBSON.

Defective title defectively stated in declaration, not aided by verdict, aliter with good title.

Where the complainant and respondent in a suit in chancery entered into a mutual covenant, that, pending the suit, they would divide the money between them in certain proportions, and that if, in the said suit, it should be decreed that these were not the correct proportions, they would respectively pay the difference, so as to conform to the decree; and the result of said suit was a dismissal of the complainant's bill, with costs; and the respondent brought an action of covenant against the complainant, reciting the agreement in his declaration, with an averment, that, by virtue of the decree of dismissal, he was entitled to receive a certain sum of money—this declaration was bad.

The agreement looked to a judicial determination of the rights of the parties in some court of law or equity, and the declaration omits all averment that these rights had been so settled.

The decree of dismissal did not, of itself, prove that the complainant owed the respondent anything. It only proved that the respondent was not indebted to the complainant.

Nor is this defect in the declaration cured by verdict. It cannot be presumed that evidence was given upon the trial to show that some decree had adjusted the amount due, as claimed in the declaration, because this would be presuming against the record, which recites the substance of the decree. A total omission to state any cause of action is a defect which a verdict will not cure.

The averment of the virtute cujus is insufficient either as matter of law or fact; as law, because no such legal consequence could follow from the premises, and as fact, because the averment was in contradiction to the record itself.

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

There was no bill of exceptions in the case, but the whole record was brought up, upon the allegation of a fatal defect in it, because no cause of action was shown by the plaintiff below in his declaration.

Hobson, a citizen of Alabama, brought an action of covenant against McDonald, as the administrator of McArthur. As the whole case depended upon a very nice point of pleading, the reporter has thought it proper to insert the whole of the declaration, which was as follows:

"William McDonald, administrator of all and singular the goods, etc., of Duncan McArthur, deceased (which said William is, and the said Duncan was, at the time of his death, a citizen and resident of the State of Ohio), was summoned to answer unto Matthew Hobson, a citizen and resident of the State of Alabama, in the said United States of America, of a plea of covenant broken; and thereupon the said Matthew, by Wm. Key Bond and H. Stanbery, his attorneys, complains: for that whereas, heretofore, to wit, on the 25th day of September, A. D. 1830, at Chillicothe, in the said District of Ohio, by a certain article of agreement, made and executed, as well by the said Matthew as by the said Duncan, and sealed with their seals respectively, which said article being on file in this court, *as an exhibit in the case in [*746 chancery hereinafter mentioned, the said plaintiff is unable to make profert thereof, it was, among other things, witnessed. That whereas, on the 10th day of November, in the year of our Lord 1810, a contract was entered into by and between John Hobson and Matthew Hobson (the said plaintiff), of the one part, and Duncan McArthur (the said defendant's intestate), of the other part, providing for the withdrawal of certain entries of land warrants, and the relocation of the same, as by reference to said contract will appear, since which time the said John Hobson had transferred his interest in said contract to the said Duncan McArthur; and whereas, on the 26th of May, 1830, the Congress of the United States passed and enacted a certain statute, in virtue of which it became competent for the parties to the said last mentioned contract, as holders and owners of the re-entries made under said last mentioned contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in said entries were valued by an inquest appointed by the United States, with interest, as by the said statute would appear. And whereas the said Matthew and Duncan were each willing to make such relinquishment to the United States, and avail themselves of the benefits of the said act of Congress, but had disagreed about their respective rights under said last mentioned contract; in consequence of which said disagreement the said Duncan McArthur had then recently instituted a certain suit in chancery in the Supreme Court of the State of Ohio, in and for the County of Ross, in said State; and, among other things, had obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money under the said act of Congress, until the matters could be inquired into, as by reference to said suit would fully appear. And whereas (as is further recited by said article of agreement first herein mentioned), the said parties, to wit, the said Matthew and Duncan, were then mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as should await the determination of said suit, should not remain inactive, and did therefore wish to put the whole matter in such state as would make the fund available and profitable, pending the same suit, but without in any manner affecting, or being held, or interpreted as affecting, their said controversy; in order to accomplish which it had then been determined and arranged, that the said Matthew should assign and transfer to the said Duncan all the interest of the said Matthew of, in, and unto the said entries and warrants in such way as would enable the said Duncan to receive from the United States the moneys

aforesaid, out of which said money the said 747*] Duncan should at *once pay to the said Matthew the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan's possession; and the said Duncan, in and by the said article of agreement first herein mentioned, did covenant, to and with the said Matthew, that if, in the said suit so instituted as aforesaid, it should be held, adjudged, decreed, or determined, that the said Matthew, his heirs or assigns, executors or administrators, were, or should be, entitled to any greater portion of said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then, and in such case, he, the said Duncan, his heirs, executors, or administrators should and would pay to the said Matthew, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess, from the day of the date of said article of agreement, which said covenant last aforesaid, it was provided by said article of agreement, should be held to embrace any judgment, order, or decree, which might produce the said result, whether made and rendered in said suit in chancery, or in any other suit, or before any other tribunal, founded on the same subject matter or contract; and in and by said first mentioned article of agreement, it was further witnessed, that the said Matthew Hobson did thereby covenant to and with the said Duncan McArthur, that in case it should be determined, held, ordered, adjudged, or decreed in said chancery suit, or before any other tribunal finally decided in a suit founded on the same subject matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, and administrators, should and would refund and pay to the said Duncan McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount so received by him beyond what he was entitled to, with interest thereon from the said date of said article of agreement.

"The said plaintiff further says, that, in performance of his covenant in that behalf in said article of agreement mentioned, he did, afterwards, to wit, on the said 25th day of September, A. D. 1830, at Chillicothe aforesaid, assign and transfer to the said Duncan McArthur all the interest of him, the said Matthew, of, in, and unto the said entries and warrants; which said assignment and transfer was then and there accepted and received by the said Duncan in discharge of the said covenant of the plaintiff in that behalf so made as aforesaid. In virtue of which said assignment and transfer, the said Duncan, afterwards, to wit, on the same day and year last aforesaid, at Chillicothe, 748*] *aforesaid, did receive from the United States the moneys so appropriated, amounting, in the whole, to a large sum of money, to wit, the sum of fifty-seven thousand six hundred and eight dollars.

"And the said plaintiff further says, that such proceedings were afterwards had in the said suit in chancery, referred to in said before recited article of agreement, that afterwards, *to wit, at the December Term, A. D. 1831, of* 898

said Circuit Court for the Seventh Circuit and District of Ohio, the said suit in Chancery was, on the petition of said Matthew Hobson, on the ground of his residence and citizenship in the State of Alabama aforesaid, removed to and docketed in the said Circuit Court; and such further proceedings were afterwards had in said suit, that the same was finally heard and decided before the Supreme Court of the United States at Washington (to which said court the same had been taken by appeal from the decree of said Circuit Court), at the January Term thereof, A. D. 1842; and such decree was, by the said Supreme Court of the United States, then and there rendered, that it was adjudged and ordered, that the said Matthew Hobson should recover against the complainants in said suit, viz., Allen C. McArthur, James D. McArthur, Effie Coons, Mary Trimble, Eliza Anderson, Frances Walker, and John Kercheval, heirs at law of said Duncan McArthur (he, the said Duncan, having deceased during the pendency of said suit, and the said last mentioned complainants having been made parties thereto in his place and stead), the sum of one hundred and sixty-six dollars and eighty-three cents, for his costs therein expended, and that he have execution therefor; and further, that the said cause should be, and the same thereby was, remanded to the said Circuit Court, with directions to the said last mentioned court to dismiss the bill without prejudice.

"And afterwards, to wit, at the July Term, A. D. 1843, of the said Circuit Court, to which the mandate of the said Supreme Court had been duly sent for execution of the said last mentioned decree, the said bill was, by the order of said Circuit Court, in conformity with said mandate, dismissed without prejudice; all which will more fully and at large appear by reference to the record and proceedings of said suit in chancery, and the said mandate, and several orders and decrees therein, now in said court remaining.

"And the said plaintiff further avers, and in fact says, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the said defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by the said Duncan McArthur as aforesaid, than the said sum of eleven thousand *five hundred dollars (which last [*749 mentioned sum the plaintiff admits he received from said Duncan at and after the execution of said article of agreement), to wit, the sum of three thousand two hundred and one dollars, with interest thereon from the said 25th of September, A. D. 1830. Of all which premises the said defendant, afterwards, to wit, on the 10th day of July, A. D. 1843, at Cincinnati, in the District of Ohio aforesaid, had due notice; yet neither the said Duncan, whilst in life, nor the said defendant, as administrator as aforesaid, since the decease of said Duncan, has at any time, though thereto requested, paid to said plaintiff the said last mentioned sum of money, at the Bank of Chillicothe or elsewhere, or any part thereof, but the same to do have hitherto refused, and the same, with the accruing interest, still remains wholly due and unpaid. Wherefore the said plaintiff saith, that neither the said Duncan nor the said defendant, his administrator as aforesaid, hath kept the said cov-

enant in that behalf, but the same is broken, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings suit, etc.

"Bond & H. Stanbery,"

"Attorneys for Plaintiff."

The defendant demurred to this declaration, but his demurrer was overruled.

At December Term, 1843, the defendant craved oyer of the agreement, and pleaded non est factum and nul tiel record. The plaintiff joined issue upon both pleas.

The case was submitted to the court upon both issues, neither party requiring a jury. The court decided in favor of the plaintiff upon both pleas, and assessed the damages at $5,833.30, with costs.

The defendant, McDonald, sued out a writ of error, and assigned the following causes:

1st. That the declaration aforesaid, and the matters therein contained, are not sufficient in law to maintain the said action.

2d. That said judgment was given in favor of the said plaintiff, when, by the laws of the land, it ought to have been given for the defendant.

3d. It does not appear, from the record, that there was any cause of action in favor of the said plaintiff against the said defendant, at the commencement of this suit; but, on the contrary, it does appear, from the record, that there was no cause of action.

Upon this writ of error, the cause came up to this court.

It was argued by Mr. Vinton for the plaintiff in error, and Mr. Stanbery for the defendant in error.

750*] *Mr. Vinton made the following points:

1st. Under the contract on which the suit was brought by Hobson, it was a condition precedent to his right to the money claimed, that he should obtain a decree in the suit mentioned in that contract establishing his right to it.

Such being the character of the contract, the declaration must aver the fulfillment of this condition precedent. 1 Chit. 351-401.

Till such condition precedent is performed, no action accrues on the contract. 1 Chit. 353; Doug. 683.

Every material fact which constitutes the ground of the plaintiff's action must be alleged in the declaration, and no proof at the trial can make good a declaration which contains no ground of action. Buxendon v. Sharp, 2 Salk. 662; Drowne v. Stimpson, 2 Mass. 444; Rushton v. Aspinwall, Doug. 683; Avery v. Hoole, Cowper, 825; 1 T. R. 145.

And after verdict nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated. Spieres v. Parker, 1 T. R. 141.

The averment in the declaration, that, by virtue of the decree set forth by plaintiff below, he was well entitled to the money he sued for, is an inference of law deduced from the facts averred, and as such not traversable. A traverse must be taken on matter of fact, not on matter of law. 1 Chit. 645; 1 Saund. 23, note; 11 Price, 343; 3 Wils. 234; 1 Moore & Payne, 803.

The only exception to the rule, that the virtute cujus, pretextu, or per quod, are not traversable, is when they are compounded of law and fact, which are connected together. Then a traverse may be taken for the purpose of trying the fact which is connected with the law. 1 Chit. 646; Beale v. Simpson, 1 Ld. Raym. 413; Trustees of Rochester v. Symonds, 7 Wendell, 396; 2 Blackf. 776; 2 Young & Jervis, 304; 1 Saund. 23, note; 11 Price, 343; 3 Wils. 234.

Mr. Stanbery, for the defendant in error:

There are three causes of demurrer stated specially:

1. That plaintiff has not shown any cause of action against McArthur, or his administrator.

2. That he has shown no breach of the covenant.

3. That there is nothing to show the plaintiff entitled to demand the said sum of $3,201, and interest.

The three grounds of demurrer are in effect one—that no cause of action is shown; and though called, or intended for, a special demurrer, is in truth a general demurrer, for it relies on matter of substance, not of form.

*We suppose the point intended to [*751 be made is, that we have not averred or shown how the final decree, which upon its face is simply a decree of dismissal, made the defendant liable to the payment of the $3,201.

Very clearly, the decree is not for any money; and if our action was upon that alone, we should show no case. It does not, per se, give us any action for any money. But our action is not founded on the decree, but on a covenant anterior to it.

In the sealed instrument containing that covenant, it is acknowledged, in such form as to estop any proof to the contrary, that certain lands belonging to this plaintiff and McArthur were to be paid for by the United States; that a controversy existed as to their relative rights to the land, which had led McArthur to commence a suit in chancery to enjoin the payment of the money by the United States; that both parties were anxious to make the fund available, and therefore they temporarily divide the fund, the plaintiff taking $11,500, McArthur all the residue. Upon this state of things the covenant is made; providing that the parties shall stand, as to the money, in statu quo, until the determination of the suit; and that if, directly or indirectly, by any decree to be made in such suit, it should be held that the $11,500 was less than Hobson's portion of the whole sum, or if such a result should in any way flow from any decree, then McArthur covenants to pay any excess that Hobson might be entitled to.

Now, it is perfectly clear that the parties did not contemplate that the decree itself should be a decree for the money in dispute. A covenant to pay such a decree would be useless, for the decree itself would be better than the covenant to pay it. Besides, the express language is, that the covenant is to take effect upon any decree, which, directly or indirectly, should or might produce a result in favor of the plaintiff's right to a greater portion of the money than the $11,500.

In setting forth a decree, then, which is not a decree for the money, we show the sort of decree which is contemplated by the cove-

nant; but yet not such a decree as, without further averment, would make a case against McArthur.

We do not stop, however, by showing the decree, but by positive averment state, that in virtue of it Hobson became entitled, under the covenant, to the sum stated beyond the $11,500. In effect, following the language of the covenant, we aver that this was a decree which produced that result.

Must we show, by averment, how a decree of dismissal produced the result alleged? That is the only question that can be made. In other words, must we introduce all our evidence into our declaration? Unquestionably we must, 752*] on the trial, *prove the allegation, that the liability to pay more than the $11,500 resulted from the covenant and the decree. We admit that, but cannot admit that we must spread all the evidence out in the declaration.

There are instances in which the mere averment of the fact is not good, without showing the manner; as where there is a covenant to pay money on the release of all actions. An averment that the plaintiff executed a release will not do, for it must appear how the release was made, i. e., by an instrument under seal, that the court may judge of its sufficiency.

In this case that doctrine does not apply. The fact of liability to pay is not dependent upon a technical thing that can only be done in one way, and which must always be alleged to have been done in that way.

Simply, the case is an action for so much money received by McArthur to Hobson's use; and the only reason why we might not recover in indebitatus assumpsit is, that the covenant under seal drives us to this action of the higher nature.

It well appears that a certain sum of money arising out of joint property of Hobson and McArthur was in the treasury of the United States. The parties differ in the division; McArthur files a bill to enjoin it in the treasury; they then agree that Hobson shall take $11,500, and McArthur the residue, amounting to $46,108, and to stand upon that division until the end of the suit pending. The plaintiff avers the suit to be ended, and that he is entitled to $3,201 of the moneys so received by McArthur beyond the amount he has received; and all this is admitted by the demurrer.

I confess I am not able to see why this is not a good declaration.

But the case does not now stand upon the demurrer to the declaration, but upon a writ of error after a finding or verdict for Hobson, and a judgment consequent on such verdict.

It appears that, at the December Term, 1843, the court below overruled the demurrer, and the defendant then took leave to plead, and filed two pleas—non est factum and nul tiel record. Issue being joined on these pleas, the trial thereof was submitted to the court at the July Term, 1844, and there was a finding on both pleas for Hobson, an assessment of damages, and judgment.

If there were any objection that might have been sustained to the declaration in consequence of any supposed defective statement of the plaintiff's right to recover the $3,201, with interest from September 25, 1830, it is now, *after verdict, to* be intended that such defect was supplied in the proof. The rule on this subject is nowhere better laid down than by Lord Mansfield, in Rushton v. Aspinwall, Doug. 679:

*"But on looking into the cases, we [*753 find the rule to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately—because, to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial—it is a fair presumption, after verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption."

In our declaration we set out the covenant with all necessary strictness, and aver that, in virtue of the decree, McArthur became bound to pay the money demanded. This averment, "in virtue of said decree," was traversable.

Where the virtute cujus contains only matter of law, it is not traversable; otherwise, where it is mixed with fact. Beal v. Simpson, 1 Ld. Raym. 408; Trustees of Rochester v. Symonds, 7 Wend. 392.

Now, if the covenant had been limited to a decree which, per se, was to be a decree for the money, and had been to pay so much money as should be so decreed, the decree alone would fix the liability without reference to any fact aliunde. Such is not the covenant, nor such the decree contemplated by the parties.

The decree may be any decree which, directly or indirectly, that is in itself, or in reference to matter dehors, may produce the result.

When, therefore, we allege a decree which does not per se give us the money, or establish our right to it, and aver that, in virtue of it, we became, under the covenant, well entitled to a specific sum, the averment is clearly mixed with matter of fact, and is traversable, and must be proved at the trial, unless admitted by the pleadings.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States, held in and for the District of Ohio by the district judge.

The questions presented arise upon the record of judgment, no bill of exceptions having been taken to the rulings of the court at the trial. It is insisted that the declaration is fatally defective, and the judgment for that reason erroneous.

The action is covenant, brought by Matthew Hobson against William McDonald, as administrator of Duncan McArthur, deceased.

The declaration recites, that, on the 10th of November, 1810, a contract was entered into between the said Matthew and Duncan, providing for the withdrawal of certain entries of land *warrants and relocation of the same; [*754 that on the 26th of May, 1830, Congress passed an act which enabled the parties, as holders and owners of these warrants, to relinquish the same and receive their value in money; that the said Hobson and McArthur were each willing to make such relinquishment, and to avail themselves of the provisions of the

act, but that they had disagreed as to their respective rights under the contract of 1810; in consequence of which disagreement, McArthur had commenced a suit in chancery in the State of Ohio against Hobson, and had obtained an injunction restraining him from receiving any of the moneys, under the act of Congress, until the matters in dispute should be settled; that both parties had then become anxious that the money, or such part of it as must otherwise await the determination of the suit, should not remain useless, and therefore desired to put their differences on such a footing as would make the fund available and profitable during the litigation, and, at the same time, without in any manner affecting the suit; that, in order to accomplish this, it had been agreed that Hobson should assign and transfer to McArthur all his interest in the said warrants, so as to enable him to receive the money from the government, out of which he should, at once, pay over to Hobson the sum of $11,500, and retain the balance; and the said McArthur did then and there covenant to and with the said Hobson, that if it should be adjudged and determined in the suit in chancery that the latter was entitled to a greater portion of the money than the $11,500, directly or indirectly, then and in such case McArthur would pay to him such further amount, with interest, at the Bank of Chillicothe. It was, at the same time, declared, that the covenant should be held to embrace any judgment or decree that might produce this result, whether rendered in the suit in chancery or in any other suit, or before any other tribunal, founded on the same subject matter. And the said Hobson did also then and there covenant to and with McArthur, that in case it should be adjudged and determined in the suit in chancery, or in any other tribunal, that he was entitled to a less sum than the $11,500, then and in such case he would refund to McArthur the excess so received, with interest, at the Bank of Chillicothe.

The declaration, then, after setting out the transfer of the interest of Hobson in the land warrants to McArthur, and also the receipt of the sum of $57,608 from the government by the latter, averred, that such proceedings were had in the suit in chancery, that it was removed into the Circuit Court of the United States, and that such further proceedings were there had, that it was finally heard and decided in the Supreme Court of the United States, at Washington, at the January Term, 1842, to which the 755*] *same had been carried by appeal, and such decree was then and there rendered, as adjudged and ordered, that Hobson recover against McArthur $166.83 for his costs, and that the cause be remanded to the Circuit Court, with directions to dismiss the bill without prejudice—all which was afterwards done at the following July Term of the Circuit Court accordingly.

The plaintiff then avers, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by McArthur, than the sum of $11,500, to wit, the sum of $3,201, with interest from the 25th of September, 1830, the date of the articles of agreement—of all which the defendant had notice.

The usual breach is then set out, concluding to the damage of the plaintiff of $10,000.

The defendant put in a demurrer to the declaration, which was afterwards overruled by the court. He then craved oyer of the articles of agreement, and, after setting them out in hæc verba, pleaded, 1st, non est factum, and 2d, as to the decree, nul tiel record. Upon which issues were joined, and were found for the plaintiff, and the damages assessed at the sum of $5,833.30.

The question presented for our decision is as to the sufficiency of the declaration after verdict, and this depends upon the construction to be given to the articles of agreement upon which the action is founded, and as set forth in the pleadings.

The constructon given by one pleader is, that the decree or order on the suit in chancery mentioned in the agreement, and upon which the right to any portion of the fund in dispute, beyond the $11,500 already received is made to depend, need not determine either the right to any excess beyond that sum, or, if any, the amount of it; but, on the contrary, either or both may be established by evidence independently of the proceedings in that or any other suit, and that the decree is material only as showing the suit to be at an end. Hence, after setting out the decree by which it appears that the bill of complaint had been dismissed with costs, the pleader proceeds to aver, that, in virtue of the decree, the said plaintiff is well entitled to have and demand of and from the defendant a greater portion of the said moneys, so received by the said McArthur, than the sum of $11,500, to wit, the sum of $3,201, with interest.

This, it is said, is an averment of a matter of fact, and not of a conclusion of law; and that, after verdict, the court must presume that evidence was given on the trial to establish the right of the plaintiff to the amount recovered over and above *the sum already re- [*756 ceived, and that, upon this ground, the judgment may well be sustained.

This is the view of the case, as set forth in the declaration, and which was sought to be sustained in the argument; and, conceding it to present the true construction of the articles of agreement—though the averment is certainly informal and illogical in the mode of stating it, as it is difficult to perceive how the right to the sum of money claimed, or to any sum, can result to the plaintiff, even as a matter of fact, in virtue of a decree dismissing a bill in chancery against him—yet, with the usual intendments of the law in support of a judgment after verdict, it might, perhaps, be deemed sufficient. The appellate court would presume that evidence had been required and given, under the averment, at the trial, to support the claim to the amount recovered. 1 Saund. 228, note; 1 Chit. Pl. 589; 1 Maule & Selw. 234; Doug. 68; 7 Wend. 396.

But the court is of opinion, that the pleader has mistaken altogether the true construction of the agreement in the particular mentioned, and has placed the right of action upon ground not warranted by any of the stipulations of the parties. This will be apparent, on recurring for a moment to the agreement as set forth in the pleadings.

The recitals show, that a dispute had arisen in respect to the division of a large sum of money coming from the government, in which the parties were jointly interested, and that a suit had been commenced by McArthur against Hobson, in chancery, enjoining him from receiving any part of it, until their rights had been judicially determined. The effect of this proceeding was to tie up the fund in chancery, pending the litigation, and until the court could make a proper distribution. It was to remedy this inconvenience, and to enable the parties to possess themselves of the fund, pending the controversy, that the agreement in question was entered into, and which was, in substance, as follows: McArthur was to receive the whole of the money from the government, and at once pay over to Hobson $11,500, retaining in his possession the residue; and if, in the suit then pending, it should be determined, directly or indirectly, that Hobson was entitled to a larger amount for his share, then McArthur would pay such additional sum, with interest, at the Bank of Chillicothe; and, on the other hand, if it should be determined that Hobson's portion of the fund was less than the sum already received, he would refund the excess, with interest, to McArthur, at the same place.

The object of the parties was to procure the money from the government, where it was lying idle, and, at the same time, to make a pro-
757*] visional *distribution, without in any way interfering with the suit in chancery. That was to be carried on for the purpose for which it was originally commenced; but as a provisional division had taken place, it became necessary to provide for a special decree, having reference to the changed situation of the fund, and, as the suit had become an amicable one, to provide, also, for the payment of any sum that might be found due from either party. Hence the stipulation, that the decree should be made upon the basis of this provisional distribution, and that the parties should pay over at once any balance that might be found due, without further proceedings.

The strongest proof exists, in the agreement itself, that the parties did not intend to interfere with the settlement of their differences by the suit in chancery, or by some other suit to be instituted for that purpose; for the last article provides, that this contract shall not be used by either party in the suit pending, or in any other suit, or in any other court, or in any proceeding under the contract of 1810, as affecting or in any way changing the rights of either in the matters in dispute; but that the suit in chancery or in any suit which either might think proper to bring, should be conducted, in all respects, as though this contract had not been entered into.

We think, therefore, it is clear, the parties intended that their respective rights to the common fund in question should be settled and fixed by the chancery suit then pending, or by some other legal proceeding that might be instituted for the purpose; and that, when so settled, they would conform the provisional distribution already made to the decision, by paying over at once the amount adjudged to be due; for we have seen, that, instead of interfering with the suit which had been already commenced, great pains are taken to guard against any such consequence, and, as if apprehensive that their rights might not be definitively settled by that suit, provision is made for the instituton of any other, by either party, before the same or any other tribunal having cognizance of the case.

In a word, the whole amount of the agreement is, to provide, first, for a provisional distribution of the fund, so that the money might be used pending the litigation; second, for a judicial determination of the controversy in respect to it, in some court of law or equity; and, third, for the payment of any balance that might be found due from either, at the Bank of Chillicothe.

This being, in our judgment, the legal effect of the agreement, it is manifest that the pleader has failed to comprehend it, and has therefore failed to set out any cause of action in the *declaration. There is a total omission [*758 of any averment of the fact upon which the right of the plaintiff to any portion of the fund beyond the $11,500 is made to depend, namely, a judgment, order, or decree awarding to him the amount. There is not only an omission of any such averment, but the contrary appears upon the face of the declaration, as the decree in the chancery suit is set out, and its contents particularly described.

It is a decree simply dismissing the bill of complaint, with costs. It may show that the defendant (now plaintiff) had not received more than his share of the money in the division, otherwise the bill would not have been dismissed; but not that the defendant was entitled to more, unless the dismissal of a bill is evidence that something is due from the complainant to the defendant.

Neither can we presume, even after verdict, that evidence was given at the trial, by which it was made to appear that the decree did determine that the amount which has been recovered in this suit was due from McArthur to the plaintiff; for this would be a presumption against the face of the record. That shows what decree was rendered, and any one of a different import would have been inadmissible under the pleadings.

Besides, there should have been an averment, not only that a decree was rendered in the suit in chancery, but that the sum claimed had been therein adjudged to the plaintiff. This is made the foundation of the right to the money, and, of course, of the action, by the agreement; and the omission is fatal to the judgment.

It is the case of a total omission to state any title or cause of action in the declaration—a defect which the verdict will not cure, either at common law or by statute. Doug. 683; Cowp. 826; 1 Johns. 453; 2 Ib. 557; 17 Ib. 439.

The averment, that, in virtue of the decree, the plaintiff was well entitled to recover, etc., is insufficient, either as matter of law or of fact. As matter of law, it was given up in the argument, as no such legal consequence could follow from the premises stated; and, as matter of fact, the averment is in contradiction to the record itself. That shows that the decree determined nothing in favor of the plaintiff; it dismissed the bill against him with costs, and nothing more.

Some weight was given, in the argument, to the peculiar phraseology of the covenant, on the part of McArthur, wherein it is provided, that, if it should be determined in the chancery suit, that the plaintiff was entitled to any greater portion of the money, directly or in-759*] directly, than the $11,500, then, and *in that case, he would pay, etc. The object of using the words "directly or indirectly" in the connection found, is, perhaps, at best, but matter of conjecture. But as the chancery suit was against Hobson, for the purpose of asserting claims and demands against him by the complainant, it was, according to the rules of chancery, an inappropriate proceeding for the purpose of asserting claims on the part of the defendant against the complainant. These would have required a cross bill. But as the suit had become an amicable one, it was provided that the claims of both parties might be settled therein, notwithstanding the irregularity of the proceeding, and hence the use of the peculiar phraseology referred to.

This explanation receives some confirmation from the covenant, on the part of Hobson, with McArthur. These words are there omitted. The suit was appropriate to enforce any claim against him.

It was said, also, and some stress laid upon the remark, that the agreement would not have provided for the voluntary payment of the balance that might be due from one to the other, if it had contemplated an adjustment of the particular amount by the suit in chancery, as, in that event, the payment could be enforced by the decree.

But we think this consideration leads to an opposite conclusion. How could the payment be made at the bank, as provided, unless the amount in dispute was first adjusted.

There was no dispute about the payment, except as respected the amount. That being determined, each party was ready to satisfy it. Besides, it is difficult to believe, that, in providing so specially for the settlement of the controversy by judicial proceedings, the parties had in view simply the determination of the question whether the one or the other had received more of the fund than his share, without regard to the amount. Such a decision would have been idle, as it could lead to no practical result in the settlement of their differences.

Upon the whole, for the reasons stated, we think the judgment below erroneous, and should be reversed, and the cause remanded to the court below for further proceedings.

Mr. Justice Wayne, being indisposed, did not sit in this cause.

Mr. Justice Woodbury dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of 760*] the United States for the *District of Ohio, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

W. and H. MASSINGILL, Plaintiffs,
v.
A. C. DOWNS, Claimant.

State legislation restricting lien of judgments, cannot affect those of U. S. courts.

Where a judgment was obtained in a Circuit Court of the United States for the District of Mississippi in 1839, and in 1841 the State of Mississippi passed a law, requiring judgments to be recorded in a particular way, in order to make them a lien upon property, this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute.

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

The facts are fully set forth in the opinion of the court, as delivered by Mr. Justice McLean to which the reader is referred.

It was argued by Mr. Sargent and Mr. Bell for the plaintiff, and Mr. Lawrence and Mr. Badger for Downs, the claimant.

Mr. Sargent and Mr. Bell made the following points:

1. When this judgment was entered, it became a lien on all the personal and real property of Chewning, in Mississippi. Hutch. Miss. Code 881, 282; Brown v. Clarke, 4 How. 12; 4 Stat. at Large, 184, Ib. 278; Rankin v. Scott, 12 Wheat. 177; United States v. Morrison, 4 Peters, 124; Burton v. Smith et al. 14 Peters, 464; Tayloe et al. v. Thompson, 5 Peters, 358.

2. The rules of court, so far as they are more than declaratory of the effect of the United States Process Act of 1828, adopt the State practice of November 25, 1839; they adopt nothing prospectively.

3. The State Act of 1841 does not purport to operate on federal judgments. No State statute can operate proprio vigore to affect directly or indirectly a judgment of the federal courts. Wayman v. Southard, 10 Wheat. 1; Bank of the United States v. Halstead, Ib. 51.

*4. There had been no adoption by [*761 Congress, or the federal courts of Mississippi under the authority of Congress, of the State act requiring the filing of an abstract of judgments in the county where the defendant's property is situated, at the time this execution was levied

Mr. Lawrence, for the claimant:

Is the law of Mississippi as to the limitation of liens of judgments applicable to the judgments of the federal courts?

We contend that it is, because the lien of a judgment is something affecting property, forming no intrinsic quality of the judgment itself as such, but derived entirely from the sovereignty within whose jurisdiction the property affected by it is situated.

It is said that a State cannot interfere with and control the federal courts in relation to the effect and operation of their judgments; that it would leave those courts entirely at the mercy of the State Legislatures.

This is the most plausible, if not the only, argument against us in this case, and a slight examination will show that it is of no real weight.

We do not contend that the States can inter-

NOTE.—Lien of Federal judgment as limited by State recording acts. See note 47 L.R.A. 475.

fere with the effect of the judgments of the United States courts, either in making them less than judgments in fact or in law, or in preventing the fruition of those judgments by process of execution. Congress has, under the Constitution, the exclusive power to regulate the proceedings in the United States courts; and even where the forms of process used in the States are adopted, it is, after all, but an exercise of the same power of Congress, and not a recognition of any authority over the subject by the States. Wayman v. Southard, 10 Wheat. 1.

If, therefore, a State law should enact that a judgment should be no evidence of debt, or should abolish all writs of execution, such a law would not be applicable to the proceedings of the federal courts, because, in the first instance, it would take away the proper intrinsic effect of the judgment itself, and make it, in whole or part, no judgment; and, in the other instance, it would take from the United States courts a necessary part of the organization of a court, namely, the power to carry into effect its own judgments.

But the lien of a judgment is not an intrinsic quality of the judgment itself, nor is it any part of the process of a court for enforcing a judgment.

1st. A judgment is in effect what it is defined to be in theory, "the sentence of the law given in a court of law."

The lien of a judgment is a quality added to 762*] it—a quality *not in any manner altering it as the sentence of the court, but superadded to it, taking effect on property, qualifying property, restraining the alienation of property; not by an act of appropriation and sale under an execution (which come under the denomination of "proceedings," and are subsequent to the judgment), but as the effect of the mere existence of the judgment.

Now, it is a matter of legal history, that, originally, judgments did not constitute any lien at all on property in England, which proves that the lien of a judgment was no part of the judgment itself.

It is matter of legal history, that even executions could not be levied on lands in England, before the Stat. of Westm. 2. Consequently the common law judgments could not affect real property, either by lien or otherwise.

It is true that it has been held in England, that this statute gave a lien on lands as a consequence of the elegit, and it has been supposed that therefore a lien was the consequence of every execution. But this by no means follows, for it has never been held that the right of levying an execution on personal property has created a lien on that species of property by the mere rendition of the judgment, as would have been the case if the lien resulted from the right of execution alone. We think that this consequence was peculiar to the writ of elegit, which was authorized by the Stat. of Westm. 2. It has never in England been held to result from any other writ of execution. Prior to 1824, judgments did not constitute a lien on property in Mississippi.

It is only by virtue of local law that this lien exists. It is a qualification of property which can only be derived from the sovereignty within whose jurisdiction the property to be affected by it is situated. That sovereignty can confer it or take it away, or modify it when conferred. That sovereignty can attach it to a judgment, or to a bond, or to anything else. But wherever and however attached, it is a regulation of property emanating, not from the court, but from the local authority. United States v. Crosby, 7 Cranch, 115; Wayman v. Southard, 10 Wheat. 25; McCormick v. Sullivan, 10 Wheat. 192; United States v. Morrison, 4 Pet. 136; Ross v. Duvall, 13 Pet. 61; Taylor v. Thompson, 5 Pet. 367, 368; Reid v. House, 2 Humph. 576; Thompson v. Phillips, 1 Bald. C. C. 273, 274; Manhattan Co. v. Evertson, 6 Paige, 466, 467; Conard v. Atlantic Ins. Co. 1 Pet. 443.

Second, the lien attached to a judgment is not (within the meaning of the acts of Congress) any part of the "process" of a court, or of its modes of proceeding.

*If it is, it must be a part either of [*763 the final process, or else of the modes of proceeding to carry the judgment into effect.

In Annis v. Smith, 16 Pet. 312, 313, this court has laid down what "process" is, and what "modes of proceeding" are, as those terms are used in the Act of 1828.

It is there said that "final process" means all the writs of execution then in use, and "modes of proceeding" are the exercise of all the duties of the ministerial officers of the States prescribed by the laws of the States for the purpose of obtaining the fruits of judgments. See, also, United States Bank v. Halstead, 10 Wheat. 61, 63.

Now, a lien is certainly not a writ or precept of any kind. It is no part of the action of the court in a suit, nor is it the exercise of a ministerial duty of an officer of the court, nor even the result of any such exercise of duty. It is no proceeding at all, it implies no action at all; and the whole progress of a suit may go on now, as it did formerly, from the original writ to the satisfaction of the judgment by a sale under execution, without any lien whatever. It is a mere dormant, extrinsic quality, attached to the judgment not by the court, nor in the federal courts by the power creating those courts, but by another power, taking effect not on the judgment itself, but upon property, qualifying that property and restraining its alienation.

But it may be said that the Circuit Court, in compliance with the law of 1828, did, in 1837, make a rule that the lien of judgments and decrees shall continue as now provided by law, and that the Mississippi Act of 1841, now in controversy, has not been adopted.

To this we answer, that if the lien of a judgment is a regulation of property, and not a "process" or "mode of proceeding," then this rule of court can have no effect whatever. It was beyond the power of the court.

Whether or not Congress itself has the power to say what shall or shall not constitute a lien on property within a State, it is not necessary now to inquire, because we say that Congress has not attempted to do it, nor has it authorized the courts to attempt it.

We say, that, under the Act of 1828, the Circuit Court of Mississippi had no power, by adoption or the want of adoption, to alter or continue a lien on property.

The Act of May, 1828, directed that writs of

execution and other final process, issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State as are now used in each State. 4 Stat. at Large, 278, 279.

The third section of that act declares, that it shall be in the power of the courts so far to al- [*764] ter final process in said courts as *to conform the same to any change made by the State Legislatures for the State courts.

The thirty-fourth section of the Judiciary Act of 1789 enacts that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or prescribe, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. at Large, 92.

The power of the court, then, in this respect, is confined to the alteration of final process.

The case of Annis v. Smith, before referred to (16 Pet. 312, 313), has settled the meaning of "final process" to be writs of execution. The lien of a judgment not being a writ of execution, the court has no power to adopt it, under the third section of the Act of 1828, and, besides, the third section obviously is confined to action in court.

Neither does the Act of 1828, in the preceding sections, adopt the lien of judgments, unless it is "final process" or a "proceeding thereupon." But the case of Annis v. Smith has settled this latter expression to mean the exercise of a ministerial duty of some officer of the court in the service of "final process."

If this be so, then, under the thirty-fourth section of the Judiciary Act, the United States courts are bound to regard the law of the State upon the subject of the lien of judgments.

[The argument of Mr. Lawrence on the constitutionality of the Mississippi statute is omitted, the decision having turned upon the first point.]

Of Mr. Badger's argument the reporter has no notes.

Mr. Justice McLean delivered the opinion of the court:

This action was brought in the Southern District of Mississippi, to try the right of property which had been levied on. The plaintiffs showed a judgment of the Circuit Court, entered the first Monday of November, 1839, for $3,716.43, with interest, etc., against one J. J. Chewning and others, on which an execution had been issued and levied upon certain slaves claimed by A. C. Downs. At the time of the levy, the property was in possession of the defendant Chewning. Downs produced a mortgage on the slaves, executed by said Chewning and regularly recorded, in favor of the "Commercial Railroad Bank of Vicksburg," to show a title in the bank adverse to the right of the plaintiffs. This mortgage bears date subsequent to that of the judgment.

On these facts, the court were requested by [*765] plaintiffs to charge *the jury "to disregard the mortgage, because of the paramount right of the plaintiffs to have execution of their judgment by means of said levy although no abstract or brief of the judgment had been recorded or enrolled in the county where the property was situated." And on this prayer for instruction to the jury, the opinions of the judges were opposed; and, at the request of the counsel on both sides, the point was certified to this court.

By the first section of the Act of Mississippi of February 6th, 1841, it is provided that "all judgments and decrees of any circuit, district, or superior court of law or equity, holden within this State, shall operate as liens from the date of their rendition upon the property of the debtor, being within the county in which the sitting of such court may be holden, and not elsewhere, unless upon compliance with the conditions hereinafter enacted."

By the second section: "That any judgment or decree heretofore rendered shall be a lien from the date of its rendition upon the property of the debtor, situated in any other county than that in which the same was rendered, on condition that an abstract thereof, on or before the first day of July next, be filed in the office of the Circuit Court of the county in which said property may be situate, in pursuance of the subsequent section of this act."

The third section provides, that where an abstract of a judgment or decree is filed in the office of the clerk of the Circuit Court, which it is made his duty to record, it shall be a lien on the property of the defendant within the county from the time of such filing.

The judgment under which the levy was made was rendered more than a year before the above act was passed.

Prior to the Act of 1824, there was no statutory lien of a judgment in Mississippi. A lien was created in that State, as in England, by the delivery of the execution to the sheriff. The Stat. of Westm. 2, or 13 Ed. 1., ch. 18, gave the elegit which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk. 212; 1 Wils. 39.

"There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an elegit." United States v. Morrison, 4 Pet. 136. And in The Bank of the United States v. Wooster, 2 Brock. 252, the Chief Justice says "The lien depends on the right to sue out an elegit."

The same doctrine was held by the Supreme Court of Indiana *before the Act of [*766] 1818 of that State, which gave a lien on the real estate of the defendant by the judgment. Ridge v. Prather, 1 Blackf. 401.

In North Carolina the lien on lands is created by the delivery of the execution to the sheriff, there being no statute in that State on the subject. And in other States of the Union, the same principle has been long established.

Now, in all these cases the lien arises from the power to issue process to subject real estate to the payment of the judgment, either by an extension or sale. In Maryland, this rule has been extended by long usage, so that a lien is created by the judgment without execution. Tayloe v. Thompson, 5 Peters, 369.

The circuit courts of the United States exercise jurisdiction co-extensive with their re-

spective districts. And it has never been supposed, that, by the Process Act of 19th February, 1828, which adopted the process and modes of proceeding of the State courts, the jurisdiction of the circuit courts was restricted. The "process and modes of proceeding" in the State were adopted by Congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting the jurisdiction of those courts.

In those States where the judgment on the execution of the State court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the State courts in a much better condition than in the federal courts.

That by the course of practice in Mississippi, the lien of a judgment in the Circuit Court extended throughout the district, prior to the Act of 1841, is not controverted. And the question is, whether that act can impair or affect in any respect a judgment rendered in the federal court before its passage. The point certified does not require us to consider whether the law can operate on judgment liens entered subsequent to its date. The plaintiffs in the above judgment acquired a right under the authority of the United States, and that right may be protected from any judgment of the Supreme Court of the State which shall impair it, under the twenty-fifth section of the Judiciary Act.

767*] *It is contended that the lien in Mississippi exists by the statute of the State, and that under the thirty-fourth section of the Judiciary Act of 1789, it is a rule of property, and that it is consequently a rule of decision for the courts of the United States, and that the Process Act of 1828 has no bearing upon the question.

The above section provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

No State statute is of more frequent application in the federal courts than the above section; and it has often been held that the settled construction of a State statute by its supreme court is considered as a part of the statute. And the statute, as thus expounded, is regarded as a rule of decision in the courts of the United States where it applies, "except where the Constitution or acts of Congress otherwise provide."

The thirty-fourth section has never been considered as an act to regulate process. And it is argued that a statutory lien, being a rule of property, is applied to judgments in the circuit courts, under this section, without being influenced, in any degree, by the Process Act.

We have seen that, where there is no statutory lien, it is created by issuing and delivering to the sheriff an execution, which authorizes the sale or extension of the real estate of the defendant. In those States, it is the process authorized by the judgment which creates the lien; and in such cases we necessarily look to the nature of the process, and the extent of its operation, to determine the lien. It must act upon the land of the defendant, and consequently the land must lie within the jurisdiction of the court.

What is a judgment lien? In the argument, it was compared to a mortgage. "A mortgage is often called a lien for a debt, but it is something more. It is a transfer of the property itself as security for the debt. This is true in law and in equity." Conard v. The Atlantic Insurance Company, 1 Peters, 441. A judgment lien on land constitutes no property or right in the land itself. "It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate incumbrances." Subject to this charge, the defendant may convey the land. "A judgment creditor has no jus in re, but a *mere power to make his gen- [*768
eral lien effectual, by following up the steps of the law." What law? The law which authorizes the judgment, and the issuing of the process through which means the judgment may be satisfied. A failure to do this releases the charge on the property. Ib.

The lien, if not an effect of the judgment, is inseparably connected with it. And this is the case, whether the lien was created by the judgment and execution, or by statute. And in either case, where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties which have been established by a solemn judgment.

This court therefore direct that it be certified to the Circuit Court, that the right of lien claimed by the plaintiffs under the judgment is paramount to that of the defendant claimed under the mortgage.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the right of lien claimed by the plaintiffs under the judgment is paramount to that of the defendant claimed under the mortgage; whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

769*] *GRANT B. UDELL and Jacob Milller, Plaintiffs in Error,
v.
ALEXANDER B. DAVIDSON.

Jurisdiction—defense, defendant's conduct in fraud of act of Congress.

The act of 1838 (5 Stat. at Large, 251), relating to pre-emption rights, provides, that "before any person claiming the benefit of this law shall have a patent for the land which he may claim, by having complied with its provisions, he shall make oath, etc., that he entered upon the land which he claims in his own right and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States should enure to the use and benefit of anyone except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time."

Where a pre-emptioner sold his inchoate title, which passed ultimately into the hands of a trustee, and the trustee loaned money out of the trust fund to the pre-emptioner, in order to enable him to pay the government; and the title thus obtained from the United States was conveyed by the pre-emptioner to the trustee, without any reference to the trust; and the trustee was ordered by a State court to hold the property subject to the trust—he cannot remove the case to this court, by virtue of the twenty-fifth section of the Judiciary Act.

There is no title, right, privilege, or exemption, under an Act of Congress, set up by the party and decided against him by the State court. By his own showing, he has acquired no title from the United States.

The allegation is, that a fraud was perpetrated upon the government, and another meditated upon the cestuf que trust, both of which this court is called upon to maintain and carry out.

The case is dismissed, for want of jurisdiction.

THIS case was brought up from the Supreme Court of the State of Illinois, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts in the case are sufficiently set forth in the opinon of the court.

A motion to dismiss it, for want of jurisdiction, was made by Mr. J. Mason Campbell, which motion was sustained by him, and opposed by Mr. Coxe.

Mr. Chief Justice Taney delivered the opinion of court:

A motion has been made to dismiss this case for want of jurisdiction.

It appears that a man by the name of Gregory had obtained, by residence on the land mentioned in the proceedings, a right of pre-emption, under the Act of Congress of 1838. But, before he paid the price nxed by the government in such cases, or made the entry, he sold his right to Miller, one of the plaintiffs in error. Miller afterwards conveyed to a man by the name of Joslyn, in secret trust for himself, and subject to his control. Subsequently to this conveyance, Joslyn, by the direction of Miller, conveyed to Udell, the other plaintiff in error, in trust to sell to the highest bidder, and apply the proceeds to the payment of the creditors of Miller, pro rata, if they were not sufficient to pay all demands.

770*] *Udell accepted the trust, and, after having done so, made an agreement with Gregory, by which Gregory was to enter the land at the proper office, at the pre-emption price, and then convey to Udell in trust, for the benefit of Miller's creditors, reserving a small portion of the land to Gregory himself. Udell was to furnish the money to enable Gregory to make the entry.

Under this agreement, Udell executed a release to Gregory of all his right to the land, in order to enable him to make the entry as pre-emptioner, and at the same time took from him a note for a thousand dollars, which was to be given up if Gregory made the conveyance according to his agreement.

The land was worth a thousand dollars. The government price to the pre-emptioner was only two hundred dollars, which sum was advanced by Udell to Gregory. One hundred and fifty dollars of this money belonged to the creditors of Miller, and was so applied at his request, and upon his statement that this application would be for the interest of his creditors. The remaining fifty was advanced by Udell, to be repaid out of the proceeds of the land, when sold. But it does not appear that the defendant in error, or indeed any of Miller's creditors, sanctioned this transaction at the time, or had knowledge of this application of the trust funds.

With the money thus obtained, Gregory made the entry, and then executed a deed to Udell. This deed, upon the face of it, is absolute, and contains no trust for the creditors.

After having thus obtained a conveyance, Udell refused to execute the trust, and therefore the defendant in error, as one of the creditors of Miller, in behalf of himself and the other creditors, filed a bill in chancery, setting out more at large the facts above stated, and praying that the land might be sold for their benefit, in pursuance of the trust.

The plaintiffs in error demurred to the bill, assigning various causes of demurrer, and, among others, that the transaction with Gregory, by which Udell obtained a conveyance, was in violation of the Act of 1838.

The chancery court, upon the hearing, decided that the land in the hands of Udell was chargeable with the trust, and directed it to be sold, and the proceeds to be applied accordingly. This decree was affirmed in the Supreme Court of the State, and the present writ of error has been presented upon that judgment.

It is unnecessary to notice any of the various causes of demurrer assigned by the plaintiffs in error, except that which relies on the provisions of the Act of 1838. For this being a writ of error to a State court, we have no right to revise its *decision upon any of the [*771 other causes assigned, and the only question before this court is, whether any title, right, privilege, or exemption, claimed by the plaintiffs in error in the State court under this act of Congress, was drawn in question and decided against them.

They do not claim that Udell obtained a valid title by the entry made by Gregory, and his subsequent conveyance to Udell. And if their defense had been placed on that ground, it would not have given jurisdiction to this court, because the proceeding to charge it with a trust created by contract would have been no im-

peachment of the grant made by the United States.

They defend themselves upon the ground, that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the Act of 1838. This is undoubtedly true; for the act requires the party who claims the right of pre-emption by residence to make oath that he has not contracted to sell or transfer the land to any other person. And he is not permitted to purchase at the low price at which the person entitled to pre-emption is allowed to buy, until this oath is taken and filed with the register of the land office. And if he swears falsely, he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a bona fide purchaser without notice.

The plaintiffs in error admit that they participated in the fraud, and consequently Udell, upon their own showing, has acquired no right to the land under the act of Congress on which he relies. They do not claim that he obtained a valid title under the law, but insist that the transaction was against its policy, and in violation of its principles. What right or privilege does he then claim under this act of Congress? It is this. He not only admits, but insists, that, by a fraud upon the government, he has obtained a deed to himself for this land, and that he, being trustee for the creditors of Miller, used the money which belonged to his cestuis que trust to accomplish his purposes; and now contends, that, by means of this fraud upon the government, he has acquired under this act of Congress a right to perpetrate a fraud also upon his cestuis que trust.

This, in plain words, is the amount of his defense; and this is the right or privilege which he claims under the provisions of the Act of 1838, and calls upon this court to recognize and maintain. We shall not comment on such a claim.

The writ of error must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the tran-772*] script of the *record from the Circuit Court of Winnebago County, State of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that this writ of error be, and the same is hereby dismissed for the want of jurisdiction.

HALL NEILSON, Plaintiff in Error,
v.
WILSON LAGOW.

Jurisdiction.

Where, upon the trial of a case in a State court, a party claims the land in dispute, under an authority which he alleges has been exercised by the Secretary of the Treasury, in behalf of the United States, and the decision was against the validity of the authority, the party is entitled to have his case brought to this court, under the twenty-fifth section of the Judiciary Act.

THIS case was brought up from the Supreme Court of Indiana, by writ of error issued under the twenty-fifth section of the Judiciary Act.

As a motion was made to dismiss it for want of jurisdiction, and the merits of the case were not discussed, a brief statement of the facts will be sufficient.

It was an action of disseisin, similar to an ejectment, brought by Lagow in the Circuit Court for the County of Knox and State of Indiana, against Neilson, Billis, and Thomas, to recover possession of a piece of property known by the name of the Steam Mill Tract, lying in the town of Vincennes. Billis and Thomas disclaimed all interest, and the suit was carried on by Neilson alone. On the 19th of September, 1821, Lagow and others conveyed the property to the President, Directors and Company of the Bank of Vincennes, their successors and assigns, forever, for the consideration of $98,000.

On the 1st of July, 1822, the bank conveyed this property to Badollet, Harrison, and Buntin, and their successors, in trust for the use of the Secretary of the Treasury of the United States, in extinguishment of the debt due by the bank to the United States. The trustees were to sell whenever requested by the Secretary of the Treasury, and continue to pay until the United States were paid the sum of $120,308, with interest. The Secretary of the Treasury was vested with power to fill up vacancies in the trust.

In July, 1822, there came on for trial in the court at Vincennes a quo warranto, which had been issued by the State of Indiana against the bank. The jury found a verdict of guilty, and the court decreed that all the franchises and property of the bank should be seized for the use of the State. The *sheriff returned [*773 that he had seized the franchises; but being unable to find any effects of any nature soever of the bank, he was unable to obey the command of the writ in respect to them. The writ was issued on the 6th of July, and the return made on the 19th of August, 1822.

In November, 1823, a judgment for $123.80 was obtained in the court at Vincennes against Lagow and the other partners of the steam mill company, and execution issued thereon. The property in question was levied upon, sold at auction, and purchased by Lagow, to whom a deed was executed by the sheriff on the 26th of December, 1823.

In 1826, another sale of the property took place, by authority of the Supreme Court of Indiana. Badollet, Harrison, and Buntin, the trustees, had filed a bill and obtained a decree against Lagow and his partners in the State court, which was carried up to the Supreme Court. That court ordered the steam mill tract, with all the buildings, engines, and appurtenances, to be sold, and appointed three commissioners to make the sale. It was accordingly made, ratified by the court, and a deed executed by two of the commissioners on the 20th of June, 1827. The purchasers were Badollet, Harrison, and Buntin, the trustees, who took the deed to themselves, their heirs and assigns, without noticing the trust. The amount of the purchase money was one thousand dollars. Evidence was given upon the trial, that no money was paid excepting the

costs and counsel fee, which payment was made from the funds of the United States, by order of the Secretary of the Treasury.

On the 28th of June, 1827, a deed was executed by Lagow and his partners, by which they renounced all claim upon each other arising from the transactions of the steam mill company, and conveyed the whole property, debts, etc., to Lagow, he undertaking to pay all debts due to other persons than the partners.

Evidence was given upon the trial, that Hall Neilson had had possession of that property since 1832, claiming to hold it under Badollet, Harrison, and Buntin, who were all dead, however, prior, to the commencement of the suit.

When the testimony was closed, the court, at the instance of the plaintiff, Lagow, gave the following instructions to the jury:

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

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

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

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

5. That if there is any act of Congress or law authorizing the conveyance from the bank to the trustees, it is incumbent on the defendant to show it; and from the fact that the defendant does not set up any such act or law, the jury may infer there is none.

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

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

14. That it is incumbent on the defendant to show the conveyance made by the trustees, if any such they did make.

20. That to defeat the plaintiff's title, founded on prior possession, as owner, it is necessary that the title set up by defendant should be shown to be a subsisting title, and superior to Lagow's title. To which instructions the defendant at the time excepted.

The court then, at the instance of the defendant, gave the following instructions to the jury, to wit, that if they believe, from the evidence, that defendant, and those under whom he claims, had been in peaceable adverse possession more than twenty years at the time this suit was commenced, the claim of the plaintiff is barred by the statute of limitations, and they must find for the defendant; to which instruction the plaintiff at the time excepted.

The defendant then asked the court to give to the jury the following instructions, to wit:

2d. That the plaintiff in this case, in order to recover, must establish a good title in himself, and that he cannot recover if the defendant has shown the real title to the land to be in another person; that it is sufficient if the defendant has made it appear to the jury that a legal and possessory title does not subsist in the plaintiff.

3d. That it was competent for the Bank of Vincennes to make a deed to trustees for the benefit of the United States, and such a deed is valid and lawful for the purpose for which it was made; but the court refused to give the same to the jury; to which refusal of the court the defendant at the time excepted.

*Under these instructions and refus- [*775
als the jury found a verdict for the plaintiff Lagow. A motion was made for a new trial, which was overruled, and the case carried up to the Supreme Court of Indiana, where the judgment of the court below was affirmed. A writ of error, issued in the manner already stated, brought it up to this court.

A motion was made by Mr. Bradley to dismiss the case for want of jurisdiction, which was opposed by Mr. Gillet.

Mr. Chief Justice Taney delivered the opinion of the court:

It appears, that at the trial in the State court, the plaintiff in error claimed the land in dispute under an authority which he alleged had been exercised by the Secretary of the Treasury in behalf of the United States; and the decision was against the validity of the authority thus alleged to have been exercised. Whether the title of the plaintiff in error can be maintained under it, or not, will be the subject of inquiry when the case is heard on its merits. That question is not now before the court, and the only point to be determined at this time is, whether we have jurisdiction to try and decide it. We think it is evidently one of the cases prescribed for in the twenty-fifth section of the Act of 1789; and the motion to dismiss is therefore overruled.

Order.

On consideration of the motion made in this cause on a prior day of the present term, to wit, on Friday, the 2d instant, to dismiss the writ of error, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is now here ordered by the court, that the said motion be, and the same is hereby overruled.

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*WILLIAM LEWIS, who sues for the [*776
Use of Nicholas Longworth, Plaintiff,

v.

THOMAS LEWIS, Administrator de bonis non of Moses Broadwell, Deceased.

Statute of limitations—after repeal of saving clause, statute runs only from time of repeal.

NOTE.—Provisos in Statutes. See note to 10 L. ed. U. S. 689.

Effect of repeal of statute on vested rights. See note to 3 L. ed. U. S. 162.

By a law of the State of Illinois, passed in 1827 "every action of covenant shall be commenced within sixteen years after the cause of such action shall have accrued, and not after." But by a proviso, persons beyond the limits of the State were exempted from the operation of the law, and might bring the action at any time within sixteen years after coming within the State. Afterwards, in 1837, this proviso was repealed.

The statute of 1827 begins to run, as to non-residents, from the time of the repeal of the saving clause, in 1837, and not before.

THIS case came up from the Circuit Court of the United States for the District of Illinois, on a certificate of division in opinion between the judges thereof.

It was an action of covenant under the following circumstances:

On the 12th of March, 1819, Broadwell executed a deed with a general warranty to William Lewis, by which he conveyed to him a tract of land in Ohio.

In June, 1825, one Matthews recovered, by ejectment, one hundred acres of the land.

Broadwell died in 1827, and one Cromwell was appointed his administrator.

In 1843, Thomas Lewis was appointed administrator de bonis non, and in the same year William Lewis brought this action.

Amongst other pleas filed (which it is not necessary to notice) was one of limitation, to which the plaintiff replied that he was beyond the limits of the State.

To this replication the defendant demurred.

The acts of the Legislature of Illinois, under which the question was raised, were the two following:

The first, passed on the 10th of February, 1827, and entitled "An Act for the limitation of actions and for avoiding vexatious lawsuits."

"Sec. 4. That every action of debt, or covenant for rent, or arrearages of rent, founded upon any lease under seal, and every action of debt or covenant, founded upon any single or penal bill, promissory note or writing obligatory, for the direct payment of money, or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators, for the payment of money only, shall be commenced within sixteen years after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, single or penal bill, promissory note, writing obligatory, or award, within sixteen years after, such payment shall be good and effectual in law, and not after."

777*] *"Sec. 7. That every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action accrued, and not after: Provided, that in all the foregoing cases in this act mentioned, where the person or persons, who shall have right of entry, title, or cause of action, is, are, or shall be at the time of such right of entry, title, or cause of action, under the age of twenty-one years, insane, beyond the limits of this State, or feme covert, such person or persons may make such entry, or institute such action, so that the same *be done within* such time as is within the dif*ferent sections* of this act limited after his or her becoming of full age, sane, feme sole, or coming within this State."

The other act was passed on the 11th of February, 1837, and was as follows:

"An act to amend an act entitled 'An Act for the limitation of actions, and for avoiding vexatious lawsuits.'

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that the proviso to the seventh section of the act, to which this is an amendment, shall not be held to extend to any non-resident, unless such non-resident be under the age of twenty-one years, insane, or feme covert, and then, in that case, the rights of such persons shall be saved for the time limited by the different sections of said act, after his or her becoming of full age, sane, or feme sole. Approved February 11, 1837."

Upon the trial, the opinions of the judges were opposed upon the following points, which were certified to this court:

"1st. Whether the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, or from the time the debt became due.

"2d. Whether the statute began to run before administration was granted.

"3d. Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1827."

The case war argued by Mr. Wright for the plaintiff, and Mr. Lawrence and Mr. Lincoln for the defendant.

Mr. Chief Justice Taney delivered the opinion of the court:

This case depends upon the construction and operation of the statutes of limitation of the State of Illinois, and comes before us upon a certificate of division between the judges of the Circuit Court.

*It is an action of covenant, brought [*778 in 1843, upon causes of action which accrued before 1827. The defendant pleaded the statute of limitations; to which the plaintiff replied, that, at the time the causes of action accrued, he was in parts beyond the limits of the State, and has ever since remained, and yet is, beyond the limits of the State. The defendant demurred to this replication, and the plaintiff joined in demurrer.

An act for the limitation of actions was passed on the 10th of February, 1827, by which it was, among other things, provided, that every action for the performance of covenants should "be commenced within sixteen years after the cause of such action should have accrued, and not after." But, by a proviso in the seventh section of the act, it is declared, that every person who was or should be, at the time of such cause of action, beyond the limits of the State, might institute his action within the time limited in the act, after coming within the State. Afterwards, by a law passed February, 11, 1837, it was enacted, that this proviso should not be held to extend to any non-resident, unless such nonresident was under the age of twenty-one years, insane, or feme covert.

Upon the argument of the demurrer, the following points arose, upon which the judges

were opposed in opinion, and which have been certified to this court:

"1st. Whether the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, or from the time the debt became due.

"2d. Whether the statute began to run before administration was granted.

"3d. Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1827."

Previous to the Act of 1827, there was no law of the State of Illinois which limited the time within which an action of covenant should be brought; and, consequently, there was no restriction as to the period within which a suit might be instituted upon the cause of action now in question. The same thing was the case after the passage of this act, as long as the plaintiff continued beyond the limits of the State. For, until he came into it, the proviso above mentioned excluded this cause of action from the operation of the statute. And as the plaintiff did not come into the State, there was no limitation running against it until the passage of the Act of 1837. This act, by repealing the saving contained in the former law, brought the claim within its provisions, and subjected it to the limitations therein contained.

The question is, From what time is this 779*] limitation to be calculated? *Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the Legislature has otherwise provided. For it is at that time that the statute first acts upon it, and limits the period within which suit must be brought. Such is obviously the policy and intention of the Illinois statute of limitations. For if the plaintiff had come into the State the day before the Act of 1837 was passed, and by that means subjected his cause of action to the provisions of the former law, the limitation would have commenced running on that day, and his action would not have been barred until the expiration of sixteen years afterwards. For the Act of 1827 gave him sixteen years from the time he brought his cause of action within its operation.

He did not, however, come into the State; and his cause of action was brought within the limitation of that law, not by his own act, but by another law. Can there be any reason for a different run of limitation in the latter case, from that which the law itself has provided in the former? The construction and object and policy of the Act of 1827 must be the same in both instances; and the Act of 1837 makes no change in it in that respect. It merely subjects the cause of action to its limitations, and does precisely what the plaintiff himself would have done if he had come into the State—that is to say, it brought the plaintiff within the limitations of the former law, and subjected him to the restrictions therein contained.

The question, however, has been already decided in this court in the case of Ross et al. v. Duval et al., 13 Pet. 62. In that case a saving clause in a statute of limitations of Virginia, similar to the one contained in the Illinois law, had been repealed by a subsequent statute. And this court decided, that, against the persons embraced in the saving clause of the original law, limitations would not begin to run until the time of the repeal; and that the party was entitled to the full period of limitation prescribed in the original act, commencing from the date of the repealing law.

A passage in the report of that case, in page 64, was cited in the argument, as maintaining a contrary doctrine. But it will be found to be entirely consistent with what the court had previously said. It relates to claims included in a statute of limitations, when, from the language of the law, it may be justly inferred that the Legislature intended to embrace a period of time already past, during which the party had omitted to sue, yet still leaving him reasonable time to prosecute his claim. But the rule there stated can have no application to the case *before us; for this claim was not em- [*780 braced in, nor operated upon by, the statute of limitations of 1827. It was brought within it by the subsequent law. And that law makes no new limitations as to past or future time, and merely subjects the cause of action to the provisions of the original law. The passage above mentioned, therefore, cannot apply to it, and is not inconsistent with what had before been said in relation to the effect of a law repealing a saving in a former act of limitations.

Under this view of the subject, the court is of opinion, upon the first point in the certificate of division, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before; and will direct it to be so certified to the Circuit Court.

And as this decision disposes of the whole case presented by the demurrer, the other points do not arise; and it is unnecessary to examine them.

Mr. Justice McLean:

I dissent from the opinion just pronounced. It overrules a solemn decision of this court in the case of Ross et al. v. Duval et al., 13 Peters, 57. And as that opinion is relied on as sustaining the decision now given, I shall examine it.

The judgment of the court in that case was placed upon two grounds. First, that the action was barred under the statute of Virginia of 1792. That act provided, that where an execution had not issued on a judgment, it might be revived within ten years, or where an execution was issued, and there was no return, other executions might be issued within the ten years from the rendition of the judgment. There was a saving in the act in behalf of infants and persons beyond the Commonwealth, "giving five years after the removal of the disability to proceed on the judgment."

By the act of 1826, the saving in the Act of 1792 was repealed, but the time of the bar was to be computed, as specially provided, from the time of the repeal of the saving.

The court considered the Act of 1792 as a limitation on the judgment, and, as more than ten years had elapsed, that all proceedings on the judgment were barred. There was nothing in the pleadings or evidence which showed that the plaintiff was within the saving of the statute.

And the court remark, "There is another view of this case, which, though not much considered in the argument, is deemed important

by the court." "And this arises under the Process Act of 1828," etc. "If the Act of 1792, or any part of it, is to be considered as a process act merely, and not an act of limitations, the 781*] *Act of 1828 makes it the law of Congress for the State of Virginia, and gives immediate effect to it." "If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect as a rule of property, and is a rule of decision in the courts of the United States under the thirty-fourth section of the Judiciary Act." "In either case, effect is given to the Act of 1792, and it is decisive of the present controversy."

"But if it be considered, as contended, an act of limitations adopted by the Act of 1828, the court are to give a construction to the Act of 1828. If this be clear in its provisions, we are bound to give effect to it, although it may, to some extent, vary the construction of the Act of 1792. And this is no violation of the rule that this court will regard the settled construction of a State statute as a rule of decision. For in this case the construction of the State law, in regard to the effect it shall have, is controlled by the paramount law of Congress."

"The judgment in the Circuit Court was entered in 1821, so that seven years of the ten years' limitation of the Act of 1792 had run when it was adopted by the Act of 1828. Now, the question is, shall no effect be given to this act of Congress in Virginia before its passage, because of the construction by the Virginia courts of the Act of 1792?"

"It must be recollected, that this act of 1828 is a national law, and was intended to operate in the national courts in every State. As it regards some of the States, it may at first have operated less beneficially in them than in others; but its provisions took immediate effect in all the States."

"It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature in such cases."

"There may be some contradictory decisions on this point, in some of the States, which have been influenced by local considerations, and the peculiar language or policy of certain acts of limitations. But the rule is believed to be founded on principle and authority."

I have cited largely from the above decision, to show that the point was distinctly considered and decided, as arising under the Act of 1828, that effect may be given to a statute of limitations, where a part of the time has run; but a reasonable part of the whole time has yet to run. And this is the principle which is repudiated in the case under consideration. I have a distinct recollection, that the point was first 782*] suggested by the *lamented Justice Story, and was discussed, and the principle was laid down with the entire concurrence of the court, so far as I know. There was no dissent expressed, either in consultation or on the bench.

It is true there was another ground on which the decision was rested; but it was also placed upon this ground, so that one ground as well as the other was ruled by the court. In the case of Ross, the court say: "The saving clause of the Act of 1792, as to non-residents, is repealed, the only effect of which is to bring within the limitation of the statute of 1792 those who were within its saving clause, and against whom the statute had not begun to run. Against such persons the statute could not begin to operate, until the repeal of the exception by the Act of 1826." And that remark is considered by the court, in the case before us, as having been made on general principles. Now, such was the express provision of the Act of 1826, that it should take effect from its date, and the remark was made in reference to that provision.

There is no rule better settled, in the construction of statutes of limitations, than that effect must be given to them according to their language. If they make no exception in favor of infants, femes covert, or non-residents, the courts can make none. And when the exceptions of a statute of limitations are repealed, the act stands as though it had been originally passed without them. In Jackson v. Lamphier (3 Peters, 280), the court say: "The time and manner of their operation [statutes of limitations], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature. Cases, however, may occur, where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of the court. If the Legislature of a State should pass an act by which a past right of action shall be barred, and without any allowance of time for the institution of a suit in future, it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." It must be admitted that the Legislature could not bar a claim to which there was no bar; but no one can doubt that a statute may bar claims where the right of action existed, and a reasonable part of the whole time of the statute has to run. This is often done in some of the States. But, while it is not doubted that the Legislature may do this, it is objected that it cannot be done as a matter of construction.

This objection is more plausible than sound. The statute creates a bar, and the question arises on its construction, whether *it is [*783 "so unreasonable as to amount to a denial of a right," in the language of this court in the case above cited. If the answer to this shall be in the affirmative, then, in the language above cited, "it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." But if the question can be answered in the negative, then a court is bound to give effect to the statute. And here is an answer, in the words of this court, to the principal ground taken in the case under consideration, and on which the decision is founded. If the court may determine whether a statute is so unreasonable as to cut off a private right, of necessity they may decide whether it is not so reasonable as to be enforced.

In the case before us, the Illinois Act of 1827 limits the right of action to sixteen years, and the proviso gives the same time to sue to a non-

resident, after he shall come within the State. But this proviso was repealed by the Act of 1837, which placed residents and non-residents, as to the time of bringing an action, on the same footing. The plaintiff's cause of action accrued under the Act of 1827; in 1837, the saving being repealed, six years were left for the statute to run to bar the claim. Was this a reasonable time? The answer must be in the affirmative. Then the act is not unconstitutional. It deprives the party of no right. In the language of the court in the case of Ross v. Duval, "the time yet to run (when the proviso was repealed), being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature, in such cases." There can be no mistake as to the point decided by the court; and that point is directly opposed to the decision now made. In such cases, it is always better to overrule a former opinion directly, than to destroy its force by indirection. In their former opinion, the court say, "The rule is believed to be founded on principle and authority."

In statutes of limitations it is usual to say, they shall begin to run from the time the action shall hereafter accrue, and when a saving of such act is repealed, that it shall operate from the date of the repeal; and if these provisions be not in the acts, they will, as a matter of course, take effect upon their passage. They must take effect from their passage, unless the language shows the time is to be computed from the date of the act. Without this provision, the question would arise whether a reasonable part of the time allowed by the statute, from the time the action accrued, had yet to run, as before marked.

In Luckett v. Dunn and Bass, 3 Litt. 218, the court say: "But the privilege previously allowed to persons who might be out of the country when their cause of action, or right of 784*] *entry, accrued, to maintain their action within ten years after their return, was expressly repealed by the first section of the Act of January, 1814, which, by a subsequent clause in the third section of the same act, was to take effect at the expiration of six months from its passage; and it was not until more than a year after the passage of that act, that this suit was brought by Luckett in the Circuit Court. It is obvious, therefore, that the absence of Buckner Pittman cannot have prevented the time which has elapsed since the lot had been held adversely by the defendants, and those through whom they claim, from barring the plaintiff's action.

The rule of so construing a statute as not to give it a retrospective effect is admitted. And a Legislature can never be presumed to intend to destroy a vested right. Indeed, they have no power to pass such a law. But a law may be constitutional, and yet have a retrospective effect. Matthewson v. Satterlee, 2 Peters, 380. In the case under examination, it is not proposed to give the statute a retrospective effect, or to affect in any degree vested rights by a construction of it. The only question is, whether the six years that the statute had to run, on the repeal of the saving, is a reasonable part of the whole time required by the act to constitute a bar. The plaintiff, though not a resident of the State, might have sued so soon as the right of action accrued.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JEREMIAH VAN RENSSELAER, Appellant,

v.

JOHN WATTS' EXECUTORS.

Practice—docketing case—nunc pro tunc.

MR. BLUNT, of counsel for the appellant in this cause, moved the court to direct the clerk to docket the case as of the time when *the transcript of the record was [*785 received by him, and in support of his motion said, that this record was forwarded to the clerk early in 1848. That it was only recently he learned that the clerk had declined filing or docketing it, until the bond prescribed by the thirty-seventh rule of court was given. That his client supposed, when he gave bond in the Circuit Court, that he had done all the law required him to do. That the record had been lying in the clerk's office about a year, during which some sixty cases had been docketed. That the bond was now filed, as prescribed by the rule, and that the case ought to be docketed as of the day the record was deposited in the office.

Mr. Seward, for appellees, united in the application.

This motion was made on the 9th of March, when the court took time to consider.

On the 12th, Mr. Chief Justice Taney announced the decision of the court as follows:

On consideration of the motion made in this cause, on the 9th instant, by Mr. Blunt, of counsel for the appellant, to direct the clerk to docket this case as of the time when the transcript of the record was received by him, and to which Mr. Seward, of counsel for the appellees, assented, this court consider the practice established by the decision in Owings v. Tiernan, 10 Peters, and do not wish to disturb it; whereupon it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

CORNELIUS W. LAWRENCE, Plaintiff in Error,
v.
GILBERT ALLEN and Samuel C. Paxton.

Tariff Act—india rubber shoes liable to duty of 30 per cent. ad valorem.

By the fifth section of the Tariff Act passed on the 30th of August, 1842 (5 Stat. at Large, 555), a duty of thirty per cent. is imposed on "India rubber oil cloth, webbing, shoes, braces or suspenders, or any other fabrics or manufactured articles composed wholly or in part of India rubber."

In the ninth section, among other articles declared to be exempt from duty, is, "India rubber in bottles or sheets, or otherwise manufactured."

By these sections, the duty of thirty per cent. is payable upon shoes made of India rubber in Brazil, although they are made by the same process as bottles or sheets, provided they come to this country in a condition to be worn without further material labor on them here, and were actually worn in this form, and provided they were called, in the language of commerce, "India rubber shoes;" and of these two facts the jury ought to judge.

The articles come within the letter of the law, and the Act of 1842 was framed with a desire to tax whatever might compete with our own manufactures.

When India rubber is made into a shape suitable for use, it may be considered a manufactured article. Originally, it was made into the shape of 786*] boots, to be used *and worn in Brazil, and afterwards into shoes; but not intended to be sent abroad as a raw material.

The fact, that the material of which these shoes are made is used for other articles of manufacture after their importation, does not change this view of the subject.

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

It was an action of assumpsit, commenced by Allen and Paxton, the defendants in error, in the Supreme Court of the State of New York, for the purpose of recovering back from the plaintiff in error, collector of customs for the port of New York, certain moneys exacted by him, as collector, for duties upon a quantity of common India rubber shoes, imported into the port of New York in September, 1845, by the defendants in error, from Para, in Brazil.

Under the provisions of the Act of Congress of the 2d of March, 1833, the suit was removed into the Circuit Court of the United States for the Southern District of New York.

The declaration contained the common money counts, to which the defendant pleaded the general issue.

The cause was tried in May, 1847, and, under the instructions of the court, the jury found a verdict for the plaintiffs below for $2,908.60.

A great deal of evidence was adduced upon the trial by the plaintiffs, to show the manner in which the shoes are made in Brazil, and their use as an article of commerce. Much of this testimony was objected to as inadmissible. A part of it is transcribed, because it is referred to in the opinion of the court.

The plaintiff's counsel then called, as witnesses, James E. Smith, Amory Edwards, George G. Wales, and William H. Edwards, who, being sworn, severally testified that they were acquainted with the articles now the subject of controversy, and with other articles of India rubber imported from Para; that they had been at Para, and were acquainted with the process of producing or making India rubber; that the juice or sap of the trees, when collected, is about the color and consistency of milk, and is called milk; that it is placed in a vessel of convenient size; that mounds of clay, or of wood covered with clay, in the shape of a shoe, or bottle, or other shape, and to which a handle is attached, are dipped in the milk, and immediately held in the heat and smoke of a fire made of a peculiar kind of nut, which dries the milk and gives it a dark color; that this process is repeated several times, until the coating is sufficiently thick, when the article is taken from the mould, by breaking the clay of which it is made, or with *which it is covered, and [*787 the pieces of clay are taken out; that shoes and bottles are then generally stuffed with straw, and that the article is then ready for sale and exportation; that bottles are made in two or three minutes; that it takes somewhat longer, say about five minutes, to prepare a shoe; there must be a new mould for every bottle; the foot-shaped mould is the best form for dipping. The shoe shape is the most convenient mode of making India rubber. The stuffing of the shoe is done by the parties who buy them in Para for exportation. The shoes are sometimes shipped in bulk, and sometimes stuffed. The term "India rubber shoes" comprehends all kinds of shoes made of India rubber, both manufactured and unmanufactured; that the price of India rubber shoes, in Para, has varied greatly since 1826; that the great demand for India rubber, of late years, in the United States, for dissolving for manufacturing purposes, has raised the price in Para; that no such things as suspenders are made in Para, that nothing is made there in a more manufactured state than the square sheets; that India rubber shoes are sometimes sold and shipped at Para without being stuffed with straw.

Much evidence was also introduced by the defendant, the object of which was to show that the articles were known, in commerce, by the name of "India rubber shoes," and were bought and sold in the market as imported, without any alteration of any consequence.

The counsel for the defendant then prayed the court to decide the law of the case, and to instruct and charge the jury as follows:

First. That in construing and applying the provisions of the tariff law of August 30, 1842, to the present case, the terms used therein are to be understood in their known commercial sense, as used and understood in the ports of the United States prior to, and at the date of, said law.

Second. That as all "India rubber shoes," imported from foreign countries, are, by the said provisions, subject to thirty per cent. duty, the true and only inquiry in the present case is, whether, in a commercial sense, and among commercial men dealing therein, the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to and at the date of the law, under the name and denomination of "India rubber shoes."

Third. That if the jury shall be satisfied, from the evidence, that the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to the 30th of August, 1842, under

the name and denomination of "India rubber 788*] shoes," then they are liable, *under the law, to a duty of thirty per cent. ad valorem, and the jury should be instructed to find for the defendant; and that, in the case stated, the jury should be instructed to find for the defendant, notwithstanding they should also be satisfied, from the evidence, either—

1st. That the term "India rubber shoes," as used in commerce, includes all other kinds of shoes made in whole or in part of India rubber, as well as these; or,

2d. That "India rubber shoes," in a more finished condition, and of a better quality, were imported from England, France, or other countries, prior to 1842, and were then, and are now, known in the markets; or,

3d. That some additional labor is usually applied to these articles, or is necessary to fit them for convenient use as shoes; or,

4th. That these articles are extensively used by manufacturers in the United States for the purpose of being made, in whole or in part, into other articles; or,

5th. That no more or other kind of labor is required to make these articles than is required to make India rubber in bottles, or sheets, or other kinds of India rubber, which, by the seventh article of the ninth section, is entitled to admission as free.

It being insisted, on the part of the defendant, that neither of these circumstances, nor all of them combined, can nullify the explicit terms of the preceding fifth section, by which all kinds of "India rubber shoes" are subjected to the thirty per cent. duty, nor make free these articles, provided they are and were known in commerce under the name "India rubber shoes."

But his honor, the presiding judge, refused so to decide the law of the case, or so to instruct the jury; and, on the contrary, the said judge did then and there decide, and did then and there charge and instruct the said jury, that the case, in the view taken thereof by the court, entirely depended on the true legal construction of the Tariff Act of August 30, 1842, and involved no question of fact for the jury; that India rubber, when used, in whole or in part, in the manufacture of oil cloth, webbing, shoes, braces, or suspenders, or any other fabrics or manufactured articles, was, by the tenth article of the fifth section of this law, subjected to the duty of thirty per centum ad valorem, specified in the clause relating to these fabrics, contained in said tenth article; that, by the seventh article of the ninth section of said act, India rubber in bottles or sheets, or otherwise unmanufactured, is declared to be exempt from duty; that, by virtue of this clause, India rubber existing in the particular forms enumerated therein, and existing in any other form in which it may be imported, is free from duty, if 789*] unmanufactured; *that, as these two clauses were both in the mind of of the Legislature when treating of India rubber, they are to be construed together; and that, so construed, the fair conclusion is—and such the said judge decided to be the true legal interpretation of said provisions—that Congress, in laying the duty, had special reference to the manufactured article in a finished state, and intended to allow India rubber to come in as free, whatever might be its form, if it had not been brought, by manufacture, into a finished state; that, as it was not pretended that the goods in question were shoes manufactured out of the material called India rubber, and as it was admitted by all the witnesses that they were brought into the form of a shoe in the process of making the material called India rubber, they were not "India rubber shoes," within the meaning of the tenth article of the fifth section, but were to be regarded as raw material and as unmanufactured, within the meaning of the seventh article of the ninth section; that the goods in question were, therefore, entitled to be admitted free of duty; that the plaintiffs having protested in writing against the payment of any duty thereon, and the collector having, notwithstanding, illegally exacted a duty of thirty per centum ad valorem thereon, the plaintiffs were entitled to recover back the moneys so exacted, except so far as the same had been refunded by way of drawback; and that the jury would, therefore, render a verdict for the amount of such remaining moneys, with interest thereon to the day of trial, in favor of the said plaintiffs.

And thereupon the said defendant, by his counsel aforesaid, then and there excepted to the whole of the said decision, charge, and instruction of the said judge, and particularly to those parts thereof wherein the said judge decided and held that the said case involved no question of fact for the jury, and wherein the said judge instructed and charged the jury, as matter of law, that the goods in question were entitled, under the act of Congress above referred to, to be admitted free of duty; and wherein the said judge also instructed and charged the said jury, as matter of law, that the plaintiffs were entitled to recover back the moneys exacted by the defendant as duties on the said goods; and the said defendant, by his said counsel, did also then and there except to the aforesaid refusal of the said judge to decide the law of the case, and to instruct and charge the said jury in conformity with the prayer of the counsel of the said defendant, hereinbefore contained.

And the said defendant, by his said counsel, thereupon, then and there further excepted to the decision of the said judge, in admitting as evidence against the defendant the deposition of *Samuel K. Appleton, and the parts [*790 thereof particularly objected to by the said counsel, as hereinbefore mentioned; and in admitting as evidence against the defendant the testimony of James E. Smith, Amory Edwards, George C. Wales, William H. Edwards, and John L. Ripley, hereinbefore particularly objected to by the said counsel; and did also further except to the decision of the said judge in excluding the instructions of the Comptroller of the Treasury, hereinbefore mentioned.

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

It was very elaborately argued in print by Mr. Butler and Mr. Toucey (Attorney-General) for the plaintiff in error, and Mr. J. Prescott Hall and Mr. Curtis for the defendants in error. These arguments would, of themselves, fill a hundred pages, and the Reporter finds it difficult to select part of them. He is therefore reluctantly compelled to omit the whole.

Mr. Justice Woodbury delivered the opinion of the court:

This was a writ of error to reverse a judgment in the Circuit Court for the Southern District of New York. That judgment was rendered in favor of Allen et al., the original plaintiffs, in a suit to recover back the amount of duties which Lawrence, the defendant, as collector of the port of New York, had demanded and received on the importation of certain boxes of India rubber shoes, in September, A. D. 1845, and which the importers claimed to be by law free. The duties were, therefore, paid under protest; and at the trial, the court, among other things, ruled, that, on the facts proved, these shoes were not, in point of law, subject to any duty; and, consequently, a verdict was returned for the plaintiffs below for the amount which had been paid to the collector, and interest.

The facts proved or admitted, which appear material, were, that these shoes consisted wholly of India rubber, and in different sizes, suited for men, women, and children; that no other work had been expended on them except to dip the moulds or lasts into the milky liquid, as procured from the India rubber trees, and then dry them over a fire—performing this process several times, till a proper thickness was obtained. A small ornament was afterwards drawn on some of them, and a coarse stuffing inserted in others, and in this condition they had for many years been imported, and worn without any essential change or addition here, unless in some instances slightly to trim and stretch them on a last. It was also proved that shoes, made in part from India rubber and in part from cloth or leather, of a thinner and lighter fabric, had been sometimes imported from Europe, and for several years had been extensively manufactured in this country.

791*] *The law which governs the question whether these shoes ought to pay a duty of thirty per cent. ad valorem, or be admitted free, is the Act of Congress of August 30, 1842. 5 Stat. at Large, 555. In its fifth section, thirty per cent. is imposed "on India rubber oil cloth, webbing, shoes, braces or suspenders, or other fabrics or manufactured articles, composed wholly or in part of India rubber." And in the ninth section, among other articles declared to be "exempt from duty," is "India rubber, in bottles or sheets, or otherwise unmanufactured."

The court below entertained an opinion, that the clause in this law imposing a duty of thirty per cent. on India rubber shoes referred to those made in a finished state from that material, after being altered in Brazil from its liquid condition to the more solid state, and to the forms of sheets, shoes, bottles, etc., and that this alteration was not a manufacture, though into a shape designed for use without any material change, and hence, that shoes so made and imported were not dutiable. This view was, undoubtedly, correct to a certain extent, and in some aspects of the subject; but in others it seems to us to involve some errors, which we think ought to be corrected, and which require more extended explanations because overruling the judgment below. Thus, although this act of Congress clearly meant to impose a duty of thirty per cent. on shoes imported, which had been made in part from India rubber after it had been hardened and fashioned into some crude shape in South America, yet we have no doubt it might likewise intend to impose this duty on shoes made abroad wholly from India rubber while in its liquid state, and especially, if, when so made, such shoes were in a condition to be worn without further material labor on them here, and were made to be so worn, and were in this form often actually worn.

It is our opinion, therefore, that the jury should have been so instructed; and if they were satisfied those shoes had been thus made to be so worn, and, in the language of commerce, if such shoes were called "India rubber shoes," no less than those made here or in Europe in part from India rubber and in a more finished form, that the duty of thirty per cent. ought to have been paid on them.

Some of our reasons for this opinion are briefly these:

The articles imported in this case manifestly come within the letter of the clause imposing a duty of thirty per cent. on "India rubber shoes." They are "India rubber shoes." Being thus provided for as shoes, the subsequent clause, making certain articles free which were unmanufactured, and not enumerating shoes among them, cannot be presumed to embrace or refer to anything already provided for. United States v. Clarke, 5 * Mason, C. [*792 C. 30. Indeed, these shoes were more emphatically India rubber shoes, than those made only in part of that material, as are most, if not all, of those manufactured in this country and in Europe. Again, to remove difficulty in many cases whether an article should come under the description of those liable to duty, there it is added, in the first clause, taxing them, "manufactured articles composed wholly or in part of India rubber;" and, in this way the duty extends to any shoes, if a manufactured article, whether they be like these, composed wholly of India rubber, or, like most others, composed only in part of it.

Much more do the shoes in this case appear to come within this provision in the act of Congress imposing the duty of thirty per cent. when we examine the spirit and object of that provision. To ascertain these with some degree of certainty, it may be useful, in the first place, to advert a moment to the past, as well as subsequent, legislation of Congress on this subject.

The import of India rubber, in any form into this country, does not appear to have attracted attention in the revenue laws, as a separate and specific article, till 1832. Before that, and especially in the tariff acts of 1823, 1824, and 1816, all of which are usually conceded to have looked to protection as well as revenue, India rubber is not enumerated eo nomine as free or dutiable, and hence was taxed generally, from twelve and a half to fifteen per cent., among the non-enumerated articles. 3 Stat. at Large, 310; 4 Stat. at Large, 29 and 590. But in 1832, when the policy had become changed to reduce an overflowing revenue, by leaving free such unmanufactured articles as furnished raw materials to our own manufacturers, and such manufactured articles

as did not compete with any made here, the Act of July 14th, 1832, sec. 3, exempted from duty entirely "India rubber." 4 Stat. at Large, 590. In 1833, a like policy, for a like reason, was pursued, and so in 1841, by expressions in the former period placing "India rubber" among the articles free from duty (4 Stat. at Large, 630), and in the latter, making "India rubber" still excepted from duty, though several articles before free were then taxed. 5 Stat. at Large, 463.

But in 1842, when the policy of the government again became adapted to protection no less than revenue, the act now under consideration was shaped so as to tax whatever might compete with our own manufacturers, and to admit free only articles in such shape or form as were not calculated to rival our own. Now, before 1842, it is well known that the making of shoes in part from India rubber, so as to be water-proof, had been invented, patented, and extensively practiced in this country. Consequently, such a protective tariff as that intro- 793*] duced in *1842 would be likely to tax any foreign fabric which was, in any considerable degree, a rival to the article made here for a similar use. And, consequently, a foreign-made shoe, whether "composed wholly or in part of India rubber," was meant to be taxed thirty per cent., if, in either case, it was in a form suited to be used as water-proof, was so designed and so used, and this form would rival the shoe made here for a like purpose.

In construing statutes, it is not only our duty to give effect to all the words used in their ordinary sense, but to eviscerate, if possible, their true spirt and intent from all the connected circumstances, attendant or subsequent as well as preceding. Bond v. Hoyt, 13 Pet. 273; 1 Kent's Com. 461.

The statute applicable directly to the present case being, in some respects, awkwardly worded, the design of it on this subject has been made more explicit and clear by the subsequent Act of July 30th, 1846, changing the forms of expression to describe the articles intended to be taxed. Thus, it is there provided, that a duty of thirty per cent. be imposed on "braces, suspenders, webbing, or other fabrics composed wholly or in part of India rubber, not otherwise provided for." And, to prevent any misconception of the intention, it is added, under the same schedule and rate of duty, "shoes composed wholly of India rubber."

It would also be very extraordinary if the spirit of the Act of 1842, in its high protective policy, should not mean to tax the foreign India rubber shoe made wholly of India rubber, when it was, and still is, a most formidable and successful rival to the shoe made here in part of the same substance; when it was at first, and for many years, the only shoe used here as water-proof; and when, under all patents and improvements since in lightness and beauty, none seem able to surpass it now in durability, ease, and economy combined.

But it is contended that the India rubber shoe, as made in Brazil and imported thence, is not a "manufactured article," and hence is not within the clause in the Act of 1842 imposing a duty of thirty per cent. It may be conceded that this duty applies only to such an article. Yet what constitutes a manufactured article?

In some instances, and for some purposes, it may be one kind of process performed on what is found in a natural state, and in some, another kind. Thus the juice of the maple or of the cane is in some views manufactured when it is made into molasses or syrup, and in others, when again made into sugar or spirit from molasses. And so the juice of the grape is in one sense manufactured when converted into wine, and in another *when made [*794 into brandy. And so is lye from ashes, when boiled down to potash or pearlash, manufactured into them. Here, the juice or sap of the India rubber tree, while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance, and in its natural form; and, in one sense and to a certain extent, its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into, is a manufacture. It is so as much as butter or cheese is a manufacture from animal milk, or tar from turpentine, and rosin from tar. Yet from the words of the law, as well as its design, it is manifest that the India rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful, and convenient form for other manufactures here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is "unmanufactured," or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy and purpose, it is "manufactured," as it is made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures.

After these, what requisite is wanting to bring it within the spirit, no less than the letter, of the provision imposing a duty? It has been changed, by fire and labor, in its color, consistency, and form, from its natural state as the milk of the India rubber tree. It has been fashioned into an article of clothing, suitable and customary to be worn in its then shape. It is a rival to other shoes made here.

These elements would, on principles of common sense, seem to amount to a manufacture, and one, when imported from abroad, likely to be taxed.

Going to more technical definitions and to first principles, such a process to make the shoe is making an article by the hand, which was once the literal meaning of the word "manufacture," or manu factum, and in the more modern idea attached to the word, it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life.

Indeed, these India rubber shoes were originally made in Brazil, not as a form of sending abroad a raw material to be used for other purposes. But they were prepared as a shoe, to *be worn in the shape as there finished, [*795 and for the purpose of excluding water. Travelers in Brazil described the use of India rub-

ber there first in the form of boots, because waterproof. 1 McCulloch's Dict. 311; Ure's Dict.

The shoe succeeded to the boot, and its export in sheets also, to be cut up to rub out pencil marks, etc., gave to the substance itself the common name of India rubber. Ibid.

In the form of the shoe, therefore, to be worn in Brazil or elsewhere, because waterproof, it was a manufacture, and one of such value for that purpose as to lead to a greatly increased export of the article in that shape within the last twenty years.

And as the invention was made, here and abroad, of thinner and lighter shoes manufactured in part from it, and of extending the use of India rubber to many new objects in dress and the arts, the demand for it, in a state as hardened and colored, without regard to form, enlarged rapidly.

Considering, too, that a mode of dissolving it here has been discovered, and of easily giving to it, afterwards, any desired shape, it may be that shoes, no less than sheets or slabs of India rubber, in a hardened form, become often, when convenient, melted down or dissolved, to be used for other purposes. This might often be done with them, though a manufacture, as their value per pound would vary but little, if any, from India rubber in the shape of sheets, as the raw material of which they were manufactured was the same, and as the expense of making them is similar—one being done by several dippings, like a candle, and the other by several layers of the gum or milk.

But this occasional use of the shoes for other purposes than wearing as water-proof shoes would not alter their original character, as a manufacture for the latter purpose, nor the importation and present character of them, as a manufacture for the same purpose.

Thus, the importation of cast iron in kettles or hand irons in a state to be so used, and frequently so used, would not be altered, as a manufacture of that kind, and as subject to pay the duty imposed on it in the tariff; because some of it, after imported, might occasionally be melted down and recast, and used for other or similar purposes.

Nor is the juice of the cane—converted into a different consistence and color abroad, and shipped here as molasses, ready to be used, and often used as such—any the less a "manufactured article," and any less subject to the duty on molasses, because some of it, after arriving in this country, may again be manufactured into sugar or spirit.

796*] *A further illustration as to the distinction between the same article, put into a shape to be sold for use as it is, and into one not for use as it is, is that of melted iron.

In that state it may be run in moulds, either for pots or for pigs, and, in the former case, fitted and sold to be used in that shape, and hence a manufacture; while, in the latter, sold to be made up afterwards into new and different forms, and hence, for some purposes, is then not regarded as a manufacture till so made up.

So lead may be melted into the shape of pigs *or bars, for exportation* and for foreign manufacture, or be run into weights for use as weights and then be regarded as already a manufacture for that purpose.

It is another evidence that shoes composed wholly of India rubber were considered by Congress as a manufactured article, that they place them in that category in the tariff with other clearly manufactured articles while they place in the category of those unmanufactured such articles as are not in a shape to be used much if at all without being made up into new forms. Thus it is with the India rubber images of alligators and lizards imported. If bottles are an exception they are specially enumerated in the tariff among the free articles, in order to be free, while shoes are not; and the former are so enumerated because usually made up here into new shapes, for other purposes before used; and when not so made up are little employed in their original shape, and have no rival manufacture to be protected by taxing them. Had Congress intended that shoes, when wholly of India rubber, should be considered as unmanufactured, and be free, it is difficult to conceive why it did not place them in that list, and declare them unmanufactured and free, rather than in the list of manufactured and dutiable articles, as it did both in 1842 and again in the revised Act of 1846.

Finally, another circumstance exists, which appears to be a decisive indication that this very importation of shoes, though called in the invoice "unmanufactured," was meant mainly as shoes for use, to be worn in their existing condition, rather than to be dissolved and used for other purposes. It is, that several of the boxes were invoiced as shoes for "ladies," and others for "misses," or children, and which different forms or shapes would be useless, as well as more expensive, if the shoes were intended merely to be cut up or dissolved for other uses, and not to be worn by different sexes and ages, as "manufactured" shoes in their present shape.

In several analogous cases, as to teas, cotton bagging, and sugar, this court has held, that it is a proper fact for the jury to *decide, [*797 whether the imported article is or is not known in commerce by the words or terms used in the tariff imposing the duty, and not a question of law, to be settled by the court, as was done here. United States v. 112 Casks of Sugar, 8 Peters, 277; Elliott v. Swartwout, 10 Peters, 151, 153; United States v. Breed, 1 Sumner, 164; 9 Wheaton, 438; Curtis v. Martin, 3 Howard, 106.

Unless it be admitted in this case, then, as most of the testimony proves, that these shoes were known in a commercial sense and use as India rubber shoes—no less than others, made in part from it—we think the jury should return a verdict on that fact; and next, that the jury should have been further instructed, that, if these shoes had been made into their present shape in order to be worn as water-proof, when the purchasers pleased, and that it was customary so to wear them, they were within the meaning of the act of Congress on this subject, "manufactured," and liable to pay a duty of thirty per cent.

Without going into other questions raised at the trial, and without dwelling longer on this,

our opinion is, that the judgment below must be reversed, and a venire de novo awarded; and the new trial be governed by the principles here settled.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court of the United States for the Southern District of New York in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to award a venire facias de novo, and that the new trial shall be conducted in conformity to the principles laid down in the opinion of this court.

798*] *ELEAZER F. BACKUS, Plaintiff in Error.

v.

WILLIAM GOULD and David Banks, who sue as well for the United States as themselves.

Copyright law of 1831—penalties, construction of sec. 6.

By the sixth section of the Act of February 3d, 1831, entitled "An Act to amend the several acts respecting copyrights," the penalty of fifty cents on each sheet, whether printed or being printed, or published or exposed to sale, is limited to the sheets in possession of the party who prints or exposes them to sale.

It does not apply to those sheets which he had published or procured to be published, whether they were found in his possession or not.

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

It was a qui tam action, brought by Gould and Banks against Backus, for an alleged invasion of their copyright in nine volumes of Cowen's Reports, and the first three volumes of Wendell's Reports.

On the trial, the affidavit of John L. Wendell was read, stating that he, the deponent, was the real plaintiff, and that Gould and Banks were merely nominal plaintiffs.

In 1838, Backus published a book entitled "A Digest of the Causes decided and reported in the Superior Court of the City of New York, the Vice-Chancellor's Court, the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New York, from 1823, to October, 1836, with Tables of the Names of the Cases and of Titles and References, being a Supplement to Johnson's Digest."

To the declaration, Backus pleaded nil debet.

Upon the trial, the plaintiffs proved themselves entitled to the copyright of the first, second, and fifth volumes of Cowen's Reports, and of the second volume of Wendell's Reports. And that from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.

The counsel for the defendant then prayed the court to instruct the jury as follows:

1st. That John L. Wendell, and not the plaintiffs, was the owner and proprietor of the copyright to the said first, second, and fifth volumes of Cowen's, and to the said second volume of Wendell's Reports, and that, by the statute, no person but the owner or proprietor could maintain said suit for said penalty, and prayed the court so to instruct the jury. But the court decided that the suit might be maintained in the name of William Gould and David Banks, notwithstanding the facts set forth in the affidavits of John L. Wendell, and so instructed the *jury, and refused to in- [*799 struct said jury as requested by defendant's counsel; to which decision, instruction, and refusal, the counsel for the defendant excepted.

2d. That the said books called the first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, are not the subject of a copyright, and the publisher of them could acquire no exclusive right to the publication thereof, and therefore could not be unlawfully infringed, and prayed the court so to instruct the jury. But the court decided, that, although the opinions of the several courts, as contained in said volumes of reports, were not the subject of a copyright, yet that the indexes of said volumes, and the statement of the cases preceding the opinions, and the marginal notes, or synopsis of the case, at the head of each case, were the subject of a copyright, for any infringement of which this action would lie, and so charged and instructed the jury, and refused to charge or instruct the jury as prayed by the defendant's counsel, to which decision, charge, and instruction, and refusal, the defendant's counsel excepted.

3d. The defendant's counsel insisted, that if the said indexes were the subject of a copyright, yet it was the duty of the proprietor thereof, who obtained the copyright, to express, in the title deposited and published (where he was not entitled to a copyright of the whole book), the matter for which he claimed such copyright; that he could not obtain a valid copyright to such matter, which was a very small portion of the work, under a general claim to a copyright to the whole book, and in this case he had not only not claimed any such copyright to the indexes, but merely a copyright to the report of the cases, and therefore had not acquired any valid copyright to such indexes, and prayed the court so to instruct the jury. But the court decided, that a copyright to the whole book would secure to the proprietors the exclusive right to such matter in the book as was susceptible of a copyright, although such matter composed ever so small a portion of the book, and so instructed the jury, and refused to instruct said jury as requested by the counsel for the said defendant; to which decision, instruction, and refusal, the counsel for the defendant excepted.

4th. The counsel for the defendant also insisted, that the plaintiffs having obtained a copyright purporting to be for the whole book, when they were only entitled to a copyright for a very small portion of the matter contained in such book, such copyright was wholly void,

and no action would lie for any infringement of it, and prayed the court so to instruct the jury. But the court decided that such copyright would, and did, secure to the plaintiffs the exclusive right to such matter in said 800*] *book, whether it were more or less, as he was entitled to obtain a copyright for, and that said copyright was not void, and that this action would lie for an infringement or pirating of any part of the matter in said books for which the plaintiffs were entitled to obtain a copyright, and so instructed the jury, and refused to instruct the jury as prayed by defendant's counsel; to which decision, instruction, and refusal, the defendant's counsel excepted.

5th. The counsel for the defendant also further insisted, that the publication of the said supplement, or third volume of Johnson's Digest, was not a printing or publishing of the said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, of which the said plaintiffs claimed to have the copyright, within the section of either of the acts of Congress giving said penalty. That said penal sections of said acts were to be construed strictly, and did not impose any penalty for printing or publishing a small portion of the matter for which a copyright was obtained; that, by the terms of the statute, the penalty was only inflicted for an unauthorized printing, reprinting, or publishing, etc., a copy or copies of the whole of the map, chart, book or books, for which the copyright had been obtained, and that for such printing, reprinting, or publishing any smaller portion than the whole, this action could not be sustained, and prayed the court so to instruct the jury. But the court decided, that an action for the penalty, given by the penal section of the act, would lie for the printing, reprinting, or publishing by the defendant of any part or portion of the matter in said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, to which the plaintiffs were entitled to a copyright, and so instructed the jury, and refused to instruct the jury as prayed by the defendant's counsel; to which decision, instruction, and refusal, the counsel for the defendant excepted.

6th. The defendant's counsel also insisted that the offense for which the penalty sued for was inflicted by the act of Congress was in the nature of a criminal offense; that the penalty was inflicted by the statute, in part, as a punishment for a criminal offense, and in part as a punishment for a tortious, if not a criminal, invasion of private property, and that the action was local; and that the act or offense for which this action was brought was committed in the State of Pennsylvania, and therefore out of the jurisdiction of this court, and consequently the present action could not be sustained, and prayed the court so to instruct the jury. But the court decided that the action could be sustained in any State of the Union, and so charged the jury, and refused to instruct the jury as prayed by 801*] *the defendant's counsel; to which decision, charge, and refusal, the defendant's counsel excepted.

7th. The counsel for the defendant also insisted, that the publication by the defendant of a bona fide digest of the first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, was not an infringement of the copyright of the plaintiffs to said books; it was a benefit, and not an injury, to those books; and prayed the court so to instruct the jury, that if they found, from the evidence in the case, that the supplement, or third volume of Johnson's Digest, published by the said defendant, was a bona fide digest of the decisions of the cases contained in said volumes, and was published by the defendant in good faith, and not for the purpose of furnishing to the public the matter contained in said volumes in a cheaper form or for a less price than those volumes were sold for; and that said digest was, in fact, a benefit instead of an injury to said volumes, and would promote the sales thereof; that then said publication was no infringement of the plaintiffs' said copyright, and this action could not be sustained, and the defendant would be entitled to their verdict. But the court refused so to instruct the jury; but did charge and instruct the jury, that if the defendant had transferred to his said digest any part of the matter contained in the indexes of said first, second, and fifth volumes of Cowen's Reports, or second volume of Wendell's Reports, and thus availed himself of the labor of others contained in books of which the plaintiffs held the copyright, the plaintiffs were entitled to their verdict; to which refusal, and charge, and instruction, the defendant's counsel excepted.

8th. The counsel for the defendant also insisted, that from the very nature of the work published, the same idea contained in the indexes to said volumes of reports, if correctly stated in said indexes, must necessarily be stated in the digest published by defendant; and if published in English, substantially the same words must be used; and if the work was a bona fide digest, and not an evasion for the purpose of furnishing the public with the work in a cheaper form than the original, the publication of said digest by the defendant could not be deemed an invasion of the plaintiffs' copyright, unless the matter in said indexes had been literally transferred to the defendant's digest, and prayed the court so to instruct the jury. But the court refused so to instruct the jury, but instructed them, that if the defendant, had transferred to the said digest, published by him, any part of matter contained in the indexes to said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, it was an invasion of the plaintiffs' said *copyright, [*802 for which this action would lie; to which refusal and instruction the counsel for the defendant excepted.

9th. In regard to the amount of the penalty to be recovered, the defendant's counsel insisted that the plaintiffs could only recover fifty cents for every sheet of the matter transferred from said index to first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's, to the said digest of said defendant, as had been proved to have been found in his possession, either printing or printed, published, or exposed for sale; and that there was no legal proof that any such sheets of said matter had been so found in said defendant's possession, and prayed the court so

to instruct the jury. But the counsel for plaintiffs insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not; and so the court decided and instructed the jury, and refused to instruct the jury as prayed by the counsel for the defendant; to which decision and instruction, and refusal to instruct, the defendant's counsel excepted.

And with such charge and instruction, the court submitted the cause to the jury, who, under such decisions, charge, and instruction, found a verdict for the plaintiffs for $2,060.75 debt, and six cents costs.

Upon all these exceptions, the case came up to this court.

They were all fully argued by Mr. James Bayard and Mr. Joseph R. Ingersoll for the plaintiff in error, and Mr. Wendell for the defendants in error.

The arguments upon all the points, except the one upon which the decision of the court turned, are omitted. The views expressed by Mr. Bayard were illustrated and enforced by Mr. Ingersoll, in his reply to Mr. Wendell.

Mr. Bayard said, that before entering upon the argument, it was right, as well in justice to His Honor the District Judge (Conkling) before whom the case was tried, as to prevent any prejudice to the case from an apparent decision by the court below, to state the circumstances under which the case comes before this court.

The case, with another, embracing precisely the same questions (which it is agreed shall abide the event of this), came on to be tried before His Honor Judge Conkling, who held the Circuit Court at Albany, in October, 1843, in the absence of the Circuit Judge (the late Mr. Justice Thompson), who was absent from sickness. In order to take a verdict which should determine the facts in the case, and fix the 802*] amount of the *penalty, if any had been incurred, the points of law were stated by counsel, and ruled by the judge without argument, with the understanding that they were to be argued before a full court, when Judge Thompson should be able to sit. His continued indisposition, which at last terminated in his death, prevented this from being done; and in July, 1845, judgment was entered upon the verdict, by order of plaintiffs' attorney, without argument. And this writ of error was sued out to bring the record into this court, where the case is really now to be decided for the first time.

[Mr. Bayard then proceeded to argue the several points until he came to the ninth prayer to the court below.]

Again by the express words of the act the offender is to forfeit and pay fifty cents only "for every such sheet which may be found in his possession."

This limitation has been totally disregarded by the learned judge of the Circuit Court, who adopted the views of the counsel for the plaintiffs, who "insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not," and so decided and instructed the jury.

This appears to be a most manifest disregard of the terms of the statute, in order to give what the judge seems to have considered an equitable construction, making it extend to a case clearly beyond its terms, which is a mode of construction altogether inadmissible in the case of a penal statute.

The reason of this limitation of the penalty may not be very clear; but the words of the statute are plain, and when this is the case, there is no room for equitable construction in any statute, but especially in a penal one.

But it might not be difficult, if it were necessary, to find reasons for the limitation.

1st. Congress did not intend that an author should lie by during the two years allowed for bringing his action, permitting another to publish and vend his work during that time, and then recover fifty cents for every sheet so published.

This would be laying a trap for his ruin, as I have shown that the penalty upon an ordinary edition might exceed $15,000; and if it were a popular work, several such editions might be disposed of in the course of two years.

2d. But for this limitation, several penalties might be incurred by several different persons on account of the same sheets.

The penalty is to be inflicted upon "any person who shall print, publish, or import, or cause to be printed, published, or *im- [*804 ported, any copy, etc., without consent of the owner, or who shall (knowing the same to be so printed or imported) publish, sell, or cause to be published, sold or exposed to sale, any copy," etc.

Not only, therefore, the publisher, but the printer, and every bookseller who sells a copy, may be liable to this penalty.

Now, upon the principle adopted by the court below, the penalty is incurred by the act of publication, printing, or selling, and the amount is to be fixed by the number of copies published, printed, or sold, without regard to where they may be found. In case, therefore, of an edition of such a work, the publisher who has caused it to be printed, the printer who has actually printed it, the bookseller in whose store the whole edition has been placed for sale, and every bookseller to whom he has sent a part of it for sale, may be liable to the penalty of fifty cents for the same identical sheets. This could never have been intended.

3d. Again, it might be that a person who had unintentionally violated a copyright by the publication of a book might, upon discovering that his publication was illegal, destroy the whole edition, and so relieve himself from the penalty. But according to the decision of the Circuit Court, he would still remain liable. Nay, if he were even to give the whole edition to the author of the protected work, he would still, on the principle of this decision, remain liable to this penalty.

These are some of the reasons which might be given for this limitation of the penalty; but whatever the reasons may have been, the words are plain, and measure the amount of the penalty by the number of sheets "found in defendant's possession."

If the intention of the Legislature was what the Circuit Court held it to have been, it would have been perfectly easy and most obviously proper to have expressed that intention, either by omitting the words, "which may be found in his possession," or by adding after the word "sale," in the next line, the words, "or which he may have sold, or caused to be sold;" either of which, particularly the former, would have been the simple and natural mode of expressing the intention contended for by the plaintiffs.

Accordingly we find, that in the British statutes on copyright (of which there have been several), there has been a change in this particular; and when the amount of the penalty was not intended to be measured by the number of books or sheets found in defendant's possession, it has been so expressed.

The first statute on this subject (from which all the subsequent ones, both in England and in this country, have been taken) was the statute 8 Ann, c. 19 (1710), which gives to 805*] *authors and their assigns the sole right of printing, publishing, and vending their books for fourteen years, with the right of renewal for fourteen years longer if the authors are living at the expiration of the first term. And the first section provides, that if any other person shall print, reprint, etc., any such book or books, without the consent of the author or his assignee, "then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copyright thereof, who shall forthwith damask and make waste paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act." Here we have the same limitation as in our act of Congress.

Next came the statute 12 Geo. II. c. 36, which was passed for the purpose of "prohibiting the importation of books reprinted abroad, and first composed or written and printed in Great Britain."

The first section of this statute, after prohibiting the importation for sale of books first written or printed in England, directs the forfeiture of the books so imported, to be damasked or made waste-paper of, as in the former statute, and then adds, "And further, that every such offender or offenders shall forfeit the sum of five pounds, and double the value of every book which he or they shall so import or bring into this kingdom, or shall knowingly sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, contrary to the true intent and meaning of this act."

Here we have the penalty not limited to the books found in the offender's custody or possession, but extended to all the books imported, sold, or exposed to sale contrary to the provisions of the statute.

The next statute was that of 15 Geo. III. c. 53, which was "An Act for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed" to them, etc.

The first section of this act secures to the said universities and colleges the perpetual copyright in books given or bequeathed to them. The second section provides, that if any person shall print, reprint, or import any such book or books, he or they shall forfeit the same, and every sheet thereof, to be damasked or made waste-paper of. "And, further, that such offender or offenders shall forfeit one penny for every sheet which shall be *found in his, her, or their custody, [*806 either printing or printed, published, or exposed to sale, contrary to the true intent and meaning of this act." Here we have the penalty limited to the sheets found in the custody of the offender.

The next was the statute 41 Geo. III. c. 107, entitled "An Act for the further encouragement of learning in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the authors of such books, or their assigns, for the time herein mentioned."

This act is remarkable in several particulars, and especially with reference to the point now under consideration, that it has, in different sections, both the kinds of penalty, viz.: one limited by the sheets found in the custody of the offender, and the other measured by the whole number of books imported. By the first section, after reciting that "it is expedient that further protection should be afforded to the authors of books," etc., the sole right of printing and reprinting is given to the author, etc., for fourteen years, with the right of renewal for another term of fourteen years, as before. Then it is enacted, that if anyone violates this right, the offender or offenders shall be liable to a special action on the case, at the suit of the proprietor of the copyright, in which damages may be recovered. It is further enacted, that the offender shall forfeit such book or books, and all and every sheet and sheets, being part thereof, to be damasked, as before. "And all and every such offender and offenders shall also forfeit the sum of threepence for every sheet which shall be found in his or their custody, either printed or printing, or published, or exposed to sale, contrary to the true intent and meaning of this act."

After several other provisions, not material to the present question, we come to the seventh section, which forbids the importation for sale of books first printed in the United Kingdom and afterwards reprinted abroad. If any person shall import such book contrary to this act, "then every such book shall be forfeited, and may be seized by any officer of the customs, and the same shall be forthwith made waste-paper." "And all and every person so offending, upon conviction thereof, shall also, for every such offense, forfeit the sum of ten pounds, and double the value of each and every copy of such book or books which he, she, or they shall so import or bring, or cause to be imported or brought, into any part of the said United Kingdom."

Here was a statute intended to give "further protection" to authors, which it does by, 1st, extending the sole right of authors, etc., to the whole of the United Kingdom of Great Britain and Ireland; 2d, giving a special action on the case to *proprietors of copyrights; 3d, [*807

increasing the penalty on reprinting, etc., from one penny to three pence; 4th, giving to officers of the customs the right, and making it their duty, to seize and destroy any books imported in violation of the act; 5th, increasing the penalty on importing such books from five to ten pounds. But the court will observe, that although this statute was intended to increases the protection to copyright, and although the Legislature had fully in view the two different modes of measuring the penalty, imposing one in the first section and the other in the seventh, yet they made no alteration in this respect with regard to books reprinted in the kingdom, but adhered to the original limitation, contained in the statute of Ann, only increasing the penalty from one penny to threepence, while they follow the statute of 12 Geo. II, in extending the penalty on imported books to all books imported.

The next act shows the intention of the Legislature still more clearly. That was the statute 54 Geo. III. c. 156, entitled "An Act to amend the several acts for the encouragement of learning by securing the copies and copyright of printed books to the authors of such books or their assigns."

The fourth section of this act extends the term of copyright to twenty-eight years (with a subsequent extension, in section ninth, for the life of the author, if living at the expiration of the twenty-eight years), gives the special action on the case for violation of the copyright, directs the forfeiture of every book printed, etc., in violation of the copyright, to be damasked, as before, and then provides, that, "all and every such offender and offenders shall also forfeit the sum of threepence for every sheet thereof, either printed or printing, or published, or exposed to sale, contrary to the true intent and meaning of this act." Here the limitation to sheets found in the custody of the offender is omitted—and this is particularly important, as I will show presently when I come to examine the acts of Congress on this subject.

I have been thus particular in the examination of these British statutes, because the acts of Congress have been evidently taken from them, copying the very words in many instances. And in the absence of decided cases, putting a judicial construction upon these acts, it is important to learn the sense of the Legislature, as to the true meaning of the terms used, from the changes which have been made from time to time; and it is very evident, from this examination, that where the Legislature intended to extend the penalty beyond the books or sheets found in the custody of the offender, they have said so in such a way as to leave no doubt about it; as, first, in the case of importation of protected books, the 808*] offender forfeits double the *value of every book imported, and finally, in 1814, and not till then, in case of reprinting in England, the offender shall forfeit threepence for every sheet either printed or printing, or published, or exposed to sale, contrary to the act.

In the last British statute on this subject (5 & 6 Vict. c. 45), which repeals the former acts, and forms a complete system of copyright law, the penalty of pecuniary forfeiture is omitted altogether; and the proprietor of a copyright has a special action on the case for damages, and a right to maintain detinue or trover for the pirated copies.

Now, let us turn to the acts of Congress on this subject. The first was the Act of the 31st of May, 1790, which gives to the author or authors of any map, chart, book, or books (being citizens of the United States), and their executors, administrators, and assigns, the sole right to print, reprint, publish, and vend the same for the term of fourteen years, with the right of renewal by the author, if living, for another term of fourteen years.

The third section provides the penalty for violating this copyright, viz.: 1st. Forfeiture of every copy of the book, etc., wrongfully printed, to be destroyed, etc.; 2d. "And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported, or exposed to sale, contrary to the true intent and meaning of this act."

The court will observe that these provisions of this act were taken from the British statutes then in existence. The same term of duration—fourteen years, with the right of renewal for fourteen years more if the author were living. The same penalty—forfeiture of books to be destroyed, and payment of a sum of money for every sheet found in the offender's possession. The difference in this part of the act being, that Congress uses the word "possession" instead of "custody," and fixes the penalty at fifty cents instead of threepence, thus making this act much more severe than the British statutes, as I remarked in a former part of my argument.

Then we come to the Act of February 3, 1831, under which this action is brought, for it repeals the previous acts. This act extends the term of copyright to twenty-eight years, with the right of renewal for fourteen years more by the author, if living, and then, after providing the mode of securing the copyright by deposit of title page, and giving notice by publication, the sixth section provides the penalty, which is, as in the former act, forfeiture of every copy of the book, but not to be destroyed, and "fifty cents for every sheet which may be *found in his possession, either [*809 printed or printing, published, imported, or exposed to sale, contrary to the intent of this act."

Now, the court will observe that this act of Congress was passed sixteen years after the statute 54 Geo. III. c. 156. And there can be no doubt that this statute was before the framers of the act of Congress, not only from the general presumption that Congress would be acquainted with an act of Parliament on the same subject passed sixteen years before, but from their adopting some of its provisions, such as the extended term of twenty-eight years. And yet Congress carefully adheres to the old penalty, limiting it to the sheets found in the offender's possession, although they must have seen the alteration made in the British statute, and known that the effect would be to extend the penalty to all sheets printed or imported. Perhaps Congress thought the penalty of fifty cents a sheet was so large that it ought to be limited to the sheets found in de-

fendant's possession. Perhaps it was intended to excite the diligence of the informer to commence his action as soon as the work was published, and before it passed out of the possession of the publisher; or, more probably, the penalty thus limited was intended to operate as a restraint upon booksellers who might take the work for sale, and who would be subject to the penalty for the sheets found in their possession. But whatever may have been the reason, the words of the act of Congress are distinct and plain.

The Legislature has prescribed a certain penalty, to be measured by a standard distinctly given. The British Parliament saw proper to alter and enlarge that penalty for the United Kingdom of Great Britain and Ireland. But the Congress of the United States, when their attention was specially called to the subject, have refused to adopt this alteration. They have adhered to the old penalty, and the courts of the United States will not make the alteration.

If this construction is correct, as I trust the court will agree with us in thinking it to be, it is very evident that the instruction given by the court, and the verdict found by the jury in this case under the direction of the district judge, impose a penalty totally different from that prescribed by the law—for not a single sheet of this work was found to be in the possession of the defendant; and the judgment upon it must therefore be reversed.

Mr. Wendell:

It is said that the penalty of fifty cents is limited to the sheets found in the possession of the defendant, though the counsel candidly admitted it to be difficult to discern the reason 810*] *of that limitation. He, however, suggested that it might have been on account of the enormous penalty which would be imposed in the case of the reprint of a whole volume, and that it might have been to induce the bringing of an action forthwith, before the books had passed into the hands of innocent holders, and thus save them from prosecution.

It was also said, that, although in the latter acts of the Parliament of England upon the subject of copyright, the words "sheets found in the custody of the offender" are omitted, the similar words contained in our original act upon the subject are still continued in the last act of Congress; from which it was inferred, that these words contained some peculiar meaning, which, with us, was intended to be preserved. The answers to which suggestions are, 1st, that the penalty will be equally enormous whether the action be brought forthwith or at the end of a year; 2d, that innocent holders of the pirated work are not exposed, for the penalty reaches only those who knowingly sell; and, 3d, the change of phraseology in the acts of Parliament shows that these words were considered mere matter of form, as "sheets printing and printed," the only state of things to which the words could attach, are retained in the act.

Mr. Justice McLean delivered the opinion of the court:

This cause is brought here by a writ of error to the Circuit Court of the United States for the Northern District of New York.

An action of debt was brought by Gould and Banks to recover certain penalties alleged to have been incurred by the invasion of the copyright of the plaintiffs in twelve volumes of law reports, to wit, nine volumes of Cowen's Reports and three of Wendell's by the publication of a Digest as a supplement or third volume of Johnson's Digest. The defendant pleaded nil debit.

On the trial, the plaintiffs proved themselves entitled to the copyright of the first, second, and fifth volumes of Cowen's Reports, and of the second volume of Wendell's Reports; and that from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.

The injury complained of consisted in copying from the above reports the marginal notes or indexes of the reported, and publishing them in the Digest. From the first volume of Cowen's Reports forty pages were copied, from the second volume twenty-nine, from the fifth fifty-four pages, and from the second volume of Wendell's Reports nineteen and a half pages *were copied, which included the whole [*811 of the indexes of that volume except eight and a half pages. The change in the phraseology was so great in these pages that the witness did not consider them as having been transferred to the Digest.

This is a qui tam action, and was brought under the sixth section of the Act of 1831; entitled "An Act to amend the several acts respecting copyrights."

Before the Circuit Court many points of law were raised, and instructions prayed, on the facts in evidence; but as the decision will turn upon the construction of the above section, under the ninth prayer of the defendant, the other questions will not be considered.

The defendant's counsel insisted "that the plaintiffs could only recover fifty cents for every sheet of the matter transferred from said index to the first, second, and fifth volumes of Cowen's Reports, and the second volume of Wendell's to the said Digest of said defendant, as had been proved to have been found in his possession, either printing or printed, published, or exposed for sale; and that there was no legal proof that any such sheets of said matter had been so found in said defendant's possession, and prayed the court so to instruct the jury."

"But the counsel for plaintiffs insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not; and so the court decided and instructed the jury." And they found a verdict for plaintiffs for "two thousand sixty-nine dollars and seventy-five cents debt, and six cents costs."

The sixth section provides, that, if any person, within the term for which a copyright has been secured, shall print, publish, or import, etc., sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such book, without consent in writing, such offender shall forfeit every copy of such book to the person legally entitled to the copyright

thereof; "and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of this act."

This penalty of fifty cents on each sheet, whether printed or being printed, or published, or exposed to sale, is limited to the sheets in possession of the defendant. But under the instruction of the court, a verdict was rendered for every sheet which the defendant had published or procured to be published.

As this is a penal section, it must be construed strictly. Under it, every copy of a book 812*] published without the consent *of the person having the copyright is forfeited, in addition to the penalty of fifty cents on each sheet in his possession.

The declaration seems not to have been drawn with the view of enforcing any other penalty than that which is imposed for each sheet found in the possession of the defendant.

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

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

JONATHAN W. NESMITH and Thomas Nesmith, Complainants,

v.

THOMAS C. SHELDON, Horace H. Comstock, David French, William E. Peters, James Forton, Atta E. Mather, Henry B. Holbrook, Samuel P. Mead, Francis E. Eldred, Phebe Ann Dean, Cullen Brown, and Charles H. Stewart, Respondents.

This court will follow decision of State court declaring its law constitutional in case depending on its own constitution.

The Legislature of Michigan passed an act on the 15th March, 1837, entitled "An Act to organize and regulate banking associations," and on the 30th of December, 1837, an act to amend the former act. By the first, any persons were allowed to form associations for the purposes of banking upon the terms specified in the law; and by the second, the stockholders were made liable, in their individual character, under certain circumstances, for the debts of the association.

The associations formed under these acts are corporations within the meaning of the constitution of Michigan, and the acts are unconstitutional and void.

The second section of the twelfth article of the constitution forbidding the Legislature from "passing any act of incorporation unless with the assent of at least two thirds of each house," the judgment of the Legislature is required to be exercised upon the propriety of creating each particular corporation, and two thirds of each house must sanction and approve each individual charter.

The Supreme Court of the State of Michigan has so construed its constitution, and it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own statute where that construction has been settled by the decision of their highest judicial tribunal.

THIS case was formerly before this court, on a certificate of division in opinion between the judges of the Circuit Court for the District of Michigan. Its facts and the reasons for its dismissal will be found in 6 Howard, 41.

It now came up upon the following certificate of division in opinion:

*"This case having been remanded [*813 by the Supreme Court, on the ground that it had not been properly certified on certain points under the act of Congress, and the cause being brought before the court for their consideration and decision, the opinions of the judges are opposed on the following point:

"Whether the banking associations organized under the Act of the Legislature of the State of Michigan entitled 'An Act to organize and regulate banking associations,' approved March 15th, 1837, and the amended act entitled 'An Act to amend an act entitled "An Act to regulate banking associations and for other purposes,"' approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the Constitution of the State of Michigan."

Article fourth, section first, of the constitution of the State of Michigan is as follows: "The Legislative power shall be vested in a Senate and House of Representatives."

Section second of article twelfth of said constitution is as follows: "The Legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each house."

The first act referred to in the question upon which the judges decided, namely, that of March 15th, 1837, authorized any persons to form associations for the purpose of banking upon the terms specified in the law. It was passed by a vote of two thirds of each branch of the Legislature.

The second act referred to provided as follows: That, "for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place shall be liable in their individual capacity to the full amount which such insolvent association may be indebted; and each other stockholder shall thereafter be also liable in like manner, in proportion to his or her amount of stock, for the payment of the full amount of the debts of such insolvent associations."

The bill filed by the Nesmiths claimed to hold the defendants responsible, as stockholders, for the debts due by the Detroit City Bank.

The bill was demurred to, and, upon the hearing, the division between the judges occurred as above mentioned and was certified to this court.

It was argued by Mr. Seaman for the complainants and Mr. Romeyn for the defendants.

Nota.—Jurisdiction of U. S. Supreme Court to declare State law void as in conflict with State constitution; to revise decrees of State courts as to construction of State laws. Power of State courts to construe their own statutes. See note to 7 L. ed. U. S. 679.

State decisions govern U. S. Courts as to State statutes and as to rule of property. See notes to 5 L. ed. U. S. 335; 6 L. ed. U. S. 290, 584; 19 L. ed. U. S. 490.

Mr. Seaman, in noticing the argument of the binding authority of the decision of the Supreme Court of Michigan, said:

It is insisted by the defendants' counsel, that 814*] the case of *Green v. Graves is a judicial exposition, by the Supreme Court, of the constitution of the State, and of the general banking acts passed by the State Legislature, and comes within the principles established by this court in the case of Green v. Neal, reported in 6 Peters, 291. The point there decided is, that "a fixed and received construction of a statute of a State by its own courts makes a part of the statute law," citing the case of Shelby v. Guy, 11 Wheaton, 361, and also a case in 7 Wheaton, 361, and several other cases. This rule is adopted on account of the State statute forming a rule of property, and it applies more particularly to real estate, as is stated in 2 Howard, 125, and 5 Cranch, 22. As stated in 6 Peters, 298, rights are acquired under this rule, and it regulates all the transactions which come within its scope; and on page 296, referring to the case of Massie v. Watts, 6 Cranch, 165, the court says: "A great proportion of the landed property of the country depends on adhering to them." The professed object of the rule is, to prevent two rules of property, and particularly in relation to real property, in the same State— one in the State courts, and another in the national courts. This is undoubtedly desirable. The principal reason on which the rule is founded appears to be this, as referred to on pages 298 and 296 in 6 Peters, citing the case of McKeen v. Delancy in 5 Cranch, 22, that when the State courts have given a construction to their statutes, and contracts, deeds, etc., have been made in pursuance of such construction, and rights have been thus acquired and have become vested, those rights ought not to be devested and contracts invalidated by a different construction of the statute by the national courts. This is undoubtedly in accordance with the principles of natural justice, and is sound reason as well as sound law. The principle recognizes the decision of the State court as forming "part of the statute," and thereby recognizes the highest court of the State as part of the law-making power; as vested with the power of legislating and making laws—that is, of engrafting upon the enactments of the Legislature new clauses and sections, explanatory of the original statutes; and that acts done, contracts made, and rights acquired under these judicial enactments, called decisions, shall be equally valid and sacred in the national as in the State courts. All this seems to be correct; the legislative power of our courts seems to arise from the structure of our institutions; and so far as regards common law rights, it arises from the very nature of things. The only difficulty in the case arises from the fact, that human reason is weak and feeble, short-sighted, cannot look into futurity to see the ultimate effect of its own opinions, and is extremely liable to be swayed by passion, prejudice, and interest; and 815*] *in attempting to engraft upon the statute explanatory clauses and sections, judges often materially change the purport, nature, and effect of it. If judges were omniscient in wisdom, pure in morals, free from passion and *prejudice, and* unerring in judgment, this difficulty would not exist. But let us suppose the State courts do, in effect, materially change the statute in construing it, as seems to have been suspected and intimated by this court in the case of McKeen v. Delancy, 5 Cranch, 22, and rights are acquired under and on the faith of such wrong judicial expositions; such rights ought to be protected, and for that purpose the wrong judicial construction ought to be regarded as an alteration, as an amendment to the statute, and should be so treated, so far as respects all rights accruing under it, by courts of justice, both State and national.

The question, then, resolves itself into this: Should these judicial alterations and amendments of the statute have a retrospective, or only a prospective effect? If they are to have only a prospective effect, their influence may be in the highest degree salutary; but if a retrospective effect and application are to be given to them, the consequences will be in many cases very pernicious. The second question is: Will the judges of this court presume that the State courts are infallible, and their decisions an unerring exposition of the State statute, and shut their eyes entirely to the terms and provisions of the statute, and refuse to inquire whether the decision of a State court is a fair explanatory law, or should be regarded in the light of a material amendment and change of the original statute. If your honor should look into the statute as well as into the decision, and find the decision equivalent to an amendment of the statute, then the amendment should not have a retrospective effect; and if the State courts give it a retrospective effect, and thereby wrong, injure, and defraud their own citizens, who are obliged to sue in those courts, it is no reason why the national courts, which were created to protect the rights of citizens of other States, should allow their suitors to be wronged and defrauded in like manner. The next question is: If your honors allow the State courts, not only to assume law-making powers, but to set the Legislature of the State at defiance, disregard their statutes, and engraft upon such statutes as many alterations and amendments as they think fit and proper, will your honors allow them to play the same pranks with the State constitutions also, and engraft as many of their dogmas and as many alterations and amendments upon these fundamental laws of the people as they see fit?

Mr. Seaman then proceeded with his argument at great length.

*Mr. Romeyn, after stating the case, [*816 said:

This question has been submitted to the Supreme Court of the State of Michigan, the highest judicial tribunal in the State. The report of the decision of that court is found in the case of Green, Receiver of the Bank of Niles, v. Graves, in 1 Douglas's (Michigan) Reports, 351. The concluding sentence of the decision (on p. 372) is as follows: "The result of our deliberations, then, is, that so much of the act under which the Bank of Niles was organized, as purports to confer corporate rights upon the associations organized under its provisions, is unconstitutional and void, and that the demurrer in this case must be sustained."

The court consisted of four judges, three of

whom concurred in that opinion, and the fourth did not dissent, but declined to participate in it, because he had not heard the argument.

In the case of Brooks et al., plaintiffs in error, v. Warren Hill, defendant in error, decided in March, 1848, and not yet reported, the Supreme Court unanimously re-affirmed the decision in the case of Green v. Graves, and decided further, that the associations under the laws in question had in no sense or form a valid and legal existence. The adjudications of the highest tribunal in the State are thus consistent and settled.

I do no propose to re-argue the questions involved in these decisions. The opinion of the Supreme Court discloses fully the grounds of the judgment.

These decisions affect the construction of the organic law of the State in a most important particular, and they involve interests of vast extent. It is difficult to imagine a case in which a disagreement between the federal tribunals and the State judicatories would be more alarming or mischievous. The bills of these associations are principally payable to bearer, and transferable by delivery. Any holder in another State would therefore have a right to sue in the Circuit Court. They are not affected by the statutes of limitations. Michigan Rev. Stat. of 1838, p. 576, sec. 4. It is plain that the consequences would be most disastrous of a decision by this court, by virtue of which a non-resident could, at any time, enforce the collection of the issues of these banks from parties who are prevented by the State decisions from collecting the assets of the bank, or availing themselves of its collateral securities, or compelling a contribution from others.

The obligation of this court to respect and follow the decisions of the State courts on the construction of their local laws will not be disputed: Brown v. VanBraam, 3 Dall. 344, note to same case in 1 Pet. Cond. 159; Elmendorf v. Taylor, 10 Wheat. 152; Swift v. Tyson, 16 Pet. 18, Groves et al. v. Slaughter, 15 Pet. 497; Rowan v. Runnels, 5 How. 139.

817*] *The last case contains the only limitations of the general rule. These limitations do not touch this suit. In it there has been no decision by this court.

There was a decision by the Circuit Court of the United States for the District of Michigan, in the case of Falconer and Higgins v. Campbell et al. reported in 2 McLean, 195. It was a suit against the defendants as directors, and it was followed by a bill in equity in the same court against the stockholders, to enforce the collection of the judgment. This case is still undisposed of—the result, by stipulation, awaiting the decision of the suit now before this court. Surely a single decision in a single circuit, and that virtually appealed from and pending in this court, will not lead to a disregard of the settled and deliberate adjudications of the highest tribunal of a State upon a most important part of its own constitution.

Mr. Chief Justice Taney delivered the opinion of the court:

In this case, the Circuit Court for the District of Michigan have certified that the following point arose in this case, upon which the justices were opposed in opinion:

"Whether the banking associations organized under the Act of the Legislature of the State of Michigan, entitled 'An Act to organize and regulate banking association,' approved March 15th, 1837, and the amended Act, entitled 'An Act to amend an act, entitled "An Act to regulate banking associations and for other purposes,"' approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the constitution of the State of Michigan."

This question, it appears, depends on the construction of the constitution of Michigan, which declares that the Legislature shall pass no act of incorporation unless with the assent of at least two thirds of each house.

The Legislature chosen under this constitution, with the assent of two thirds of each house, passed an act authorizing any persons resident in any county in the State to form associations for banking business, upon the terms and conditions prescribed in the law; and declaring the stockholders in such associations to be a body politic and corporate, by such name as they should designate and assume, and conferring upon them the usual powers of banking corporations.

Under this act of the Legislature, an association of persons was organized, under the name of The Detroit City Bank.

Another act was afterwards passed by the Legislature, under a power reserved in the first, to amend its provisions. And this act, under certain circumstances, made the stockholders liable for the debts of the association.

*The complainants in this case, hav- [*818 ing become creditors of the association, filed their bill in equity, to charge the defendants as stockholders, under the provisions of the last mentioned act. And in the progress of this suit, the question arose which has been certified as above mentioned.

If we regarded the question as an open one, a more particular statement of the provisions of these acts of the Legislature would be necessary, and also of the transactions which led to this suit. And the point certified would require a very careful and deliberate examination by this court.

But it appears that the same question has arisen in the State courts of Michigan, and been decided in its Supreme Court, upon full argument and consideration. We refer to the case of Green v. Graves, decided in 1844, and reported in 1 Doug. Michigan Reports, 351. In that case the court held, that the banking associations organized under the acts of the Legislature mentioned in the certificate of division were corporations within the meaning of the constitution of Michigan; and that these acts were unconstitutional and void.

The point certified is precisely the same. It relates altogether to the construction and legal effect of the constitution of that State, and of the two acts passed by its Legislature. And it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own Constitution and statutes, when that construction has been settled by the decision of its highest judicial tribunal. After the decision

above mentioned, therefore, the question certified cannot be considered as open for argument in this court. The cases of Groves v. Slaughter, 15 Peters, 449, and the two cases of Rowan v. Runnels, 5 How. 134, in relation to the construction of the constitution of Mississippi, stand on very different grounds, as will be seen by a reference to the cases.

Upon this view of the subject, it will be certified to the Circuit Court, as the opinion of this court, that the banking associations organized under the acts of the Legislature mentioned in the certificate of division were corporations within the meaning of the constitution of Michigan; and that these acts of the Legislature are unconstitutional and void.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this 819*] court for its opinion, agreeably to *the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the banking associations organized under the act of the Legislature of the State of Michigan, entitled "An Act to organize and regulate banking associations," approved March 15th, 1837, and the amended Act entitled "An Act to regulate banking associations, and for other purposes," approved December 30th, 1837, were corporations or bodies corporate within the meaning of the constitution of the State of Michigan, and that these acts of the Legislature are unconstitutional and void; whereupon it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

GEORGE B. STEARNS, Administrator de bonis non of John O. Page, Appellant,

v.

RUFUS R. PAGE.

Statute of limitations—sufficiency of averments to induce court to open old account.

The general rules stated which govern a court of equity in opening accounts and sustaining claims which are barred by the statute of limitations.

Great caution is exercised, and the complainant is holden to stringent rules of pleading and evidence.

He must state in his bill, distinctly, the particular act of fraud, misrepresentation, or concealment; must specify how, when, and in what manner it was perpetrated.

The charges must be definite and reasonably certain; capable of proof and clearly proved.

If a mistake is alleged, it must be stated with precision and made apparent, so that the court may rectify it, with a feeling of certainty that they are not committing another and perhaps greater mistake.

And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made.

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

The bill, filed by Stearns as administrator de bonis non of John O. Page, proposed to open and review the accounts of the estate of said Page, which were filed from 1811 to 1816 by his widow and original administratrix, Sarah Page.

The record was very voluminous. There was a bill, and an amended bill, and amendments to the amended bill, and an amendment to one of the amendments to the amended bill. Then there were answers to all these bills, and exceptions to the answers, and motions for the production of books and papers; and a great mass of testimony filed. After all, the record was deemed incomplete, and a certiorari issued to bring up more.

*It is unnecessary to give an extend- [*820
ed account of all these things, because the opinion of the court is so intermingled with, and founded upon, the facts of the case, that it is sufficient for the Reporter to refer the reader to that opinion.

The defendant below pleaded the statute of limitations, although he answered the bill.

In October, 1843, the Circuit Court dismissed the bill, when the complainant appealed to this court.

It was argued by Mr. Evans for the appellant, and Mr. Allen for the appellee. Only such parts of their arguments will be given as bear upon the question of limitations.

Mr. Evans's third point was, that the plaintiff is not barred by the statute of limitations, nor by lapse of time.

The questions how far courts of equity are bound by statutes of limitations, and whether ex proprio vigore, or only by rules of their own by analogy to the statute, and how far and under what circumstances lapse of time is a

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NOTE.—Statute of limitations in equity, in cases of fraud.

In cases of fraud, the statute begins to run from the time of the discovery of the fraud. Buchanan v. Brown, Cooke, 185; Pugh v. Bell, 1 J. J. Marsh. 401; Crane v. Prather, 4 J. J. Marsh. 77; Croft v. Arthur, 3 Desaus, 223; Wanburzee v. Kennedy, 4 Desaus, 474; Van Ryn v. Vincent's Ex'rs, 1 McCord's Ch. 314; Hadix v. Davidson, 3 Monroe, 40; Shield v. Anderson, 3 Leigh, 729; Eigleberger v. Kibler, 1 Hill, 121; Haywood v. Marsh, 6 Yerg. 60.

In legal actions, the act of limitation commences running when the cause of action accrues, not when the plaintiff, who was ignorant before, comes to the knowledge of his rights. The cases in which the Chancellor will not permit the statute to commence running, until the party discovers his rights, are where the rights themselves are purely equitable. If legal rights are pursued in a court of equity, the legal operation of the statute must prevail. Thomas v. Floyd, 3 Lit. 177; Foot v. Farrington, 41 N. Y. 164.

In action on the case, to recover damages for a fraud in the sale of a land warrant, defendant pleaded the statute of limitation, to which plea plaintiff replied that the fraud was not discovered until within three years next to the bringing the suit. Replication was overruled and the plea sustained. Hamilton v. Shepard's Adm'r, 3 Murphy, 115.

It is a mistake to say that the statute of limitations does not run where there is a fraud or trust. Where there is a pure trust in which equity exercises exclusive jurisdiction, or where there is a fraud in which equity exercises a like jurisdiction, it is not within the letter or spirit of the statute.

bar, have been frequently discussed before this and other tribunals.

In many cases relief has been refused; in many cases it has been granted. Many general expressions have been used, and frequent attempts been made to define with precision the principles which govern courts in these cases. But, after all, it comes to exactly this: that there is and can be, in the nature of things, no certain and definite rule on the subject. Each case must depend upon the exercise of a sound discretion, growing out of the circumstances of the case. 3 Johns. Ch. Cas. 586.

Hercy v. Dinwoody, 2 Ves. Jun. 90–93, reviews the cases prior to that time, and repeatedly speaks of the circumstances as influencing the decision one way or the other.

What, then, are the particular circumstances, or the nature and kind of circumstances, which have been held to bar relief?

They will be found to be cases where the fraud was known to the party affected by it, and who has neglected, for a long time, to assert his rights.

Or where the circumstances afford a presumption almost irresistible, that the matter was adjusted and settled by the parties in the time of it.

Or where it appears satisfactorily, that evidence has been lost, papers burned, documents scattered, which could throw light upon it, thus leaving it altogether in doubt whether any fraud were really committed.

Or where it is inequitable to grant relief; where there is a want of good faith and con-
821*] science in the party seeking it; *as where the sureties of an executor were called in, after a long period, to make good the fraud of his testator, etc.; or where the property in question has passed into bona fide hands, large expenditures made, etc.

Where this is done with a knowledge of the party seeking relief, it is a want of good faith to seek it. Where without his knowledge, then it has arisen from want of reasonable diligence —and the court will not permit an innocent man to suffer to help a negligent one.

Or where, on some ground of public policy, it is deemed right not to disturb family settlements and possessions.

But in cases of actual fraud, against the party himself, I know of no case where relief has been withheld, unless the circumstances of the case show clearly and satisfactorily that it was known and acquiesced in, or furnish sufficient presumption that it was settled.

Where is the case that mere lapse of time, without such circumstances, bars relief?

What would be said to a bill charging fraud, admitted by the answer, but repelling it by urging, You are too late. True, I defrauded you; whether you knew it or not, I neither know nor care. I have had the fruits of it thirty years, and I set you at defiance. What would the court say? If they would grant the relief, as I think they would, then it follows that mere lapse of time, in such a state of things, is no bar.

The cases maintain this view. Any quantity of them may be found.

Lord Erskine, in Cotterell v. Purchase (Forrester, 66), says: "No length of time can prevent the unkennelling of a fraud."

Lord Northington, in Alden v. Gregory, 2 Eden, 285, says: "The next question is, in effect, whether delay will purge a fraud. Never, while I sit here. Every delay adds to its injustice, and multiplies its oppression."

So in 2 Ves. Jun. 281, 282. No length of time merely, a bar. See case. And that was a case where no fraud imputed.

So in our own courts, Prevost v. Gratz, 6 Wheat. 481: "It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to give ample and decisive relief."

In Michoud v. Girod, 4 How. 560, 561, no length of time, as against a party to the fraud.

*In Warner v. Daniels, 1 Wood. & [*822
M. on p. 111, Justice Woodbury recognizes the general principle, that, where fraud exists, length of time is no bar, and cites several cases, quod vide.

So it will not be a bar if it would work injustice. Other cases cited by Woodbury, 112.

The true reason for the rule is stated in Fonblanque on Eq. 260 (marginal, p. 331) in notis: "But though courts of equity will interpose to prevent these mischiefs, which would probably result from persons being allowed to bring forward stale demands at any distance of time to disturb the possessions of others, yet, as its interference in such cases proceeds upon the principles of conscience, it will not encourage, nor in any manner protect, the abuse of confidence, and therefore no length of time will bar a fraud."

He afterwards adds, "Unless it appears that the circumstances of the fraud were known to

But if it were on a subject matter cognisable at law, and within the cases provided for in the statute, the statute is as positive a bar in a court of equity as in a court of law. Ib.; Rundle v. Allison, 34 N. Y. 180.

If a right be acquired by fraud, and the cause of action be concealed by fraud from the plaintiff, the statute of limitations will only run from the time the fraud is discovered. Taft v. Wright, 42 How. Pr. 1; Prindle v. Beveridge, 7 Lans. 225; Smart v. Waterhouse, 10 Yerg. 94.

Time does not begin to run to bar a bill to be relieved against fraud, until the fraud is discovered; and held, that where a bill was filed to set aside a fraudulent conveyance, and it does not appear when the fraud was discovered, there was no bar. Baker v. Dobyns, 4 Dana, 226; Raymond v. Simmonson, 4 Blackf. 77; Sears v. Shafer, 6 N. Y. 268.

If a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, courts of equity will interpose, and remove the bar out of the way of the other injured party. Booth v. Lord Warrington, 4 Bro. Parl. Cas. 163; S. C. 1 Bro. Parl. Cas. 445; Hovenden v. Lord Annesley, 2 Sch. & Lefr. 634; South Sea Company v. Wymansdell, 3 P. Wms. 143; De Loraine v. Browne, 3 Bro. Ch. C. 633, 646 and note; Story on Eq. Pl. sec. 751; 2 Story, Eq. Jur. sec. 1521; Brooksbank v. Smith, 2 Younge & C. 58; Oakes v. Howell, 27 How. Pr. N. Y. 145.

As to limitation of actions in equity cases, see note to Thomas v. Heirs, etc. of Harvie, 10 Wheat. 146.

As to laches, or efflux of time, as a defense in equity, see note to Pratt v. Carroll, 8 Cranch, 471.

the party, and that with such knowledge he has lain by a considerable length of time."

Before length of time can operate as a bar, it must appear—be shown affirmatively—that the party had knowledge.

It is important to keep this in mind. Some of the authorities speak of "equitable circumstances" being allowed to repel the bar, from which it would seem to follow, that the burden was on plaintiff; but the true rule is, that time is not of itself merely and per se a bar, but is made so, and may be made so, by the circumstances of the case.

There are numerous other cases, to the effect that time proves no bar, unless under circumstances. 10 Ves. Sumner's edition, 423; 2 Johns. Ch. 252; Pugh's Heirs v. Bell's Heirs, 1 J. J. Marshall; Bertine v. Varian, 1 Edw. Ch. 343.

But where a fraud appears in a stated account, the whole will be opened, though of a great many years' standing. Vernon v. Vawdry, 2 Atk. 119; Whalley v. Whalley, 1 Meriv. 436; 3 Bro. Ch. Cas. Am. ed. 1844, 646, 527, note.

This subject has been before the court recently. Attention drawn to it in Lewis v. Beard, decided this term. They refer to McKnight v. Taylor, 1 How. 161, and Piatt v. Vattier, 9 Pet. 416, as containing their views of the general rules applicable to such cases.

It is to be noticed, that all these cases were cases where the circumstances rendered it inequitable to grant the relief—cases of unmitigated neglect, leaving no reasonable doubt of injustice being done by granting the relief sought.

There was no occasion, therefore, to examine the cases where such circumstances were want- [*823 ing. Adopting the principle *applicable to such a state of facts, and almost the language of an English case, they say the court will not be called into activity, unless where conscience, good faith, and reasonable diligence exist on the part of the plaintiff. Certainly. Conscience and good faith, in not disturbing others' possessions, and reasonable diligence, so that no pretence of acquiescence might arise.

But whatever effect is to be given to lapse of time, or the statute of limitations, ordinarily, it is quite clear, from all the authorities, that it does not begin to operate until the discovery of the fraud. It must be full and complete discovery.

In cases of fraud, the statute begins to run from the time of such full and complete disclosure as enables the parties interested to see the nature and extent of the fraud committed. Croft v. Administrators of Townsend, 3 Desaus. 239; Wamburzee v. Kennedy, 4 Desaus. 474; see also, the cases cited by counsel in 4 Howard, 552: Boone v. Chiles, 10 Peters, 223.

Vague rumors not sufficient. A party possessing imperfect information is guilty of no laches. See cases cited by counsel as before, 4 Howard, 552.

In the case at bar, the discovery was made within six years from filing the bill. So alleged in the bill. Not denied by answer. Is therefore to be taken as true.

The defendant is bound to negative particularly all circumstances alleged in the bill calculated to avoid the statute. 8 Cow. 360; 3 Johns. Ch. 384, 391; Story on Eq. Pl. sec. 754, et seq.; 6 Ves. 586; 2 Paige, 576; same, in 11 Pick. 331; 3 Paige, 273; and cases in any number cited in Cow. & Hill's Phil. Ev. Discovery of paper written by J. O. P. since bill filed, not denied by answer.

The offer to refer to arbitrators is a waiver of the bar relied upon. This not denied by answer. Baillie v. Sibbald, 15 Ves. 185; Farnham v. Brooks, 9 Pick. 212; 2 Story Eq. sec. 1521, et seq.; 1 Ib. sec. 523, et seq.

Equitable circumstances may be shown to repel the whole effect of the bar. 2 Story Eq. sec. 1524; see note on p. 737.

There are other equitable circumstances in the case, which should do away the effect of the lapse of time. The books and papers are in existence, and intelligible.

This was a reason assigned in Pickering v. Lord Stamford, 2 Ves. Jun. 585. But it appearing that the account had been so regularly kept, that there was no difficulty in ascertaining the personal estate of the testator, etc., relief was decreed; and a case, too, where the Master of the Rolls had said he should be glad to get rid of it.

*Time has not obscured the transac- [*824 tions, or only to our detriment. We are the party whom time and death have injured.

The language is 4 Howard is, where the original transactions have become obscure, and by time.

The court must see that time has actually and in fact produced its accustomed effect, before it shall operate.

Above all, where it is evident that no such result has followed, why should effect be given to it?

This case differs from most others which are reported, in this: that the defendant is the original party, with all his faculties and knowledge fresh upon him.

Why then should plaintiff—the estate of J. O. Page—be deprived of its rights? Has he or any of the representatives been guilty of such laches as shall debar him? Upon what ground will the court not be called into activity?

The case furnishes no presumption of payment. It is not a case for presumption. The answer negatives it.

Whatever error or fraud ever existed now exists. Whatever wrong was done remains.

It furnishes no evidence of acquiescence. The nature of the wrong, and the mode of doing it, so far as appellants were concerned, and proportions, three eights, forbid almost discovery. The then administrator disposed to peace, a woman. No means of redress then but at law; no means of proof; no opportunity for a discovery from defendant.

It seeks to disturb no innocent person's possessions, but is against the original wrongdoer. It is not against the representatives of the original party, and who may be supposed to be left without the means of defense, etc., as in Mooers v. White, 6 Johns. Ch. 369. It will scarcely be urged by defendant, that, whatever errors or mistakes were committed, they did not originate in his representations. They could arise from no other source. Nobody else had the means of furnishing the data. Nobody else had inducements to falsify. The answer admits that he gave all the information in his power.

It will be said the answer denies all fraud. This is not sufficient; it does not deny, but admits, the gross errors which are the result of that fraud.

A denial of fraud is not sufficient nor conclusive, if the facts and circumstances are such as to lead to a different conclusion. Howard v. Camp, Walker's Ch. Rep. 427.

Fraud may be presumed in equity, though it must be proved at law. Lord Chesterfield v. Jannsen, 1 Atk. 352; Denton v. McKenzie, 1 Desaus. 300; Warner v. Daniels, cases cited by court, 1 Wood. & M. 103; Watkins v. Stockett, 6 Harr. & Johns. 435; Boyden v. Walker, 2 Ib. 292.

825*] *But if there remains any doubt as to the fraudulent representations of defendant, we are entitled to relief on the ground of mistake.

The court will open a settlement made by mistake, though receipts have passed and a note has been given. 4 Desaus. 122.

"But if there has been any mistake, or omission, or accident, or undue advantage, or fraud, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined." 1 Story's Eq. sec. 523.

In some cases the whole account will be opened, in others a more moderate remedy given. Ib. seq.

And though an account be settled by arbitrators, it is not conclusive if an error can be shown in the account. Patterson v. Pearl, 3 Atk. 530; 1 Madd. Ch. 101.

There must be error enough upon the bill to show there is reason for it; and if plaintiff proves some of the errors, he entitles himself to a decree. Twogood v. Swanton, 6 Ves. 486. He may take advantage of errors in law, as well as in fact. Roberts v. Kuffin, 2 Atk. 112.

Mistake is within the same rule as fraud, both as regards time and reliefs. 2 Younge & Collier, 58, cited in 2 Story's Eq. 739, note.

Time does not run against the remedy for a mistake until it be discovered. 4 J. J. Marshall, 77; Bertine v. Varian, 1 Edw. Ch. 343; 1 Paige, 564. See, also, 1 Wood. & M. p. 107, cases cited by Woodbury, and remarks showing what is equivalent to a fraud—such as availing himself of false representations of others, enjoying fruits, etc.

The relation of these parties was of a fiduciary character, whether it were a copartnership or not—a relation which the courts regard and watch with great scrutiny. Much in any aspect was intrusted to defendant; his control was great, his account large.

1 Story's Eq. 497, note.—"A settled account between attorney and client, or between other persons standing in confidential relations to each other, will be opened more readily than any others; and even, it is said, upon general allegations of error, without any errors being pointed out, when the answer admits errors."

So if a partner, who exclusively superintends the business of the concern, should, by concealment of the true state of the affairs, purchase the share of the other partner for an inadequate price, the purchase will be held void. 1 Story's Eq. sec. 220; Maddeford v. Austwick, 1 Sim. 89; Smith, in re Hay, 6 Madd. 2; E. I. Co. v. Donald, 9 Ves. 275.

*Mr. Allen said, that, where a bill [*828 calls for a general account on the ground of fraud, it is not sufficient to make a charge of fraud in general terms; it should be pointed out, and the point stated. 1 Story's Eq. Pl. 251.

This court will be governed by the decisions of the Sate courts, where the transactions arose in the construction given by them to the statute of limitations. 16 Peters, 455–457.

The statute applies to this case. 1 Mass. Laws, 280, 13th February, 1787; 1 Maine Laws, 297.

This court will not interfere after so great a lapse of time as has passed in this case. 1 Howard, 161, 189. The decisions of the State court upon the subject are found in 3 Pickering, 212, 237–248.

Mr. Justice Grier delivered the opinion of the court:

A brief history of the conceded facts of this case, anterior to the filing of the amended bill, may save the trouble of a more tedious analysis of the bill and answer, with their numerous amendments, and tend to elucidate the merits of the case and the questions decided by the court.

John O. Page, the complainant's intestate, was a merchant in Hallowell, Maine. He built and owned shares in vessels employed in trade, and had a retail shop or store, which, for some years before his death, was managed by his brother, Rufus K. Page. In 1810, John O. Page went to England, leaving his business chiefly in care of his brother, and died there, in February, 1811, intestate, leaving a widow and three minor children. Sarah Page, the widow, took out letters of administration on the estate. She filed an inventory of the property, amounting to the sum of $64,000, and charged herself with additional receipts of cash in the administration accounts afterwards filed, showing the whole amount of the estate to be over $80,000.

Rufus K. Page claimed to have been a partner with his brother in the store, by a parol agreement with him, whereby John should furnish the capital, and Rufus conduct the business, dividing the profits, five eights to John and three eights to Rufus.

The sureties of Sarah Page in her administration bond were Nathaniel Dummer, her father-in-law, and Thomas Bond, Esq., her brother-in-law, who also aided and counseled her in settling the estate. In February, 1812, Chandler Robins, register of the Probate Court, and John Agry, a respectable merchant and ship owner, were mutually chosen by the administratrix and Rufus K. Page to settle all accounts between the estate of John O. Page and Rufus K. Page. By their settlement or award, Rufus was charged as debtor to John—

*For capital advanced to [*827 store	$10,769.00
For five eights of profits of store..	12,934.00
Amounting in all to	$23,703.00
From which was deducted John's debt to store	7,828.00
Leaving a balance due by Rufus to the estate	$15,875.00

After adding and subtracting various other matters of account not connected with the partnership, they found a balance due by Rufus to the estate to be $17,190, of which $8,106 was cash, and the remainder, $9,084, consisted of John's share of the notes and accounts due to the store, and which Rufus retained in his hands for collection. The first administration account filed by Sarah Page acknowledges the receipt in cash of the sum of $8,106 from R. K. Page, and the accounts afterwards filed show that she had received the balance of $9,804, partly in cash and partly in notes.

Sarah Page settled the final account of her administration on the 20th of February, 1816. She died in 1826. In 1828, Stearns, the complainant, intermarried with Louisa, one of the daughters and heirs of John O. Page. In 1834, he took out letters of administration de bonis non on the estate of John O. Page, for the purpose of prosecuting claims under the treaty of the United States with France. After this he commenced an examination of the administration accounts of Sarah Page, and began to entertain suspicions that Rufus K. Page had taken advantage of her ignorance of accounts, and had defrauded her in his settlement. And finally, at November Term, 1838, more than twenty-six years after the settlement of defendant's account with the administratrix, this bill was filed against Rufus K. Page for a discovery and account.

The amended bill abounds in general charges of fraud against the defendant; alleges that he concealed from the administratrix the true state of the affairs of the deceased, which had been intrusted to his care; that the partnership claimed by him with the deceased was a false pretense, "and that the said Sarah did not distrust, or had it not in her power to disprove the same;" that the accounts exhibited of the partnership transactions were totally false and fraudulent in their statements and aggregates, calculated and designed to deceive and mislead.

It charges, also, that some ten thousand dollars of private debts due by Rufus to John were intermingled with the partnership accounts so as to produce an erroneous result, and that he had sold and converted to his own use the brig Emmeline, which was owned, in whole or in part, by John, and rendered no account of the same.

828*] *Afterwards, in October, 1841, by a further amendment to the bill, the complainant admits, that, "from means of information which he now has," there was a partnership between John and Rufus, but insists that the profits were to be divided between them in the ratio of two thirds to John and one third to Rufus.

The defendant, in his answer, after denying the general charges of fraud and mistake, asserts, that he entered into partnership, by parol agreement, with his brother, John, in 1806; that the business of the firm was transacted in the name of Rufus K. Page; that John advanced the capital, and Rufus superintended and conducted the business of the store, and the profits thereof were to be divided five eights to John and three eights to Rufus; that the books of the firm were kept on these principles, and always open to the inspection of John, and frequently examined by him; that when John advanced money or goods for the use of the firm, he took the notes of the firm; and that defendant gave notes to John for goods and money supplied, and (to use his own phrase) "for equalizing the capital," to the amount of over $10,000; that immediately on the announcement of the death of John O. Page, an inventory of the goods in the store was taken and placed in the hands of Bond, the attorney of Sarah Page, the administratrix; that he afterwards settled fully and fairly all accounts with the administratrix and her attorney, and produces the books, and the statement of their final settlement as made out by Robins and Agry, the referees chosen by the parties to make the settlement and adjust the accounts, and shows, moreover, by the administration accounts filed by said Sarah, that he had paid her the balance of over $17,000 found to be due by him according to the account thus stated:

He asserts, moreover, that John owned but one half of the brig Emmeline, which the administratrix afterwards sold to the defendant for the sum of $3,000, with which she charged herself in her administration account. And finally, the answer relies on the settlement of accounts thus made more than twenty-five years before the filing of the bill, as a bar to all further account, especially after so great a lapse of time, when papers are lost, witnesses dead, and transactions forgotton, and pleads the statute of limitations.

Statutes of limitation form a part of the legislation of every government, and are necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction (as in matters of account), they are equally obligatory on each court. In other cases, courts of equity act upon *the analogy of limitations at law, [*829 and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches or unreasonable delay. They also interfere in many cases to prevent the bar of the statutes, where it would be inequitable or unjust; as, for example, if a party has perpetrated a fraud which has not been discovered till the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of the injured party. In cases of mistake also, as well as fraud, they will not consider the statute as running till after the discovery of the mistake, as laches cannot be imputed to the injured party till the discovery of the fraud or mistake has been made. 2 Story's Eq. sec. 1520. But as lapse of time necessarily obscures the truth and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. Charges of fraud are easily made, and lapse of time affords no reason for relaxing the rules of evidence or treating mere suspicion as proof.

If a defendant can be compelled to open settled accounts, to explain or prove each item, after a lapse of near thirty years, by general allegations of fraud—if the fraud can be proved by his inability to elucidate past transactions after so great a length of time, or by showing some slips of recollection, or by contradicting him in some collateral facts by the frail recollection of other witnesses—no man's property or reputation would be safe.

A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment—must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made.

Every case must, of course, depend on its own peculiar circumstances, and there would be little profit in referring to the very numerous cases to be found in the books on this subject. In the case of Michoud v. Girod, 4 How. 830*] 504, lately decided in *this court, transactions were investigated after a lapse of more than twenty years; but the facts proving the fraud were all on record, and were not disputed. The false accounts made out against the estate of the deceased by the executors were on file, and their iniquity was apparent on their face. Moreover, the complainants resided in Europe, and were kept in ignorance of their rights, and hindered from prosecuting them by the promises, threats, and fraud of the guilty parties.

In this case, the complainant seeks to open an account stated and settled twenty-six years before the filing of his bill, and this account not rendered by the defendant to a woman unacquainted with business, and received by her without examination, but stated from the books, by referees or arbitrators chosen for the purpose, and in the nature of an award between the parties, executed and acquiesced in by both without complaint for a quarter of a century.

Six years is a statute bar to an action of account, both at law and in equity. Has the complainant stated in his bill, and sustained by proof, such a case as would justify the interference of a court of equity after so great a lapse of time?

1. Has he discovered anything which was not as open to discovery by himself or his predecessor in the administration, more than twenty years before?

2. Has he shown any fraud, misrepresentation, or concealment, practiced by the defendant on Sarah Page, and "made it palpable to the court," so that it would be justified in directing the whole account to be opened and taken de novo?

3. Or has such clear mistake or omission been shown with regard to any of the items of the account, that the court would grant liberty to the complainant to surcharge and falsify generally, or as to any particular item?

In order to repel the imputation of laches, the complainant states that he did not take out letters of administration de bonis non on the estate of John O. Page till the year 1834, eight years after the death of Sarah Page, the administratrix, and six years after his marriage with one of the heirs; "that, on examining the papers and accounts, he discovered that there was a considerable amount of property of said estate included in the inventory which had not been administered by said Sarah in her lifetime; that, in pursuing the inquiry, he gradually obtained information by various means, afforded, in the first place, by the state of those papers, and from sundry other sources and conversations with persons now living or deceased, which produced the persuasion and firm belief that there was much of said property in the hands and possession of Rufus K. Page which has not been exhibited or accounted for by him," etc.; *"but that how far the [*831 said Sarah Page was in the knowledge and possession of all the information in respect to the premises that has come to his knowledge, he is not able to say, on account of her death before he had any reason or opportunity to ascertain the same." It appears, therefore, that the complainant has discovered no fact of which Sarah Page was ignorant. He can specify no misrepresentation, concealment, or fraud, practiced by defendant, which has for the first time come to light. He does not state what property was not accounted for by Sarah Page, or how she was deceived or defrauded by Rufus. In fact, taking the various bills and amendments together, it is very plain that this bill was filed on suspicion of fraud, and for the purpose of a discovery of facts from the defendant on which to found specific charges of fraud. It is clear, also, that these suspicions had their origin, not on the discovery of any new facts concealed from his predecessor in the administration, but from his necessary ignorance of facts of which Sarah Page and her counsel must have been fully conversant, from the very nature and circumstances of the case.

When this bill is devested of its general and vague charges of fraud in matters of which the complainant could have no personal knowledge, it might well be doubted whether it contains sufficient matter properly set forth to entitle the complainant to call on the defendant, after so great a length of time, to answer to its allegations and make a discovery with regard to facts so likely to be forgotton or indistinctly remembered.

But, waiving this point, let us examine the specifications of fraud or mistake which some attempts have been made to substantiate.

1. The complaint about the ship Horatio being found untenable is left out of the amended bill, and need not be noticed.

2. The bill denied that any partnership had existed between Rufus and John O. Page; but, after taking testimony to contradict the answer

in this respect, an amendment, filed in 1841, admits the partnership, but charges that the terms were different from those stated in the answer. On this point, the answer, being responsive to the bill, must be taken to be true unless disproved by two witnesses, or something equivalent. The memorandum in the handwriting of John O. Page, not being signed by Rufus or himself, and never communicated to Rufus or assented to by him, cannot be received as evidence of the fact.

3. The notes of Rufus to John for $10,000, if given, as stated in the answer, to show the amount of capital advanced to the store by John, are fully and properly accounted for. 832*] *The referees who stated these accounts had the partnership books and the parties before them, and could best judge how the capital account had been kept, whether by credits in the books or giving the notes of the firm, which would be the notes of Rufus K. Page. The parties acquainted with the transaction had no difficulty about it, and the mere suggestion of a stranger to the whole transaction, now made, some thirty years afterwards, that possibly these notes were the private debt of Rufus, and not given to represent the capital of the store, cannot be received as evidence of mistake or fraud. The answer being responsive to the bill, and uncontradicted by the evidence, is conclusive of the fact. The accounts show that Rufus accounted with the administratrix for the goods of the store inventoried on the decrease of John Page, for the capital of the firm, amounting to over $10,000, and for John's share of the profits, exceeding $12,000. The complainant has wholly failed to show any mistake, omission, fraud, concealment, or misrepresentation, on the part of Rufus K. Page, in connection with the subject.

4. The interest of John O. Page in the brig Emmeline was transferred by Sarah Page, the administratrix, to Rufus, and the amount accounted for by her in the inventory and administration accounts settled by her. Whether the money was paid to her by Rufus, as he asserts in his answer, or she made a gift of it to him on account of the known intention of her husband to give it to him by his will, is wholly immaterial in this case, as the administrator de bonis non can have no concern with property administered and accounted for by his predecessor in the trust.

In the course of the argument, the learned counsel noticed other items of account, which they alleged to be erroneously stated or not sufficiently explained; but as they were not charged in the bill, they will not be noticed.

The decree of the Circuit Court must therefore be affirmed, with costs.

Order.

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

834

*THE UNITED STATES, Plaintiffs [*833 in Error,

v.

RICHARD KING and Daniel W. Coxe, Defendants.

Louisiana practice—facts found by court—contract between Spanish government and Marquis de Maison Rouge construed.

The case of the United States v. King and Coxe, 3 Howard, 773, reviewed.

According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions.

But this practice is not applicable to the courts of the United States. A writ of error in them brings up only questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below.

Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where a special verdict is found or a case is stated, in neither of which there is any necessity for a bill of exceptions.

Where the court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is closed against it.

Leaving this statement out, there is still enough in the record to enable the court to take cognisance of this case, because the defendants below asserted a legal title to be in themselves by virtue of a grant which severed the land claimed from the royal domain.

The construction of this grant, issued in 1797, by the Baron de Carondelet, to the Marquis de Maison Rouge, is a question of law upon which this court must review the decision of the Circuit Court.

The two grants or contracts of 1797 and 1798 must be construed together. That of 1797 refers to the one of 1795, and cannot be understood without it.

The contract of 1795 was for the benefit of the emigrants, and must have been intended to be shown by Maison Rouge to those persons whom he was inviting to settle upon the land. No personal benefit or compensation to himself individually is provided in it. The object was to promote the policy of the Spanish government, as whose agent Maison Rouge acted, and not as the proprietor of the land.

The contract of 1797 was intended to supply two omissions in that of 1795, namely, to designate with more particularity the place where the settlement was to be made, and to provide for a larger number of families than was mentioned in the original contract.

For both these purposes, a certain tract of land was marked out, and "destined and appropriated" for the uses of the settlement.

The grant of 1797 does not contain the words usually employed in Spanish colonial grants, when there was an intention to sever land from the royal domain and convey it as individual property.

THIS case was formerly before this court, and is reported in 3 Howard, 773.

Being sent down to the Circuit Court under a mandate from this court, it came up for trial before the Circuit Court in May, 1845, when sundry proceedings took place before that court, which it is not necessary to specify. The result was, a judgment in favor of the United States, from which King and Coxe sued out a writ of error, and brought the case again before this court.

Whilst so pending, this court, on the 16th of February, 1848, passed the following order, which was announced by Mr. Chief Justice Taney:

834*] * King and Coxe v. *United States. } Supreme Court of the United States, December Term, 1847.

"Upon examining the record now before the court and referring to the points originally in controversy and still remaining undecided, the court are of opinion, that the matters in dispute can be more conveniently and speedily heard, and finally determined, by re-instating the case in this court in the condition in which it stood at December Term, 1844, previous to the judgment rendered at that term; and the counsel for the respective parties having, upon the recommendation of the court, consented to re-instate the case in the manner proposed—

"It is thereupon, with the consent of counsel, as aforesaid, ordered, that the judgment rendered in this court at December Term, 1844, and all the proceedings thereon, and subsequent thereto, be, and the same are hereby set aside and vacated, and the case as it stood at term aforesaid, previous to the said judgment, re-instated. And it is further ordered, that it be placed on the docket of December Term, 1848, to be argued at that term on such day as the court may assign—the United States being, as before, the plaintiffs in error, and King and Coxe the defendants."

The case was therefore before the court just as it stood prior to the argument of it, as reported in 3 Howard, 773.

The history of the case is there given, and all the documents upon which the claim of King and Coxe was founded are set forth at large. It is unnecessary, therefore, to repeat them here.

The United States being plaintiffs in error, the argument was opened and concluded by Mr. Toucey (Attorney-General), who was replied to by Mr. Coxe and Mr. Gilpin, on behalf of the defendants in error.

All the parts of their arguments are omitted, except those which bear upon the points decided by the court.

The Reporter has his own notes of Mr. Coxe's argument, but prefers to print the argument of Mr. Gilpin, as that gentleman has been kind enough to revise the notes of his argument.

Mr. Toucey (Attorney-General), for the plaintiffs in error:

Whether the paper dated 20th June, 1797, signed by the Baron de Carondelet, was a grant to the Marquis de Maison Rouge of a complete title to the thirty square leagues, is the principal question presented upon the record. It is supposed, that, under the Spanish or any other government, if a grant from the sovereign is set up and relied on, it would be necessary to appear, that there was an intention to make such grant. The intention is the principal 835*] thing. It is the essence of the act. *It is the disposing will which governs, when expressed. It lies at the foundation of all law and every contract. The rule that the intention must govern is not the property of any one system, but a maxim of universal law. If such an intention to make a grant do not appear, but the direct contrary, the supposition of a grant is absolutely excluded. And if this be the state of the case upon the face of the assumed paper title, the result will be fortified, if it be possible, by the fact that the practical construction of both parties was in accordance with it. Such is the precise condition of the grant now alleged as a complete title in this court.

It will be necessary to see, 1st, what was agreed to be done, on the part of the Spanish government; 2d, what was actually done, in pursuance of that agreement; and 3d, in what light it was viewed by the parties after it was done, or the practical construction.

First, what was agreed to be done by the Spanish government. This is in the form of a written agreement, clearly expressed, and not liable to misinterpretation, bearing date March 17th, 1795. From this paper it appears there were certain "families who proposed to transport themselves" to Louisiana. The Marquis proposes to bring thirty families, "for the purpose of forming an establishment with them, on the lands bordering upon the Washita." The government agrees. 1st, to pay two hundred dollars to every family of two laborers, and in proportion; 2d. to furnish them with a guide, and provisions, from New Madrid to Washita; 3d, to pay for transportation of their baggage and implements, not to exceed three thousand pounds for each family; 4th, to give each family of two four hundred arpents of land, ten arpents by forty, and in proportion for a greater number; 5th, to give the same to their European servants with families, after six years. This contract was signed, "that it might come to the knowledge of those families who propose to transport themselves hither." It proposes to give nothing to anyone but the thirty families who are to constitute the establishment, and their European servants. It stipulates to give nothing to De Maison Rouge for his services, neither land nor money. There is not a stipulation in it for his benefit. The whole benefit stipulated, including the land promised, is to go to the thirty families composing the establishment. The whole contract was for their benefit. This is the clear, express, unequivocal contract at the outset, and there is no pretense that it was ever modified.

The compensation to De Maison Rouge for his services was to be derived elsewhere, if he had any; either from collateral advantages, or through the emigrants, or in some other mode, which does not appear, except in the case of Alexander *Lawrence, where the Mar- [*836 quis secured the right to take to himself either the money or the land. This was the contract, "for the establishment on the Washita of the thirty families of farmers destined to cultivate wheat," which was approved by the king, "in all its parts." Thus, and thus only, it became obligatory upon the Spanish government, and its officers derived their authority to carry it into effect. The effect of it was to constitute the Marquis de Maison Rouge an agent of the Spanish government; it clothed him with authority to act in its name; it was his letter of credence to the emigrants who proposed to come; and that was its avowed object, as expressed in the concluding paragraph. When used by the agent in treating with the emigrants, and acted upon by them, it became a complete and perfect contract between the Spanish government on the one hand, and the emigrants on the other, by which they were entitled to demand of the government the stipulat-

ed benefits. Thus far, then, there is no intention manifested by the Spanish government to bestow these benefits upon the government agent, or to permit them to be intercepted by him; but the express language of the contract, which received the royal assent, shows the direct contrary in every particular. Having this safe ground at the outset—certain knowledge of the previous contract, of the land promised to be given, of the persons to whom it was to be given, and of the agency of De Maison Rouge—it will be difficult to go astray afterwards, in tracing the acts of public functionaries, done in pursuance of this contract, and by virtue of this authority.

The absence of the usual formalities tends strongly to show that here was no grant or concession. There was no petition for a grant to De Maison Rouge. He did not ask for any land. There is no decree or adjudication granting a petition. There is no warrant of location, permit to occupy, or any other formality, giving him possession, with promise of title upon performance of the usual or the stipulated conditions. There was no consideration proceeding from him, moving the government, or that could be supposed to move the government, to grant to him this territory with the colonies upon it. He had introduced no emigrant at his own expense. The government had introduced all the families at its own expense. It had paid their transportation, furnished them with guides and provisions, given them a bounty in money, and promised them and their servants lands in proportion to their numbers. It had even paid the expenses of De Maison Rouge, as appears by the letter of Baron de Carondelet of the 1st of August, 1795, to Filhiol, the commandant of the post. "The journey of M. Maison Rouge has cost more than five hundred dollars."

837*] *But to come to the paper alleged to be a grant to De Maison Rouge. Why should the Spanish government give the whole territory to him? It does not appear, upon the face of the instrument, that the government intended a benefit to him. The words are, "We destine and appropriate for the establishment of the aforesaid Marquis de Maison Rouge." It is called his establishment by way of distinction. Here is no grant in form to him, nor to any other person. The instrument does not name any grantee, nor contain words of grant. All the precedents require both. The instrument begins with the cause of the designation of the land. Because the establishment was nearly complete, it had become desirable to remove, for the future, all doubt respecting other families or new colonists who might come to establish themselves. The lands are expressly designated for the establishment, and the original contract, the king's approval, and the recital in this instrument, all show that the establishment is the colony of thirty families. The fact that the lands comprised in the figurative plan, as it is called, are the identical lands to be given to the emigrants composing this colony, as entirely decisive against the idea of a grant to De Maison Rouge. It was not the intention of the Spanish government to require the colonists to look to him for the title to *their lands*, but directly to the government, who *introduced them*, paid their expenses, gave them a bounty in money for coming, and promised to give them their lands upon the condition of inhabiting and cultivating them. The government did not intend to invest him with the title, because that would incapacitate it to perform its contract with the colonists, and with the European servants who should at the end of six years have become heads of families. The original contract, being specifically referred to, is incorporated in this instrument as fully as if recited verbatim, and the lands are designated under it, for the purposes set forth in it. There is no escape from the conclusion. The designation of the lands for the colony is expressly made "under the terms stipulated and contracted for" by the Marquis; and the royal order approving of that contract, and authorizing it, is expressly referred to by name, description, and date. The effect of this act of the government was merely to prescribe certain limits within which these colonists should receive their lands, when they should become entitled to them, and within which other emigrants should not be permitted to intrude, without the consent of government. That is the effect produced, and it is the only effect produced. It does not come up to the standard of an inchoate title to De Maison Rouge. He had no title at all—no promise of title to him upon the performance of conditions, express *or implied, imposed by the act of [*838 the parties or by act of law.

Having thus shown what the government contracted to do, and what the government had done, and that neither in the one nor the other was there manifested an intention to convey this land to the Marquis de Maison Rouge, but the direct contrary, it remains to be seen how the parties regarded it, and what was the practical construction given to this instrument by both of them.

First, the colonial government did not put such a construction upon it as would vest in him the title to the thirty leagues square, and require the colonists to look to him, instead of the government, for their titles. They did not regard the land as his property. The letters of Baron de Carondelet to Filhiol, the commandant of the post, abundantly show this. Subsequent grants in the same tracts, made by the government from time to time, show it also. The inventory made after the death of De Maison Rouge by Filhiol, as commandant, it is admitted by the claimant, did not contain this land. This was in April, 1800, before the secret treaty of San Ildefonso.

Second, the Marquis de Maison Rouge puts no such construction upon this instrument. This is shown by his letters to Filhiol. In that of the 21st of March, 1796, speaking of the claims of a Mr. Morrison, he says: "Mr. Morrison alleges that M. Miro has promised to him that quantity of land, but he does not say that it was not for him alone, but for the sixteen families and upwards of Americans he was to have brought into the country and settled in the Prairie Chatellraud. Moreover, he has promised to discover a saline. He has fulfilled none of these conditions. This extent not having been granted to him individually, it still remains in the domain of the king. He has no more right to claim it than I would have to consider myself as proprietor of the

whole extent that has been granted to me, to settle agreeably to my contract with the families that I have announced to the government, and that they know to be in mission for this place." Others of the letters are equally explicit. In his will, dated the 26th of August, 1799, which is subsequent to the date of the alleged grant, he declares that he possesses property in Paris, Berry, and Querry, which had been confiscated; he gives a house and land which he had purchased, to his maid servant; and he also mentions the place where he has all the articles necessary to build a saw-mill for cutting plank, and a pump auger. But there is no mention of this tract of thirty square leagues, which is now claimed as his property. He nominates Louis Bouligny his legatee under a universal title: "And also the residue and re- 839*] mainder of my *goods, rights, and actions, as well within as out of this province, in case my parents are dead, I constitute and name for my sole and universal heir the aforesaid Louis Bouligny." The defendants now claim the absolute title to thirty square leagues of land under this clause of the will, by this description of goods, rights, and actions.

Third, the inventory which was made by the government officer does not include this land. It was made when the agent of the legatee was present, sent from New Orleans to look after the property of the deceased. Filhiol states that he made the inventory "in presence of M. Michael Pommier, charged with a power from M. Louis Bouligny," but there was not any land mentioned in the said inventory.

Mr. Gilpin, for the defendants in error:

Under the decision of this court at the last term, this case is now presented as if the decree and opinion given in January Term, 1845 (3 Howard, 784), had never been made. The case was then treated as an appeal, presenting for revision all the facts and law. It was, in fact, a petitory action brought here by a writ of error; and, having been tried below without a jury, under the provisions of the Louisiana Code of Practice, art. 494, 495, which are adopted by the Act of Congress of the 26th of May, 1824, 4 Stat. at Large, 63, the finding of the court on all matters of fact was conclusive, and not subject to revision. Parsons v. Armor, 3 Pet. 414; Hyde v. Booraem, 16 Pet. 169, 176; Minor v. Tillotson, 2 How. 394.

It appeared, too, on the argument at the last term, that the record before the court in 1845 was extremely imperfect—not presenting all the evidence which was before the Circuit Court, as required by the Louisiana practice on appeals (Thayer v. Littlefield, 5 Rob. 153; Parkhill v. Locke, 15 La. 443; Mitchell v. Jewell, 10 Martin, 645; Davis v. Darcey, 1 New Series, 589), nor correctly exhibiting the character of some of the material evidence which was presented. The depositions on which this court mainly relied, as establishing the certificate of Trudeau to the plano figurativo to be antedated and fraudulent (3 Howard, 785), were shown to be ex-parte, and to have ben contradicted by many witnesses whose evidence did not appear in the record.

What we are now to discuss is, therefore, a case presented by a writ of error, founded on an allegation of an erroneous judgment of the Circuit Court of Louisiana on certain points of law apparent on the record.

What was the case before the Circuit Court?

By the Treaty of the 30th of April, 1803, sec. 3, 8 Stat. at *Large, 200 all the [*840 inhabitants of Louisiana, at the time of cession, were protected in the full enjoyment of their property—every species of property, real and personal, whether held by complete or inchoate titles. Soulard v. United States, 4 Pet. 511; Delassus v. United States, 9 Pet. 117. The defendant King is in possession of a tract of 4,666 acres on the west bank of the Washita, from which the United States seek to evict him. He has vouched in warranty his grantor, the defendant Coxe, in the mode prescribed by the law of Louisiana. Civil Code, secs. 2476, 2493; Code of Practice, secs. 378, 380, 384. Coxe has answered, and claims to have been the owner under a title derived directly from the Marquis de Maison Rouge, to whom the Spanish government granted, on the 20th of June, 1797, a large tract, which continued to be the property of his devisee at the time of the treaty, and of which the tract in controversy is part. Coxe also asks, by way of reconvention (Code of Practice, sec. 375), that his own title to two thirds of the whole tract granted to Maison Rouge may be confirmed; the other one third being vested, as he alleges, in the heirs of Turner, as set forth in a document describing their respective interests, and marked Schedule A. On the trial, much evidence, documentary and parol, was offered on the part of the defendants to maintain, and on the part of the United States to deny, the validity of the grant to Maison Rouge, and the title of the defendants under it. It was chiefly denied on three grounds: first, that the grant of the 20th of June, 1797, was connected with, or supplementary to, a contract made on the 17th of March, 1795, between the Spanish government and Maison Rouge, for the settlement of emigrant families at Washita, the conditions of which agreement, it was contended, had not been fulfilled by him; second, that the land embraced in the grant had never been separated by a survey from the royal domain, the one certified by Trudeau being alleged to be antedated and fraudulent; and, third, that the defendant Coxe had estopped himself from all claim under the grant by accepting a league square, which was patented to him by the United States on the 20th of December, 1842, pursuant to provisions of the Act of Congress of the 29th of April, 1816, 3 Stat. at Large, 328. The Circuit Court dismissed the plea of reconvention, found the grant of the 20th of June, 1797, to be valid, and adjudged the title of the defendants to be good. A full opinion was prepared, filed, and is annexed to the record, setting forth the grounds on which the decree was made.

What error of law in these proceedings appears by the record to have been committed by the court?

No exception was taken at the trial to the opinion of the *court, or to the judg- [*841 ment; bills of exceptions were taken, both by the plaintiffs and defendants, to decisions in regard to the admission and rejection of evidence; no other exceptions appear upon the record.

Although the decisions excepted to by the defendants are clearly erroneous, yet it is not now material to inquire into them, as the judgment of the court is in their favor. It would be material so to do, if the decision of this court should be in favor of the plaintiffs, and they entitle the defendants, in that event, to the protection of a venire de novo instead of a final judgment against them, so that they may have the benefit of the evidence of which the decisions excepted to deprived them.

Was there any error in law in the decisions excepted to by the plaintiffs?

The first, fourth, and fifth bills of exceptions have been abandoned by the Attorney-General.

Was there any error in law, in the form or substance of the judgment itself, on a review of which by this court it can be legally reversed?

No exception has been taken to the opinion of the Circuit Court, or any portion of it; there is no agreed case; there is no agreed or reported statement of facts; there is no testimony reduced to writing and sent up by the clerk; there is no certificate that all the evidence received in the Circuit Court is, directly or indirectly, before this court. If, then, there is any error (beyond those in the bills of exceptions already disposed of), it must be in the mere terms and language of the decree itself. Now, the rules by which this is to be ascertained are incontrovertible. So far as the decree establishes a matter of fact, it is conclusive, and cannot be revised. Penhallow v. Doane, 3 Dall. 102; Wiscart v. Dauchy, 3 Dall. 327; Jennings v. Thomas, 3 Dall. 336; United States v. Casks of Wine, 1 Pet. 550; Parsons v. Bedford, 3 Pet. 434; United States v. Eliason, 16 Pet. 301; Minor v. Tillotson, 2 How. 394; Phillips v. Preston, 5 How. 289. So far as the decree establishes a matter of law dependent on a certain state of facts, it is conclusive, unless there be a formal exception taken to such decision, with a statement of all the facts necessary to its revision. Dunlop v. Monroe, 7 Cranch, 270; Walton v. United States, 9 Wheat. 657; Parsons v. Armor, 3 Pet. 414; Carver v. Jackson, 4 Pet. 80; Hyde v. Booraem, 16 Pet. 169, 176; Phillips v. Preston, 5 How. 289; Louisiana Code of Practice, secs. 488, 489, 495; Porter v. Dugat, 9 Martin, 92; Mollew v. Thompson, 9 Martin, 275; Kimball v. Lopez, 7 La. 175. It is a presumption of law, that if any state of facts would sustain the decree, such state of facts was established in the Circuit 842*] Court. Campbell v. Patterson, *7 Verm. 89; Butler v. Despalir, 12 Martin, 304; Mitchell v. White, 6 N. S. 409; Hill v. Tuzzine, 1 N. S. 599; Piedbas v. Milne, 2 N. S. 537; Fitz v. Cauchois, 2 N. S. 265; Miller v. Whittier, 6 La. 72; Love v. Banks, 3 La. 481. These rules apply as well to a decree of a court authorized to decide matters of fact, as to the verdict of a jury. Mayhew v. Thompson, 6 Wheat. 130; Livingston v. Story, 9 Pet. 656; Reynolds v. Rogers, 5 Hamm. 172; Franklin Bank v. Buckingham, 12 Ohio, 482; M'Girk v. Chauvin, 3 Missouri, 237. Even if the decree is obscure or defective in form, or contains what is surplusage, yet it is sufficient if it follows the issue, and finds, affirmatively or negatively, the facts *contested* therein. Brown v. Chase, 4 Mass. 436; *Deering* v. Halbert, 2 Litt. 292; Todd v. Potter, 1 Day, 238; Shepherd v. Naylor, 6 Ala. 638; Keene v. McDonough, 8 La. 187.

Examine, by these rules, the errors alleged to exist in the terms and language of this decree.

First, it is said that the Circuit Court adjudicated the title to lands for which the United States have not sued. The language of the decree does not warrant this allegation; the dismissal of the plea of reconvention, shows, conclusively, that the decree was confined to the lands claimed in the petition of the United States. The introduction of the title of Maison Rouge was by the United States, in their petition, wherein they declare it to be a pretended title, under which the defendants set up a claim which they deny. The terms of the decree (even if obscurely expressed) are inconsistent with any other judgment than that of the right of the defendant King to the tract conveyed and warranted to him by Coxe, and so described in Schedule A, which is the land sued for by the United States, and no more.

Second, it is said that the Circuit Court erred in adjudicating the instrument of the 20th of June, 1797, to be a grant to Maison Rouge. Now, in the first place, it is to be remarked that the Circuit Court do not say this; their decree is, that the grant of land under that instrument, and so held by the defendants, is valid; that their title to the possession of it, as against the United States, is sufficiently established, and that they ought to be quieted in that possession. Such decrees against a claim of the United States, in a similar action, have been sustained by this court even where the defendant has received no formal instrument of grant whatever. United States v. Fitzgerald, 15 Peters, 420. They will, in such case protect an equitable as well as a strictly legal title; they will not give back to the United States property which has been separated from the royal domain. But, besides, if the Circuit Court has *adjudged this instrument [*843 to be a valid grant—a complete title in form—have they erred, or, if they have erred, can this court revise such error?

Even if the Circuit Court committed an error, this court cannot revise it. It is a question of fact. If the instrument was signed by the governor—if it was in the form required by the Spanish law—if there was a survey ascertaining the land granted—if the conditions of the grant were performed by the grantee—then the instrument was a valid grant. All these are questions of fact; they have been adjudged affirmatively by the Circuit Court; they cannot be revised here. If the Circuit Court erred, their error was in no sense an error of law; if any state of facts whatever could establish, in point of law, such a decree as they have made, that state of facts must be presumed to have been proved. In any event, this decision of the Circuit Court is not their judgment on the point at issue; it is merely their reason for the judgment; it is mere surplusage; if omitted entirely, the decree would still have been responsive to the issue.

It is not, then, necessary—it is not even competent—for this court to inquire whether the grant of the 20th of June, 1797, was a valid grant, even if the point were presented by the record, which it is not. But were that point

examined, the decree of the Circuit Court would be fully sustained. The power of the governor to make the grant is indisputable; and the language of the grant is, according to the Spanish law, such as to convey an absolute title. United States v. Arredondo, 6 Pet. 728; United States v. Clarke, 8 Pet. 436. It was located by a survey—a plano figurativo—made by the Surveyor-General. The conditions contained in it were performed, and were formally certified so to have been by the competent Spanish authorities. The objections—the only objections—have been two, both of which are futile. The genuineness of the certificate of the Surveyor-General was disputed; this objection has been now but faintly pressed, if not entirely abandoned. It rests on the ex parte evidence of McLaughlin, Filhiol, and Pommier, which will not stand the test of examination. The performance of the conditions has been denied by an ingenious argument, which seeks to connect the grant of 1797 with the contract of 1795, though in reality the first was meant to supersede the last—to take its place. The contract involved the Spanish government in heavy expenditures and was particularly adverse to the policy of Morales, then becoming all-powerful in the civil administration of Louisiana. It was considered by him desirable, especially after the Treaty of 1795, to promote large settlements of foreign emigrants, excluding the 844*] *Americans; in that part of Louisiana, but, at the same time, to avoid the heavy expenditures and numerous inconveniences of the contract system. Hence the grants to Maison Rouge and Bastrop, in lieu of the previous plan of contracts and payments by the government. To suppose that the former was a continuance of, and not a substitute for, the latter, is not only unsustained by any evidence, but is adverse to the very objects the Spanish government sought to attain.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is one of much interest to the parties concerned and to the public.

The peculiar practice of Louisiana, which has been adopted in the Circuit Court for that District has produced some embarrassment in this case. According to the laws of that State, unless one of the parties demurs on trial by jury, the court decides the fact as well as the law; and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the Superior Court, therefore, in the State practice necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding.

In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other States. And the removal of the case from the Circuit Court to this court is regulated by Act of Congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a circuit court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the Circuit court upon questions of fact are as conclusive as if they had been found by the jury.

When this case was tried in the Circuit Court, neither party demanded a jury, and the questions of fact which arose in it were decided by the court. The record transmitted on the writ of error set forth all the evidence, as is usual in appeals in the State courts; and it appeared that the authenticity of one of the instruments, under which the defendants in error claimed title, was disputed, and the conflicting evidence upon that subject stated in the record. The Circuit Court decided that the paper was authentic, and executed at the time it bore date. This question was fully argued here, as will appear by the report *of the case [*845 in 3 Howard, 773; and the attention of the court not having been drawn to the difference between an appeal in the State practice and the writ of error from this court, it did not, in considering the case, advert to that distinction. And being of opinion that the weight of evidence was against the authority of that instrument, it rejected it as not legally admissible, and, proceeding to decide the case as if it were not before the court, it reversed the judgment which the court below had given in favor of the defendants. Upon reconsideration, however, we were unanimously of opinion, that the decision of the Circuit Court upon this question of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic, and sufficiently proved. And in order that the defendants might have the benefit of the decision in the Circuit Court, the case was re-instated in this court at the last term, to be heard and decided upon the questions of law presented by the record, as it was originally brought up, without prejudice from the former decision of this court.

It has been again argued at the present term; and the case, as it appears upon the record, is this:

It is a petitory action, brought and proceeded in in the Circuit Court, according to the Louisiana State practice. The suit is brought by the United States against Richard King, one of the defendants in error, for a parcel of land lying in that State, and described in the petition. King answered, admitting that he was in possession of the land, and claiming title to it under a conveyance with warranty from Daniel W. Coxe, the other defendant; and prayed that he might be cited to appear and defend the suit. On the same day, Coxe appeared and answered, and alleged in his defense, that the land sued for was part of a large tract of land which had been granted by the Baron de Carondelet to the Marquis de Maison Rouge, by an instrument of writing, dated June 20th, 1797, which he sets out at large in his answer; and by sundry intermediate conveyances, he deduces a title from Maison Rouge to himself for three fourths of the entire tract. He insists that the instrument of writing executed by the Baron de Caronde-

let was a complete grant conveying to the Marquis de Maison Rouge an indefeasible title to the land therein mentioned, and that, from the date of the said instrument, it ceased to be a part of the royal domain, and became the private property of the said Maison Rouge. He also avers that this grant was made in consideration of services rendered by Maison 846*] Rouge in settling thirty *emigrant families on the Washita River, in Louisiana, under a contract made by him with the Baron de Carondelet, dated March 17, 1795, and approved by the King of Spain on the 14th of July in the same year. And he then proceeds, in his answer, to assume the character of plaintiff in reconvention, and prays that the grant of the 20th of June, 1797, to the Marquis de Maison Rouge may be declared valid, and that he and King may be recognized to be the lawful owners of the parts of the said grant held by them, as described in the answer of King, and in a schedule annexed to his (Coxe's) answer, and that they may be quieted in the ownership and possession of the same, and that the United States may be ordered to desist from treating and considering any part of said grant, as designated in a certain survey by John Dinsmore, referred to particularly in his answer, as public property.

Upon this issue the parties proceeded to take testimony, which is set out in full in the record. A great part of it is immaterial, and much of it relates to questions of fact which were disputed in the Circuit Court. This mode of making up the record, which is borrowed from the State practice, is irregular, and unnecessarily enchances the costs when a case comes up on writ of error. In cases where there is no jury, the facts, as decided by the court, ought regularly to be stated, and inserted in the record, provided the parties cannot agree on a statement. This is most usually done by the court in pronouncing its judgment. In this case, there is a statement by the judge who decided the case, containing his opinion both on the facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot therefore be resorted to as a statement of the case. And as there is no case stated by consent, it is necessary to examine whether the facts upon which the questions of law arise sufficiently appear in the record to enable this court to take cognizance of the case.

As we have already said, the action brought by the United States is what, in the practice of Louisiana, is called a petitory action, and is in the nature of an ejectment in a court of common law. In a State court where there is no distinction between courts of law and courts of equity, the plaintiff in a petitory action might recover possession, or a defendant defend himself, under an equitable title. But 847*] the distinction between law *and *equity is* recognized everywhere in the jurisprudence of the United States, and prevails (as this court has repeatedly decided) in the State of Louisiana, as well as in other States. And if these defendants had possessed an equitable title against the United States, as contradistinguished from a legal one, it would have been no defense to this action. But no such title is set up, nor any evidence of it offered. The defendants claim under what they insist is a legal title, derived by the Marquis de Maison Rouge from the Spanish authorities.

Under the treaty with Spain, the United States acquired in sovereignty all the lands in Louisiana which had not before been granted by the Spanish government, and severed as private property from the royal domain. It was incumbent, therefore, upon the defendants, to show that the land in question had been so granted by the Spanish authorities; otherwise the United States were entitled to recover it.

The defendants, in their answer, allege, that it is part of a tract of land that was granted to the Marquis de Maison Rouge by an instrument of writing executed by the Baron de Carondelet in 1797. This instrument refers to the royal order of 1795, and the figurative plan of Trudeau. The defendant Coxe also refers in his answer to these instruments, as containing a part of the evidence of this title; relying upon the paper of 1795 as showing the services which formed the consideration of the instrument upon which he relies as a grant. These instruments were all received by the Circuit Court as authentic and sufficiently proved, and are set forth at large in the record. The question between the United States and the defendants is, whether, according to the Spanish laws at that time in force in the province of Louisiana, the instrument of writing dated in 1797 passed the title to the land described in the figurative plan of Trudeau to the Marquis de Maison Rouge, as his private property.

This is a question of law to be decided by the court. And it is altogether immaterial to that decision to inquire what emigrants were introduced by Maison Rouge, or what authority he exercised within the territory in question, because whatever was done by him is admitted to have been done under and by virtue of the authority derived from the instruments before mentioned; and it depends upon their construction to determine whether it was done as the agent of the government or as owner of the land. His acts cannot alter their construction.

Confusedly, therefore, as this record has been made up, and loaded as it is with irrelevant and unnecessary parol testimony, the facts upon which the question of title arises are as fully before *us as if they had been set [*848 forth in the form of a case stated; the disputed question as to the authority of the plan of Trudeau being, so far as this writ of error is concerned, finally settled by the decision of the Circuit Court.

We proceed, then, to examine the question of title, and to inquire whether the land in question was conveyed to the Marquis de Maison Rouge by the Spanish authorities before the cession to the United States.

The paper executed in 1795 is evidently a contract to bring emigrants into the province, and not a grant of land. But as the instrument relied on by the defendants as a grant

refers to this, and is founded upon it, it is necessary to examine particularly the stipulations contained in it, in order to ascertain its object, and to see what rights were intended to be conferred in the land destined for the proposed settlement, and to whom they were to be granted.

This agreement states that the Marquis de Maison Rouge, an emigrant French knight, had proposed to bring into the province thirty families, also emigrants, for the purpose of forming an establishment with them on the lands bordering on the Washita River, designed principally for the culture of wheat and the manufacture of flour. And the provincial authorities agreed to pay to every family one hundred dollars for every useful laborer or artificer in it, to furnish guides from New Madrid or New Orleans to the place of destination, to pay the expenses of their transportation from those places, and to grant to each family, containing two white persons fit for agriculture ten arpents of land, extending back forty arpents, and increasing in the same proportion to those which should contain a greater number of white cultivators. And European servants brought by the emigrants, bound to serve six or more years, if they had families, were to be entitled to grants of land, proportioned in the same manner to their numbers, upon the expiration of their term of service.

It will be observed, that this contract contains no stipulation in favor of Maison Rouge. All the engagements on the part of the government are in favor of the emigrants who should accept the conditions. Indeed, it seems to have been no part of the purposes of this agreement to regulate the compensation which he was to receive for his services. Its only object, as appears by the concluding sentence, was to make known the offers made by the Spanish government to those who were disposed to come. It was therefore to be shown by the Marquis to those whom he invited to remove to his establishment, and it does not appear to have been thought necessary, and perhaps was not desirable, that his compensa-
849*] tion or his interest in *forming the colony should be made public. That was a matter between him and the Spanish authorities, which doubtless was understood on both sides. And whether it was to be in money, or in a future grant of land, does not appear. Certainly it was not to be in the land on which this establishment was to be formed, because the government was pledged to grant it to the colonists. The provincial authorities, it seems, had not the power, by virtue of their official stations, to enter into this agreement. After it was drawn, it was transmitted to the king of Spain for his approval; and he ratified and confirmed it by a royal order. All that was done under it, therefore, was done under the authority of this special order, and not by virtue of any power which belonged to the provincial officers, in virtue of the offices they held.

It is manifest from this contract, approved as it was by the king, that Spain was at that time particularly anxious to strengthen herself in Louisiana, on the Washita River, by emigrants from Europe. It is a matter of history, that, at that period, the political agitations in France and the neighboring nations on the continent of Europe induced many to emigrate. These emigrants were, for the most part, persons who were attached to the ancient order of things, or who were alarmed or dissatisfied with the changes which were taking place around them, and consequently were precisely of that character, and imbued with those political feelings, which the Spanish government would prefer in the colonists who settled in the province of Louisiana. The very liberal and unusual terms offered in this contract shows its anxiety on the subject. Its evident object was to obtain a body of agriculturists from the continent of Europe, who would settle together under one common leader, in whom the government could confide, and form a colony or establishment of themselves. Such a colony, in sufficient numbers to afford some degree of protection against Indian marauders, would, by opening, cultivating, and improving the place of their settlement, create inducements to others of their friends or countrymen to join them, and thus promote the early settlement of that part of the province, which this agreement shows the Spanish government was anxious to accomplish.

The Marquis de Maison Rouge, it seems, from his position as an emigrant French knight, was regarded as a suitable person to be employed in forwarding this policy. What were his peculiar duties is not defined in this agreement; but it appears that he was to make known the offers of the government, and select the colonists, and superintend the settlement and formation of the establishment. It is too plain to be questioned, *that, in doing [*850 this, he was, by the agreement, to act as the agent of the government, and not as the proprietor of the land.

The contract specifies no particular place on the Washita. It merely provides that it should be on the lands bordering on that river. And the Spanish authorities, in their desire to settle that part of the province—as these unusual offers so clearly evince—would naturally be ready to make grants to others. There was danger, therefore, that the unity of the establishment of Maison Rouge might be broken in upon by intervening grants to persons with whom he had no connection, and who, as they did not come under his auspices, might not be disposed to submit to his superintendence, or acknowledge the authority which the Spanish government had conferred on him. The success of his establishment might thus be endangered. There was another omission. He contracted to bring in thirty families. It might well be doubted, under the terms of this agreement, whether the promises of the government extended beyond that number; and others might be deterred from coming, under the impression that they would not reap the like advantages. These omissions were calculated to embarrass the establishment, and retard its success. Indeed, it appears by the figurative plan of Trudeau, that grants to others had then already been made in the territory there marked out; and it will appear, we think, upon examining the instrument of 1797, that these were the omissions it intended to supply, and the difficulties it intended to remove. It was to carry the plan of 1795 into more perfect execution, not to make a grant to Maison Rouge.

It begins by reciting that the Marquis de Maison Rouge had nearly completed the establishment on the Washita which he was authorized to make by the royal order of 1795, and then assigns, as a reason for executing this instrument, the desire to remove for the future all doubts respecting other families or new colonists that might come to establish themselves. This is the only motive assigned, and therefore was the only object which this paper was intended to accomplish. The doubt had arisen under the contract of 1795, and that doubt did not concern Maison Rouge nor the thirty families which he had contracted to bring, but other families and new colonists that might come to establish themselves. And in order to remove these doubts, it destines and appropriates for the establishment aforesaid the thirty superficial leagues marked in the plan of Trudeau, under the terms and conditions stipulated and contracted for by the said Maison Rouge. That is to say, it appropriates a large tract of country, far beyond the wants of the thirty families, in order to show that there would be 851*] room for *the other families or new colonists. It is to be for the exclusive use of the colony which Maison Rouge was to establish, to prevent the apprehension of disturbance from other persons; and it is declared to be under the same terms and conditions, in order to satisfy those other families, or new colonists, that the liberal provision made for the thirty families would also be extended to them. And the instrument also states that this territory is appropriated for "the establishment aforesaid," that is, for the establishment authorized by the contract of 1795, and not for one to be made under a new contract; and it further states, that it is made by virtue of the powers granted by the king—evidently referring to the royal order which was before mentioned in this instrument, and showing that the provincial officers who signed it were acting under special authority, and not under their general powers to grant land. Every expression in this instrument indicates that it was executed to remove doubts which might arise under the previous contract, and to carry that plan into full effect. There is not a word or provision in it which implies that there were any doubts about the rights of Maison Rouge under his contract, or that he was to have any other rights under this than were given to him by his former agreement. The land is appropriated for "the establishment aforesaid." In other words, it was to be the same establishment, with the same rights, but with limits more distinctly defined, and the rights of other families and new colonists who might unite themselves with the original thirty more clearly recognized.

It is said that the last instrument should be construed by itself, as distinct from the previous contract, and that the contract of 1795 was referred to merely to show the services which were rendered under it by the Marquis de Maison Rouge, as the consideration upon which this grant was made to him. It is a sufficient answer to this argument to say, that the last instrument, in express terms, states that *the* motive for making it was to remove doubts *in the former one* as to other families and new colonists, and consequently could not have been designed to be an independent agreement, conferring new rights upon Maison Rouge alone. It in effect negatives the idea that the first was regarded as a mere consideration; for upon such an interpretation, there would be no doubts to be removed as to the new colonists. They would have LO interest in it. There would be the certainty that the services had been rendered by Maison Rouge, and that this instrument intended to regard him. Besides, the last instrument would be unmeaning and unintelligible without referring to the first, and construing them together. It would be impossible, *without taking the two agreements to- [*852 gether, to understand from the last what was meant by the establishment of the Marquis de Maison Rouge, or how it was to be formed, or what were to be the privileges of the new colonists, or what were the conditions contracted for by Maison Rouge. None of these things are specified in the instrument of 1797. It refers for them to the former contract.

But if this instrument is taken by itself, and regarded as independent of the other, it contains no words of grant, none of the words which were employed in the colonial Spanish grants which intended to sever the land from the royal domain, and to convey it as individual private property. It is true that the Spanish colonial grants are in general more summary and brief than common law conveyances. But they are by no means loosely or carelessly expressed; and it must not be supposed that they are ambiguous because they are brief. On the contrary, the intention to convey is always expressed in clear and distinct terms. And these grants, like the patents for land issued by the government in this country, appears to have been prepared by officers of the government well acquainted with the colonial usages and forms. Thus, for example, in the case of Arredondo and Son, reported in 6 Peters, 694, where the grant was for a large tract, upon condition that the parties should at their own expense establish two hundred families upon it, it is expressly stated, that the land was granted according to the figurative plat, "in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof."

It cannot be supposed that a grant of thirty superficial leagues, far beyond the quantity usually conveyed to an individual, would have been carelessly drawn in new and unusual terms, calculated to create doubts, and that established form and usages would be disregarded and needlessly departed from. Certainly there is every reason to believe, that, if this land was intended to be conveyed to the Marquis de Maison Rouge, that intention would have been expressed with at least ordinary perspicuity. Yet, among the many cases of Spanish colonial grants which have come before this court, we are not aware of one, great or small, in which a paper in language resembling this has ever before been produced and claimed as a grant.

The note at the foot of this instrument has been relied on to prove that it was intended to be a grant. We think it is not susceptible of that construction, and that its language proves the contrary. The note is a short one, and

merely says, that, "in conformity with his contract, the Marquis de Maison Rouge is not to 853*] admit or establish any American on *the lands included in his grant." The lands mentioned in this note are undoubtedly the lands described in the body of the instrument, and his establishment was to be formed on them. The note apprises him that, in doing so, he must conform to his contract, and not admit any American. There was therefore a pre-existing contract in relation to this settlement, by which the rights of the parties were defined, and by which Maison Rouge was prohibited from admitting or establishing Americans upon this land. The contract referred to is evidently the contract of 1795. We hear of no other. The thirty families which Maison Rouge was to introduce under that agreement were to be emigrants—Europeans; and he is to conform to this stipulation, in introducing the other families and new colonists, in the thirty superficial leagues marked out on Trudeau's plan. They were not to be Americans. The establishment formed on this land was therefore to be made under the contract of 1795, and the rights of both parties regulated by it. The note in question was appended, because the body of the instrument referred only to the undertakings of the government, and without this note Maison Rouge might have regarded himself as absolved from his agreement as to the character of the additional or new colonists. But how could he be required to conform to his contract, unless the contract spoken of was to be carried into execution upon this territory? The words, "lands included in his grant," which are used in the note, meaning nothing more than the lands set apart and appropriated by this instrument for his establishment; and to give them any other meaning would make this brief note unmeaning and inconsistent with itself. He was not to admit or establish Americans in the territory destined and appropriated for the establishment which he was to form, under the contract of 1795—that contract requiring this establishment to be formed of emigrants. This appears to be the plain meaning of this note, and we can see nothing in it that will justify a different construction, or give any reason to suppose that a grant was intended to Maison Rouge as his private property.

It is objected, also, that the decision of the Circuit Court, upon the question of title, is not brought here by the writ of error, because no exception was taken to it in the court below. But no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court. It is hardly necessary to refer to authorities on this point; but it may be proper to say, that in Craig v. The State of Missouri, 4 Peters, 427, and in another case which we shall pres- 854*] ently notice, this court have held, *that, where the Circuit Court decides, as in this case, both the fact and the law, no exception can regularly be taken. Even in a court of common law, an exception is never taken to the judgment of the court upon a case stated, or on a special verdict; yet the judgment is subject to revision in the appellate court. The same rule must prevail where the facts upon which the inferior court decided appear in the record; like a case stated, the question in the superior court necessarily is, whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record.

Under this view of the subject, which brings the question of right directly before us for decision, it is perhaps hardly necessary to say anything as to the manner in which the judgment was entered in the Circuit Court. But if the defense of King could have been maintained, yet the language in which the judgment was rendered is open to serious objection. It may have been intended to cover only the land in controversy in the suit against King. But it may well bear the construction of being not only a judgment in favor of King, but also in favor of Coxe, for the large portion of this territory to which he claims title in his answer, and for which he became plaintiff in reconvention against the United States under the Louisiana practice. In the opinion before mentioned, which was filed by the judge after the case had been removed by writ of error, he states that he overrules the plea in reconvention because it placed the United States in the attitude of a defendant as to the land thus claimed. This decision is undoubtedly right. But yet in the judgment, as stated in the record, the plea in reconvention is not overruled, and its language would rather seem to imply that it was a judgment against the United States in favor of Coxe for the land claimed by him in reconvention, as well as in favor of King for the land sued for by the United States. If this is the meaning of the judgment, it would be obviously erroneous, even if King had made good his defense. But it is unnecessary to decide what is its legal construction, because, in either view of it, the judgment is erroneous, and must be reversed.

Neither is it necessary to examine in detail the exceptions taken at the trial to the admission of testimony. In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, *the appellate court will reject it, and [*855 proceed to decide the case as if it was not in the record. This is the rule laid down in the case of Field et al. v. The United States, 9 Pet. 202, and is undoubtedly the correct one. It is certainly proper, where evidence supposed not to be legal is received by the court, to enter on the record that it was objected to. But this is done to show that it was not received by consent, and a formal bill of exceptions is not required to bring it to the notice of the superior court. It may, however, be done in that form, if the parties and the court think proper to adopt it; and the objections have been so stated in this case, in conformity, we presume, with the Louisiana practice. But as the material evidence in the case was all legally before the Circuit Court, it would be useless to examine whether errors were committed as to portions of it which are altogether unimportant. And this court being of opinion, for the reasons hereinbefore stated, that this instrument

of writing relied on by the defendants did not convey, or intend to convey, the land in question to the Marquis de Maison Rouge, the judgment of the Circuit Court must be reversed and the cause remanded, with directions to enter a judgment for the United States for the land described in their petition.

Messrs. Justices McLean, Wayne, McKinley, and Grier, dissented from this opinion. Messrs. Justices McLean and Wayne filed opinions in writing, as follows:

Mr. Justice McLean:

Had not my brother judges pronounced the above opinion, I should not have supposed there could be any difficulty in determining the character and effect of the grant in question. Being in the minority, I shall only state some of the grounds on which my opinion has been formed.

The validity of the grant depends upon the laws of Spain in 1797, the time it bears date. Those laws were foreign, and are required to be proved. The incorporation of Louisiana into the Union cannot affect this principle. The treaty of cession and the acts of Congress subsequently enacted, recognizing private rights in the ceded territory, only reiterated the well established principles of the laws of nations. In the language of the act of Congress, we are to look "to the laws and ordinances of the government under which the claim originated."

On the 17th of March, 1795, the Baron de Carondelet, Governor of Louisiana, and others, entered into a contract with the Marquis de Maison Rouge, which was sanctioned by the 856*] King of *Spain, to bring into "these provinces thirty families, emigrants, for the purpose of forming an establishment with them on the lands bordering upon the Washita, designed principally for the culture of wheat," etc. on the following conditions: 1st. Two hundred dollars to be paid out of the royal treasury for every family composed of two persons fit for agriculture, etc. four hundred dollars to those having four laborers, and in the same proportion for a less number. 2d. A guide to be furnished them. 3d. Their transportation to be paid, not exceeding three thousand pounds to each family. 4th. Ten arpents of land, extending back forty arpents, for a family of two laborers, and in the same proportion for a greater number. 5th. Other privileges.

The Marquis performed much labor, and consequently incurred much expense, in the fulfillment of the contract. And on the 20th of June, 1797, the Baron de Carondelet and Andres Lopez Armesto executed to the Marquis the following instrument: "Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families, by the royal order of July 14th, 1795, and desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted to us by the King, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the Surveyor-General, Don Carlos Lareau Trudeau, under the terms and conditions stipulated and contracted by the said Marquis de Maison Rouge," etc.

"Note, that, in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American in the lands included in his grant."

The certificate of the surveyor, Carlos Trudeau, laid down the surveys with precision, stating the superficial total at two hundred and eight thousand three hundred and forty-four superficial arpents, equal to thirty leagues, etc. And the surveyor adds: "It being well understood that the lands included in the foregoing plats, which are held by titles in form, or by virtue of a fresh decree of commission, are not to compose a part of the thirty degrees; on the contrary, the Marquis of Maison Rouge promises not to injure any of the said occupants, promising to maintain and support them in all their rights, since if it should happen that the said thirty leagues should suffer any diminution of the land occupied, there will be no objection or inconvenience to the said Marquis de Maison *Rouge's completing or [*857 making up the deficiency in any other place where there are vacant lands, and to the satisfaction of the concerned."

This survey, being annexed to the patent and referred to in it, constitutes a part of the grant, with the conditions specified.

The error in the argument seems to be in supposing this grant to have been issued in fulfillment of the contract of 1795. The grant was in no way connected with that contract, except as showing the consideration on which the grant was made to the Marquis, and with the express view of relieving the royal treasury, which was often without funds, from the charges imposed by the contract. Charles Tessier, now a judge in Louisiana, was chief clerk in the land office, and who made out the grant, states, that Rendon and Morales successively filled the office of intendant, and being charged with the public finances, which were greatly embarrassed for want of money, they made difficulties about paying for the families which Maison Rouge introduced and was authorized to introduce, and tried to get rid of farther advances to Maison Rouge." And the witness says the land was not worth so much as the expenses of the government might amount to in the end. And J. Mercier, another witness, confirms the statement of Tessier.

The truth of these statements is sustained by the words of the grant. The royal order of 1795 being referred to, the grant states: "And desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge," etc. Now, it must be observed that the Marquis was the mere agent of the government, under the contract of 1795. He was to have no interest in the land, nor did the government, in the contract, propose to pay him for his services. That this enterprise was deemed one of great importance is shown by the gratuity of land and money given by the govern-

ment to families, and also in agreeing to pay the expense of their transportation. And the government being "desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves," etc. These were no part of the families under the first contract, but other families." So that the families or colonists which should come under the grant were not to come under the contract, but to settle under the grant, having no claim on the government. This relieved the royal treasury from any further embarrassment on account of the contract of 1795, and removed all doubts in regard to such settlers.

858*] *But the land was granted to the Marquis de Maison Rouge, subject only to the terms of the grant and of those specified in the certificate of the surveyor, which were incorporated into the grant. The conditions thus expressed were, that the Marquis should not admit "any American in the lands included in his grant." And he was to protect the rights of those who had a good title to lands within his grant, and should receive other lands in lieu of those, thus held. These two conditions constituted the contract referred to, I have no doubt, in the note affixed to the grant. There was, then, no connection between the grant and the contract of 1795, except as the latter showed the meritorious services of the Marquis, which constituted, in part at least, the consideration of the grant.

But was this instrument a grant? Under the common law it was not a grant, but it is one under the civil law. If the instrument separates the land from the public domain, and appropriates it to the use of an individual, it is a grant. No words of inheritance or terms of grant are necessary by the civil law. In this grant the words are, "We destine and appropriate conclusively for the establishment of the aforesaid Marquis," etc. Now, these terms appropriate the land described "conclusively." Nothing could be more specific than this. It separates the land designated in the plat from the lands in the crown, and no subsequent condition was annexed. He had nearly completed the establishment of the Washita under the contract of 1795, and for these services the grant was made. If the grant had required the Marquis to do certain things, as to settle a number of families, there would be some apparent ground to say, that he, or those claiming under him, must show a performance of the condition. But even in such a case the grant would be good, for the cession of the country by Spain to France, and by France to the United States, within a short time after the grant, would have excused the performance of such a condition. It would be strange indeed if our government should require the performance of a condition which excludes our own citizens from benefits and gives them to foreigners. This point has been decided in the case of Arredondo.

But the most conclusive answer to this view is, that the grant required no such condition, and that, in this respect, it has no connection with the contract of 1795. That contract, by this grant, was admitted to be nearly completed, and there was no requirement that it should be completed. It was found burdensome to the treasury, and was abandoned. Under that contract, titles were made to the settlers, and not to the Marquis. And the land for the thirty families would have required a small tract in comparison with that covered by the grant.

*This instrument, it is said, does not [*859 purport to be a grant. If this be so, those who issued it, and all others, who have officially and professionally examined it heretofore, have been strangely mistaken. Charles Tessier, who was a principal clerk in the office of the Spanish government of Louisiana for making grants of land, and who made out this grant, says it "was denominated and considered as a titulo en forma, and was such complete and perfect evidence of title as not to require any other to validate or strengthen it." J. Mercier, who was a clerk in the land office with Tessier, also states that it is a grant. Both of these persons, from their public duties, must have been as well acquainted with the forms of titles then used, and indeed better, than any other persons. And this is a matter of fact to be established.

The commissioners appointed by the government to investigate land titles in Louisiana reported, in 1812, "that the instrument under date of the 20th of June, 1797, is a patent, or what was usually, in Louisiana, denominated a title in form."

This claim being before the House of Representatives in 1817, a committee reported, that they "are of opinion that it is a legal and formal title, according to the laws and usages of the province of Louisiana." Other reports were made by a committee of the Senate confirmatory of the grant. The confirmation of the claim to a league square, by Congress, was a recognition of the grant. On no other supposition could the Act of the 29th of April, 1816, confirming the league square, have been passed.

There can be no question that this grant would have been held valid under the Spanish government, and, both by the treaty of cession and the laws of nations, it must be held valid by this government. The largeness of the claim can be no objection to it. Tracts as large were given, for services less meritorious than those rendered by the Marquis de Maison Rouge, by the Spanish government. Grants were made, under that government, for services, civil or military, performed or to be performed. And there was no service deemed more meritorious by Spain, except military service, than that of establishing colonies, reducing the country to cultivation, constructing mills and other improvements. The quantity granted was left generally to the discretion of the governor or other officer who represented his sovereign in making the grant.

If this instrument be a grant which would have been held valid by the Spanish government, then we are bound in good faith so to consider it. And I cannot entertain any doubt that it is a complete grant, and therefore I dissent from the decision of a majority of the court.

*Mr. Justice Wayne: [*860

Four of us do not concur with the majority of the judges in the judgment given by them in this case.

I will now give my reasons for not doing so.

comprehending in what I shall say, as well as I can, those objections which were urged, in our consultations upon the case, by Messrs. Justices McLean, McKinley, and Grier, against the judgment.

Apart from every consideration connected with the intrinsic validity of the grant, and the defendants' title under it, I regard this judgment as unwarranted either by the case presented on the record, by the conduct and decision of this court in respect to it at the last term, or by the course and argument of counsel which have necessarily resulted from, and been limited by, that decision. Besides, in my view, it does injustice to other parties, now regularly before the court, who were entitled to be heard, according to our rules and practice, before a decision was made which, in effect, decides their rights, and takes what may be their property from them, without a hearing.

On these grounds I dissent from the judgment. But in addition to them, the evidence on the record, imperfect as it may seem to be to others as to the intrinsic merits of the defendants' title—for that point does not purport to be now presented for our adjudication—is yet sufficient to satisfy me that the grant to the Marquis de Maison Rouge is, in form and substance, genuine, valid and complete, conferring upon him and those who claim under him, a just and perfect title under the treaty by which Louisiana was ceded to the United States.

This suit was a petitory action, brought by the United States in the Circuit Court of Louisiana, in the year 1843, to recover from the defendant, Richard King, a tract of land of 4,606 acres, lying on the west side of the Washita River, in that State. The defendant denied that the United States had any title to the land; and he further prayed, in accordance with the law and practice of Louisiana, that as he derived his title by purchase from Daniel W. Coxe, who had warranted it, he might be cited as warrantor, and made a party defendant in the suit.

Coxe came in and filed his answer. He also denied that the United States had any title to the land; and he further alleged, that the tract in controversy was part of a large body of land to which his own title was a valid one, derived from the Marquis de Maison Rouge, who was an inhabitant of Louisiana, to whom the Spanish government had granted it in due form, and in whom it was legally vested previous to the Treaty of the 30th of April, 1803, which ceded that territory to the United States, and guarantied to the inhabitants the full enjoyment of their property. In his answer, he further put in a plea of "reconvention," 861*] *also, in accordance with the law and practice of Louisiana, wherein he asked to be quieted in his own title to the whole grant, against the United States; and he annexed a statement, marked Schedule A, in which the different tracts sold by him since he became the purchaser were particularly set forth, among which was that conveyed to the defendant King for the recovery of which the suit was brought.

By the Code of Procedure of Louisiana (arts. 494, 495), the mode of proceeding in which must, by the provisions of the Act of Congress *of the 26th of* May, 1824 (4 Stat. at Large, 63), *regulate the practice* of the courts of the United States in that district, either party is entitled to a trial by jury; but if that mode is not preferred, the issue of fact, as well as of law, is to be tried by the court, the finding of the facts by the court being, in that event, equivalent to the verdict of a jury. This was done in the present case.

In the summer of 1843, the defendant and warrantor, Coxe, being anxious for the termination of the suit, entered into an agreement, which appears on the record (p. 80), whereby it was stipulated that it should be immediately set down for trial, and he consented to the admission of much documentary evidence, chiefly derived from, or appended to, reports of committees of Congress. Among these documents was a pamphlet published by a person of the name of Girod, who was an adverse claimant to a tract of land alleged to be within the Maison Rouge grant; and also several depositions, annexed to the pamphlet, which purported to have been legally taken in suits that had been instituted many years before against the defendant Coxe. It was also stipulated by the agreement, that bills of exceptions might be taken by either party, not only during the actual trial, but even after the decision, until the record, if there should be a writ of error, was transmitted to this court.

When the trial came on, the plea of reconvention put in by the warrantor was dismissed by the court, "because, under the practice of Louisiana, it is to be regarded in the light of a new suit, and consequently places the government in the attitude of a defendant before the court." Record, 182.

In addition to the documentary evidence admitted by the agreement, a number of persons were examined at the bar. Their testimony appears to have been mainly directed to establish the genuineness and authenticity of the grant of Baron Carondelet to Maison Rouge, and of the plano figurativo of Trudeau, the Surveyor-General, which was annexed to it; to rebut the contrary evidence derived from Girod's pamphlet, and which was supposed to exist in the old depositions printed with it; and to show the complete validity of the grant in question, so far as *it depended on the Spanish laws and [*862 the recognized and settled practice of the Spanish government. None of the oral testimony—and there were seven or eight witnesses—was reduced to writing, or appears in any shape or form upon the record.

After a trial, which occupied several days, the Circuit Court found and decreed the grant of the 20th of June, 1797, to be a valid instrument, and adjudged the title under it of the defendant King, and Coxe, his warrantor, to be legal and good to the tract mentioned in the answer of the former, and in Schedule A annexed to that of the latter. This, under the law and practice of Louisiana, was a complete and definite finding by the court of the facts at issue—equivalent to the verdict of a jury.

No opinion was delivered by the court at the time this decree was given, but one was subsequently prepared and filed, and is annexed to the record. It presents in a cogent and succinct manner, but more in detail, the matters of fact, of which the decree gives the summary result; and shows that they were founded on very full evidence, oral as well as documentary,

and especially that the testimony derived from Girod's pamphlet was, in the opinion of the court, conclusively disposed of by that of "persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth."

No exception was taken on behalf of the United States to any portion of this opinion, although the agreement gave full power to counsel to do so at any stage of the legal proceedings.

In the progress of the trial, however, five bills of exceptions were taken by the counsel of the United States to the rulings of the court, and three by the defendants. Upon the latter it is unnecessary to express an opinion, as the judgment was in favor of the defendants, further than to remark, that, if it had been otherwise, they might have afforded a sufficient ground for its reversal.

The bills of exceptions on the part of the United States did not embrace any error in the opinion of the court, or in its decision of any legal point arising out of the validity of the grant, or its construction, or the Spanish law or practice in relation to such instruments, but were confined exclusively to the rejection and admission by the court of certain documentary evidence. To each bill of exceptions was annexed, separately and distinctly, the testimony connected with it and necessary to a decision upon it.

A writ of error was issued in behalf of the United States, returnable to this court at December Term, 1843. With this writ of error were returned not only the five bills of excep- 863*] tions *taken by the counsel of the United States, with the evidence embraced therein, but also the three bills of exceptions taken by the defendant. This, however, formed but a small part of the errors of the clerk of the Circuit Court in making up and returning the record. To these bills of exceptions he annexed a great mass of documentary testimony, a large part of which consisted of printed pamphlets, and among them the pamphlet of Girod, with its appendix; but whether all even of the documentary testimony which had been exhibited at the trial was embraced, did not appear: and it is certain that no portion whatever of the parol evidence had been reduced to writing, or was embraced in the record, although the judge had expressly relied upon it as contradicting the allegations in the documentary evidence. It also contained evidence on the part of the defendant, to prove that the grant in question was a valid grant, according to the Spanish laws and practice in regard to such official acts.

On this singular record, the case was argued before this court on the 24th of February, 1845. The opinion of the court (3 Howard, 773) was against the validity of the grant, the judgment of the Circuit Court was reversed, and the cause was remanded to it "for further proceedings to be had thereon in conformity with the opinion of the court."

In the argument of the case, reference was largely had to the documentary evidence improperly introduced into the record; and the plaintiffs' bills of exceptions, which alone were properly before the court, were scarcely adverted to.

The opinion of the court was put upon the fact, which it considered established by the testimony, that the certificate of Trudeau, or the plano figurativo, annexed to the grant, was antedated and fraudulent; and that therefore, if the grant itself was a genuine instrument, it had not "the aid of an authentic survey to ascertain and fix the limits of the land, and to determine its location." This opinion in regard to the genuineness of the certificate of Trudeau was thus expressed: After an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent; and we refer to the evidence of Filhiol, McLaughlin, and Pommier, as establishing conclusively that the actual survey, upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor in the paper of 1797 (the alleged grant) was for land in a different place, and higher up the Washita River. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis of Maison Rouge, who died in 1799, but after his death, and at the instance of Louis Bouligny, who, according *to the laws [*864 of Louisiana, was what is there termed the forced heir of the Marquis; and that it was made in anticipation and expectation of the cession of the country to the United States, the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th of April, 1803. We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record."

It will be seen from this opinion, that the judgment of the reversal of this court was not founded upon any error of law presented in the bills of exceptions in the record, nor even upon any facts stated in those bills of exceptions; but that it was purely a judgment on the facts of the case, different from that which was found by the Circuit Court of Louisiana, sitting without a jury, and found mainly upon the old depositions of three witnesses, which are in the appendix to Girod's printed pamphlet. Neither in the judgment, nor in the opinion of the court, did I concur at that time.

Upon the return of the record, with this opinion, to the Circuit Court of Louisiana, on the 9th of May, 1845, the attorney of the United States moved that the case should be taken up for final decision. The attorney of the defendant, on the other hand, moved for a new trial, and prayed for a jury; and in an affidavit, it was sternly urged upon the court, that, in the previous trial, the case had been prepared and conducted under the belief of the law being well settled, that, in a petitory action, in which neither party called for a jury, the finding of the facts by the court would be considered by the Supreme Court as equivalent to a special verdict, and would not be reversed, except so far as they might be brought up by bills of exceptions. The affidavit then went on to show, not only that several witnesses, whose testimony was not reduced to writing, had proved the genuineness of the certificate of Trudeau, and his unimpeachable official and private character, but that the very depositions

of Filhiol, McLaughlin, and Pommier, from which the Supreme Court took the facts on which it mainly relied, discarding from them the finding of the Circuit Court, were ex-parte, and had been taken without notice to, or the knowledge of, the claimants under the Marquis of Maison Rouge. The affidavit then alleged that the defendants could again prove before the jury, and corroborate with additional evidence, the facts which had been found by the court upon the former trial.

The Circuit Court overruled the application, and ordered a final judgment to be entered for 865*] the United States, and against *the defendant, regarding the judgment and opinion of the Supreme Court as a final one against the validity of a grant, and being commanded by its decree to "proceed according to that judgment and opinion." To this judgment a general exception was taken, and the case came again before this court on a writ of error, and was argued at the last term, December 15th, 1847. This argument has not been reported, probably because no formal decree of reversal or affirmance was made. It embraced, however, an elaborate view of the whole course of proceeding which had occurred, and made it apparent, that, in the statement of the merits of the case in the previous opinion of the Supreme Court, great error had been committed in the assertion of facts; and that, in rejecting the finding of the Circuit Court as conclusive evidence of the facts, and in permitting an inquiry into errors of law not made the subject of bills of exceptions, there had been a deviation equally great from the well settled decisions of this court.

The suit was not, as this court admitted in its decision, "a controversy in a court of equity, but in a court of law; the petitory action brought by the United States in the Circuit Court of Louisiana being in the nature of an action of ejectment. 3 How. 787.

No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record. Penhallow v. Doane, 3 Dall. 102; Wiscart v. Dauchy, 3 Dall. 327; Jennings v. Thomas, 3 Dall. 336; Talbot v. Seaman, 1 Cranch, 38; Faw v. Roberdeau, 3 Cranch, 177; Dunlop v. Munroe, 7 Cranch, 270; United States v. Casks of Wine, 1 Peters, 550.

The case of Parsons v. Bedford, 3 Peters, 434, was, like the present, a petitory action, instituted in the District Court of Louisiana, and brought for review to this court, on a writ of error and bill of exceptions. It differed in one respect—the facts were found by a jury. The parol evidence, however, had not been written or entered upon the record, although requested by the plaintiff. That refusal was made the ground of an exception. This court decided that it was no error, not merely because the refusal was not matter of error, but because, "if the evidence were before the court, it would not be competent for them to reverse the judgment for any error in the verdict of the jury."

By the Code of Practice of Louisiana (art. 494, 495), which, under the Act of 24th of May, *1824 (4 Stat.* at Large, 63), is also the law by *which the courts of the United States are gov-

*866 erned, the decree of the Circuit Court upon the facts *was in all respects equivalent to [*866 the verdict of a jury; and the principle thus established by this court would be equally applicable to it. It was so held in Parsons v. Armor, 3 Peters, 425, where the parties had waived the trial by jury, and the case was brought up by writ of error, the court saying it was certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony, as well as the law of the case, to the revision of the court.

In the year 1842, the effect which was to be given to the judgment of the court in Louisiana, asserting a conclusion of facts where a jury had been waived, was deliberately considered in the case of Hyde v. Booraem, 16 Peters, 176. It was then conclusively settled by this court, that it had no authority on a writ of error, to revise the evidence which the Circuit Court had before it, or the interpretation they placed upon it, or the conclusions they drew from it. This court then said, "That is the province of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. If either party in the court below is dissatisfied with the ruling of the judge on a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions on matters of fact." In the subsequent case of Phillips v. Preston, 5 Howard, 290, the point was treated as conclusively settled.

It should, then, have been taken in this case as established, that everything which was matter of fact in this controversy had been fixed beyond question in this court by the judgment of the Circuit Court of Louisiana; and that no portion of the proceedings of that court remained open for revision here, but "such rulings on matters of law as were brought before us by an appropriate exception, in the nature of a bill of exceptions."

No final opinion to this effect was written by this court for publication in our reports after the argument at the last term. But such opinion was expressed unanimously by us in our consultation. And, in accordance with it, this court ordered, that "the judgment rendered in this case at December Term, 1844 (3 Howard, 788), and all the proceedings thereon and subsequent thereto, should be set aside and vacated, and the case, as it stood at the term aforesaid previous to the said judgment, re-instated." Under this last order, the case has been before us at the present term.

The case has been argued, and in my opinion properly argued, by the counsel for the defendants in error, upon the correctness of the rulings of the Circuit Court on matters of law, stated *in the bills of exceptions taken [*867 by the United States, who are the plaintiffs in error.

The judgment of the Circuit Court has established the fact, that the grant made by the Baron de Carondelet, as the Governor of Louisiana, on the 20th of June, 1797, to the Marquis de Maison Rouge, was valid under the laws of the French and Spanish governments then prevailing in Louisiana, and consequently continued to be so by the treaty which ceded Louisiana to the United States. It has therefore been

properly treated as a question which, under the decisions I have referred to, cannot, upon this record, now properly come before this court.

The validity of the grant must depend upon the genuineness of the instrument itself, and upon its sufficiency to give to the grantee a complete and formal title to the land mentioned in it, pursuant to the laws of Spain at the time it was made. The concurrence of these two facts is essential to the validity of the grant. It is therefore distinctly, but succinctly, affirmed in the judgment of the Circuit Court, and must be taken to be established thereby. From the opinion of the Circuit Court, explaining its reasons for this judgment, it is apparent that both of these points were fully examined, proved, discussed, and decided upon. The assertion that the certificate of Trudeau to the plano figurativo has been antedated, or is fraudulent, cannot be maintained. It rests solely upon evidence not worthy of credit, from the circumstances and manner it has been introduced by Girod in his pamphlet, which is shown to have been contradicted, and which, if it were necessary to sift it, would be found to present intrinsic and abundant proof of its own discrepancies and inconsistencies. That the grant is a complete and formal title to the land mentioned in it, pursuant to the laws of Spain, is also conclusively established. It depended on the laws and usages of that government, on the performance of the necessary conditions, and, finally, on the recognition of the grant by the Spanish authorities as the complete and formal investment of the full ownership of the land embraced in it. All these were matters of fact susceptible of proof. That such proof was adduced, and, was sufficient, is an inference we are bound to take from the finding of the court, as is shown by its judgment, to which they were necessary. When we turn to the opinion which the Circuit Court has thought proper, though under no obligation to do so, to annex to its judgment, we find such was explicitly the case. On each and every one of these points there was testimony in the Circuit Court. On that testimony that court founded its decision, as a fact, that the grant was a valid and complete one. It says, that the genuineness of the grant is 868*] "conclusively established *by the testimony of witnesses who were well acquainted with the signature of the Baron de Carondelet." Of the evidence in Girod's pamphlet, which alone impugned the genuineness of Trudeau's plano figurativo annexed to the grant, the court says: "It is insufficient to counteract the force and effect of testimony emanating from persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth." Of the performance of the conditions of the grant, the court says, there was "the most conclusive evidence that the conditions thereof, whatever they may have been, have been complied with." And finally, in regard to the evidence which established it as a complete and formal title, the court says, it is what was usually termed in Louisiana, under the Spanish government, a titulo en forma—a title in form—as is shown by the testimony of Tessier, who was examined under a commission, and who, as the court observes, was officiating at the time as secretary in the Land Department. He proved, under oath, that such an instrument was "such complete and perfect evidence of title as not to require any other to validate or strengthen it."

The validity of the grant was therefore properly regarded as an established fact, not now open to argument, under the order of this court pursuant to which the case is now before us. It has been so treated by the counsel of the defendants in error, without interposition or remark from the court. And therefore, as it is now made to form the principal, if not the sole, basis of the decision just expressed as that of the majority, it is a point upon which, in my opinion, the counsel for the defendants have not had that hearing to which they are entitled, and which is necessary to a proper investigation of this important title. The points raised by the bills of exceptions taken by the United States are before this court on this writ of error, and they have been argued and may be decided. It is otherwise with that of the validity of the grant.

If the only persons to be affected by this decision were the defendants on the record, it seems to me it would be improper to make it under the circumstances I have stated. But it has been brought to the notice of this court, before its judgment has been pronounced, that an act of Congress was passed on the 17th of June, 1844 (5 Stat. at Large, 676), the object of which was to bring in the best form, for final adjudication, those long unsettled titles in Louisiana, arising under the governments, which existed there before the cession; and that under this law, the heirs of Henry Turner, who are claimants under the land grant to the Marquis of Maison Rouge, but to a far larger extent of land than the quantity now in controversy, are at this time defendants *in [*869 error in this court, having been brought here by the United States, after having had a decree in their favor in the Circuit Court. These parties, by a formal motion, have asked that our present decision, if the same shall go to affect the validity of the grant, may be postponed until they shall be heard. They have stated, and the fact is so, that the record in their case was filed by the United States only a few days before the argument in the present case, and has only been printed since, so that, without any fault or negligence of their own, they have been unable to avail themselves of the rule of this court which permits parties in subsequent cases involving the same questions to be heard when the case first in order is reached; that while the question and point of law, so far as regards the validity of the grant, are the same, the evidence necessary to its fair and complete adjudication is much more fully established in their record that in the confused and imperfect one now before us; and especially, that it presents the testimony of numerous witnesses of the highest and most unimpeachable character, which has never been submitted to this court, directly establishing the authenticity of the documents in question, as well as proving the practice, usages, and laws of the Spanish government in regard to their form and effect. That in their case the facts were not found solely by the court below, but that their record exhibits the verdict of a jury, founded, in addition to other evidence, on the

actual inspection of the original documents, which affirms their authenticity and completion, and the perfectness of the title under them. And finally, that if, under these circumstances, a decision shall now be made against the validity of the grant, it will be made on imperfect evidence, while fuller evidence is on the records of this court awaiting its examination, and also in prejudication of the rights of parties coming here under the sanction of an act of Congress, who have not been guilty of any delay in presenting themselves before this court, and who have been precluded from the benefit of the rule before alluded to by no fault of their own. Can we refuse with justice an application, to grant which injures no one, to refuse which may be productive of consequences the most serious, and perhaps irreparable wrong?

Nor, in my opinion, are these the only considerations which should have induced us to refrain from a hasty decision, with imperfect evidence, on the validity of this grant. Four years ago, we made a decision relying on this same imperfect record, which contained an assertion and statement of facts rested on evidence since acknowledged by us to have been illegal in itself, and which we now know is 870*] positively contradicted. If *this grant is fraudulent in its execution, or in effect is such, though genuine, as to give no title to those who claim under it, it is our duty to say so. But that should only be done after the calmest consideration of all the testimony relating to it, whether in the record of this case or in that of any other case on our calendar in which is involved the question of the validity of the grant. We ought not to have forgotten, that, in doing otherwise, we may affect the rights and property of many of our citizens who have not been heard; that we shall controvert the opinions formally expressed for almost half a century by the board of commissioners who first examined the title, by the officers of the general land office, by the Legislature of Louisiana, by committees of Congress, and by the Circuit Court of the United States —all of whom, after investigation, have declared this grant to be valid, and which has never been said to be otherwise by any other tribunal than this court, when it gave its now recalled judgment, founded upon the depositions annexed to Girod's pamphlet.

If we examine the judgment of the Circuit Court now under review upon the principles that have been heretofore settled by this court, we shall find no error in the "rulings of the judge in a matter of law brought before this court by an appropriate exception in the nature of a bill of exceptions." Hyde v. Boorsem, 16 Peters, 176.

In regard to the three bills of exceptions which were taken by the defendants, also in the record, we need not say anything, because they are not properly before us, and have not been referred to in the argument. But it may not be amiss to remark, that they afford another reason why a final judgment should not now be entered against the defendants, though the decision of a majority of the court may be adverse to them, because they allege the rejection of important testimony in their favor in respect to the validity of the grant, for reasons which, without expressing a conclusive opinion upon them, I may say were strongly and plausibly urged.

Let us now examine the bills of exceptions taken in behalf of the United States, to see whether they present any illegal ruling of the Circuit Court.

They are five in number, but the first, fourth, and fifth have been properly and candidly conceded by the Attorney-General to be untenable. I am to remark, then, upon the second and third.

The second is an exception to the admission in evidence of a petition of Daniel Clark, the grantor of the defendant, to the Intendant Morales, on the 1st of August, 1803, together with the alleged copy of a certificate, purporting to be signed by Leonard, *and [*871 Amirez, officers of the royal treasury in Louisiana, on the 5th of August, 1803, in which it was declared, that the Marquis of Maison Rouge had complied virtually with the terms of his contract. The signatures are certified by a notary to be known to him as genuine, and both papers appear to be part of the same "instrument." The genuineness of the signatures was not denied by the Attorney-General. The only ground taken in the argument to sustain the exception was, the insufficiency of the testimony to prove a compliance by Maison Rouge with the conditions of the grant. It is certainly no valid objection to the admission of an authentic document as testimony, that it does not prove all for which the party offering it contends. This may affect its sufficiency, not the legality of its admission. It is a document from the Spanish archives, the authenticity of which was proved, as well as the removal of the records themselves, many years ago, by the Spanish authorities. Its admission is clearly within the rule established in the case of The United States v. Wiggins, 14 Peters, 345. The exception is limited to the admission of the evidence, not to the legal effect which has been or may be given to it, and it cannot be doubted that the decision of the Circuit Court to admit it was correct.

The plaintiff's third bill of exceptions was also an objection to the admission of documentary evidence, namely, the report of the commissioners appointed under the Act of the 3d of March, 1807, declaring that the grant to the Marquis Maison Rouge "is a patent, or what in Louisiana was denominated a title in form, transferring to him the title, in as full and ample a manner as lands were usually granted by the Spanish government, subject, however, to the conditions stipulated in his contract with the government." That such a report was made, and that the document in question was a copy of it, was not disputed. Such an official act of the officers of the United States in regard to the title was certainly legal evidence in the chain of proceeding, whatever its bearing and effect upon the validity of the title may be. But, if this were not so, it will be enough to say, to dispose of this exception, that, in the course of the trial, another copy of this same document was introduced in evidence on the part of the United States.

These are the only exceptions to the judgment of the Circuit Court which were taken at the trial, and which have been brought before

this court in this record. Neither can be sustained; nor do the majority of the court, in the opinion read by the Chief Justice, attempt to sustain them.

What, then, is there in the record, upon which the majority of the court rely, to warrant their judgment?

872*] *It has been argued, on the part of the United States, that there are errors apparent on the face of the record, which, though not made the subjects of exception, will be noticed by this court. These errors are said to be in the judgment itself. That judgment is in the following words:

"The court having maturely considered the law and the evidence in this case, doth now order, adjudge and decree, that the plaintiffs' petition be dismissed; and that the grant made by the Baron de Carondelet, as the Governor of Louisiana, on the 20th of June, 1797, to the Marquis de Maison Rouge, be, and the same is hereby declared valid; that the said Richard King, defendant, and the said Daniel W. Coxe, the warrantor, be, and they are hereby declared and recognized to be the lawful owners of the parts of the said grants held by them, as described in the answer of the said Richard King, and in Schedule A, and that they be quieted in the ownership and possession of the same."

In this judgment, three patent errors are alleged to exist. It is said that it adjudicates the title for lands for which the United States have not sued; that the acceptance, by the defendant Coxe, of a league square, was an extinguishment of his claim to any other portion of the land; and that which was principally argued and urged was, that "the instrument executed by the Baron de Carondelet, on the 20th of June, 1797, was not a grant to the Marquis de Maison Rouge." These errors are alleged to be apparent on the record, independently of any exception embracing them. None such, it is admitted, were taken in the court below, or brought here.

Admitting, for the purposes of this argument, that this court can reverse a judgment for such an irregularity as is said to be in this, in its adjudication of the title for lands for which the United States have not sued, without, however, conceding it as a fact that this court can properly do so, in a case brought to it upon a writ of error, this is not the case for the exercise of such a power.

The court having decreed that the petition of the United States should be dismissed, and that the defendant King should be quieted in the ownership and possession of that land for which the United States sued, is as "definitive a sentence," or judgment, as the court could have given upon the subject matter of the suit. It put an end to the suit, and absolved the defendant, in the language of the civil law of Spain, from the demand which had been made or sued for. Anything put with it, growing out of the mode of proceeding in the trial, but separable from that "sentence," so as not to interfere with its execution, is, in the civil law 873*] of Spain under which the *judgment was given, one of those divisions or points (capitulos) which can be appealed from, and set aside upon the appeal to a superior court, or by the court giving the "sentence," on account of its comprehending a thing not demanded or prayed for. But not so when the defendant has been acquitted and declared free from the demand, unless a right to revoke the sentence has been reserved by the judge (L. 9, tit. 22, p. 3); though it may be reversed upon appeal in a superior court, for meritorious cause, when there has been error in the judge in acquitting the defendant from the demand for which he was sued. It cannot be denied, that, in this case, the "sentence" or judgment is conformable to the proceedings, so far as it acquits the defendant from the demand of the United States. The jus in re, or dominion in the thing sued for by the United States, is for so much land, particularly described in the action, as the mode of proceeding in Louisiana, or the civil law of Spain, in this particular still existing in Louisiana, requires to be done, with a recital—proper enough, and admissible in such actions, but not necessary—of a survey by Dinsmore, without authority of the plaintiffs, under an alleged pretended claim, called "the Maison Rouge claim." The answer of the defendant, after a general denial of all and singular the allegations in the petition, except as they are thereafter specially admittted, is, that "he is the true and lawful owner of the tract of land described in the petition," with a recital of his purchase from Coxe; that he is in possession of the same, and has made valuable improvements; with a prayer that he may be dismissed with costs, and that Coxe, as his warrantor, may be called to appear and defend him in the suit. The issue, then, according to the Louisiana mode of proceeding, or the civil law of Spain, between the United States and King, was certain, positive, and respondent upon the part of King to what the United States sued for, and is no way changed by the intervention of Coxe as his warrantor. That makes another issue between Coxe and Kin, so far as his denial of King's statement of his warranty to him; but it is not a substitute for the first issue between the United States and King, as to the dominion of the land sued for. Coxe, it is true, comes in upon the prayer of King, to defend the suit as his warrantor; not, though, as the court here seems to suppose, exclusively to maintain King's ownership of the land sued for as a part of the Maison Rouge grant; for in this petitory action by the United States, King might have resisted it by any equitable title other than that which was equitable or legal connected with that grant. But King asks that Coxe may be brought in as a party; that, "if this suit should be decided against him, he *may have judgment against the Unit- [*874 ed States and the said Coxe, for the value of his improvements on the land, and a judgment against Coxe for the purchase money and interest thereon, from the time of eviction," and costs of suit. In such a case, no error or irregularity in the judgment, in respect to Coxe's answer, can invalidate the finding upon the answer of King, if the latter can be executed upon the thing sued for. In other words, there may be in the civil law of Spain, upon which the rights of the parties in this case exclusively depend, distinct findings in the same judgment, without the error of one of them having the effect to vacate the other; and in

that case it often happens that one of the findings in the judgment is made the subject of appeal, and that it is reversed without affecting the other. Now, though this may not be done in our writ of error, what I contend for is, that, if in a writ of error in a case from Louisiana, a judgment shall have distinct findings, one of them expressly comprehending and adjudging the subject matter of the suit, we shall separate it from the others which we may think cannot be maintained, and affirm the first, as would be done in the courts of Louisiana, when the subject matter of rights claimed and denied depends upon the Louisiana law, or upon that law which existed there when the parties to the suit respectively acquired their rights in the subject matter of the suit.

But further, the language of the judgment, as to the land upon which it is to operate, is explicit. It dismisses the petition of the United States, and quiets the defendant in the possession of precisely that land, in quantity and description, for which the United States sued him. Whether it was or was not the intention of the Circuit Court to adjudicate the title to other lands, in which the defendant King has no interest, but to which his warrantor, Coxe, may have a title, is of no consequence, for both are so discriminated in the judgment that they cannot be confounded; and were so, that each might be independent of the other, or, in the language of the civil law of Spain, be firm and valid, from having passed into a thing adjudged (cosa juzgada). Besides, such adjudication of a thing not sued for cannot vitiate the judgment for the thing that is sued for in this case; for, if the former is not valid only because it is for land, as this court says, not sued for, the other part of the judgment in favor of King is valid, it being for the very land which was sued for. The fact that King and Coxe claim dominion of parts of what they say they respectively own, under the same grant, and that the court affirms their rights under it, cannot render that part of the judgment in favor of King less a judgment, because it is for a thing in contes-
875*] tation; *and, though a part of the Maison Rouge grant, the whole of that grant never was so. It was neither so by the action brought by the United States against King, nor did it become so from the answer of Coxe, though that answer, as well as the answer of King, raised the question of the validity of that grant, for the purpose of having it judicially determined whether or not it gave to King the dominion of the land for which the United States sued him, as a part of the Maison Rouge survey. To so much of that land or survey, and to no more of it, is the judgment in favor of King an affirmation of his ownership, or of Coxe's right of alienation of it to King. A judicial determination in favor of the validity of the grant and survey, for any portion of the latter, is a good reason for the United States, by its proper functionaries, to consider that the land embraced in the survey was private property when Louisiana was ceded, or that it was not a part of the public land intended to be conveyed by the treaty to the United States. But the validity of the grant was not, nor can it be, as the case is in the record, the foundation *for a judgment* in favor of Coxe for all the *land which he claims under it, because the* United States had not submitted to the jurisdiction of the court for any such purpose. A "definitive sentence," or judgment, is only valid when it is given against a person subject to the jurisdiction of the judge. LL., 12, 15, tit. 22, p. 3. But the United States did submit itself to the jurisdiction of the court, for the land for which it sued King; and the judgment acquitting him of that demand is final and conclusive in his favor against the United States, though it may be reversed for error in itself by this court, upon a proper exception, and though the execution of it is suspended by the cognizance which this court is legislatively empowered to take of that "sentence" or judgment. I say legislatively empowered, for that phrase indicates the extent and boundary of this court's cognizance of a case in error. Until it shall be enlarged by Congress, I must think that the court has exceeded it, in this instance, by making an erroneous "division or point," in a judicial sentence containing two distinct "divisions or points," the foundation for the reversal of both, and that, too, without an exception having been taken in the court below to either of them, to bring one or the other of them up for concurrence in this court. If this court means to claim the power, and to exercise it in the review of a judgment, by a superior court, of an inferior, according to the civil Roman law, or as that law was modified under the Spanish rule in Louisiana, it may be done. But in doing it in this case, I may be allowed to dissent from my brethren, until some better *reasons for the exercise of [*876 such power shall be given than I have yet heard.

However, does the language of the judgment necessarily embrace any other land than that which the United States claim in their petition? The inquiry should not alone be, whether the judgment may not bear that construction, but whether or not it does not admit of another, more coincident with the case as it is on the record and appeared to be on the trial, and more in harmony with the duty of the judge who gave it, in respect to the only "definitive sentence" which, under the civil law of Spain as it exists in Louisiana, can be given in a suit for real property where a warrantor appears to defend the respondent to the action in the character of a plaintiff in reconvention. If the judgment will bear such a construction, though the language of it may not obviously show it, we are bound to give that, of which it is susceptible, most favorable to its operative accuracy, or "executive process for a thing adjudged." Now, my reading of this judgment is, that the petition of the United States is dismissed, and that King is quieted in the ownership and possession of the quantity of land for which the United States sued him, on account of the court having found the fact of the validity of the Maison Rouge grant, and that the further declaration in the judgment in respect to Coxe's ownership of the other lands in Schedule A, and that he is to be quieted in the enjoyment of them, is but an inference from the court's finding, from the proofs in the case, that the Maison Rouge grant and survey were valid. That it could not have been the intention of the court to be a judicial sentence seems to me certain—first, because the court had dis-

allowed or dismissed Coxe's plea in reconvention, by which alone his title to other lands than that sued for was brought in question, and second, because the only judgments which the Louisiana law permits to be given in such a case are the affirmation of his title to the land by decreeing its ownership to his vendee, or the disaffirmation of it, with a sentence against the warrantor for the purchase money, with interest upon it from the final eviction, and for the value of the improvements and costs. Besides, in all fairness of construction, if we consider the words of the judgment in connection with what, manifestly, the Circuit Court, throughout the trial, thought was the only issue before it, do the words, "that the said Richard King and the said Daniel W. Coxe, warrantor, be, and they are hereby declared and recognized to be the lawful owners of the parts of said grant held by them, as described in the answer of the said Richard King and in the Schedule A," imply an adjudication for more land than that for which King had been sued, and of which Coxe had been the owner, as [*877 *877] *described in the schedule, before he sold it to King? Of themselves, the words may; but that it was not so meant seems to me to be certain, from the dismission of the petition of the United States for just the land for which it had sued. I have used this course of argument, however, in respect to the judgment, not so much for the purpose of establishing the correctness of my own construction of it, as to show, that, in this court's review of it, instead of doing as it has done, it should, in accordance with its own well established rule, have made every reasonable presumption in favor of its correctness. So the court has done in all previous cases where that which was equivocal in a judgment has not interfered with the right to a forced execution upon it of the matter in controversy. And so essential is the propriety and policy, in jurisprudence, of putting an end to further controversy after a judgment rendered, though there may be surplusage in it, that no instance can be found in our books, nor in the English reports, of a judgment set aside, in a court of review, which distinctly finds the issue between the parties, on account of other matter in it, unless upon exceptions taken to the court's ruling of the law in the case applicable to the issue. This I believe to be the only instance to the contrary, and I cannot think it will ever be a precedent for another.

In the case under consideration, the action was instituted by the United States against King, for the recovery of a tract of land in the actual occupation of the defendant. The petition is in the general terms in which such pleadings are usually framed in Louisiana, and avers the invalidity of the title under which the defendant claims to hold the land, and the paramount legal title of the United States. The answer of the defendant to this petition is equally general in its terms, and asserts, without any specification of details, the validity of his title, and controverts the allegations in the petition. So far the case is perfectly simple, and, being followed by a general judgment for the defendant, so far as that judgment disaffirms the title of the United States and affirms that of the defendant, there is no ground upon which error can be alleged. In such a state of the case, without the intervention of the warrantor, I am warranted in saying, from the decision just read by the Chief Justice, that the judgment of this court would have been in favor of the judgment of the Circuit Court. The supposed difficulty, however, which the case presents, and which has caused the reversal of the judgment of the Circuit Court, arises from the circumstance, that King not only puts distinctly and simply in issue the question of title between himself and the United States, but he vouches, in warranty, Coxe, from whom he purchased. *King was, by the prac- [*878 tice in Louisiana, obliged to do that. Let us for a moment inquire into the nature of that practice, and what it is meant to accomplish. In my opinion, it has a decisive and hostile bearing against the ground taken by this court, that the judgment of the Circuit Court should be reversed on account of its supposed adjudication of title for more land than the United States sued for.

At common law, as is familiar to all of us, when an action is brought to recover real estate which a defendant holds by purchase from another, accompanied with a covenant of warranty, the defendant may, at his option, elect either to give notice of the pending action to his vendor and warrantor, or to await the result of the suit, and, if judgment passes against him, sue upon his covenant of warranty. In the first case, the warrantor may take upon himself the burden of the defense, if he pleases, or may omit it. In either case, notice of the suit having been given to him, he is bound by the judgment. It is, nevertheless, still necessary that an action upon the warranty should be brought against him to enforce his personal liability. And upon proof that he had notice of the first suit, the judgment against his vendee will be conclusive evidence against him of the breach of his covenant.

If no such notice of the first suit be given to him, he may, in an action on the covenant, controvert the title of the original plaintiff, and require full proof of it to fix his liability. In all cases, however the responsibility of the warrantor is judicially settled in the second suit.

The Louisiana law seeks to accomplish precisely the same results by a speedier process. It permits the defendant to call, in warranty, the party from whom he derives title. The warrantor may forthwith appear in court as a party, and in his own name defend the suit. Notwithstanding this, however, no judgment is entered against him at the suit of the original plaintiff; but in case he shall be adjudged entitled to the property in contestation, a second judgment is entered simultaneously, in favor of the original defendant, against his warrantor.

This subject was fully discussed in this case at our last term; but, as I have remarked before, we have no report either of the argument or the decision. I depend upon my own notes of that argument, and upon those of Mr. Coxe, of counsel in the case, from which I have derived much information. In my view, however, of the Louisiana law and practice, it is clear that the original proceedings and pleadings between the original parties to the suit remain as they were before the intervention of the warrantor, and the defense interposed by the war-

rantor cannot be made the foundation of any judgment to be rendered in favor of the plaintiff in the original action.

879*] *If this view of the matter be correct, in giving judgment in favor of King against the United States, the Circuit Court was necessarily limited to the pleadings between the parties. And so this court regarded the question at the last term; for although Coxe, in the defense interposed by him, sets up a claim to a larger portion of the entire Maison Rouge grant, and although this court, when this case first came before it, considered that the controversy was thus enlarged so as to comprehend this addition to the subject matter involved, and that Coxe became answerable to a judgment co-extensive with his claim, yet we were all satisfied, at the last term, that in this we had, as in other respects, misapprehended the local law, and the majority of the court now—as it ought to have done before, as I then thought—have confined us within our legitimate limits, and restricted the judgment to King alone, and to the property described in the petition. It would seem necessarily to follow, from this view of the case, that, in our consideration of the judgment of the Circuit Court, we ought to be restricted to the matters put in issue by the pleadings between the original parties.

In this aspect of the case, the grounds upon which the present decision is made to rest, in the opinion of the court, are wholly dehors the record.

Be this, however, as it may, this point in the case, so vital in the view taken by the majority of the court, has not been argued by counsel on either side. Nor is it considered distinctly and independently in the opinion of the court. In the absence of both, I am not disposed to pass any definite judgment. It is a point, however, which must be surmounted or avoided to warrant the judgment just given by this court.

But it is said that Coxe's acceptance of a league square was an extinguishment to any other portion of the land, and that there was error because it is not so declared in the judgment. This is certainly a matter dehors the record. Nothing concerning it is either on the face of the judgment or in the bills of exceptions. It is not in any way before this court, by any principle or rule of practice known to this court or any other court having the power to reverse, upon writs of error, the judgments of inferior courts. Some correspondence in regard to it is found, like Girod's pamphlet, in the mass of documents improperly sent up with the record; but we have no means of knowing whether or not it is the whole of the correspondence. I repeat, we cannot consider it by any known rule of judicial proceeding. Suppose it, however, to be before us for examination; can it be contended that the acceptance of this league square by Mr. Coxe was an extinguishment of his claim to the rest of the

880*] land in *the grant, if that were otherwise valid, or that it annulled the conveyance to King made by Coxe long before the patent for the league square? The Act of Congress of the 29th of April, 1816, confirmed all claims *recognized* as complete grants in the report of *the commissioners* appointed under the Act of the 3d of March, 1807, and authorized a patent to be issued therefor; and the Maison Rouge claim had been so recognized and reported; but it was provided that under "no one claim shall any person or persons be entitled, under this act, to more than the quantity contained in a league square." Had no stipulation been made with Mr. Coxe when he received this patent, his right to any further quantity would not, by the language of this law, have been lessened or impaired. It did not, nor was it meant to, impair the quantity assumed by the United States in the treaty of cession of Louisiana, by which all the inhabitants were protected and maintained in the enjoyment of their whole property. And if it had been so meant, I do not think that I venture anything which will not be acquiesced in by my associates in this court, when the subject shall be fully examined, in saying, that Congress cannot constitutionally pass an act taking from the inhabitants of Louisiana, or those of any other purchased territory now making a part of the United States, any property guarantied to them, their descendants or assigns, by treaty, so as to exclude them from having their rights to the whole of what they claim judicially ascertained. A treaty is the supreme law of the land, and it limits the legislation of Congress to the fulfillment of all of its provisions, to the fullest extent of them, and not for less or a part of what individuals have a right to claim under it as property, but for the whole. And what that whole may be, where there is a dispute about it between the United States and those claiming, can only, under our system, be judicially ascertained and determined, unless, by the treaty or by the consent of the claimants, some other mode of determining the right has been agreed upon. But if this were not so, in this case there cannot be a doubt; for before Coxe accepted the patent for a league square, he made an inquiry what affect his acceptance would have upon his claim, and he was assured at the general land office, acting under the instructions of the Attorney-General, that it did not preclude him from seeking the recognition or confirmation of his entire claim by Congress or the courts of the country.

I will now consider, as briefly as I can, the only other error assigned by the majority of the court on this judgment. It is, that the Circuit Court adjudicated the instrument executed by the Baron de Carondelet, on the 20th June, 1797, to be a grant to the Marquis de Maison Rouge. This is surely not an *error [*881 brought before this court by a proper exception, and more, it is not an error apparent upon the record. It not only is not in any bill of exceptions, but it is not a ruling of the Circuit Court which was at any time formally objected to, directly or indirectly, in the court below. If it is an error, it exists in the language and office of the judgment itself—nowhere else.

Accurately speaking, this is not the judgment of the Circuit Court upon the issue made and submitted by the pleadings. It is the reason or cause assigned for the judgment. The prayer in the petition of the United States is, that they may "be decreed by a judgment of this honorable court, to be the true and lawful owners of the aforesaid land and premises." The

judgment responsive to this prayer is, that "King, the defendant, and Coxe, the warrantor, are declared and recognized to be the lawful owners," and are to be quieted in the ownership and possession of the same. The portion, therefore, of the decree now excepted to is a reason of the court for rendering such judgment. It is no necessary part of the issue submitted for adjudication or of the judgment actually given. As a reason of the court, it is mere surplusage, and can be altogether rejected without affecting the validity of the judgment. It is well settled, that, if a judgment be defective in form, yet if it follows and is responsive to the issue, and is substantially right in that respect, neither such defect, nor any surplusage contained in it, is a ground for error. Moore v. Tracey, 13 Wend. 282; Buckfield v. Gorham, 6 Mass. 447; Brown v. Chase, 4 Mass. 436; Deering v. Halbert, 2 Littell, 292; Todd v. Potter, 1 Day, 238. In Louisiana, in the case of Keene v. McDonough, 8 Louisiana, 187, it is said "An erroneous reason, given in a judgment which is correct in itself, is no ground for reversal." In any event, the reasoning of the court on which it either partially or wholly puts its judgment, even if incorrect, can only form the ground of an exception to be submitted to the court below; and if there persisted in, must be made the foundation of a bill of exceptions to be revised by this court. No exception whatever was taken to this portion of the judgment or reasoning of the Circuit Court.

If, however, the declaration, or decree embraced in the judgment, is an essential and necessary part of it, can it be revised by this court? It is the assertion of a fact, depending exclusively upon the performance by the grantee of the conditions of the grant, and upon the laws and usages of Spain, in cases where such instruments were issued and such conditions performed. Whether or not this fact was established is, as I have already shown, a matter belonging to the Circuit Court exclusively to decide. That court had before it the evidence of the performance of the conditions of the 882*] grant, and of the laws *and usages of Spain in regard to it. We have not. Nay, more, we are bound to presume that this judgment was right, so far as it did or could, by any possibility, depend upon a matter of fact. Every matter of fact necessary to sustain it will be presumed to have been proved, and will be taken by this court to have been fully proved in the Circuit Court. This is a principle too well settled, alike by the common law and the law of Louisiana, to need discussion. Campbell v. Patterson, 7 Vermont, 89; Butler v. Despalir, 12 Martin, 304; Mitchell v. White, 3 New Series, 409; Hill v. Tuzzine, 1 New Series, 599; Piedras v. Milne, 2 New Series, 537, also 265; Miller v. Whittier, 6 Louisiana, 72; Love v. Banks, 3 Louisiana, 481.

And in the case of Carroll v. Peake, 1 Peters, 18, this court said, in the absence of proof to the contrary, if any possible state of the case can be imagined, or any amount of testimony supposed, necessary to sustain the opinion of the Circuit Court, this court will assume that such a state of the case existed, and that such evidence was offered on the trial. Whether or not this is a complete "title in form" under the Spanish law, as it existed in 1797, and whether the conditions contained in it (supposing the performance of them to be necessary to its validity) were performed, are purely matters of fact, depending upon evidence which was before the Circuit Court. We ought, and are bound, to presume they were legally and conclusively established by that evidence. If so, the decree and judgment of the Circuit Court were free from error, and should be so affirmed by this tribunal.

I think I may say, that no error assigned, either in the record or by a majority of this court, in behalf of the United States, has been sustained. In my opinion, if the case could be justly decided now, a judgment of affirmance should be entered. I wish sincerely that I could, consistently with what I have felt myself bound to do, close my remarks upon the course pursued by a majority of the court in this case with what I have said. Something remains to be done.

In the opinion expressed by the majority of the court, they have deemed it proper to discuss the validity of the Maison Rouge grant, as if it were not affected in any way by the facts ascertained in the judgment of the court below, and as if in every aspect, whether of fact as to the performance of the condition, or of legal effect according to the law and usages of Spain, its validity was here before us for examination and adjudication. This course I deem at variance with the settled law and practice of this court. But as I regard the grant to be clearly valid, and the opinion now given by the majority of this court against it as of the highest importance to one of the States of *this Union, and to a large portion of [*883 its people, I will submit the grounds on which I think that the Circuit Court in Louisiana, properly adjudged the grant of the 20th June, 1797, to the Marquis de Maison Rouge, to be valid, legal, and complete.

Under the royal order of the 24th August, 1774, the Governor of Louisiana had the amplest powers to grant lands, without limitation as to quantity, and without the necessity of a confirmation by the Spanish government. This power existed undiminished until the royal order of 22d October, 1798, when it was conferred on the Intendant. 2 White's New Recopilacion, 245; United States v. Arredondo, 6 Peters, 727; United States v. Clarke, 8 Peters, 452.

After the Treaty of the 17th October, 1795, between the United States and Spain, by which the latter government relinquished its claim to the territory on the eastern side of the Mississippi north of the 31st degree of latitude, so that the settlements of the United States were rapidly approaching the inhabited portions of Louisiana, it became, even more than had been previously the case, an object of Spanish policy to promote the establishment of colonies of European emigrants on the outposts of Louisiana, and to encourage the cultivation of wheat, so as to supply its inhabitants, and make them independent of the people of the United States for that food. At no period of Spanish colonization was the disposal of the public lands a source of revenue, as ours have been in the United States. Conditions of settlement on the performance of other stipulations were im-

posed, but in no instance was the payment of money exacted, except in a few cases in Florida, where grants of land were permitted by the king to be made by the Indians to individuals for depredations upon the latter. But money for the king's revenue, or for colonial purposes, was never exacted in payment for lands granted. The land granted was usually limited in quantity, but varied according to the objects for which the grant was made. Several cases determined in this court exhibit the ratification by it of grants made by the Spanish governors of Florida and Louisiana, from a few acres to hundreds of thousands of acres. Every kind of consideration for them is also exhibited. Sometimes the settlement and cultivation by the grantee himself; sometimes by settlers to be introduced by him; at other times, the construction of mills, or the establishment of large grazing farms; again a reward for military services; sometimes the liquidation and settlement of previously existing contracts. Of all these considerations, and of many others, which were the foundation of grants of land by the Spanish Governor, the records of this court afford ample evidence.

884*] *In this state of the country, and under that system of policy, the Spanish Governor, Carondelet, made a contract on the 17th of March, 1795, with the Marquis de Maison Rouge, a French emigrant, then lately arrived in the colony. The object of it was to establish a colony of European immigrants on the Washita River, to cultivate wheat, and to erect mills for manufacturing flour. The Spanish government agreed to pay in money two hundred dollars for every family of two persons, four hundred for those having four laborers, and one hundred for those having one useful laborer. It also agreed to facilitate their passage to the place of settlement, supply them with provisions, to pay for the transportation of them and their luggage, when they came by sea to New Orleans, and to grant to every family containing two white persons fit for agriculture four hundred arpents of land, and a corresponding proportion for more or less. In the outset, the number of families was limited to thirty.

The contract of March, 1795, was designed to be the beginning of a national policy deemed by the Spanish government, and its representatives in Louisiana, essential to the independence of that province, and to the preservation of other territories of Spain still farther south. The government, therefore, undertook to defray all the expenses of its commencement, knowing that, after the settlement of thirty families in a wilderness, others would be induced to migrate to it, paying their own way, on account of that security which first settlers always give to new lands. The Marquis de Maison Rouge stipulated for nothing to be performed on his part but the introduction of thirty emigrant families into the province. Every other term of the agreement is to be performed by the Spanish government. The inspection of it, at pages 58 and 103 of the record, will show that all the onerous stipulations were on the part of the Spanish authorities, but none of them could in any way, or by any construction of it, result in any pecuniary gain to Maison Rouge. Guides and provisions, expenses of transportation, and grants of land and money, were to be furnished, given, paid, and made to the emigrants. Not a dollar was to be paid to the Marquis. The contract does not give him an acre of land. Not the smallest benefit from it was to come to him.

The Intendant, Morales, a man of vigorous character, and strict in his administration of the colonial finances, did not approve of the Baron de Carondelet's mode of colonization in his contract with Maison Rouge, on account of the expenditures to which it led; but at the same time he expresses his opinion, that it was the policy of the Spanish government to "have an extensive settlement on the Washita, to protect the possession *of the kingdom [*885 of Mexico." But Carondelet's contract with Maison Rouge, for the settlement of the thirty families, had received the royal sanction as early as July, 1795. The burden of it, except so far as the services of the Marquis had aided in its accomplishment, had fallen on the Spanish government. The literal compliance with it had been nearly fulfilled by the settlement of the thirty families, and the importance of the extension of such settlements became more apparent after two years had passed, as Morales acknowledged, than it had been when the policy was first adopted. It was then that the Baron de Carondelet recollected the unrewarded services of Maison Rouge—that he was a noble emigré impoverished and driven from France by the Revolution—and, no doubt, excited by the success of his policy, in his first experiment in colonizing the Washita under the personal agency of the Marquis, determined to extend it, by making a large grant of land to him; which policy he was to carry out on his own acount, at his own expense, and for his own benefit. The language of the grant is, "Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795, and desirous to remove, for the future, all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted us by the king, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the surveyor, Don Carlos Lareau Trudeau, under the terms stipulated and contracted for by the said Marquis de Maison Rouge." This grant was made on the 20th June, 1797, eleven days after the letter of the 9th June from Morales to the Marquis de Maison Rouge (record, p. 24), in which the Intendant, after refusing to alter a previous decision concerning the payment of money to some of the Marquis's emigrants, under the contract of 1795, says: "I doubt not that your intentions are the best for the interest of my august sovereign; that with this object, besides the convenience of living under his wise laws, you formed your plan, and I cannot disguise my belief that it would be very useful for Spain to plant an extensive settlement on the Washita, to protect the possession of the kingdom of Mexico; but I cannot admit, with all his

reasoning, that your project will be the best and most advantageous to effect that purpose; far from it. I entertain the opinion, that, if the government desire to benefit by the present circumstances, they can accomplish their ends 886*] *without great expense." It may be reasonably concluded, that the extract from the letter of Morales was in reply to one from Maison Rouge, concerning the contract of 1795. The internal evidence warrants such an inference. And, as it shows a difference of opinion between the Intendant and the Baron de Carondelet concerning the mode of colonization, and the disapproval by the former of the manner in which the latter had carried out that policy in his contract with Maison Rouge —both of them, however, acknowledging the wisdom and necessity of such policy, though differing upon whom the expense of it should fall—we have the motives and the reason for Carondelet's grant to the Marquis. Further, the grant in quantity, two hundred thousand arpents, was not more than enough for five hundred families, at the rate of allowance fixed by the contract of 1795. It could only become valuable to the Marquis by being colonized by him. The general policy on which it was made justifies the extent of the grant, and shows the strong desire of the government to extend and promote the settlement on the Washita, without incurring the expense of the previous arrangement. It was well known, before the contract of 1795 was made with Maison Rouge, and from the execution of it by him, that settlers could not be induced to fix their residences in such a wilderness then, without gratuities of land and money, and their transportation being paid. These were to be borne, therefor, by the Marquis. It is not at all improbable, if his life had been spared to carry out his design, that the cost of it would have left him but a small part of what at first seems, from the magnitude of the grant, to be a principality. Time only has ever repaid the actual cost of colonization; but individual settlers in new countries, when not disturbed by wars, or destroyed by savages, have commonly gathered fruits for themselves and for their posterity. Still, the grant was an inducement for the Marquis to attempt to colonize it. The man who has fallen from a high estate into nothing, seizes upon ventures to regain his elevation, and the greater the risk he may run and overcome, the greater will be his pride at his re-exaltation, or, if of another temper, his thankfulness to Providence for his success.

I cannot help thinking, too, that there is a caution in the terms of the grant, if taken in connection with the contract of 1795, very much in favor of its validity. As that contract did, it guards against the introduction of American settlers, which, under the former, the government had been able to prevent, by making its payments and grants of land only on proof that the families or emigrants had come from Europe. And it not only forbids any interference with the previous settlers 887*] within the *grant, who held by "title in form," or by virtue of a fresh commission, but imposes on the Marquis an obligation "to maintain and support them in all of their rights"—that is, titles made and granted to other persons within the region comprehended in the figurative plan of Trudeau, just as that grant was made to the Marquis, and which, when they were found to exist, the Marquis was permitted to have land elsewhere, in equal quantities.

Hitherto I have endeavored to show, in this part of the case—made so, however, only by the decision of the majority of the court—that the grant was authentic and genuine, from the internal evidence in it connected with that of the contract of 1795, and from the services of the Marquis in fulfilling that contract, in conformity with the national policy of Spain in respect to settlers on the Washita. But I have done so more for the purpose of showing its reasonableness, and to resist suggestions against it, than with any intention of relying upon it myself, exclusively, as conclusive of the fact of the execution of the grant by Carondelet, with the figurative plan of Trudeau contemporarily annexed; for the execution of the grant is proved by the witness Tessier, just as the law of Louisiana, or the civil law of Spain, required that it should be, for the purpose of verifying, in the trial of a suit, any instrument (escritura) upon which a party in it relies for establishment of his right.

An instrument of writing (escritura) is every deed that is made by the hand of a public escridano, or notary of a corporation, or council (concejo), or sealed with the seal of the king, or other authorized "person." L. 1, tit. 18, p. 3. "Hence arise the two kinds which produce full faith and full proof; one public, made by the escribano or notary, with the solemnities prescribed by laws"; "another authentic, which is that sealed by the king, bishops, prelates, and great men of the kingdom." Either of these is, in suits, judicially proved, when such as are distinctively "public" are signed by a "public escribano," when it is not wanting in any required solemnity, and when the deed or original is confirmed by the register or protocol, in the escribano's records; and when the deed is of that denomination called "authentic"—from being signed by the king, or an officer authorized by the royal order of the king, special or general—the proof of such signature, and the instrument having a proper seal, establishes it, without any reference to the protocol of it, in the public archives, when it appears that the protocol, or order for it, has been lost, or is beyond the jurisdiction of the court, so that the conformity between the original and the protocol cannot be ascertained by the *process of the court. It must be [*888 recollected, that the deed given to the party is the original, though taken from the register or protocol; and that, in the law of Louisiana, or civil law of Spain, a copy, or traslado, is the transcript from that orignal.

Now, it is by just such proof as I have mentioned, that the grant to the Marquis de Maison Rouge has been established in this case, as an authentic original, proved not by one witness only, but by two, with a positiveness of declaration and knowledge of the fact of the signatures to the grant that cannot be made stronger. Mr. Dubigny, Secretary of State for Louisiana, pp. 53, 54, of the record), says, that "he recognizes the signatures 'to the deed' of the aforesaid Baron de Carondelet, and of Don

Andres Lopez Armesto, the secretary of the government of Louisiana, as genuine, and of the proper handwriting of these persons respectively; that the said instrument is in the handwriting of Charles Tessier, Esq., of Baton Rouge, who was then first clerk in the secretary's office"; and he "moreover declares, that he had a knowledge thereof about the time it was issued, and that it (the grant) was a maker of public notoriety." This affidavit was made by Mr. Dubigny in 1824, before Galvin Prual, Esq., a justice of the peace for the city of New Orleans. Nineteen years afterwards, on the 22d of May, 1843, Charles Tessier, Esq., the same person mentioned by Mr. Dubigny, is examined in this case, by virtue of a commission for that purpose issued by the Circuit Court, and he says, in answer to the direct interrogatories put to him, repeating the same also to the cross-interrogatories, without deviation or alteration, except in other particulars, showing his forbearance in speaking of the transaction after such a lapse of time—he says that "he is above sixty-seven years of age; that he was a native of Louisiana; that he was, when the grant was made, principal clerk in the office of the Spanish government for making grants of land; and that he is now the judge of the parish of East Baton Rouge; that the grant marked A is filled up in the handwriting of this deponent, who was chief clerk of the Spanish government of Louisiana at the time, and did the land office business in filling up grants; that he is familiar with the handwriting of the governor, Baron de Carondelet, and of Don Andres Lopez Armesto, secretary of the government; the deponent has often seen them both write and sign their names; the signatures of Governor Carondelet and Secretary Armesto to the document A are both genuine." What more than the testimony of these two witnesses—both of unquestioned character, each in his life signalized in their community by holding offices of pub- [*889*889*] lic *trust and confidence—can be wanting, to establish the genuineness of the grant to Maison Rouge? But there is more. Tessier further says, that "he has a personal knowledge of the time when the said grant was made and issued, because he filled it up at the time of its date; his knowledge was therefore personal, as he performed the service; the grant was not a secret, but of public notoriety; that the grant was denominated and considered a titulo en firma; and was such complete and perfect evidence of title as not to require any other to validate or strengthen it; that he was familiar with the operations, forms, usages, and customs of the Land Department under Governor Carondelet; and that though he, at this distance of time, nearly fifty years since, cannot recollect whether Carlos Trudeau's plan and process verbal was or was not before his eyes when he filled up the body of the grant A, he always obeyed the orders of the Baron de Carondelet, and of the secretary of the government, Don Andres Lopez Armesto, and in this instance, as in others, performed his official duty." He repeats, to another interrogatory, "that at this distance of time, forty-six years, he is unable to say whether he had or had not Trudeau's figurative plan and process verbal before him; but he is certain he performed his duty, either by dictation or written instructions of his superiors, or by seeing the document B (Brengier's copy of Trudeau's figurative plan), though he cannot say in which of the three respective modes he acted upon the occasion; there was a general form of ordinary grants, which changed when the grant was special, for certain purposes and under certain conditions, and the governor or secretary then usually dictated or wrote the words of the grant, which was afterwards copied; but he cannot recollect how it was in this instance." And in his answer to the cross-interrogatory, he says that, "in his answers to the interrogatories in chief, he has answered the different questions as well as he could, and endeavored to discriminate between their opinions and his own personal knowledge of matters."

The proof of the grant, then, is positive, but suspicion is attempted to be thrown upon it by the denial of the fact it recites, that the figurative plan of Trudeau was annexed to it, when it was signed by the governor. And that denial rests upon Tessier's forbearing to state positively that it was before him when he filled up the grant, and upon Girod's pamphlet and the ex-parte testimony annexed to it. Now, before any suspicion of the grant can arise from Tessier not being able to swear positively to that fact, it must appear that it was in the order of the business of the Spanish land office, and that it was required by the laws and usages of Spain in Louisiana, that such *figura- [*890 tive plans—which, it must be remembered, are not actual surveys, but descriptions of natural boundaries in a grant, in conformity with which actual surveys were afterwards to be made—should form a part of that muniment of title in the land office from which the secretary made or filled up the grant, and that it was not sufficient for such a statement to be made of it as there is in the grant in this instance. I will make no assertion upon this point in respect to what was the practice in Louisiana when it was a province of Spain; but Florida land grants and those of Louisiana were made under royal orders of the king of Spain, and I can say, that, in our judicial affirmation in this court of Florida land claims, we have not in any instance called for a figurative plan in any one of them, but have in several of them ordered surveys to be made from the descriptions in the grants. But I may also say, that there is a good reason why the figurative plan of an extended grant should not have been before the secretary who filled it up at the time when he did so, and it is this: that the figurative plan was a mere delineation of what the grant, by conformable description, gave, and that, as the verification of the delineation by actual survey could only establish the locality of the land, it was not in a condition before that was done for official registry. Under the Spanish law, the survey of the Surveyor-General or his authorized deputies was conclusive of the locality of the grant, but the grant itself gave property to the grantee. It was property meant to be protected by the treaty. Though no survey had been made by the Spanish surveyors before the treaty was made, surveys afterwards, in conformity with the grant, have been always deemed sufficient by this court, and where a case has occurred, under a claim of a Spanish grant, where there had been, either before or

after the treaty, an imperfect survey, this court upon being satisfied of the genuineness of the grant, has ordered the survey to be made, to carry out the grant to its originally intended consummation. See the case of The United States v. Forbes, 15 Peters, 173.

But how can the contemporary annexation of the figurative plan to the Maison Rouge grant be denied in this case, after the proof of the signatures of the governor and secretary to the grant? Those officers assert in the grant that it was annexed, with limits and boundaries designated by Don Carlos Trudeau. Now, unless these signatures are disproved, or it is proved that the governor, Carondelet, and the secretary, Armesto, had combined to practice a fraud upon their sovereign, by the assertion of a fact in a deed which did not exist, the fact that it was annexed to the grant when it was made cannot be denied. The deed or grant, when proved, is good for all that it contains, 891*] whether *it be for what is granted, or for a fact by which that is to be thereafter practically ascertained; and neither is deniable but for fraud in the making of the grant. Or the grant may be shown to have been made without authority or contrary to law. Neither fraud nor violation of law is imputed to this grant, and it stands good for all that is asserted in it, against any suspicion of fraud which alleges that the figurative plan of Trudeau had been antedated. But, further still, against such a suspicion, shall no force be given to the declaration of Trudeau himself in such a case? His signature to the figurative plan is proved. He was the Surveyor-General, whose duty it was to make for the governor, by his order, such a figurative plan, before the governor could make the grant. A plan is made purporting to be signed by Trudeau, his signature is proved to be genuine, the governor and his secretary recognized it to be such by making a grant according to it; the character of Trudeau for private virtue and official ability and integrity is proved by those who knew him. If all this be not proof positive that the figurative plan had been made and was annexed to the grant contemporarily with its execution, then no proof will suffice, and our rejection of it involves a denial of all truthful character in the three highest functionaries then representing the king of Spain in Louisiana, the Baron de Carondelet, Secretary Armesto, and the Surveyor-General Trudeau. Such is the consequence concerning these men; but I know the majority of this court do not mean it, for if the more subordinate condition of two of them had not imposed upon their contemporaries the conviction that they were uninfected by the corruption which we are too apt to suppose degraded the provincial officers of Spain, the Baron Carondelet lived in his long career of public service to his sovereign, and died in it, unsuspected.

I will not take up further time by making any remarks upon the suggestion that the grant of June, 1797, was not meant to convey land to the Marquis de Maison Rouge for himself, but was a grant for emigrants, as the contract of 1795 with him was, except to say, that it would indeed be very singular if the two were for the same purpose; that in that of 1795 the government of Spain bore all the burdens of colonization, and in the grant of June 20th, 1797, no provision is made for such a purpose, but they were to be borne by the Marquis de Maison Rouge, an impoverished emigré from France, and whose poverty in his humble residence in a wilderness, bought by him for a small price, is proved in the record, and relied upon by this court, as it is shown in his will by his use of the word "bienes" as a reason that such a grant was not made to him. He used that word "bienes"—as any other person who had been brought up *under the civil [*892 law would have done—as signifying all that a man can own, or which can be property. Besides, however, the difference in regard to the expenses of colonization in the two instruments just mentioned, that they were not meant for the same purpose, without benefit to the Marquis in the last, is very conclusively shown by the fact that they were made by different authorities—the one by the governor, Carondelet, without operation until it received the approval of the king, because it involved the expenditure of the king's revenue; that of June, 1797, by the governor himself, who, by the royal order, was authorized to make grants of land without the special assent of the king to such grants.

It is true that the language of the grant to the Marquis, after saying that he "is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795," does recite further, "that, desirous to remove for the future all doubt respecting other families or colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge the thirty superficial leagues marked in the plan annexed to the head of this instrument." But the extension of colonization implied by it certainly cannot become a fact of a previous contract for that purpose, almost already completed, without the same terms for its enlargement as the king of Spain imposed upon his treasury in the first contract or other terms expressed and assented to by the Marquis. And I will further say, if this grant, from its terms, can be interpreted to convey land for emigrants, of which the Marquis was only a trustee, that the terms used in it will be equally effective to convey to the Marquis the dominion of the land for himself, if the facts in the case and the reasoning upon them shall preponderate in favor of the latter interpretation. In other words, the suggestion of the court in the opinion, of a conveyance having been intended for colonists, and not for the Marquis, admits, so far as the suggestion conveys the first idea, that the words of the grant are sufficient to convey the land by such an instrument. There can be no objection to the grant, then, on account of a deficiency of formal terms of conveyance. Such services were never required by the civil law of Spain to make a good grant for land. Any words for that purpose are enough, in a grant from which an equitable title can be inferred for the grantee. The suit of the United States against King is in the nature of a writ of ejectment. Inasmuch, however, as the distinction, so well known in England and in our States in the United States, between courts of equity and courts of common law does not prevail in *Louisiana, what in England [*893

would be recognized as a purely equitable title may serve as well in a court in Louisiana as a perfect legal title, either to maintain the claim of the United States, or as a defense on the part of the defendant against such demand. In the case of The United States v. Fitzgerald, 15 Peters, 407, this court recognized what has just been said to be the correct doctrine of the Circuit Court of the United States sitting in Louisiana, and gave judgment for the defendant in a writ of error, upon a right purely equitable, against the strictly legal title of the United States, in a petitory action for the recovery of land.

But let it be admitted, for the sake of the argument, that the instrument of June 20th, 1797, was designed to carry out more extensively the contract of 1795, either for the benefit of the settlers who had been already introduced under that contract, or for other colonists who might thereafter be placed upon the land by the Marquis, I cannot see how the right of the United States to recover in this action is in any way strengthened.

Whether the thirty leagues were assigned to the Marquis for his own use, or in trust for others—whether he was to be the sole and exclusive proprietor, or was to hold it, as is contended, for the benefit of others—is a question with which the United States have nothing to do. That is wholly between the Marquis, as holding the legal title, and those who may advance a claim as cestui que use.

In either case, the land was severed from the public domain and became private property. It could not, in either case, pass, by any construction of the treaty, to the United States. They have neither a legal nor equitable title to the land. In order to entitle the United States to a judgment, they must affirmatively aver and prove a title in themselves.

The very pretension that the Marquis received this grant as a trustee for others is as fatal against a recovery by the United States as if the entire legal and equitable title were conceded to be, as in my judgment it is clearly shown to be, vested absolutely and exclusively in the Marquis de Maison Rouge.

I have written much upon this case, I know—more than I usually permit myself to do in any case; but less would not have shown the judicial history of this, from the beginning of the action to its first appearance in this court, or our judgment and vacated judgment afterwards, and now the course which this court has taken upon the writ of error to reverse the judgment of the Circuit Court.

One word more. The mandate upon the decision here made is for the reversal of the judgment given in favor of King for the land for which the United States sued him. The case will *of course be before the [*894 Circuit Court of Louisiana again, when new evidence on both sides may be introduced, or, if that does not exist, for that court to correct the error in its judgment. It cannot do so by any decision of this court upon the bills of exceptions in the record. The reversal is for causes or errors said to be in the judgment. If, then, the Circuit Court shall, in its further trial of this cause, be of the opinion that the evidence proves title to the land in King, I presume that the mandate will be satisfied if it gives a judgment in his favor again for that quantity of land for which the United States has sued, without saying anything about the validity of the title, or declaring that Mr. Coxe is an owner of any part of the Maison Rouge grant.

Order.

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

Howard J.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1850.

BY BENJAMIN C. HOWARD,

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

VOL VIII

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES.

DURING THE TIME OF THESE REPORTS.

The Hon. ROGER B. TANEY, *Chief Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. JAMES M. WAYNE, *Associate Justice.*
The Hon. JOHN CATRON, *Associate Justice.*
The Hon. JOHN M'KINLEY, *Associate Justice.*
The Hon. PETER V. DANIEL, *Associate Justice.*
The Hon. SAMUEL NELSON, *Associate Justice.*
The Hon. LEVI WOODBURY, *Associate Justice.*
The Hon. ROBERT C. GRIER, *Associate Justice.*

REVERDY JOHNSON, Esq., *Attorney-General.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*
BENJAMIN C. HOWARD, Esq., *Reporter.*
RICHARD WALLACH, Esq., *Marshal.*

Mr. Justice McKinley, being engaged during this term in holding an important session of the U. S. Circuit Court at New Orleans, did not attend the session.

RULES OF COURT.

No. 53.

Note by the Reporter.—As the dissent of Mr. Justice Wayne from this rule was inadvertently omitted from the publication of it in the preceding volume, it is now reprinted.

Ordered, that no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.

Counsel will not be heard, unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points. And no other book or case can be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard ex-parte, upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1849.

Mr. Justice Wayne dissents from this rule.

Woodbury, J., does not concur in this rule.

No. 54.

Ordered, that where an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that at which the case is docketed, it shall be dismissed at the costs of the plaintiff.

No. 55.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

No. 56.

Ordered, that printed arguments under the fortieth rule shall not hereafter be received, unless filed within the first ten days of the term.

No. 57.

Ordered, that when a division of opinion is certified to this court by a circuit court, the parties shall be placed on the docket of this court, as plaintiff and as defendant respectively, in the manner in which it shall appear from the statement of the case they stand in the Circuit Court.

No. 58.

Ordered, that twelve printed copies of the abstract, points, and authorities required by the 53d rule, be filed with the clerk three days before the case is called for argument—nine of these copies for the court, one for the Reporter, one for the opposing counsel, and the remaining one to be retained by the clerk.

This order to take effect on the first day of May next.

April 24, 1850.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

January Term, 1850,

AND REPORTED HEREIN,

VOL. 49.

AS HAVE ALSO BEEN REPORTED IN

8 HOWARD AND IN 17 CURTIS'S DECISIONS.

8 How.	Title.	17 Curt.	Here in.
1–2	United States v. Carr		
	United States v. Carr	476	963
2–4	" "		964
4–7	" "		965
7–9	" "		966
9–10	" "		967
10–11	Ladd v. Ladd	479	967
11–14	" "		968
14–16	" "		969
16–19	" "		970
19–22	" "		971
22–24	" "		972
24–27	" "		973
27–29	" "		974
29–31	" "		975
31–34	" "		976
34–36	" "		977
36–39	" "		978
39–40	" "		979
41	United States v. Staats	492	979
41–43	" "		980
44–46	" "		981
46–48	" "		982
48	Surgett v. Lapice	497	982
48–51	" "		983
51–53	" "		984
53–56	" "		985
56–58	" "		986
58–60	" "		987
60–63	" "		988
63–65	" "		989
65–68	" "		990
68–70	" "		991
70–72	" "		992
73	Nathan v. Louisiana	505	992
73–75	" "		993
75–78	" "		994
78–80	" "		995
80–82	" "		996
82–83	" "		997
83–85	United States v. Buchanan	509	997
85–87	" "		998
87–90	" "		999
90–92	" "		1000

8 How.	Title.	17 Curt.	Here in.
92–95	United States v. Buchanan	509	1001
95–97	" "		1002
97–100	" "		1003
100–102	" "		1004
102–104	" "		1005
104–107	" "		1006
107–109	Williams v. Benedict	515	1007
109–112	" "		1008
112–113	" "		1009
113–114	United States v. Boisdore United States v. Powers United States v. Turner	517	1009
114–116	" "		1010
116–119	" "		1011
119–121	" "		1012
121–123	" "		1013
124	Bennett v. Butterworth	520	1013
124–126	" "		1014
126–129	" "		1015
129–131	" "		1016
131–133	" "		1017
133–134	" "		1018
134–135	Veazie v. Williams	527	1018
135–137	" "		1019
137–139	" "		1020
139–141	" "		1021
141–144	" "		1022
144–146	" "		1023
146–148	" "		1024
149–151	" "		1025
151–153	" "		1026
153–156	" "		1027
156–158	" "		1028
158–161	" "		1029
161–163	" "		1030
163	Phalen v. Virginia	539	1030
163–166	" "		1031
166–168	" "		1032
168–169	" "		1033
170	McClanahan v. Davis	542	1033
170–172	" "		1034

8 How.	Title.	17 Curt.	Herein.
172–174	McClanahan v. Davis	542	1035
174–176	" "		1036
176–178	" "		1037
178–181	" "		1038
181–183	" "		1039
183	" "		1040
183–186	Taylor v. Taylor	548	1040
186–188	" "		1041
188–191	" "		1042
191–193	" "		1043
193–195	" "		1044
195–198	" "		1045
198–200	" "		1046
200–203	" "		1047
203–205	" "		1048
205–207	" "		1049
207–210	" "		1050
210	" "		1051
210–212	Maxwell v. Kennedy	560	1051
212–215	" "		1052
215–217	" "		1053
217–220	" "		1054
220–222	" "		1055
222–223	" "		1056
223–224	Marsh v. Brooks	565	1056
224–227	" "		1057
227–229	" "		1058
229–232	" "		1059
232–234	" "		1060
234	Wanzer v. Tupper	568	1060
234–235	" "		1061
235–236	Clark v. Manufacturers' Ins. Co.	569	1061
236–239	" "		1062
239–241	" "		1063
241–244	" "		1064
244–246	" "		1065
246–249	" "		1066
249–251	" "		1067
251	Lord v. Veazie	575	1067
251–253	" "		1068
254–256	" "		1069
256	" "		1070
256–258	Peale v. Phipps	578	1070
258	Wilson v. Barnum	579	1070
258–261	" "		1071
261–262	" "		1072
263	Doe v. Watson	581	1072
263–265	" "		1073
265–268	" "		1074
268–270	" "		1075
270–272	" "		1076
272–274	" "		1077
274–275	Reed v. Proprietor of Locks and Canals on Merrimac River	585	1077
275–277	" "		1078
277–280	" "		1079
280–282	" "		1080
282–284	" "		1081
284–287	" "		1082
287–289	" "		1083
289–292	" "		1084
292–293	" "		1085
293–294	Menard v. Massey	591	1085
294–297	" "		1086
297–299	" "		1087
299–302	" "		1088
302–304	" "		1089
304–306	" "		1090

8 How.	Title.	17 Curt.	Herein.
306–309	Menard v. Massey	591	1091
309–311	" "		1092
311–314	" "		1093
314–316	" "		1094
316	" "		1095
317–318	Bissell v. Penrose	605	1095
318–320	" "		1096
320–323	" "		1097
323–325	" "		1098
325–328	" "		1099
328–330	" "		1100
330–333	" "		1101
333–335	" "		1102
335–338	" "		1103
338–340	" "		1104
340–343	" "		1105
343–345	" "		1106
345–347	Mills v. Stoddard	620	1107
347–350	" "		1108
350–352	" "		1109
352–355	" "		1110
355–357	" "		1111
357–359	" "		1112
359–362	" "		1113
362–364	" "		1114
364–366	" "		1115
366–367	Caldwell v. United States	625	1115
367–369	" "		1116
369–371	" "		1117
371–374	" "		1118
374–376	" "		1119
376–379	" "		1120
379–381	" "		1121
381–384	" "		1122
384	" "		1123
384–385	Gibson v. Stevens	631	1123
385–388	" "		1124
388–390	" "		1125
390–392	" "		1126
392–395	" "		1127
395–397	" "		1128
397–400	" "		1129
400–402	" "		1130
402	West v. Smith	636	1130
402–404	" "		1131
404–407	" "		1132
407–409	" "		1133
409–412	" "		1134
412–414	" "		1135
414	Murrill v. Neill	641	1135
414–416	" "		1136
416–419	" "		1137
419–421	" "		1138
421–423	" "		1139
423–426	" "		1140
426–428	" "		1141
428	" "		1142
429–430	Grove v. Brien Gilmor v. Grove	648	1142
430–432	" "		1143
432–434	" "		1144
434–436	" "		1145
436–439	" "		1146
439–440	" "		1147
441	Sheldon v. Sill	651	1147
441–443	" "		1148
444–446	" "		1149
446–448	" "		1150
448–450	" "		1151

8 How.	Title.	17 Curt.	Here in.
451	Le Roy v. Beard	654	1151
451–452	" "		1152
452–454	" "		1153
454–455	" "		1154
455–458	" "		1155
458–460	" "		1156
460–463	" "		1157
463–465	" "		1158
465–468	" "		1159
468–470	" "		1160
470	Prentice v. Zane	661	1160
470–472	" "		1161
472–475	" "		1162
475–477	" "		1163
477–480	" "		1164
480–482	" "		1165
482–485	" "		1166
485–487	" "		1167
487–489	" "		1168
490	Mager v. Grima	667	1168
490–492	" "		1169
492–494	" "		1170
495	Williamson v. Berry	669	1170
495–497	" "		1171
497–499	" "		1172
499–501	" "		1173
501–504	" "		1174
504–506	" "		1175
506–509	" "		1176
509–511	" "		1177
511–514	" "		1178
514–516	" "		1179
516–519	" "		1180
519–521	" "		1181
521–524	" "		1182
524–526	" "		1183
526–528	" "		1184
528–531	" "		1185
531–533	" "		1186
533–536	" "		1187
536–538	Williamson v. Berry	669	1188
538–541	" "		1189
541–543	" "		1190
543–545	" "		1191
545–548	" "		1192
548–550	" "		1193
550–553	" "		1194
553–555	" "		1195
555–558	" "		1196
558–560	" "		1197
560–562	" "		1198
562–565	" "		1199
565	" "		1200
565–566	Williamson v. Irish Presbyterian Congregation of New York	705	1200
566–567	Williamson v. Ball	706	1200
567–568	" "		1201
569	Mills v. St. Clair County	707	1201
569–571	" "		1202
574–576	" "		1203
574–576	" "		1204
576–579	" "		1205
579–581	" "		1206
581–584	" "		1207
584–586	" "		1208
586–588	Kennedy v. Bank of the State	714	1209
588–591	" "		1210
591–593	" "		1211
593–596	" "		1212
596–598	" "		1213
598–601	" "		1214
601–603	" "		1215
603–605	" "		1216
605–608	" "		1217
608–610	" "		1218
610–613	" "		1219
613–614	" "		1220

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1850.

1*] *THE UNITED STATES, Appellants,
v.
BURROUGHS E. CARR and John Peck, Claimants of sixteen boxes of Havana Sugar, Twelve Baskets of Champagne Wine, etc.

THE UNITED STATES, Appellants,
v.
BURROUGHS E. CARR and John Peck, Claimants of Ten Boxes, Twenty Half Boxes, and Six Quarter Boxes of Raisins, Four Kegs of Grapes, etc.

Manifest—goods imperfectly described in—omission to describe—penalty—statute.

The sixteenth section of the Act of Congress passed on the 18th of February, 1793, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries and for regulating the same" (1 Stat. at Large, 305), prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods.

The forfeiture provided in the seventeenth section was intended to apply to cases where the foreign merchandise was not included at all in the manifest, and not to cases where it was included in fact, although not with legal precision, and where there was no bad faith.

The Act of May 31st, 1844 (5 Stat. at Large, 658) gives jurisdiction to this court in revenue cases without regard to amount, only where the judgment is rendered in a Circuit Court of the United States. Therefore, where the case was brought from the Court of Appeals for the Territory of Florida, and the amount in controversy did not exceed one thousand dollars, the case must be dismissed for want of jurisdiction.

THESE two cases were brought by appeal from the Court of Appeals for the Territory of Florida, and were argued together. The questions involved were the same in both. The first of the two cases was this:

In January, 1844, the schooner Hope W. Gaudy was about to sail from the port of New York to that of St. Augustine in Florida, the vessel being licensed for carrying on the coasting trade. Maurice Gaudy, the captain of the schooner, produced to the collector of New York the following manifest, viz.:

[*2

"Manifest of the cargo on board the schooner Hope W. Gaudy, Gaudy, master; burden one hundred and forty tons, bound from New York for St. Augustine, Fla., January 13th, 1844.

Marks.	No.	Packages and contents.	Shippers.	Residence.	Consignees.	Residence.
B. E. & C. Co.	1	Eighteen hundred and fourteen packages	John Peck	New York	B. E. Cantello	St. Augustine
J. M. H.	2	Three pack. mdse.	Do.	Do.	J. M. Hernandez	Do.
C. Burt & Co. S. S. P.	3 4	Eleven do. Twenty-three do.	Do. do.	Do. Do.	G. Burt & Co. S. S. Peck	Do. Do.

Maurice Gaudy.

The oath taken by Gaudy, and the permit to sail granted by the collector of New York, were as follows:

L. / D. C. I, Maurice Gaudy, master of the schooner Hope W. Gaudy, do solemnly swear to the truth of the annexed manifest; and that, to the best of my knowledge and belief, all the goods, wares, and merchandise

Note.—Jurisdiction of U. S. Supreme Court dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded can be shown. See note to 7 L. ed. U. S. 592.
12 L. ed.

of foreign growth or manufacture therein contained, were legally imported, and the duties thereon paid or secured; so help me God.

Maurice Gaudy.

Sworn to this 13th day of———, 1844.

G. W. Davis, D'y Col.

District of New York, Port of New York:

M. Gaudy, master of the schooner Hope W. Gaudy, of Cape May, having sworn, as the law directs, to the annexed manifest, consisting of four articles of entry, and delivered duplicate thereof, permission is hereby granted to the said schooner to proceed to the port of St. Augustine, in the State of Forida.

Given under our hands, at New York, this 13th day of January, 1844.

D. G. W. Davis, D'y Collector.

W. D. K. J. Davenport, D. Naval Officer.

On the arrival of the vessel at St. Augustine, the manifest was presented to the collector, who made upon it the following indorsement: "No. 3. A, inward, schr. Hope W. Gaudy, of Cape May, Maurice Gaudy, master, 140 75-95 tons, from New York, entered January 25th, 1844."

On the 29th of January, 1844, the District Attorney of the United States filed, in the Superior Court for the District of East Florida, a libel against "sixteen boxes of sugar, twelve baskets of Champagne wine, twenty-five sacks of Liverpool salt, five cases and five baskets of olive oil, ten boxes of French cordial, seven casks of London porter, two casks of Scotch 3*] ale, *two half pipes of French brandy, one pipe Holland gin, thirty half boxes and twenty-four quarter boxes of raisins, ten bags of cassia, two boxes of citron, five chests of tea, ne frail (or basket) of almonds, three drums of figs, two boxes of lemons, and ten bags of coffee."

The libel alleged that the said merchandise was not (nor was any part thereof) specified or certified in the manifest of the cargo of the said vessel, as is required by the act of the Congress of the same United States, in such case made and provided, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The libel then claimed that the merchandise had become forfeited to the uses specified by law.

In March, 1844, Burroughs and Carr filed their claim as owners of the goods. After sundry proceedings which it is not material to state, the cause came up for hearing, when the judge dismissed the libel. The United States carried it to the Court of Appeals, which affirmed the judgment of the court below. An appeal was then taken to this court.

The act of Congress under which the libel was filed was the Act of 18th February, 1793, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." 1 Statutes at Large, 305.

By the sixteenth section, it is enacted, that "the master or commander of every ship or vessel licensed for carrying on the coasting trade, and being destined from any district of *the* United States to a district other than a district *in the* same or an adjoining State on the sea coast, or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be, if there is one, otherwise to the collector of the district comprehending such port, or to a surveyor within the district, as the one or the other may reside nearest to the port at which such ship or vessel may be, duplicate manifests of the whole cargo on board such ship or vessel, or if there be no cargo on board, he shall so certify; and if there be any distilled spirits, or goods, wares, and merchandise of foreign growth or manufacture on board, other than what may by the collector be deemed sufficient for sea stores, he shall specify in such manifests the marks and numbers of every cask, bag, box, chest, or package containing the same, with the name and place of residence of every shipper and consignee of such distilled spirits, or goods of foreign growth or manufacture, and the quantity shipped by and for *each, to be by him subscribed, and to [*4 the truth of which he shall swear or affirm; and shall also swear or affirm, before the said collector or surveyor, that such goods, wares, or merchandise, of foreign growth or manufacture, were to the best of his knowledge and belief legally imported, and the duties thereupon paid or secured; or if spirits distilled within the United States, that the duties thereupon have been duly paid or secured; upon the performance of which, and not before, the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the master, with a permit thereto annexed, authorizing him to proceed to the port of his destination. And if any such ship or vessel shall depart from the port where she may then be, having distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture on board, without the several things herein required being complied with, the master thereof shall forfeit one hundred dollars; or if the lading be of goods the growth or manufacture of the United States only, or if such ship or vessel have no cargo, and she depart without the several things herein required being complied with, the said master shall forfeit and pay fifty dollars.

And by the seventeenth section it is enacted, that "the master or commander of every ship or vessel licensed to carry on the coasting trade, arriving at any district of the United States, from any district other than a district in the same or an adjoining State on the sea coast, or on a navigable river, shall deliver to the collector residing at the port she may arrive at, if there be one, otherwise to the collector or surveyor in the district comprehending such port, as the one or the other may reside nearest thereto, if the collector or surveyor reside at a distance not exceeding five miles, within twenty-four hours, or if at a greater distance, within forty-eight hours next after his arrival, and previous to the unlading any of the goods brought in such ship or vessel, the manifest of the cargo (if there be any), certified by the collector or surveyor of the district from whence she last sailed, and shall make oath or affirmation, before the said collector or surveyor, that there was not, when she sailed from the district where his manifest was certified, or has been since, or then is, any more or other goods,

wares, or merchandise of foreign growth or manufacture, or distilled spirits (if there be any other than sea stores on board such vessel) than is therein mentioned; and if there be no such goods, and if there be no cargo on board, he shall produce the certificate of the collector or surveyor of the district from which she last sailed as aforesaid, that such is the case; where-5*] upon such collector *or surveyor shall grant a permit for unlading the whole or part of such cargo (if there be any) within his district, as the master may request; and where a part only of the goods, wares, and merchandise of foreign growth or manufacture, or of distilled spirits, brought in such ship or vessel, is intended to be landed, the said collector or surveyor shall make an indorsement of such part on the back of the manifest, specifying the articles to be landed; and shall return such manifest to the master, indorsing also thereon his permission for such ship or vessel to proceed to the place of her destination. And if the master of such ship or vessel shall neglect or refuse to deliver the manifest (or if she has no cargo, the certificate), within the time herein directed, he shall forfeit one hundred dollars; and the goods, wares, and merchandise of foreign growth or manufacture, or distilled spirits, found on board, or landed from such ship or vessel, not being certified as is herein required, shall be forfeited, and if the same shall not amount to the value of one hundred dollars, such ship or vessel, with her tackle, apparel, and furniture, shall be also forfeited."

The second of the two cases mentioned in the commencement of this report was similar in its circumstances to the case just stated, except that the goods were brought to St. Augustine in a different vessel, and that the value of the goods was shown by appraisement to be only seventy dollars.

The cases were argued by Mr. Johnson (Attorney-General) for the United States, and by Mr. Wood, of New York, for the claimants.

Mr. Johnson said that three questions were involved in the case:

1. Whether the manifest of itself was a sufficient compliance with the sections above quoted of the act of Congress.

2. Whether, if defective, the defect is cured by the certificate of the collector of New York.

3. Whether, if the manifest be in violation of the act, the defect works a forfeiture of the goods.

1st. The manifest was not made out according to law. The 16th section regulates the conduct of the master at the port of departure. He must deliver to the collector a duplicate manifest of his cargo; and must also, if there is any merchandise on board of foreign growth or manufacture, specify the marks and numbers of every cask, bag, box, etc., containing such articles. The object of this is to enable the collector at the port of destination to identify these boxes as being the same which had once paid duties at the custom-house. He must 6*] also *make oath that the goods were legally imported. All this being done, the collector is authorized to give him a permit of departure. But it must be evident from an inspection of the record, that the master has not complied with the law. The manifest only says 1,814 packages of merchandise. What was there to prevent the master from substituting other packages, exchanged at sea, for those which he had on board at the time of his departure from New York? The act requires a distinct specification of all the marks on all the boxes. But here it is not even stated whether they contain foreign merchandise or not. The collector at New York could also refer to the marks on the boxes, and ascertain, by the records of his office, whether or not such boxes had been regularly imported; but if the construction contended for on the other side be correct, smuggled goods could be transported coastwise just as easily as those which had paid duties.

2d. The certificate of the collector at New York does not heal this defect. He is only authorized to certify in case all the requisitions of law are complied with. If his certificate is conclusive, then he is invested with judicial power, and neither the collector of the port to which the vessel is going, nor the district judge, can properly interfere. The manifest is no longer subject to their supervision; although the authority of the first collector to certify is limited to the case of previous compliance with the law on the part of the master. The 16th section says, if he (the master) shall depart "without the several things herein required being complied with," etc.; showing that a compliance with a part would not be sufficient. The power of the collector of New York was therefore limited, and his certificate could not heal the defect in the manifest.

3d. Are the goods subject to forfeiture?

The last paragraph of the 17th section must be construed to refer to the 16th. It says that the "merchandise, not being certified as is herein required," shall be forfeited, and in certain cases the vessel also. But if we show that the merchandise is not certified as the 16th section requires, the forfeiture attaches.

Mr. Wood made the following points:

1. The manifest in these cases is correct, and made out according to long established usage.

2. It is sufficient, under the 16th and 17th sections of the Act of 18th February, 1793, to insert in the manifest the marks and numbers of the casks, boxes, packages, etc., containing foreign merchandise, with the name and residence of every shipper and consignee thereof, and the quantity shipped by and to each.

*3. All this is done in the manifest in this[*7 cause.

4. This provision of the act necessarily and impliedly requires that the foreign merchandise from one shipper to a consignee shall be distinguished from every other consignment, when either the consignee or shipper, or both, are different, but it does not require that the foreign and domestic merchandise consigned by any one shipper to any one consignee shall be so differently numbered and marked as that the foreign merchandise can, by the numbers and marks, be distinguished from the domestic merchandise.

5. Such distinction in the manifest between the marking and numbering of foreign and domestic merchandise, consigned by one and the same shipper to one and the same consignee, has never been made in practice, and the long

established usage must be considered as settling the construction of the act.

6. The manifest in question is conformable to the most approved precedents. See American Lex Mercatoria, Appendix.

7. Assuming that the manifest ought to have been more specific, and so as to distinguish between the foreign and domestic merchandise consigned by one and the same shipper to one and the same consignee, yet the certificate of the collector thereon, and the oath of the master, being correct and according to the provisions of the said 16th section, the goods are not forfeited under the 17th section of said act, but the master only is subjected to the forfeiture of one hundred dollars under the said 16th section.

8. The forfeiture of the goods under the 17th section is confined to the case where the goods are not certified as required.

9. Penal laws are to be strictly construed, and the interpretation of revenue laws is in favor of the subject, especially in the case of forfeiture of goods for acts not done by the owner thereof. Hubbard v. Johnstone, 3 Taunt. 177; Chests Tea v. United States, 1 Paine, 499.

10. The Legislature, in applying the pecuniary penalty upon the master to any defect in the manifest and certificate in the particulars enumerated in the 16th section, and in limiting the forfeiture of the goods to the prejudice of the owner thereof, in the 17th sections, to a defect in the certificate, clearly meant to narrow the ground of forfeiture of the goods, and to confine it to a case of a defect in the certificate, per se.

11. If every defect in the manifest should be deemed to extend to the certificate, and to render that defective by relation, so as to cause a forfeiture of the goods by the owner, it would confound the distinction clearly drawn by the 6*] act between the *two cases, and would deprive the owner of the goods of those salutary rules of construction above referred to.

Mr. Chief Justice Taney delivered the opinion of the court:

The first of these cases arises upon a libel filed in the Superior Court for the District of East Florida, against certain goods which were brought into the port of St. Augustine, in the schooner Hope W. Gaudy, and there seized by the collector as forfeited, for an alleged violation of the revenue laws. The appellees appeared as claimants; and at the trial in the Superior Court, the libel was dismissed, and the decree of dismissal afterwards affirmed in the Court of Appeals for the Territory of Florida. From this last mentioned decree the United States appealed to this court.

The Hope W. Gaudy was regularly licensed to carry on the coasting trade; and the goods in question were part of a cargo shipped at New York for the port of St. Augustine. The master of the schooner, previous to his sailing from New York, delivered a manifest of his cargo to the collector, in which the goods seized were included, with the proper affidavit annexed; and the collector indorsed upon it the certificate and permit to proceed on the voyage, as required by the Act of February 18, 1793. This manifest, so certified and indorsed, was in due time after the arrival of the vessel delivered to the collector of St. Augustine.

There is no imputation of bad faith in this transaction, upon the master or owners, or any of the parties concerned. But the forfeiture was supposed to have been incurred by a breach of the provisions of the 16th and 17th sections of the act of Congress above mentioned. Part of the cargo consisted of foreign merchandise. And it was insisted, on the part of the United States, that this portion of it was not marked and described in the manifest, in the manner required by the 16th section, and was on that account liable to seizure and forfeiture at the port of destination.

We do not think it material to inquire whether the manifest did or did not describe with legal precision the foreign merchandise which the master had taken on board when he sailed from New York. For if the manifest be liable to that objection, the 16th section, which prescribes the manner in which foreign merchandise shall be specified in the manifest, punishes the omission by a small pecuniary penalty of the master: but does not forfeit the goods.

Neither does the clause of forfeiture in the 17th section apply to imperfections of that description. The manifest, which *the mas- [*9 ter is required by this section to deliver at the port of destination, is the one certified by the collector at the port of shipment, and this he did deliver. And the law forfeits the foreign merchandise, or distilled spirits, found on board or landed from the vessel, in those cases only in which it is not included in the manifest certified as aforesaid. This is evidently the meaning of the law. But the record in this case shows that the goods seized were included in the manifest; and whether they were there described with legal precision or not is immaterial to this inquiry. For a defect in that respect, where there is no fraud, does not subject the goods to forfeiture, either at the port of shipment or the port of delivery. Indeed, it can hardly be supposed that an offense, which in the 16th section is punished by a small pecuniary penalty on the master, was intended in the succeeding section of the same law to be visited on the owner, and subject him to the aggravated punishment of the forfeiture of his goods; and the more, especially as the defect, if any, was the fault of the public officer who was apprised by the oath of the master to the manifest that foreign merchandise was on board, and whose duty it was, when thus informed, to see that it was designated and described as the law requires before he granted the certificate and permit to proceed on the voyage.

The decree of the Court of Appeals for the Territory of Florida must therefore be affirmed.

The other case between the same parties, now before us, is similar in all respects to the one in which I have just stated the opinion of the court. But the record shows that the value of the goods in controversy in this case is only seventy dollars.

The Act of May 31, 1844, which gives appellate jurisdiction to this court in revenue cases, without regard to the sum in dispute, gives it only where the judgment is rendered in a Cir-

cuit Court of the United States. Consequently, it does not apply to a judgment rendered in the Court of Appeals for the Territory of Florida. The right to appeal from that court is regulated by the Act of May 26, 1824. And that act limits the appellate power of this court to cases in which the amount in controversy exceeds one thousand dollars.

This case must therefore be dismissed for want of jurisdiction.

Orders.

The United States v. Carr and Peck, Claimants of Sixteen Boxes of Havana Sugar, etc.

This cause came on to be heard on the tran-10*]script of the record *from the Court of Appeals for the Territory of Florida, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Court of Appeals in this cause be, and the same is hereby affirmed.

The United States v. Carr and Peck, Claimants of Ten Boxes, etc., of Raisins.

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

HARRIET V. LADD, by her next friend, Montgomery D. Corse, Complainant and Appellant,
v.
JOSEPH B. LADD, John H. Ladd, The Farmers' Bank of Alexandria, John Hooff, Benoni Wheat, and John J. Wheat, the two last trading under the firm of Benoni Wheat & Son, Defendants.

Marriage settlement with power—execution of power—witnesses—evidence.

Where a married woman has power, under a marriage settlement, to dispose of property settled upon her, by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practiced upon her, but alleges no specific mode or act by which this undue marital influence was exerted, and the facts disclosed in the testimony go very far to contradict the allegation, the charge cannot be sustained.

Every feme covert is presumed, under such a settlement, to be, to some extent, a free agent.

Where the marriage settlement recited that the woman was possessed of a considerable real and personal estate, which it was agreed should be settled to her sole and separate use with power to dispose of the same by appointment or devise, and then directed that the trustee should permit her to have, receive, take, and enjoy all the interest, rents, and profits of the property to her own use, or to that of such persons as she might from time to time appoint during the coverture, or to such persons as she, by her last will and testament, might devise or will the same to, and in default of such appointment or devise, then the estate and premises aforesaid to go to those who might be entitled thereto by legal distribution—this deed enabled her to convey the whole fee, under the power, and not merely the annual interest, rents and profits.

Where the marriage settlement gave her the power of appointment to the use of such persons as she might from time to time appoint, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been sealed and delivered, this was a sufficient execution of the power, although the witnesses did not attest the fact of her signing it.

The authorities upon this point examined.

*THIS was an appeal from the Circuit [*11 Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of equity.

The facts of the case were these:

On the 20th of October, 1824, a marriage being about to take place between Joseph B. Ladd and Harriet V. Nicoll, both of the town of Alexandria, the following marriage settlement was executed by those parties.

"This indenture, tripartite, made this twentieth day of October, in the year of our Lord eighteen hundred and twenty-four, between Joseph B. Ladd, of the town of Alexandria, of the first part, Harriet V. Nicoll, of the town aforesaid, of the second part, and John H. Ladd, of the town aforesaid, of the third part. Whereas, a marriage is shortly to be had and solemnized, between the said Joseph B. Ladd and Harriet V. Nicoll; and whereas, the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been argeed between her and the said Joseph B. Ladd should be settled to her sole and separate use, with power to dispose of the same, by appointment or devise; and whereas, the said Joseph B. Ladd has agreed to add to the property of the said Harriet V. Nicoll one hundred and sixty-two shares of the Alexandria and Washington Turnpike Company, and the premises hereinafter described, now occupied by Dr. Vowell, which is likewise to be settled in manner aforesaid, with this understanding, that in case the said Harriet V. Nicoll should, after the intended marriage had, happen to survive the said Joseph B. Ladd, she shall not have or claim any part of the real or personal estate whereof the said Joseph B. Ladd should die seized or possessed, or entitled to, at any time during the coverture between them, by virtue of her dower, or title of dower, at common law, or by virtue of her being administratrix, or entitled to the administration of the goods and chattels, rights and credits, of the said Joseph B. Ladd, or in any other manner whatever. Now, this indenture witnesseth, that in pursuance of the agreement aforesaid, and of the sum of five dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Joseph B. Ladd hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, sell, and convey, unto the said John H. Ladd, his heirs and assigns forever, a house and lot situated upon the north side of King Street, and to the westward of Pitt Street, in the said town of Alexandria, and bounded as follows, to wit: Beginning upon King Street, four feet to the

NOTE.—Marriage settlements or conveyances for benefit of wife and child, when good and when void as to creditors. See note to 5 L. ed. U. S. 204.

12*] eastward of the centre *of the square formed by Pitt and St. Asaph streets, and running thence eastwardly with King Street, and bounding thereon twenty-three feet nine inches, be the same more or less; thence northwardly with a line parallel to Pitt and St. Asaph streets, one hundred and nineteen feet; thence westwardly and parallel to King Street, the length of the first line; thence southwardly with a straight line to the beginning; also one hundred and sixty-two shares of Alexandria and Washington Turnpike Company; and the said Harriet V. Nicoll, in consideration of the agreement aforesaid, and of the sum of five dollars to her in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said John H. Ladd, his heirs and assigns forever, the following property, to wit: All that property situated on the east side of Union Street, long known by the name of Conway's Wharf, with the warehouses, dwelling-houses, docks, and appurtenances thereto belonging, as it was devised by the late Richard Conway to Joseph Conway, deceased, from whom it descended to the said Harriet V. Nicoll; also, one lot of ground on the west side of Union Street, purchased by the said Joseph Conway of Thomas Conway, by indenture, now of record, in the County of Alexandria; also, all right, title, interest, claim, or demand of the said Harriet V. Nicoll, under the will of her late husband, William H. Nicoll, of Northumberland County, Virginia, or that may have descended to her from her father, Joseph Conway, deceased, or from her mother, or from any other person. To have and to hold all and singular the property hereby conveyed unto him, the said John H. Ladd, his heirs, executors, administrators, and assigns, to his and their only use forever; upon such trusts, and for such uses, intents, and purposes, as are hereinafter mentioned; that is to say, in trust, for the use of the respective parties who have conveyed the same until the solemnization of the intended marriage, and from and after its solemnization, then upon the trust that the said John H. Ladd, his heirs, executors, and administrators, shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy, all the interest, rents, and profits of the property hereby conveyed to and for her own use and benefit, or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, or to such person or 13*] *persons as she, by her last will and testament in writing, to be by her signed, sealed, published, and declared, in the presence of the like number of witnesses, may devise or will the same to; and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto, by legal distribution; it being the intent of the parties that none of the property hereby conveyed shall be at the disposal of, or *subject to*, the control, debts, or engagements of the said Joseph B. Ladd.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first before written.

"Joseph B. Ladd, [Seal.]
"Harriet V. Nicoll, [Seal.]
"John H. Ladd. [Seal.]"

On the 1st of November, 1824, Joseph B. Ladd, in conformity with the above agreement, transferred to John H. Ladd, the trustee, one hundred and sixty three shares in the Washington and Alexandria Turnpike Company, being one share more than he had stipulated to transfer.

On the 2d of January, 1827, Harriet V. Ladd, by writing under her hand and seal, executed in the presence of three witnesses, and reciting that it was in pursuance and in execution of the power reserved to her in her marriage settlement, directed the trustee to transfer and assign to John Hooff, cashier of the Farmers' Bank of Alexandria, one hundred and sixty-two shares of the aforesaid turnpike company, "forever thereafter to be and inure to the benefit of the said John Hooff."

On the same day, the trustee made the transfer, as directed.

In October, 1827, the following proceedings took place at the Farmers' Bank of Alexandria, and appear from the minutes of the Directors:

"It is proposed to lend Joseph B. Ladd upon his note, indorsed by John H. Ladd, the sum of $7,000, provided the board shall be satisfied that the real security he may offer shall be good security for that sum; decided in the affirmative."

"Oct. 9, 1827.—The loan provisionally granted to Joseph B. Ladd on the 1st instant, being under consideration, a deed of trust to John Hooff, trustee, signed by John H. Ladd and Harriet V. Ladd, and dated the 9th day of October, 1827, containing a description of the property intended to be conveyed as collateral security for the said loan, having been laid before the board, read and considered, and upon the question, Shall the said property be deemed good security for the said loan of $7,000? the vote was in the affirmative.

*"Resolved, therefore, that the loan [*14 of $7,000 be made to the said Joseph B. Ladd, upon the conditions contained in the said deed; and upon the further consideration, that the said Joseph B. Ladd cause the property contained in the deed to be regularly insured, and the policies assigned over to the trustee, John Hooff; upon this resolution John C. Vowell, Reuben Johnston, John H. Ladd, and Samuel Messersmith, voted in the affirmative; in the negative, Rd. M. Scott."

The deed referred to in the above proceedings, reciting the marriage settlement, conveyed to Hooff all that part of the wharf called Conway's Wharf, lying on the east side of Union Street, in the said town of Alexandria, as the same was devised by the late Richard Conway to the said Joseph Conway, the father of the said Harriet, with all buildings, etc., being the property described in, and conveyed by the marriage settlement, and then proceeded thus: "And whereas the Farmers' Bank of Alexandria has agreed to loan to the said Joseph B. Ladd the sum of seven thousand dollars, or such part of that sum as he may require, on his notes, to be indorsed by the said

John H Ladd, and discounted at said bank, and to be renewed from time to time, under the indorsement of the said John H. Ladd, or of such other person or persons as the board of directors of said bank may from time to time approve of, according to the usages of said bank, on the following terms and conditions: that is to say, that the said loans and discounts or interest to become due thereon, shall be secured by an effectual lien on the premises before described; that on the said notes being regularly renewed, and kept up, and on the said interest or discounts being punctually paid on such renewals, and on one thousand dollars of the principal being paid within two years from the date hereof, the said Joseph B. Ladd shall be allowed the further term of one year, that is to say, three years from the date hereof, for the payment of the residue of said loan; and if within the said third year the said Joseph B. Ladd, his executors or administrators, shall pay to the said bank the further sum of two thousand dollars, and shall pay and discharge the interest or discounts on the said notes as they shall be renewed, then that the time of the payment of the residue of said loan shall be extended one year further, that is to say, for the term of four years from the date hereof, he, the said Joseph, his executors or administrators, paying the interest or discounts on the said notes as they shall be renewed during the said fourth year; and if, within the said fourth year, the said Joseph shall pay the further sum of two thousand dollars of the principal of said debt, then that the time of the pay-
15*] ment of the residue *of the said debt shall be extended one year further, that is to say, for the term of five years from the date hereof; the said Joseph, his executors or administrators, paying the discount or interest on the notes offered for renewal as the same shall be discounted."

The deed then directed, that, if the payments mentioned above were not made, Hooff was to sell the property, "provided, however, that the same shall produce enough to pay and satisfy the whole amount of said loan which shall not be paid, with all discounts and interest which shall be due thereon, and all reasonable charges and expenses of sale." It contained also this important declaration and condition: "And the said Harriet V. Ladd, in execution of the power of appointment to her reserved as aforesaid, does hereby direct and appoint the premises herein described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited."

This deed was signed and sealed by the parties thereto, with a memorandum underwritten in these words, in the usual place of attestation: "Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles W. Muncaster, Jonathan Field," and bore the certificate of the clerk that it was proved as to John H. and Harriet V. Ladd, by three of the witnesses, acknowledged by the trustee, Hooff, and ordered to be recorded.

On the 13th of April, 1829, Hooff re-transferred to John H. Ladd, the trustee, the one hundred and sixty-two shares of turnpike stock, which the trustee had transferred to him on the 2d of January, 1827.

On the 30th of April, 1829, Harriet V. Ladd directed the trustee to transfer these shares to Sarah Ladd, which was accordingly done on the same day.

On the 21st of November, 1839, Sarah Ladd transferred eighty shares of this stock to the bank, and on the 6th of December following, the remaining eighty-two shares to Sarah Easton Ladd.

On the 16th of December, 1839, the following proceedings took place at the bank:

"Farmers' Bank of Alexandria, December 16th, 1839.

"The president and cashier, having made arrangements for further security on the debt of Joseph B. Ladd to this bank, having laid the same before the board, it is ordered to be recorded as follows, viz.: The Farmers' Bank of Alexandria having this day received from Mrs. Sarah Ladd a transfer of eighty shares of *stock in the Washington and Alexandria [*16 Turnpike Company, as further security for the payment of Jos. B. Ladd's note, amount six thousand dollars, due the said bank and unpaid, with an understanding the stock is not to be sold in less than two years from this date, and then to be applied towards the payment of said note of six thousand dollars, but the said Mrs. Sarah Ladd may direct the payment of the proceeds of said stock at any time previous to the expiration of said term of two years at her pleasure, and then to be applied towards the payment of said note of Joseph B. Ladd, amount six thousand dollars.

(Signed) "John C. Vowell,
"President."

"Alexandria, November 21, 1839.

"Amended by introducing a clause that the bank shall not proceed against the property in deed of trust, Conway's Wharf, until two years from this date, and then stock to be sold, without Mrs. Sarah Ladd should prefer to pay for the stock at the par value.

"A copy. John Hooff, Cashier."

On the 27th of July, 1842, Hooff advertised the real property conveyed to him for sale, and sold it on the 7th of September, for $4,175, to Benoni Wheat and John J. Wheat. Two days before the sale, Hooff by writing consulted Mrs. Ladd respecting the terms of sale, and the parcels in which the property should be sold, and received from her the writing returned indorsed in these words: "I agree to the above arrangement.—Harriet V. Ladd."

In February, 1843, Harriet V. Ladd, by her next friend, Montgomery D. Corse, filed her bill in the Circuit Court against her husband, the trustee, the bank, Hooff, and the Wheats.

The bill, after meeting the marriage settlement and the marriage, alleges that under said contract she had no power to convey or dispose of the property settled on her by way of anticipation or otherwise. Nor had she power to appoint the use of the income rents, etc., to any person, for the debts or benefit of her said husband.

That she was induced by the marital influence of her husband, and with the knowledge and connivance of the said bank, to sign a deed of trust to John Hooff, to secure a debt of her husband indorsed by her trustee, which deed is witnessed by four persons in manner and form as shown by the exhibit of it.

That no power is given to the trustee to convey the property, nor could she authorize him, 17*] and that said deed of trust is *null and void, and was obtained by marital influence and coercion, while living with her husband, and her husband did not join in said deed, nor was she separately examined to ascertain if she freely executed it, etc., nor was she authorized to execute said deed, without all the forms were complied with.

That she is falsely made in said deed to say that she had previously appointed under her power, when in fact she never had, and that her husband and trustee were acting for their own personal interest.

That said Hooff and said bank have caused the wharf lot to be sold to Benoni Wheat, who holds the same in possession as his property, and refuses to let your oratrix have the same.

That the said bank holds the shares of turnpike stock included in the settlement, as security for the money loaned to her husband.

That she was induced by marital influence to execute an instrument dated 30th April, 1829, as will be shown, directing her trustee to transfer 162 shares of turnpike stock to Mrs. Sarah Ladd, to secure $4,000 loaned by her (as guardian to Sarah Easton Ladd) to your oratrix's husband, and when the same should be paid to be re-transferred to the use of your oratrix.

That a settlement having taken place by which Sarah Easton Ladd received 82 shares in full of her claim, the remaining 80 shares were on the 21st of November, 1839, transferred by Sarah Ladd to said bank, without any authority, and they were then the property of your oratrix, and not of Sarah Ladd, as the bank well knew.

That all the said writings, transfers, and doings in the premises were illegal, and in fraud of her rights secured to her by said marriage contract; that all the aforesaid actings and doings in the premises, and every act and doing connected with the same, by the aforesaid Joseph B. Ladd, John H. Ladd, John Hooff, Benoni Wheat, and the said Farmers' Bank of Alexandria, were in violation of her rights, and done to defraud her of that property and those rights secured to her or intended so to be by the marriage contract aforesaid.

That the said deed to Hooff, and the pretended assignment of the turnpike stock, ought to be declared null and void as to your oratrix, and she ought to be restored to her property and rights, and quieted against all said parties, and that the dividends on said shares received by said bank for at least four years ought to be paid to her.

The bill then states the desertion of complainant by her husband.

18*] *That the part of the property sold has not paid the debt, and it will take the residue of her property to pay it. It prays that the deed of indenture may be surrendered and cancelled, and that complainant may be quieted against all the defendants in her enjoyment of her said property; that the bank may assign the shares of turnpike stock, or in default pay the value thereof and all dividends received thereon; and it concludes with a prayer for general relief.

In June and July, 1843, Hooff, the Wheats, *and the bank filed their answers.* The husband and trustee did not answer the bill. This answer denied the complainant's construction of the marriage settlement, insisted upon the competency and regularity of the appointment, and of all the proceedings had in pursuance thereof, averred that the property could be applied to the payment of the debt due to the bank with her consent; that she was quoad the property a feme sole; that the loan was made to Joseph B. Ladd on his notes, indorsed by the trustee, and upon the security of the deed of trust; that the greater part of the money was expended upon the improvement of the property which belonged to her; that the complainant was privy and assented to the sale, and set forth the facts connected with the transfer of the turnpike stock, and denied all fraud or undue influence in bringing about any of the transactions between the parties.

To all these several answers there was a general replication and issue; and a commission was issued to take testimony, under which the facts above stated, and those hereinafter adverted to, were established in proof.

On the 6th of October, 1845, the cause came on for hearing, when the Circuit Court dismissed the bill, with costs. The complainant appealed to this court.

The cause was argued by Mr. May and Mr. Brent for the appellant, and Mr. Francis L. Smith and Mr. Jones for the appellees.

The points raised by the counsel respectively are thus stated upon their briefs:

For the appellant.

1st. What is the construction and effect of the marriage settlement, and what powers did it confer or restrain?

2d. Have its terms and power been duly executed, so as to make a valid appointment or execution thereof?

3d. Will equity aid the defective execution?

4th. Has the complainant by her own acts precluded herself from the relief prayed, in respect to the property withheld from her?

*5th. Has she not a clear right to the [*19 shares of turnpike stock?

6th. Is she not entitled to be quieted in the unsold property, at least to have the deed as to that cancelled?

1st Question. We contend that the marriage settlement gave her no sweeping power to alienate the property, but only from time to time during coverture to appoint the uses of the income, etc.

In support of this we cannot do better than review Kent's learned opinion, in 3 Johns. Ch. Rep. 87 (see pp. 97, 100, 102-104, 112, and in pages 113 and 114); he concludes that she can only convey as authorized in marriage settlement, and that a power over the income, etc., does not authorize a deed of the whole by anticipation. See on this, 2 Kent's Com. 166, note.

2d Question. But conceding that she had power to sell and dispose, has she exercised it according to the formula prescribed?

Her marriage settlement requires her appointment to be by an instrument under hand and seal, attested by three credible witnesses.

The appointment relied on by our adversaries as to the real estate is the deed to Hooff.

This deed is defective—

1st. That it is attested by but two witnesses as to Mrs. Ladd.

2d. That the attesting clause only attests the sealing and delivering.

And, first, Mrs. Ladd's execution required three witnesses. See Hopkins v. Myall, 2 Russ. & Mylne, 86; 1 Ib. 535.

Next, the attesting clause is defective. See 1 Roper, pt. 2, 1946, 1947; Waterman v. Smith, 9 Simons, 629; 3 Maule & Selwyn, 512.

This last authority equally destroys the execution of the transfer of the turnpike stock, whether you refer to her first appointment, 2d January, 1827; or her last appointment, 30th April, 1829, under which the bank claims 80 shares.

It is true that the attesting clause as to this stock says simply "witness," which would imply only one witness, and is therefore defective.

But take it as if it were "witnesses" or "witnessed," then parol proof is not admissible to explain how it was witnessed, because the power requires that the seal and signature should be attested. 1 Roper, pt. 2, pp. 197, 198; 9 Simons, 629, and note; 3 Maule & Selw. 512.

But no parol proof was introduced here to explain how it was executed. 2 Grattan, 439. 20*] *Then all these appointments are void and defective in forms as required.

3d Question. Will equity aid these appointments, under the circumstances?

The witnesses required are placed as guards, and their number cannot be aided in equity. Hopkins v. Myall, 2 Russ. & Mylne, 86; 1 Ib. 535.

The counsel here cited and commented on a number of cases. 2 Jac. & Walk. 425; 1 Mylne & Craig, 105, 111; 6 Wendell, 9; 20 Law Library, 74, 75; 3 Russ. 565; 6 Bligh, N. S. 120; 3 Ham. 529; 7 Beavan, 551; 8 Wheat. 229; 1 Peters, 338; 12 Peters, 375; 16 Ves. 116; 3 Johns. Ch. 97-113; 2 Merivale, 483; 8 Leigh, 21; 2 Russ. & Mylne, 86; 1 Ib. 535.

4th Question. Is Mrs. Ladd equitably estopped from claiming her rights in this property?

It is said that it would be a fraud in her now to claim as against the purchasers.

What are the facts?

First, we objected to Hooff as a witness.

By agreement, Hooff is to be considered as having been examined under an order of court, but the question as to his competency is reserved.

We allege that Hooff is an incompetent witness, because the legal title was passed to him by the original trustee, John H. Ladd, in violation of his trust, and that the legal title being still in Hooff, the decree, if in our favor, would be for a reconveyance to our trustee, or some other trustee, with costs as against Hooff.

But even conceding Hooff's competency, then his evidence consists of his answer and deposition, per our agreement.

He proves by way of estoppel—

1st. That he always understood, and verily believes, that a large portion of the loan to Ladd was used in improving the wharf property claimed by complainant.

Answer to this, first, that he does not state it of his own knowledge; second, that if he did, it proves no fraud in complainant.

2d. That after an order of the bank directing a sale, the complainant applied for and obtained an extension of the credit payments at the sale.

3d. That, at Mrs. Ladd's request, the bank ordered the property sold should be laid off by certain specified boundaries before the sale, upon the supposition that by such division it would command a large sum, and that in accordance with a previous *understand- [*21 ing, on the 5th of September, 1842 (two days before the sale), the complainant wrote her approval on Exhibit No. 2.

Answer. By the deed of trust to Hooff, one month's notice was to be given of the place, time, and terms of sale.

And by the advertisement, the wharf was to be sold, subject to no easement or incumbrance —and the dwelling and storehouse to be sold at the same time.

All this was advertised to be done on the 7th of September.

But two days before the sale, Hooff and Mrs. Ladd agree, by the paper No. 2, to divide the property and sell the wharf, subject to a right of the dwelling and warehouse to land on the wharf.

Is not this a material change in the terms advertised?

Unquestionably, by the deed of trust these new terms ought to have been advertised one month, which was not done.

But it will be said that Mrs. Ladd agreed to vary the terms, and have the sale without any advertisement of the new terms.

Even if she was competent so to agree, there is no proof that she had ever read the advertisement, or knew what day the sale was to take place.

Nor does it follow, that, when she agreed on the 5th of September to vary the terms of sale as advertised, she had any reason to believe that Hooff would not re-advertise the property on the modified terms of sale.

Then here is a sale made on one set of terms advertised, and another set of terms announced at the sale, for Hooff says he sold on the terms as altered on the 5th of September, and nothing done by Mrs. Ladd to waive the one month's advertisement of the new terms.

For her meeting Hooff on the day of sale (not time of sale, which was 12 o'clock per the advertisement), on the premises and conversing with him, and suggesting that addition (which, however, does not appear in the record) to the description of the property "then about" to be offered for sale, would not prove that Mrs. Ladd waived the due notice, unless it was proved that she knew the sale was then to take place.

Then it is clear that Hooff advertised the wharf clear of incumbrances, and sold it subject to an incumbrance as avowed at the time of sale, and there is nothing to prove that Mrs. Ladd agreed to waive the advertisement, as required in her deed of trust.

Was that a fair and legal sale?

And have the purchasers any standing in equity?

If a trustee sells in violation of the injunctions in his deed of trust, the legal title passes at law, but in equity the cestui que *trust [*22 has relief against the purchaser who has bought with constructive notice of the breach of trust,

or non-compliance with the conditions. Taylor v. King, 6 Munf. 366; 4 Crauch, 403; and 4 Munf. 421; Greenleaf v. Queen, 1 Peters, 138, 145.

But do the circumstances thus detailed, namely, Mrs. Ladd's application to extend the credit payments, her request to divide the property for sale, and her conversing with the trustee, Hooff, on the premises on the day of sale—do all these circumstances amount to fraud in bar of her equity?

We contend not.

Because fraud consists in the "suppressio veri or suggestio falsi."

And there is no suppression by Mrs. Ladd of the fact that she had restricted her power by her marriage settlement. On the contrary, it is plainly recited in the deed to Hooff, who knew it well, and his purchasers were equally bound to know the recitals in the deed to their vendor. See 2 Tucker's Com. 439, 442.

Finally, if we have succeeded in demonstrating that this married woman had no power to convey except modo et forma, than we deny that her fraud can confer such a power on her.

For where a feme covert had no power to convey by anticipation, it was held that her fraud could not operate so as to give such a power. Jackson v. Hobhouse, 2 Merivale, 488.

Then, if the settlement is relied on as conferring a power to appoint away this real estate, we have shown—

1st. That it does not authorize such sweeping deposition.

2d. That what it does authorize has not been formally appointed or attempted to be.

3d. That as against this feme covert, under all the cases and all the circumstances, equity would not cure the defective execution.

And if there was a resulting separate equitable estate in Mrs. Ladd, with no power to alienate it in any mode, we have shown, first, that the express power to appoint during coverture negatives all other powers; second, that in Virginia separate real estate can only be disposed of by deed, etc., with privy examination.

The next subject matter is the turnpike stock. We show that the bank holds 80 shares, admitted to be part of the settled stock. We have already shown that it is defectively appointed. And if so, there is no pretense of fraud here, as touching the real estate.

It is true the Virginia decisions say that a 23*] simple settlement *of personal estate to separate use involves the jus disponendi, but that means where no special mode of disposition is expressed. See 3 Rand. 377, 381, 392; 9 Leigh, 206, 207-221.

In such cases, all the authorities concur, that the forms are restraints. Inasmuch, then, as the bank holds the legal title charged with our equity in these shares, we have a right to a decree, devesting them of the tortious title thus acquired, and an account of the back dividends.

And we also have a right to have a decree for the unsold portion of the property, under the prayers for special and general relief, and to an injunction against a sale of that and a reconveyance in trust.

If, then, we have rights in any or all this property, we have a right to have all these conveyances cancelled in equity. 1 Story's Eq. 9, 10, 12.

As Mrs. Ladd's title is but an equitable one, she must enforce her rights in chancery, as she has no remedy at law.

Part of the brief on behalf of the defendants was as follows:

The bill charges force and fraud—the undue exercise of marital power, etc., etc., as the inducements that forced the complainant, against her will, into the execution of the deed in trust to Hooff, subjecting a portion of her separate estate as collateral security, etc., etc.

All these charges are met and conclusively repelled in the answers of the defendants—and are so left without a particle of evidence to countenance them; and positively discredited by every circumstance in the case.

The complainant's case is then left to rest upon certain technical objections to the said deed in trust, for supposed departures from the limitations impose by the settlement on her, the complainant's own rights in her own separate estate.

The following objections to that instrument are insisted on:

Objection 1. Attestation defective, in not specifying the act of signing as one of the acts attested.

Answer 1. The attestation, coupled, as it ought to be, with the conclusion of the deed, stating its execution under the hands and seals of the parties, is a sufficient attestation to the signing.

Answer 2. No distinct attestation to the signature necessary.

Against the reason and authority of the adjudications which, within the last thirty-six years seem to have upheld the objection, contrary to all the precedent opinions, and to have overruled our answers to it, see Sugden on Powers, 6th ed. ch. 6, sec. 4, pp. 294-325, and the authorities there reviewed and criticised; *Pollock v. Glassell, 2 Grattan, Va. 440, [*24 and the authorities there cited and reviewed, etc., etc.; Langhorne v. Hobson, 4 Leigh, 224; Tod v. Baylor, Ib. 498; Parks v. Hewlett, 9 Leigh, 511; Hume v. Hord, 5 Grattan, 374; Lessee of Fosdick v. Risk, 15 Ohio, 84; Lord Mansfield's opinion in Wright v. Wakeford, reported in the Appendix, No. 6, to Sug. on Pow. ed. 1823.

Answer 3. Even if the marriage settlement directed the writing to be signed, and the signature to be distinctly attested, that direction is not restrictive, and in no sort avoids the deed.

1st. Because the words of the settlement, if they call for Mrs. Ladd's signature, and for the attestation of three witnesses to her signature, are merely directory, and do not necessarily exclude any other form of alienation competent to an ordinary proprietor and bargainer.

2. Because Mrs. Ladd was in the nature of a feme sole, whose jus disponendi is not restricted to the mode of alienation or appointment directed in the settlement; the settlement not purporting to negative every other mode 1 Fonbl. ch. 2, sec. 6, pp. 96-101, notes n, o, p, q, and the authorities there cited; Ewing v. Smith, 3 Desaussure, 417, and the authorities there cited and commented on; Jaques v. Methodist Episcopal Church, 17 Johns. 548, and

the authorities there cited and explained; Sugden on Powers, 6th ed. ch. 4, sec. 1, from p. 208 to the end of the section, the authorities there cited; 1 Serg. & Rawle, 275; Clancy on Husband and Wife, ed. 1837, ch. 5 and 6; Newlin v. Newlin, 1 Serg. & Rawle, 279; Story's Eq. Jur. ed. 1846, sec. 1390, and authorities there referred to; Field v. Sowle, 4 Russ. 112; Gardner v. Gardner, 22 Wend. 526; Dallam v. Wampole, 1 Peters, C. C. 116; Vizonneau v. Pegram, 2 Leigh, 183; Atherly on Mar. Set. 335; Lee et al. v. Bank of U. S. 9 Leigh, 200; manuscript case of Woodson v. Perkins.

Objection 2. The sealing and delivery of the deed by Mrs. Ladd is attested by only two witnesses, whereas the settlement called for three.

Answer 1. The objection rests on a mistake of fact; it is attested by three witnesses.

Answer 2. As a deed executed by her in her capacity of a feme sole as to her separate estate, and not restricted to the particular form of alienation directed by the settlement, no written attestation of witnesses appended to the deed was called for by the act of Assembly regulating conveyances; it is enough if the deed be proved to be her act by three witnesses before the proper court; and it is so proved.

25*] *They need not be subscribing witnesses. Act of Assembly regulating conveyances; Turner v. Stip, 1 Wash. 319; Long v. Ramsay, 1 Serg. & Rawle, 72.

Objection 3. That Mrs. Ladd ought to have been privily examined, pursuant to the Virginia act of Assembly.

Answer 1. It follows from the competency of Mrs. Ladd as a feme sole sui juris, in respect of her separate estate (as established by the authorities above cited) that to call for her privy examination as a feme covert would be contradictory and absurd.

Answer 2. That her acts disposing of her separate estate are effectual without privy examination, has been expressly and well settled, by authority. Peacock v. Monk, 2 Ves. Sen. 191; Wright v. Cadogan, 6 Bro. Parl. Cas. 486; Barnes's Lessee v. Irwin, 2 Dall. 199; Doe v. Staple, 2 Term Rep. 695; Bradish v. Gibbs, 3 Johns. Ch. 523; Powell on Contracts, 67; Compton v. Collison, 1 H. Bl. 334; Rippon v. Dawding, Ambler, 565; 1 Tuck. Black. 115.

Objection 4. That Mrs. Ladd's jus disponendi, or power of appointment, was restricted to the annual interest, rents, and profits, and did not extend to the land itself.

Answer 1. The settlement extends, plainly and expressly, both to the land and to the rents and profits.

Answer 2. The land itself passed, ex vi terminorum, under the terms "all the interests, rents, and profits."

Devise of "issues and profits" of land, all one with a devise of the land itself. Parker v. Plummer, Cro. Eliz. 190.

So a devise of the "occupation and profits" of a house and park is a devise of the very house and park. Paramour v. Yardley, Plowd, 2d point, argued pp. 541–543, decided p. 546.

No difference whether a devise of the land itself, or of the use, occupation, or profits of the land. Manning's case, 8 Co. Rep. 187.

"Rents and profits" means, not annual rents and profits, but the estate itself. Bootle v. Blundel, 1 Meriv. 213, 232, 233; Allan v. Backhouse, 2 Ves. & B. 65.

Grant by deed of the "profits" of land to one and his heirs passes the whole land. Co. Lit. 4 b; 4 Com. Dig. Grant, E. 5; Clancy on Husband and Wife, ch. 6, pp. from 295 to 303, and cases there cited; Barford v. Street, 16 Ves. 135; Jaques v. Methodist Episcopal Church, 17 Johns. 548, and cases there cited; Roper on Husband and Wife, 136, and cases there collected. The expression "from time to time" will not prevent the wife from making a sweeping appointment. Pybus v. *Smith, 3 [*26 Bro. Ch. Cas. 346; 2 Story, Eq. Jur. secs. 1393–1395; Virginia Rev. Co. ed. 1803, p. 159, sec. 12.

But the supposing the execution of the power of appointment defective in strictly legal requisites, a court of equity would leave her to her strictly legal remedy, and not help her to an unconscionable advantage; but, on the contrary, would actively interpose to relieve the purchaser or mortgagee, and compel the feme covert or infant to do equity.

Under the circumstances of this case, it would be against conscience, and fraudulent, for the complainant to take advantage of the alleged defects in the deed.

And married women, as well as infants, are barred by their own frauds.

It is a fraud to object to the sale or mortgage of their property, after it has been consummated with their assent, express or implied.

Their assent is implied, if they stand by and see their property disposed of, without instantly asserting their right, and notifying the party interested.

Any knowledge of the act whereby their rights are affected, is a "standing by," if they have opportunity to assert their right, etc., and covinously neglect it.

Littleton, sec. 678; Co. Lit. 357 a, 357 b, and 35 a. Feme covert's rights are choked and suffocated by her silent acquiesence, even though her covin be united with that of her husband.

Savage v. Foster, 9 Mod. 35, 37; 1 Robinson, La. 244. Married women are as much bound as their husbands to be honest; equally necessary for them to come with clean hands into a court of equity. Braxton v. Lee's Heirs, 4 Hen. & Mun. 376–383; Engle v. Burns, 5 Call, 463; Evans v. Bicknell, 6 Ves. 174–193; Morrison v. Morrison, 2 Dana, 16.

Even were the deed in trust to Hooff defective, a court of equity would lend its aid in favor of a creditor. 1 Story, Eq. Jur. secs. 95, 96. 97, 169, 170, and cases there cited. A feme covert may bind her separate property, for her own or husband's debts, and will be held to a specific performance of her contract. 2 Story, Eq. Jur. secs. 1399, 1399 a, 1340, and cases there cited; Hulme v. Tenant, 1 Bro. C. C. 14, and notes; Owen v. Dickerson, 1 Craig & Phil. 46; Allen v. Papworth, 1 Ves. Sen. 163; 3 Johns. Ch. 144.

The complainant is estopped, by her deed in trust to Hooff, from now attempting to claim the property. Shaw v. Clements, 1 Call, 381, top p.; Danforth v. Murray, 12 Johns. 201; Stevens *v. Stevens, 13 Johns. 316; Jack- [*27 son v. Bull, 1 Johns. Cas. 90; Jackson v. Hoffman, 9 Conn. 271; Heth. Cocke and Wife, 1 Rawle, 344.

As to the right of the bank to hold road stock, Jervis v. Rogers, 13 Mass. 105, S. C. 15 Ib. 389; Union Bank of Georgetown v. Laird, 2 Wheat. 390; Elder v. Rouse, 15 Wend. 206; Chesslyn v. Smith, 8 Ves. 183.

Mr. Justice Daniel delivered the opinion of the court:

The important legal questions arising upon this record, and on which the decision of the cause must depend, appear to be these:

1st. The nature and extent of the estate embraced within the power reserved to the feme by the marriage settlement; viz., whether that power comprised as well real as personal estate, or was limited to interest, rents, and profits merely, and by name.

2d. The mode of appointment indicated by the marriage contract, and whether this mode has been shown to have been either strictly or substantially and fairly complied with in the requisites of signing, sealing, and attestation."

Before proceeding to a particular examination of the questions above stated, it may be proper to premise some observations with respect to the charges in the bill; and first, of undue marital influence, and second, of fraud as means employed in accomplishing the wrongs to which the complainant alleges she has been subjected, and against which she has sought relief. With regard to the first of these alleged means, it must be remarked, that no certain or specific mode or act, neither coercion, allurement, nor willful misrepresentation or falsehood, is charged, by which the free will, the judgment, or the inclination of the complainant has been restrained or misled. Every feme covert is presumed, under a settlement like the one in the present case, to be to some extent a free agent; and she must or ought to be presumed to entertain dispositions of kindness towards her husband. But if, in the indulgence of such dispositions, she should make an unlucky or unprofitable appointment, it would be carrying the principle of protection to an extreme destructive of every conception of free agency, to determine that these untoward results were in themselves proofs of undue marital influence. The husband does not answer the bill in this case, and there is no direct evidence introduced to sustain this charge as to him; but some of the facts in the testimony go very far to contradict this allegation—as, for instance, the conduct of the feme, manifested and repeated long 28*] *after the separation from her husband had at any rate exempted her from any influence his presence and immediate agency might have been supposed to exert. This same conduct of the feme, her positive co-operation in the arrangements of the sale of the property, and her acquiescence in that sale until after the title had been made to the purchaser, furnish such presumption of the absence of fraud in the transactions complained of, which, if it is not absolutely conclusive, certainly calls for contravening evidence of a direct and powerful character—evidence of force sufficient to overthrow and set aside the complainant's own acts and declarations. But independently of the facts and circumstances just adverted to, the *positive denial of* fraud in every answer in the cause, and the absence of any proof to sustain it, should alone be taken as a complete refutation of the charge.

We will now particularly consider the nature and extent of the estate reserved to the complainant by the marriage settlement, and which was embraced within her power to appoint, by a just construction of that instrument. It is alleged in the bill that this estate was limited to interest, as synonymous with income, rents, and profits, eo nomine, and did not extend to the fee of the real estate, nor to the principal of the stock settled to the uses of the marriage. By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and imperative, by giving effect to some clauses to the exclusion of others. Expounded by this rule, let us see what will be the character of the estate here limited to the wife, and what the extent of her power to appoint a relation thereto.

The deed of settlement begins by reciting, "that, whereas the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed should be settled to her sole and separate use, with power to dispose of the same by appointment or devise." The deed then sets forth the estate, real and personal, conveyed by it, and enumerates the trusts created thereby, and amongst them the one involved in this controversy, and differently interpreted by the parties thereto, as follows, viz.: that the trustee "shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy all the interest, rents, and profits of the property hereby conveyed, to and for her own use and benefit; or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall from time to time during the coverture, by writing, appoint, etc., or to such person or *persons as she [*29 by her last will and testament, etc., may devise or will the same to; and in default of such appointment and devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution."

Let it be here remarked, that the object of the deed is declared to be the settlement of the whole of the estate, real and personal, upon the married woman, with power to dispose of the whole of it, either by appointment or devise. It will not be denied that this investment of, and authority over, the whole estate, so explicitly declared, might not have been modified or even revoked by subsequent provisions of the same instrument; but certainly they should be made to yield only to declarations equally explicit, or to such as are absolutely contradictory to and irreconcilable with them. Can it be correctly affirmed of the subsequent and specific designation of the trusts in this deed, that they are either plainly contradictory or irreconcilable with the purposes of the settlement previously and so explicitly declared? May not the term "interest," contained in that enumeration, considered in its relative collocation to the terms "rents" and "profits," be understood as equivalent with the word "estate," especially when the terms "rents" and "profits" may be correctly taken to cover interest under-

stood as mere revenue, and still more especially when we keep in view the previous purpose set forth in the deed—that of settling on the feme, and subjecting to her disposition by deed or will, the whole of her estate, real and personal? Certainly there is nothing in the term "interest" incompatible with the meaning of the terms "estate" or "property," for in an ordinary as well as in a technical acceptation, interest may imply both estate and property. But there is another illustration of this matter which would seem to put it beyond farther doubt, that the power of appointment in question cannot by any rational construction be restricted to interest understood as revenue or money, or to rents and profits eis nominibus. Let it be again remarked, that, by the preceding part of the marriage contract, all the estate, real and personal, was settled to the feme, with power to appoint the whole, without exception, by deed or will. Then, after the words which it is insisted for the complainant restricted her power, we have, at the conclusion of the deed, these words: "and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution." Now, the construction which would restrict her power to interest, rents, and profits, would seem as if intended to make the fee or inheritance dependent upon the contingency of an appointment of these mere chattel interests by the feme; if she 30*] *fail to appoint these, which alone it is insisted she had power to appoint, then, as a condition or consequence, "the estate and premises aforesaid" to go to those who may be entitled thereto by distribution. Let it be supposed that, being thus restricted, she does appoint these chattel interests; when then becomes of the inheritance or fee? The feme cannot, according to the argument, control or appoint it either by deed or will; this, it is said, is beyond her power. Does it not in this aspect of the case descend, or become subject to distribution, precisely as it was to do as the condition of non-appointment? So that, whether she appoints or not, the fee or inheritance goes precisely the same way. This construction renders the provisions of the marriage contract useless and unmeaning. It contemplates on the part of the wife an action wholly nugatory as to the ultimate disposition of the fee, which it places entirely beyond her control either by deed or by will, and leaves it to pass according to the law of inheritance whether she be active or quiescent. This confusion and obscurity in the construction of the contract is removed by taking the context—by connecting the first clear and positive declaration of its objects, viz., the settlement on the feme of all her real and personal estate, and the power in her to appoint the same by deed or will, with the concluding provision of that contract, which declares that, in default of appointment or devise, "then all the estate and premises aforesaid," covering the whole deed; not the interest on money, not the dividends on stocks, nor profits of any kind, but the whole estate conveyed and settled, shall go to those who may be entitled thereto by legal distribution. This construction gives consistency and meaning to the entire contract, and satisfies us that the power of appointment reserved to the wife was co-extensive with the whole estate and subjects of the settlement.

It remains next to be considered whether the mode of appointment prescribed or indicated by the marriage contract, whether the power be construed in an extended or restricted sense, has been strictly or fairly and substantially complied with. On behalf of the appellant it is insisted that, in the deed of the 9th day of October, 1827, from John H. Ladd, the trustee in the marriage settlement, and Harriet V. Ladd, to John Hooff, as trustee for the Farmers' Bank of Alexandria, regarding that deed as an appointment by Mrs. Ladd, under a competent power, still in its execution there has been such a departure from the mode prescribed for the exercise of the power by Mrs. Ladd, as renders her act wholly inoperative and void. The marriage contract, after securing the property *settled to the use of the wife, pro- [*31 ceeds thus: "or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses." The deed to Hooff, it will be seen, after reciting that John H. Ladd, the trustee in the marriage contract, in execution of the trusts expressed and declared in the marriage contract, and for a pecuniary consideration, does grant, bargain, and sell to Hooff; and, after farther recital, that "the said Harriet V. Ladd, in execution of the power of appointment to her reserved in the settlement, does hereby direct and appoint the premises hereinbefore described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited," concludes in the following language: "In witness whereof, the said John H. Ladd, Harriet V. Ladd, and John Hooff, have hereunto set their hands and seals, the day and year first before written." Then, after the names and seals of the parties are written, in the usual place of attestation, these words: "Sealed and delivered in the presence of George C. Kring, John McCobb, Matthias Snyder, Charles Muncaster, Jonathan Field."

Upon this state of facts, it has been contended that the execution of the power was defective and null, inasmuch as the power could be executed only by an instrument under the hand and seal of the married woman, and that the attestation of the witnesses shows simply a sealing and delivery of the deed of appointment, and shows nothing in relation to the signing by the parties. Some objection was made in the argument, founded upon the relative position of the names of the attesting witnesses, as tending to produce uncertainty as to which of the parties the witnesses meant to testify; but this objection, whether or not under other circumstances it might have been of any importance, was obviated by an exhibition in court of the original deed, which it was admitted was the document before the court below in the trial of this cause. In considering this objection to the defective attestation of the instrument of appointment, it is to be observed, that the complainant, by her bill, does not impeach the deed on any such ground; on the contrary, she expressly alleges that this deed was signed and executed by all the parties

thereto, and witnessed by the four persons whose names appear thereon. Such being the state of facts, it may very properly be questioned whether a party admitting and averring the execution of an instrument, and impeaching only its fairness or its legal operation, ex- [*32] hibiting nothing in the state of the pleadings requiring his adversary to establish the execution of such instrument, can, even in the court of original cognizance, be permitted to deny or question at the trial the existence or execution of the document against his own averment or admission. Such a proceeding would be a surprise in the court below; but it would be still more so if, after the trial, and without even an exception indorsed upon the document, it could be objected to before an appellate tribunal. There is no exception taken to the form or attestation of this deed of appointment found in the record before us. But was there not proof of the full execution of this power, inclusive of signing, according to approved legal intendment? One of the earliest cases, perhaps the earliest, going directly to sustain the exception here urged to the execution of the power, is that of Wright v. Wakeford, 17 Vesey, 454. In that case, as in the one before us, the contract creating the power directed the appointment to be made by writing or writings under hand and seal; and in that case as in this, the memorandum of attestation was in the words "sealed and delivered," omitting to assert in terms the signature by the maker. Lord Eldon forebore to decide whether this certificate or memorandum embraced the signing as well as the sealing and delivery of the instrument, and sent the case to the Common Pleas, who certified (three of the justices, Heath, Lawrence, and Chambre, concurring against the opinion of Mansfield, Ch. J.) that in their opinion the power had not been well pursued.

After Wright v. Wakeford, followed the cases of Doe, ex dem. Mansfield, v. Peach, 2 Maule & Selwyn, 576, Wright v. Barlow, 3 Maule & Selwyn, 512, Doe, ex dem. Hotchkiss, v. Pearce, 6 Taunton, 402. These cases rest upon Wright v. Wakeford, and some, if not all of them, refer to it expressly as their foundation. But, even contemporaneously with the cases just mentioned, it will be perceived that the courts have in some instances sought to free themselves from these literal trammels of Wright v. Wakeford, as too narrow to comprise the principles of justice and common sense; for as nearly as 7 Taunton, 355, in the case of Moodie v. Reed, which was sent from the Chancery, the will was attested in this general phrase, "witness, etc.," by two witnesses. In the testimonium clause the testratrix says: "These bequests are signed by me." Gibbs, Ch. J., said that this was clearly a good attestation of the signing. Still later, it has been ruled in several cases where the power required a will signed and published in presence of three witnesses, that the attestation was good expressing the will to have been signed and delivered. The evident [*33] disposition of the courts being to adopt the reason and substance of the transaction, they have, as matter of construction, determined that delivery was publication. See 4 Sim. 558; 5 Sim. 118.

But whatever doubt may heretofore have *overhung and* perplexed this matter, that doubt, so far as the reasonings of the English bench should shed light upon the judicial mind of our country, ought to be cleared away. This effect, we think, should be produced by the arguments in the House of Lords of the assembled judges in the case of Burdett v. Spilsbury, reported in 6 Manning & Granger, beginning at p. 386. In this case, presenting, as of course, in exhibition of great ability and learning, the execution and attestation of appointments under powers are the subjects considered. The cases from Wright v. Wakeford down, involving any important principle, are reviewed, and these subjects placed upon the basis of common sense. It is true that the facts in the case of Burdett v. Spilsbury were not precisely those of Wright v. Wakeford, the attestation clause in the latter being special, and that in the former case not special; yet in the examination of the latter case, and of those which have followed and been rested upon it, their doctrines are discussed and by a majority of the judges disapproved, several of the judges who conceived themselves constrained to support Wright v. Wakeford, upon the maxim stare decisis, expressing their regret at the obligation supposed to be binding upon them, and declaring that, were the case res integra, they should certainly reject its doctrines. The extended views of the judges in Burdett v. Spilsbury cannot be given consistently with the limits of this opinion, yet some of their illustrations of the principles they maintain may properly be adverted to. And it will be perceived that the substance and meaning of those principles are comprised in the following positions:

1st. That the terms and modes prescribed in settlements for the execution of powers should be followed in reason and substance, so as to insure the purposes and objects contemplated by such settlements, and so as to prevent them from being sacrificed to mere literal severity of construction.

2d. That the memorandum of attestation to a deed or will, whether that memorandum be general or special, is not conclusive as to the ceremony of the execution of the instrument to which such memorandum is annexed, but may be explained by the testimony of the witnesses themselves, or by reference to the testimonium clause of the instrument, as showing the facts and circumstances set forth in that clause, and which the witnesses were called on to attest.

[*34] *Thus in the case of Burdett v. Spilsbury, p. 392, Wightman, Justice, says: "The power requires that the instrument shall be signed, sealed, and published by the testatrix in the presence of three witnesses, and that they shall attest the instrument. No form of attestation would for the first thirty years have dispensed with the necessity of calling one of the subscribing witnesses, if any were alive, to prove that the formalities required by the power had been complied with; but after thirty years, the case would rest upon the presumption arising from the production of the instrument itself. In the present case, the instrument shows a general attestation of it by three witnesses, without any statement of the particular facts they attested: but they must be understood to have attested something; and to ascertain what that is, there is no principle of law, nor

any authority of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information as to that which it is to be presumed the witness did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says, 'I do publish and declare this to be my last will and testament. In witness whereof I have set my hand and seal to this my last will and testament,'—and then follows a signature and seal purporting to be those of the testatrix. But supposing such a special form of attestation as that contended for had been adopted, it would not have varied the character of the evidence derived from the terms of the instrument, and the general attestation of the witnesses. It would but have raised a presumption for the jury that they did witness that which is stated in the attestation, subject to any doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not."

In the same case, Williams, Justice, says: "Now, the language of the power (as has been already mentioned) is, by her last will and testament, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses. All this is found to have been done, and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favor of it, nor wholly excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with. And here it seems very important to attend particularly to the document itself. The will first contains the whole testamentary part; every disposition of the property is first fully made, and the will is therefore as to that, its principal object, complete. The rest regards the manner [*35] of *the execution. It is thus: 'I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal.' The testratrix signed this part twice, once after the above words, and again where her seal is affixed, and directly opposite to the latter is the word 'witness,' and immediately under it are the names of the witnesses; and the question is whether it is to be understood that they attested, or, in other words, were witnesses to anything; and if so, how much? And first it is to be asked, for what purpose was this testimonium clause (as it has been called) introduced, or rather added? Certainly not to explain or to qualify the will, or any part of it. To its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and that only. Why are we to suppose that the testatrix was ignorant of the terms, upon which alone her dispositions could be available? This, the language of the clause shows she did understand. The clause, therefore, having this object, we come to consider the purpose for which the witnesses are introduced, and I confess I cannot conceive it possible to understand the meaning of their presence, except to witness something. If it be said, and with truth, that the witnesses cannot be presumed to be cognizant of the contents of the will, because that is contrary to experience, it is surely somewhat contrary to the same experience to suppose, that, when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were performed, but that they saw nothing of them, and that, too, when the very language of the testimonium (I declare, etc.), imports that the testatrix was making the declaration, not to the winds, but to persons to whom she might address herself—who were there to see and hear. If, then, the witnesses must be understood to have attested something, I can see no possible reason for stopping short of the conclusion, that they attested everything which by the clause purports to have been done, that is, signing, sealing, and publication." Again by the same justice, p. 433: "Now, in Wright v. Wakeford, the power required the consent of A and B, testified by writing or writings under their hands and seals, attested by two or more credible witnesses. The attestation clause is sealed and delivered by the within named A and B, in the presence of C. B. and G. B. Here the ceremony of signing was omitted in an attestation which professed to give an account of what had been done, and there was not, as in the present case, a testimonium clause."

In speaking of Wright v. Wakeford, Gurney, Baron, remarks: "'It is impossible to [*36] mention the names of Lord Eldon and the three other judges of the Common Pleas, Heath, Lawrence, and Chambre, otherwise than in terms of great respect. Nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice. It has disappointed the just expectations of sellers and devisors, and involved the courts in great difficulties." So, too, Lord Brougham, p. 466: "I hardly know a case which has excited, at different times, more remark than Wright v. Wakeford. It has been again and again questioned, it has again and again been criticised, by the learned judges. It cannot, therefore, be said to have been at any time a case that commanded anything like the entire concurrence of Westminster Hall."

The reasoning of Tindal, Ch. J., in Burdett v. Spilsbury, applies with great force and clearness to the question before us. "If," says this judge, "the word 'witness' is taken abstractedly by itself, as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it must be taken to be witnesses to all that was actually done at the time, which is found by the special verdict to be all that was required to be done. Or, if the word 'witness' is to be construed with reference to the statement immediately preceding it at the end of the will, then the word 'witness' necessarily implies that the testatrix did in their presence declare the instrument to be her will, and that she did in their presence, put her hand and seal thereto, that is, in the language of the settlement, that she signed, sealed and published it in the presence of these three witnesses. To this construction an objection was taken at your Lordship's bar, which had also been relied upon by some of the learned judges who delivered their opinions before me; viz., that it proceeds upon the supposition that the whole instrument may legally

be read together to explain the meaning of the word 'witness,' and that it supposes the witnesses are connusant of the contents of the instrument, neither of which can be supposed. But I cannot feel the force of this objection. There has been, from the earliest time at which deeds were known, a marked and acknowledged distinction between the operative part of the deed itself, and the testimonium clause (as it is called) at the end of the deed. The essential part of the deed is that part, and that only, which contains the grant. The clause at the end is introduced, not as constituting any part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may 37*] be held to be *confined to the knowledge of the parties, namely, the grantor and grantee, the testimonium clause is expressly introduced into it for the use of the public and the witness to the deed. It is well known that a similar clause was constantly inserted in old deeds and charters, at the close thereof, beginning with the words hiis testibus, and thence generally called the hiis testibus clause, in which the names of the persons present, who heard the deed read by the clerk, were written, not by themselves, but by the clerk who prepared the deed. Spelman in his Glossary, p. 228, traces out the variations in the form of the clause, at different periods of our history; and Madox, in the Defrutation prefixed to his Formulare Anglicanum, goes more fully into the matter, and in the work itself gives numerous instances which it is impossible to read without being satisfied that the sense requires that the witnesses, whose names are inserted in the hiis testibus clause, must of necessity have known the words preceding it, or in fact they would have witnessed nothing at all. Take, for example, among many, that numbered 312—And that this my gift, grant, and confirmation may remain firm forever, I have confirmed this present charter with the impression of my seal, hiis testibus, etc. Who can doubt for a moment that these witnesses either actually read, or heard read over to them, the words of the deed immediately preceding their names, and that the introduction of the preceding clause had no other object or purpose? And this practice continued down to the reign of Henry VIII., as appears by the authority of Lord Cocke, who states the authority then began of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom of, or indorsed upon, it. But that the clause in cujus rei testimonium, so long as it was found at the close of the deed itself, never formed part of the deed itself, is evident from Shepard's Touchstone, where he says: 'A deed is good, albeit these words in the close thereof, in cujus rei testimonium sigillum meum apposui, be omitted'—citing authorities which show that it is no more in fact than what it imports to be, the very attestation of the deed which has preceded it. There is therefore no reason why the word 'witness,' written immediately after this testimonium clause, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the testi*monium* clause." Again it is said by the same *judge, p. 459:* "So far from its being a rule of law that you may not, in the attestation of a deed, look back to that which is found at the close of the deed itself, that, on the contrary, in most of the cases which have been relied on by *the defendant in error, express refer- [*38 ence has been made to the close of the deed itself."

A quotation from the opinion of Lord Campbell will close these extracts from the opinions in Burdett v. Spilsbury, protracted, perhaps, beyond what even this interesting case will warrant. His Lordship says, p. 467: "My Lords, in this case the only question is, whether the will was attested by three credible witnesses." He proceeds, p. 468: "My Lords, independently of authority, I cannot doubt that for a moment. The only objection that can be made is this, that the will upon the face of it does not contain any process verbal or history of the transaction. But the power imposes no such condition—it does not say a will, signed, sealed, and published in the presence of three witnesses and attested by them, and a will containing a history of the solemnity—there are no such words in the power." Again, p. 469: "If it were necessary, my Lords, I think the testimonium clause here might be resorted to, both upon principle and authority." These reasonings of the English judges, going to show that, upon principle, and independently of recent statutory provisions, the memorandum of attestation, so far from being conclusive upon the facts of signing, sealing, and publishing or delivering an instrument, may itself be controlled, either by the examination of the witnesses themselves, or by reference to the testimonium clause of such instruments, are fully sustained, and even more than sustained, by the authority of the Supreme Court of that State from whose jurisprudence and policy this controversy might be supposed in some degree to take its complexion. If, therefore, the most express adjudication of the Court of Appeals of Virginia can govern this case, it seems at once disembarrassed of the objections alleged to the execution of the power created by the marriage contract.

The recent decision in the case of Pollock et ux. v. Glassel, reported in 2 Grattan, 439, would seem to be decisive of the questions now before us, that case having clearly ruled as the law of Virginia with regard to a deed, that, although the distinctive character of the instrument is to be determined by its intrinsic evidence the question is still open whether it be the deed of the party, and that must be decided by evidence aliunde. If by the plea of non est factum, or other proper denial, the fact that the paper was sealed by the party be put in issue, then it must be proved by competent and satisfactory testimony. In Virginia, by long usage, which has received the sanction of a statute, a scroll is used by way of a seal. The decisions have required that the substitution of the scroll for a *seal shall be recognized on the face [*39 of the deed, but in no case has it been held that, in the absence of such recognition, evidence is inadmissible to prove that in fact the scroll was affixed to the instrument with intent that it should stand in place of a seal. In the case above referred to, it is said by the court, "Here the question occurs in a court of pre-

bate, whose province it is to examine the subscribing witnesses, and, if their testimony is satisfactory, to establish and perpetuate the due execution of the instrument. Upon what principle or authority are the subscribing witnesses to be estopped, because of some informality in the paper, from proving the fact, that it was sealed by the testatrix, or, what is the same thing, that she adopted the scroll affixed to it by way of seal? In the much stronger case of a deed, there could be no such estoppel in a court of probate." In the same case the court say, through Baldwin, Justice: "It will be seen that the statute requires the will to be attested by the witnesses, but does not prescribe what, nor that any, facts shall be stated in their attestation. I think it plain, that the Legislature meant nothing more than that the instrument itself should be attested, in order to identify the witnesses and designate who are to prove its execution. The object was not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence, and selected for the purpose. The subscription of their names denotes that they were present at and prepared to prove the due execution of the instrument so attested, and nothing more. The attestation is the act of the witnesses, and it was not intended to confide to them the duty of stamping their testimony upon the paper; which would avail nothing as evidence, however perfect, and which ought to create no estoppel, however imperfect. This view of the statutory provision is in effect sustained by the English decisions." Again, p. 465, it is said by the same judge: "I think it clear that the subscription of the witnesses is substantially the attestation contemplated by the statute; and it is sufficient if the purpose be indicated by the briefest memorandum, or merely by a fair presumption arising from the local position of their signatures upon the paper; and whether a memorandum of attestation be general or special, it may be denied or contradicted by the subscribing witnesses, in the whole or in part, and of course is open to explanation if in any way ambiguous." The court then proceed to review the case of Wright v. Wakeford, and the cases of Doe v. Peach, Wright v. Barlow, and Moodie v. Reid, rejecting them as authority in the State of Vir- 40*] ginia as to the form and influence *of the memorandum of attestation, and concurring with the doctrines declared by the majority of the judges in Burdett v. Spilsbury.

An objection has been made to the sale under the deed of trust, based upon the fact that the portion of the property actually sold did not equal in value the whole amount of the debt due to the bank, which it is insisted should have been the case, according to the proviso in that deed. We do not see the force of this objection, inasmuch as, by the express terms of the deed, authority was given the trustee or the bank to sell the property in separate parcels, as either might deem it necessary or advisable; and it would have been impracticable before an experiment to ascertain a priori how much of the property would be requisite for the satisfaction of the debt, and thus a literal adherence to the proviso would lead either to the preventing a sale altogether, or to the sacrifice of the whole estate, whether there should have been a necessity for it or not. Moreover, the sale by parcel in this case was selected upon a calculation of advantage to the feme, and with her express approbation, with the view of saving to her, if practicable, a portion of the property.

Upon full consideration of the facts and the law of this case, the court are of opinion that the marriage contract gave power to the feme covert to appoint the entire estate and property embraced within it; that the provisions and conditions of that contract have been complied with in the execution of the power thereby created and reserved; that therefore the decree of the Circuit Court dismissing the bill of the appellant, the complainant below, ought to be affirmed, and it is hereby accordingly affirmed.

Order.

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

THE UNITED STATES, Plaintiffs, 41]
v.
THOMAS STAATS, Junior.

Felony—sufficiency of indictment—the statute punishing forgery covers the use of a genuine but false instrument to support claim in fraud of the U. S.

Where an act of Congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; every such person shall be deemed and adjudged guilty of felony," etc., it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent."

Where the act done was the transmission to the Commissioner of Pensions of an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, it was an offense within the meaning of the act of Congress.

THIS case came up from the Circuit Court for the Northern District of New York, on a certificate of division in opinion between the judges thereof.

It was an indictment under the Act of March 3d, 1823, entitled "An Act for the punishment of frauds committed on the government of the United States." 3 Stat. at Large, 771, 772.

By the first section it is enacted, "That if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited; or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed,

power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony, and being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labor for a period not less than one year, nor more than ten years; or shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars.

42*] *The first count of the indictment charged that one David Goodhard was a claimant for a revolutionary pension, and did claim and receive the same; and that "Thomas Staats, Jr.," contriving and intending to injure and defraud the said United States of America, and to cause and induce the said United States of America to pay unto the said David Goodhard divers large sums of money, did cause and procure to be transmitted to the Commissioner of Pensions of the said United States of America, and to be presented at the office of the said Commissioner, a certain writing, purporting to be made, subscribed, and sworn to by one Benjamin Chadsey. After setting forth the contents of the paper, it proceeded, that the said Staats, "knowing the said affidavit to be false and untrue," and that Benjamin Chadsey did not know what had been stated in the paper, "did transmit, and did cause and procure to be transmitted, to the said Commissioner of Pensions of the said United States of America, the said false writing and affidavit, as a true writing in support of the aforesaid claim of the said David Goodhard, with intent to defraud the United States of America."

The second count charged, that David Goodhard was a claimant for divers sums of money as a pensioner, and that in support of the said claim one William Bowsman did subscribe and made oath unto a certain affidavit therein mentioned; whereas, in truth, Bowsman did not know what was so set forth. "And the said Thomas Staats, Jr., well knowing the premises and well knowing that the said affidavit or writing was false and untrue,.....did cause and procure to be transmitted and presented to the Commissioner of Pensions of the said United States of America, the said false and untrue affidavit or writing as a true writing, in support of the claim of the said David Goodhard, with intent to defraud the said United States of America."

The accused was found guilty. A motion was afterwards made to arrest the judgment upon the verdict, when the judges were opposed in opinion on the following questions:

1. Whether the said indictment is fatally defective, for the reason that the acts charged to have been committed by the said defendant are not in said indictment charged to have been committed feloniously or with a felonious intent.

2. Whether the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the first section of the Act of Congress, approved March 3d, 1823, entitled "An Act for the punishment of frauds committed on the government of the United States."

*Mr. Johnson (Attorney-General), on [*43 the part of the United States, contended,

1. That, in an indictment for such an offense as is stated in the indictment in this case, it is not necessary to charge that the acts were done feloniously. United States v. Elliott, 3 Mason, 156; United States v. Gooding, 12 Wheat. 460; United States v. Lancaster, 2 McLean, 431.

2. That the acts charged are an offense within the first section of the act.

Mr. Justice Nelson delivered the opinion of the court:

The prisoner was indicted under the third section of the Act of Congress, passed 3d March, 1823, entitled "An Act for the punishment of frauds committed on the government of the United States."

The section provides, that if any person shall falsely make, alter, forge, or counterfeit, etc., any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any false, forged, altered or counterfeit deed, etc., with intent to defraud the United States, knowing the same to be false, forged, or counterfeit; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony, etc.

The indictment contains two counts. The first charges, that one David Goodhard was an applicant for a pension under the Act of Congress entitled, "An Act supplementary to the Act for the relief of certain officers and soldiers of the Revolution," passed 7th June, 1832; and that Thomas Staats, Jr., the prisoner, contriving and intending to defraud the United States, and to cause and induce the same to pay to the said David divers large sums of money, did cause and procure to be transmitted to the Commissioner of Pensions, and to be presented at the office of the said Commissioner, a certain writing purporting to be made, subscribed, and sworn to, by one Benjamin Chadsey, etc., in which said writing, it was alleged and declared

44*] *(setting out the contents of the affidavit), the said Thomas Staats, Jr., knowing the said affidavit to be false and untrue, etc., and did cause and procure to be transmitted to the said Commissioner of Pensions the said false writing and affidavit, as a true writing, in support of the aforesaid application of the said David, with intent to defraud the United States.

The second count is substantially like the first, except that it avers the false affidavit to have been made by one William Bowsman.

The prisoner, on being arraigned, pleaded not guilty; and, on the trial of the issue, was convicted; whereupon his counsel moved in arrest of judgment; upon whose motion the following questions arose, upon which the opinions of the judges were opposed, and the questions certified to this court:

1. Whether the said indictment is defective, for the reason that the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and,

2. Whether the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the first section of the act of Congress above recited.

1. In respect to the first question certified. The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.

In all cases of felonies at common law, and some, also, by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime.

Sir William Blackstone observes, that the term "felony" originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods; but that, by long use, it came, at last, to signify the actual crime committed.

45*] *He further remarks, that the idea of felony is so generally connected with that of capital punishment, that it is difficult to separate them, and that the interpretation of the law conforms to that usage; and therefore, if a statute makes any new offense felony, the law implies that it shall be punished with death, that is, by hanging as well as by forfeiture, unless the offender prays the benefit of clergy. 4 Bl. Com. 97, Wend. ed.

This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim, or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses.

But, in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority.

The statute upon which the indictment in question is founded describes the several acts which make up the offense; and then declares the person to be guilty of felony, punishable by fine and imprisonment. The transmission or presentation of any deed, or other writing, to any office or officer of the government, in support of, or in relation to, any account or claim, with the intent to defraud the United States, knowing the same to be false, are the only essential ingredients. The felonious intent is no part of the description; as the offense is complete without it. Felony is the conclusion of law from the acts done with the intent described; and makes part of the punishment; as, in the eye of the common law, the prisoner thereby becomes infamous, and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted.

The question arose in a case before Park, J., on the Northern Circuit, in 1831, on the trial of an indictment for burning stacks of grain, which is made felony by the 22 & 23 Car. II. The second count charges the prisoner with aiding and abetting; and an objection was taken, that the indictment should have averred that he was feloniously present aiding and abetting. *Park, J., was inclined to think [*46 the objection fatal; but allowed the trial to proceed, and the prisoner was acquitted on the facts. Case of Canon et al., 1 Lewin's Northern Circuit, 227.

It again arose before Lord Lyndhurst, C. B., at the Durham Assizes, in 1834, on an indictment under the statute of mayhem, 9 Geo. IV., ch. 31, sec. 2. An objection was taken after conviction, that the indictment did not allege that the prisoner upon the prosecution feloniously did make an assault, etc.; but it was held that, as the indictment described the offense in the words or terms of the statute, it was sufficient. Deacon on Cr. Law, Suppt. 1652, 1681. Rex v. Thomas Liddle.

This statute, after describing the acts constituting the offense, concludes, like the one before us, that every such person shall be guilty of felony, and, on conviction, shall suffer death. The decision, therefore, bears directly upon the question in hand; and, as the principle seems to have been given up in the country from whence it was derived, and, at best, is here but the merest technicality, it is difficult to perceive any ground for still giving effect to it. It would be otherwise, if the felonious intent was

descriptive of the offense, and not simply of the punishment.

We shall, therefore, direct that it be certified to the court below, that the indictment is not fatally defective, for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent.

2. With respect to the second question certified.

The court are of opinion that the offense charged in the indictment comes within the statute.

The only doubt that can be raised is, whether the writing transmitted or presented to the commissioner in support of the claim for a pension should not, within the meaning of the statute, be an instrument forged, or counterfeited, in the technical sense of the term; and not one genuine as to the execution, but false as it respects the facts embodied in it.

The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offense, probably are forged instruments in a strict technical sense; and there is force, therefore, in the argument, that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the government a similar offense, had reference to the same description of instruments.

47*] *But this is by no means a necessary conclusion upon the words of the statute. Indeed, upon this construction, it is not easy to see the materiality of the clause: because the uttering and publishing of the forged instruments mentioned in the first clause, as true, is made an offense, the same as the forging; and it is quite clear, that the acts provided against in the subsequent clause amount to an uttering and publishing. If restrained, therefore, to forged instruments, the clause would seem to be unnecessary.

The deeds and other writings mentioned are not connected with those in the preceding paragraph, as would have been natural, and almost of course, if intended to describe similar instruments. The language is "any deed, power of attorney," etc.; not, the aforesaid deed, which words must be in effect interpolated, upon the construction contended for.

The clause, therefore, may well be regarded as providing for a distinct and independent offense—one essential to the protection of the government against fraudulent claims; and which consists in the transmission or presentation of false or counterfeit papers to any officers of the government in support of an account or claim, with intent to defraud.

The case is within the mischief intended to be guarded against; and, also, within the words; and we think the considerations urged, founded upon the form and structure of the general provision, though plausible, and calculated to excite doubts, not sufficient to take it out of them.

A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in *its mischievous* effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it.

We shall direct, therefore, that it be certified to the court below, that the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the act above referred to.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agree- [*48 ably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court—

1st. That the indictment is not fatally defective for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and,

2d. That the acts charged in the said indictment to have been committed by the defendant do constitute an offense within the provisions of the first section of the Act of Congress, approved March 3d, 1823, entitled "An Act for the punishment of frauds committed on the government of the United States." Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

FRANCIS SURGETT, Appellant,

v.

PETER M. LAPICE and Edward Whittlesey.

Equity cause in Louisiana removed to U. S. Circuit Court can be brought here only on appeal—back land in Louisiana—rights of pre-emption—construction of statutes.

Where an "action of jactitation" or "slander of title" was brought in a State Court of Louisiana and removed into the Circuit Court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error.

This case distinguished from that of the United States v. King, 3d and 7th Howard, 773 and 844.

Before the transfer of Louisiana to the United States, the Spanish government was accustomed to grant lands fronting on the Mississippi River, and reserve the lands behind those thus granted for the use of the front proprietors, who had always a right of pre-emption to them.

After the transfer, Congress recognised this right of pre-emption by several laws.

In 1832, Congress passed an act (4 Stat. at Large, 534) giving to the proprietors of any tracts bordering on a river, creek, bayou, or water-course, the right of preference in the purchase of any vacant tract of land adjacent to and back of his own tract, provided that the right of pre-emption should not extend so far in depth as to include lands fit for

cultivation bordering on another river, creek, bayou, or water-course, and provided that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the President of the United States for the public sale of the lands in the township.

This last proviso cannot be construed to apply to a township where the lands had already been exposed to sale by order of the President in 1829. The act having been passed in 1832, a compliance with it was impossible, and it must, therefore, be construed as applying prospectively to those lands which had not been exposed to public sale.

The first proviso related only to a river, creek, bayou, or water-course which was a navigable stream. The bayou in question was not so, as is shown by the evidence in the case, and also by the fact that the sections of land, as laid out by the public surveyor, cross it. When the surveyor comes to navigable streams, he bounds upon the shore, and makes fractional sections.

49*] *In order to bring land within the exception, it must be fit for cultivation, and also border on another river, etc. The two circumstances are coupled together, and both must concur, or else the exception does not apply.

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

It was a possessory action in the sense of the Code of Practice of that State, originally commenced by Lapice and Whittlesey, in the Ninth District Court of the State of Louisiana, in and for the parish of Concordia, against Surgett, who was a citizen and resident of the State of Mississippi; and at whose request it was removed into the Circuit Court of the United States.

On the 21st of November, 1829, Surgett purchased several lots, from number 28 to number 35 inclusive, in township 5, range 9, east, in the Ouachita district in Louisiana, which lots fronted on the Mississippi River.

On the third Monday of November, 1829, the President of the United States issued a proclamation, offering the public lands in this township for sale.

On the 15th of June, 1832, Congress passed an act (4 Stat. at Large, 534), entitled "An Act to authorize the inhabitants of the State of Louisiana to enter the back lands." This act provided that every person who, by virtue of any title derived from the United States, owns a tract of land bordering on any river, creek, bayou, or water-course, in the said territory, and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price and on the same terms and conditions as are, or may be, provided by law for the other public lands in the said State, etc., etc. 1. Provided, however, that the right of pre-emption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course. And every person entitled to the benefit of this section shall, within three years after the date of this act, deliver to the register of the proper land office a notice, in writing, stating the situation and extent of the tract of land he wishes to purchase; and shall also make the payment or payments for the same, at the time and times which are or may be prescribed by law, for the disposal of the other public lands in the said State, the time of his delivering the notice aforesaid being considered as the date of the purchase. 2. Provided, also, that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as may be *designated by the President of the Unit- [*50 ed State, for the public sale of the lands in the township in which such claims may be situated, and all claims not so entered shall be liable to be sold as other public lands, etc. And if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, his right of pre-emption shall cease and become void; and the land may thereafter be purchased by any other person, in the same manner, and on the same terms, as are, or may be, provided by law for the sale of other public lands in the said State.

On the 14th of July, 1834, a part of the land lying back of the lots owned by Surgett was entered at the land office by Whittlesey and one Sparrow, whose interest was afterwards purchased by Lapice.

On the 24th of February, 1835, Congress passed another act (4 Stat. at Large, 753), extending the time given by the former act to one year from the 15th of June next.

On the 17th of March, 1836, Whittlesey entered the remaining portion of the lands back of Surgett's lots.

On the 20th of May, 1836, Surgett made application to enter the lands in controversy, which had been taken up by Whittlesey and Sparrow, and by Whittlesey. At the same time, he made a tender of the purchase money, which was refused by the receiver, in consequence of the following indorsement upon the application by the register:

"By reference to the official township map, it will be seen that the land called for in the above application is such as is exempted from the right of back concession (so called) by the first proviso of the act under which the applicant claims, which reads ('meaning the right to the back land'), shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course. Now, from the evidence in this office, the land embraced in the rear of the above lots or fractional sections is fronting on another bayou, and that the same is fit for cultivation, the fact of a part being good land, above or during high water-mark, is on file herewith. Under the circumstances of the case, the land called for in part has been entered by other persons as public land, subject to private entry, and the application is rejected, so far as the action of this office can decide, subject to the decision of the department."

On the 10th of April, 1840, Lapice and Whittlesey filed a petition in the Ninth District Court of the State of Louisiana, which is known by the laws of that State as an "action of *jactitation," or "slander of title." The [*51 petition "shows, that one Francis Surgett, residing in Adams County, in the State of Mississippi, has heretofore, at various times, and on divers occasions, slandered the title of your petitioners to the aforesaid tracts of land, and still continues to do so, by giving out in speeches

and otherwise, and public proclaiming, that he, the said Surgett, is the rightful and true owner of said tracts of land, and not your petitioners; alleging that the said Whittlesey and Sparrow acquired from the United States no legal and valid right thereto, and threatening the said Sparrow and your petitioners with a suit to recover the same; that your petitioners and the said Sparrow, while part owners, have frequently requested said Surgett to desist from the slandering their said title, or to bring suit to establish his own title thereto, if any he has; but he has refused, and still refuses, either to desist or to bring suit as requested; that said acts of the said Surgett have damaged your petitioners five hundred dollars."

The petition then prays, "That, after due proceedings had, the said Surgett be ordered to set forth his title to the tracts of land described in the aforesaid petition, if any he has, and establish it contradictorily with your petitioners; that unless he produces a good title paramount to your petitioners, that judgment be rendered in their favor, quieting them in their title and possession of said land, and that the said Surgett may be forever enjoined from setting up any claim or pretensions to the same; that your petitioners recover five hundred dollars damages against the said Surgett, and the costs of suit to be taxed, and for general relief in the premises, etc."

On the 10th of June, 1841, Surgett, being a citizens and resident of Mississippi, removed the cause to the Circuit Court of the United States for the District of Louisiana.

On the 3d of December, 1841, Surgett filed his answer, in which he denied altogether that the petitioners had any title to the lands, but claimed that the title was in himself. The answer then proceeds thus: "Respondent pleads in reconvention that he himself is the true and lawful owner of so much of the said lands claimed by the plaintiffs, as are embraced in the aforesaid back concessions claimed by him, and prays that he may be decreed to be the legal owner thereof; that the certificates granted by the commissioners of the land office to Sparrow and Whittlesey, or either of them, may be avoided and annulled; and that, if patents have already issued in their favor for said lands, the plaintiffs may be decreed to convey all their right, title, and interest, by virtue of said patents, to your respondent; that he may be [*52 quieted in his title and possession *thereof, and may recover judgment against said plaintiffs for the sum of one thousand dollars damages, sustained by him in consequence of their illegal pretensions, and for general relief in the premises."

Under commissions to take testimony, thirteen witnesses were examined, as to the nature and character of the bayou called Mill Bayou, in the rear of Surgett's lots. It is impossible to insert all this evidence.

On the 7th of April, 1845, the Circuit Court passed the following decree:

"The court, having duly considered the law and the evidence in this case, doth now order, adjudge and decree, that the plaintiffs Lapice and Whittlesey be quieted in their title to, and possession of, the land set forth and described in their petition, and that the defendant, Francis Surgett, be forever enjoined from setting up any claims or pretensions to the same. It is further ordered, adjudged and decreed, that the said defendant do pay the costs of this suit."

From this decree Surgett appealed to this court.

The case was argued by Mr. Lawrence and Mr. Jones for the appellant, and Mr. Brown and Mr. Johnson (Attorney-General) for the appellee.

The points raised by the counsel for the respective parties were the following:

For the appellant.

1. As to jurisdiction.

A motion has been made to dismiss this case for want of jurisdiction, because (it being an action at law, and not a suit or proceeding in equity) it should have been brought here by writ of error, and not by appeal.

This was a petitory action originally commenced by the appellees in the State court of Louisiana, in the manner authorized by the laws of that State, and removed at the instance of the appellant into the Circuit Court of the United States. It is known in the Louisiana Code as an "action of jactitation," or "slander of title," and may be brought by anyone having a colorable title to, or possession of, land or other property, against any person claiming title to the same, to compel the latter to establish his title, or else to punish him for the slander. If the fact of claiming title is denied, and no title is asserted, the trial is upon that issue alone, and would undoubtedly be a trial at law. But if the fact of the supposed slander is admitted, and the defendant sets forth his title, the original action is at an end; the answer becomes the ground of another *suit; the former de- [*53 fendant becomes the actor, the plaintiff, and the trial becomes one as to the respective titles of the parties to the thing in controversy. And it makes no difference, according to the Louisiana practice, whether the defendant in the suit for slander commences a new suit by petition founded on his title, or whether he does it by his answer in the same suit. In either case, it is in substance a new suit and another trial. Livingston v. Hermann, 9 Martin, 656, 700, 722; Hewit v. Seaton et al. 14 La. 160; Millaudon et al v. McDonough, 18 La. 106; Proctor v. Richardson et al. 11 La. 188.

When, however, the answer is made the groundwork of a new suit in the Circuit Court of the United States, where the distinction between suits at law and suits in equity is established, the character of the suit will be determined by the subject matter and the general character of the proceedings. If the controversy is one appropriate exclusively to equity jurisdiction, and if the proceedings partake mostly of the character of equity proceedings, the suit is one in equity, so far at least as to entitle it to be brought up to this court by appeal rather than by writ of error. McCollum v. Eager, 2 How. 61; Parish v. Ellis, 16 Pet. 454; Parsons v. Bedford et al. 3 Pet. 447.

The equity jurisdiction of the courts of the United States is the same in one State as in another, and wholly independent of the local law of every State, without distinction.

Accordingly, the extension of a common law remedy to an equitable right, by the local law of any State, does not take away the equitable remedy proper to the courts of the United

States 1 Story's Equity, secs. 57, 58; 3 Story, on the Constitution, 506, 507, 644, 645, and cases there cited.

The remedies in the courts of the United States must be at common law or in equity, not according to the practice of the State courts, but according to principles of common law or equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Robinson v. Campbell, 3 Wheat. 222.

Being a case which, upon general principles, is a peculium of equity, its jurisdiction in the circuit courts of the United States was not taken away by a law of Massachusetts giving the common law courts jurisdiction of the same matter. United States v. Howland, 4 Wheat. 115.

By parity of reason, in Pennsylvania the legal remedy by ejectment, although extended by State law and practice to equitable titles, cannot be sustained on such title in the Circuit Court of the United States in that State; but 54*] the plaintiff *must still show a paramount legal title. Swayze v. Burke, 12 Pet. 23; see Vatier v. Hinde, 7 Pet. 274; Golden v. Prince, 3 Wash. C. C. 313; Pratt v. Northam, 5 Mason, C. C. 95.

All these principles have been extended and applied in their utmost latitude, and with additional illustrations, to Louisiana. See Livingston v. Story, 9 Pet. 655; S. C. 13 Pet. 368; Ex-parte Poultney, 12 Pet. 474; Ex-parte Myra Clarke Whitney, 13 Pet. 404.

And see all these reviewed, and the doctrine re-asserted, in Gaines et ux. v. Relf et al. 15 Pet. 9; Gordon v. Hobart, 2 Sumner, C. C. 401.

Lastly, this court has decided, in effect, that the United States, in conferring chancery jurisdiction on the courts in Louisiana, have imposed no foreign law on the State, nor introduced any foreign or new principle of jurisprudence. The whole innovation went no further, in that State, than a mere change in the mode of obtaining a judicial end, for which the local law is there supposed to afford an adequate remedy in another form. Gaines et ux. v. Relf, Chew et al. 2 How. 650.

Although in Louisiana, as in many other of the United States, there are no distinct forums of law and equity, yet an equity jurisprudence (not materially distinguishable, either in its principles, in its practical ends, or in the means of accomplishing its ends, from that which other States have borrowed from the equity system of England) is incorporated with the general jurisprudence of the State, and is administered by the same courts and the same remedies.

Those remedies, in their practical forms, in their processes, and in their reach and effect (though not precisely conformed in all respects to the rules of equity practice prescribed to the courts of the United States), are fashioned after the same model as those of the equity side of the English Chancery styled the Forum Romanum; and are quite appropriate to all the most comprehensive heads of equity cognizable in the courts of the United States. Civil Code of Louisiana, art. 21, 1958 to 1962, recognitions of equity eo nomine.

Actions whereby contracts, etc., may be set aside by the active interference of the court (over and above the universal right of defense on equitable grounds), as effectually and extensively as by any form of procedure in any court of equity.

C. Code, art. 1854 to 1874, 2567 to 2578, 2634 to 2636, Lesion; 2496 to 2518, Redhibition; 1841 to 1843, Nullity resulting from Fraud; 1876; Contracts vitiated by Fraud, etc., may be avoided either by exceptions or actions.

*Code of Practice, Louisiana, sections [*55 treating of Petition and Citation, art. 170 to 207; of Conservatory acts, 208, 209; of Sequestration, 269 to 283; of Injunction, 296 to 309; of Appearance and Answer, 316 to 329; of Exceptions, 330 to 346; of Interrogatories, 347 to 356; of Incidental Demands, 362 to 364; of Intervention, 389 to 394; of Parties to Suits, 101; of Amendments, 419 to 440; of Trial which is regularly on hearing before the court and only allowed by jury sub modo, 476 to 492 and 493 et seq.

1st. The subject matter of this suit was one of exclusive equity jurisdiction. Surgett had an equitable title to the land in controversy, his opponents had a colorable legal title and possession. In no State (except Pennsylvania), where law and equity jurisdictions are distinct, could he stand for one moment in a court of law. His equitable title could be asserted only in a court of equity against the legal title of his adversaries.

2d. The forms of proceeding were more nearly allied to proceedings in chancery than to proceedings at common law. They commence by petition, in which the ground of complaint and relief sought are set forth. The defendant is ruled to answer. The answer admits, denies, or avoids the facts in the petition, or sets forth new matter upon which the defendant may recover is sustained. Interrogatories are filed. The case is heard by the court on the facts and the law, and ends by a decree. See Justice McLean's opinion in Parsons v. Bedford, 3 Pet. 450.

Now, it is not incumbent on us, who appeal from these proceedings, to show that they are perfectly regular chancery proceedings in all their parts. On the contrary, we contend that they are not so, and that, on the principles adopted by this court in Livingston v. Story, 9 Pet. 632, the decree should be reversed. All that it is incumbent on us to show is, that, whatever these proceedings may be denominated in the Louisiana State practice, and however generally they may be used, they partake sufficiently of the character of chancery proceedings to render an appeal rather than a writ of error proper, the subject matter being one of equity jurisdiction.

2. As to the merits.

On the 21st of November, 1829, Francis Surgett purchased lots 28 to 35 inclusive, in township 5, range 9 east, in the Ouachita district, Louisiana; said lots fronting on the Mississippi River.

On the 15th of June, 1832, Congress passed an act, 4 Stat. at Large, 534, giving to the proprietors of any tracts "bordering on any river, creek, bayou, or water-course" in the territory, *the right of preference in the purchase [*56 of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents, French measure, nor in quantity of

land that contained in his own tract: "Provided, that the right of pre-emption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course." The act required that, to entitle a person to its benefits, he should, within three years from the passage thereof, make application to the register and receiver, and make payment for the land. It also required, that when any public offering of the township for sale should be made under proclamation of the President, the pre-exemptioner should, at least three weeks prior thereto, gave notice of his claim.

On the 24th of February, 1835, 4 Stat. at Large, 753, Congress passed an act, extending the time given by the act just cited to the 15th of June, 1836.

Before the expiration of the last mentioned act, to wit, on the 20th of May, 1836, Mr. Surgett made application to enter the lands now in controversy, lying immediately back of his river lots, at the same time making tender of payment therefor; which application and tender were refused, on the ground that the land sought to be entered bordered on a bayou, and was fit for cultivation, was consequently subject to private entry, and had actually been entered by others. By reference to the receiver's receipts, it will be seen that a portion of this land had been entered on the 14th of July, 1834, by Edward Sparrow and Edward Whittlesey, jointly, and the remainder by Edward Whittlesey on the 17th of March, 1836. It also appears from the petition, that P. M. Lapice, one of the appellees, had purchased the interest of Sparrow in the land.

From this state of facts the question arises, whether the land so entered by Sparrow and Whittlesey were subject to private entry, by reason of their being fit for cultivation and bordering on a "bayou," or whether, on the contrary, Mr. Surgett had not a full right of pre-emption to these lands, and his application ought not to have been received.

For the appellant it will be maintained, that the decree below was erroneous, for the following reasons:

1. Because the evidence contained in the record does not show that the land in controversy bordered on any "river, creek, bayou, or water-course," within the meaning of the Act of Congress, dated 15th June, 1832.

It is especially to be remarked, that most of the witnesses who describe this "bayou" as of any considerable length, depth, or width, speak of it from a single visit in the spring of the 57*] *year 1828, during a freshet, and give both its width and depth as measured from the embankments that inclose it.

It is variously described as from 1 to 2½ miles long, 30 to 80 feet wide, and from 7 to 17 feet deep from the embankments. There is not a particle of evidence that it is navigable, or a perennial stream. On the contrary, the evidence shows that for the greater part of the year it is dry; that it is at no time a running stream, except from overflows of the Mississippi, or heavy rains.

This was not a "bayou" within the meaning of the law. In the Roman civil law, it is laid down, that, to constitute a river or running *stream*, as contradistinguished from torrents and temporary water-courses, the flow of water must be perpetual; though, if a stream which usually runs throughout the year should happen to be dried up during the summer, it would not cease to be perennial, any more than a stream which usually flows only during winter would be perennial because of an extraordinary flow during summer. Digest, lib. 43, tit. 12.

Again, the act of Congress speaks of a tract of land "bordering" on a river, etc. It is contended that a fair construction of this law does not apply it to any small and insignificant stream which may pass through a tract of land, making no difference either in the figure of the tract or the computation of its area; but that "bordering" on a stream has reference to a stream which makes one of the "confines," outer edges, or exterior limits, of the tract. A "tract of land," as that expression is used in acts of Congress in relation to public lands, means some legal subdivision, bounded by lines run in the mode prescribed for public surveys. So the word "lands," as used in this act of 1832, must mean some legal subdivisions known to the law. If, then, a stream of water should run through such "tract of land" or "lands" without constituting a "border" or limit to the same, it would not be within the act in question. The law of Congress obviously had reference to such bodies of water as controlled the shape of the tract.

Again, the history of this anomalous mode of surveying authorized by the Act of 15th June, 1832, its object, and the geographical peculiarities of the State of Louisiana, all show that the purpose of the act was to deal with something of more importance than mere swamps or drains.

2 White's Recopilacion, 228, 235, 240, 276, 277; State Papers, Public Lands, Vol. III. p. 557; Ib. 2, paragraph 2, col. paper, 380, memorial of Louisiana.

2. If there were proof in the record derived from the examination of witnesses, it would not be admissible for the purpose of *show- [*58 ing that Surgett had not the right to take these tracts as back pre-emptions, in view of the fact that the Surveyor-General (to whose discretion it was committed) had laid them out in square sections, had not noted on the official plat the existence of any such body of water as is within the meaning of the law, as he was required to do if any such existed, but had merely indicated by a line the existence of some nameless and insignificant swamp or slough. Act March 3d, 1811, sec. 2; 2 Statutes at Large, 662.

3. Supposing the swamp or slough described in the evidence, and delineated on the plat, to be a "bayou" within the meaning of the act of Congress, still the decree of the Circuit Court was wrong, because some of the tracts in controversy (lots No. 1 and 2 of sec. 61) did not border on this "bayou," taking them even to be entire tracts as they were surveyed and patented. See Plat A.

But we are not bound to treat them as entire tracts, as they have been surveyed and patented, because the law of the 15th June, 1832, 4 Stat. at Large, 634, itself makes provision for a resurvey of the back lands, in order to enable the front proprietors to avail themselves of the privilege of pre-emption. Now, if these back

lands were resurveyed, and the front lots extended back in the manner exhibited in plat B, not one of them (except lot 28) could be said to include lands bordering on this "bayou," or through which this bayou runs, unless the bare touching at a single point would exclude the land back of lot 29. As to all the rest, they would be entirely clear of this "bayou."

4. The title which the appellees set up is not good, inasmuch as the original patents to Whittlesey and Sparrow do not cover the land in controversy, there being no such sections, under the laws of the United States, as sections numbered 58, 59, 60, and 61.

The first law, and that which laid the foundation of the land system, was the ordinance of 20th May, 1785. 1 Birchard's Compilation, Land Laws, Opinions, etc. p. 11.

This ordinance pointed out the mode in which the townships should be surveyed, each six miles square; that the plats should be marked by subdivisions of one mile square, containing 640 acres, the lines thereof to be parallel to the external lines of the township, and numbered from 1 to 36, beginning each succeeding range of the lots with the number next to that with which the preceding one concluded; and where a fractional township should be surveyed, the lots protracted thereon should bear the same numbers as if the township had been entire.

59*] *The 2d section of the Act of 18th May, 1796, 1 Stat. at Large, 467, 468, prescribes the precise manner in which the sections in townships shall be numbered, beginning with the number one in the northeast section, and proceeding east and west, alternately, through the townships, with progressive numbers, till the thirty-sixth be completed.

The 10th section of the Act of 3d March, 1803, 2 Stat. at Large, 233, made it the duty of the surveyor, appointed to survey the lands south of Tennessee, to cause the same to be surveyed, as far as was practicable, into townships, and subdivided in the manner authorized and directed in relation to lands lying northwest of the River Ohio.

The 7th section of the Act of 2d March, 1805, 2 Stat. at Large, 329, extends the powers of the surveyor of lands south of Tennessee over the territory of Orleans, and directs him to survey and divide the lands thereof in the same manner (as near as the nature of the country will admit), as the lands northwest of the River Ohio.

Thus far the mode of surveying and numbering was uniform and precisely marked out. The section at the northeast corner of every township was to be numbered one, and all the other sections were to be numbered in regular progression from right to left, and left to right, alternately, to the thirty-sixth, which would always and of necessity be the southeast section of the township.

The 2d section of the Act of 3d March, 1811, 2 Stat. at Large, 662, authorized a different mode of surveying those lands which lay on rivers, creeks, etc., but did not authorize any change in the other portions of the townships, and such has been the construction of the land office. See 2 Birchard's Comp. 495; Brown's Lessee v. Clements, 3 How. 650; Jourdan et al. v. Barrett et al. 4 How. 169.

5. As to the objection made by the judge of the Circuit Court, namely, that the Act of 1832 was not applicable to lands which had at that time been already offered for sale, it is submitted—

1st, That the enacting portion of the law is of the most general and comprehensive character.

2d. That the proviso, requiring a notice of claim to be filed three weeks before offering of the land at public sale, was not intended as an exclusion of lands which had been already offered from the operation of the law, but simply as a facility for ascertaining before any public sale what lands were claimed as back pre-emptions, and what were not, so that it could be known before hand what lands were legally subject to sale and *what were not. This [*60 reason not applying to lands already offered at the date of the act, the proviso requiring three weeks' notice did not apply to them. All the pre-emption laws contain a similar proviso. Such was the construction of the land office. 2 Birchard's Compilation, 573.

The enacting clause applied to all public unappropriated land. The proviso in question was applicable only to such lands as had not been offered.

If this be so, then Mr. Surgett had a right, under the Act of 16th June, 1832, at any time prior to the 16th of June, 1835, to file his application to enter the land in controversy.

This right having been extended to the 16th of June, 1836, by the Act of 24th February, 1835, 4 Stat. at Large, 753, Mr. Surgett, having made his application on the 20th of May, 1836, was consequently within the time prescribed by law, and his application ought to have been admitted.

Points on the part of the appellees:

1. That this cause involves legal rights, for which a plain and adequate remedy is provided by the ordinary process of the common law.

2. That the character of this action, which is essentially an action at law, is not, and could not be, changed, by the laws of Louisiana, into a proceeding in equity, in the United States Circuit Court in Louisiana, or in this court.

3. That this cause was tried in the Circuit Court as a court of law, and not according to the forms of a court of equity.

4. And as a consequence of the above propositions, the appellees will contend, that, this being a cause at common law, should have been brought up to this court by writ of error, and not by appeal, and that this appeal should be dismissed.

5. At the trial below, and after it had commenced, the appellant applied for a continuance of the cause, which was refused by the court. To this refusal the appellant excepted. The appellees will contend that the court decided correctly in refusing the continuance, and that such a refusal is not a ground for an exception or appeal.

6. The appellees will contend that the diagram marked B, offered in evidence by the appellant, and mentioned in the second bill of exceptions, was rightly rejected by the court.

7. That there is no error in the opinion of the court in the third bill of exceptions.

8. That the only questions open on this appeal are those raised by the bills of exception.

9. That the appellant, not having shown

61*] that he had any *title to the sections 28, 29, 30, 31, 32, and 33, at the time (to wit, the 26th of May, 1836), when he claimed to purchase the property in dispute from the register of the land office, as back concessions to said sections, and not having shown that he acquired any title to said sections until the 15th of June, 1837, his application was rightly rejected by the register of the land office.

10. That the application of the appellant to purchase the back concessions, being indefinite, and not showing the extent of the land which he claimed to purchase, was not such as is required by law, and was rightly rejected by the register.

11. That the right to purchase back concessions is confined to owners of front tracts which do not exceed forty arpents, French measure, in depth, and the appellant, not having shown what is the depth of his front tract, has not established his right to any back concessions.

12. That the register of the land office, having decided against the claim of the appellant, his decision is conclusive, so far, at least, as this case is concerned, or, if not conclusive, is correct.

13. That the appellant did not, at the time of his application, make payment or a legal tender for the back concessions claimed by him.

14. That the land in controversy is fit for cultivation, and borders on the Mill Bayou, which is sufficiently large and deep to drain the adjoining country, and render it fit for cultivation, and that said land therefore cannot be claimed as a back concession.

15. That the land in controversy was offered at public sale, in pursuance of a proclamation of the President, on the third Monday of November, 1829, and was therefore not liable to be claimed as a back possession.

Additional points of the appellees:

16. A part of the land in question was purchased by the appellees, or those under whom they claim, on the 14th of July, 1834. They will therefore contend, that they had obtained a vested title thereto at the time of the passage of the Act of 24th of February, 1835, ch. 24, 4 Stat. at Large, 753, which could not be devested by the application of the appellant made on the 20th of May, 1836.

See Thompson v. Schlatter, 13 La. R. 119, and Act of 15th of June, 1832, ch. 140; 4 Stat. at Large, 534; 2 Birchard's Land Laws, 727.

The appellees will cite the following authorities in support of the first fifteen points made by them:

62*] *On the 1st point: 1 Starkie on Slander, 2d Am. ed., marginal pages 2 and 191.

On the 2d point: Livingston v. Herman, 9 Martin, La. 713; 2 Cond. R. 40; Thompson v. Schlatter, 13 La. R. 119; McDonogh v. Millaudon, 3 How. 693; U. S. v. King, 3 How. 773; Code of Practice of La. p. 8, art. 30, p. 90, art. 374, p. 10, art. 41 and 43, p. 12, art. 44; Vidal v. Duplantier, 7 La. R. 45, 8 N. S. 105; Poultney v. Cecil, 8 La. R. 422; 7 How. 846; Constitution of U. S. art. 3, sec. 2, and art. 7 of Amendments; Act of Congress of 24th Sept. 1789, ch. 20, sec. 16, 1 Stat. at Large, 82; Act of 26th May, 1824, ch. 181, sec. 1, 4 Stat. at Large, 62; Parsons v. Bedford, 3 Pet. 433, 446; Livingston v. Story, 9 Pet. 632; Minor v. Tillotson, 2 How. 392; Phillips v. Preston, 5 How. 278, 289.

On the 3d point: Act of 24th Sept. 1789, ch. 20, sec. 12, 1 Stat. at Large, 79; Stat. of 13 Edw. I. ch. 31; 1 Saund. Pl. and Ev. 317 and 318; Mayhew v. Soper, 10 Gill. & Johns. 366; Phillips v. Preston, 5 How. 278, 289.

On the 4th point: Act of 24th Sept. 1789, ch. 20, sec. 22, 1 Stat. at Large, 84; Act of 3d March, 1803, ch. 93, sec. 2, 2 Stat. at Large, 244; San Pedro, 2 Wheat. 132; Ward v. Gregory, 7 Pet. 633; Parish v. Ellis, 16 Pet. 451.

On the 5th point: Sims v. Hundley, 6 How. 1; 2 Chit. Gen. Pr. 572; Mellish v. Richardson, 9 Bing, 126; 23 E. C. L. R. 276.

On the 6th point: Act of 18th May, 1796, ch. 29, sec. 2, 1 Stat. at Large, 464; Act of 3d March, 1803, ch. 40, sec. 10, 2 Stat. at Large, 244; Act of 3d March, 1831, ch. 116, sec. 5, 4 Stat. at Large, 493; 1 Greenleaf's Ev. 2d ed. secs. 501, 502.

On the 7th point: The acts cited under the 6th point, and 1 Greenleaf's Ev. secs. 440, 441.

On the 8th point: 38th Rule of Court; Armstrong v. Toler, 11 Wheat. 277; Penuock v. Dialogue, 2 Pet. 15; Carver v. Astor, 4 Pet. 1; Ex-parte Martha Bradstreet, 4 Pet. 102; Magniac v. Thompson, 7 Pet. 348; Gregg v. Lessee of Sayre et ux. 8 Pet. 244; Act of 24th April, 1820, sec. 2; Act of 10th May, 1800, sec. 7.

On the 9th, 10th, and 11th points: Act of 15th June, 1832, ch. 140, 4 Stat. at Large, 534.

On the 10th point, also, 9 La. R. 57.

On the 12th point: Act of 15th June, 1832, ch. 140, 4 Stat. at Large, 534, and Act of 24th Feb. 1835, ch. 24, 4 Stat. at Large, 753. The appellants will also rely on the decision of the Secretary of the Treasury affirming the decision of the register of the land office in this case, and will cite the decision* of the [*63 Secretary of the Treasury on the 18th of March, 1839, in the case of Robert Ford et al. Bagnell v. Broderick, 13 Pet. 450.

On the 13th point: Act of 15th June, 1832, ch. 140, 4 Stat. at Large, 534.

On the 14th point: Act of 3d March, 1811, ch. 46, sec. 5 and 10, 2 Stat. at Large 663, 665; Act of 15th June, 1832, ch. 140, 4 Stat. at Large, 534; Act of 24th April, 1820, ch. 51, sec. 3; 3 Stat. at Large, 566.

On the 15th point: The same acts referred to in the preceding point, and Thompson v. Schlatter, 13 La. R. 119.

17th. The appellees will also contend that the petitory action instituted by the appellant in this case cannot be maintained on the equitable title set up by him. United States v. King, 7 How. 846; S. C. 3 How. 773.

Authorities cited by the counsel for the appellants, in reply:

The following acts of Congress were cited in reply to the twelfth point in the brief of the appellees, to show that, in those pre-emption laws where the decision of the register and receiver has been treated as conclusive, the power of decision has been expressly given to the registers and receivers to determine the fact of occupancy and cultivation, without any appeal from their decision.

Act of 31st March, 1806, sec. 2, 2 Stat. at

Large, 480; Act of 29th May, 1830, 4 Stat. at Large, 420, upon which the language of the court in Wilcox v. Jackson, 13 Pet. 498, was founded; Act of 22d June, 1838, 5 Stat. at Large, 251, which was a continuation of the last cited act; Act of 19th June, 1834, 4 Stat. at Large, 678; also a continuation of the Act of 1830; Act of 4th Sept. 1841, sec. 11, 5 Stat. at Large, 456.

In the laws granting back pre-emptions in Louisiana, there is no power of determination given to the register and receiver.

The circular issued from the Treasury Department, June 19th, 1801, 2 Birchard's Compilation, 226, will be cited to show that the abstract on page 53 and the extract from the Sales book, page 54, of the record, were required by the instructions from the general land office, and properly offered in evidence.

Also, Commissioner's Instructions to Register, New Orleans, etc., 2 Birchard's Comp. 374. Mr. Haywood to Registers and Receivers, 2 Ib. 465. Circular to Registers and Receivers, June 15th, 1821, 2 Ib. 314. And especially the Circular of 7th June, 1820, under the cash system. Certified copy from general land office.

64*] *The letter of Land Commissioner to Registers and Receivers in Louisiana, in relation to the Act of 15th June, 1832, will be referred to. 2 Birchard's Comp. 573.

Reference is also made to the last paragraph of the circular of 5th September, 1821, 2 Birchard's Comp. p. 256, to show that the certificates of the register and the receiver's receipts were to bear the same numbers, and were to be issued in all instances in regular numerical order.

Mr. Justice Catron delivered the opinion of the court:

1. On the facts appearing in the record, a motion was made to dismiss the suit for want of jurisdiction, because it was brought here by appeal, which brings before the revising court all the evidence; whereas, had a writ of error been brought, such parts of the evidence only could have been considered as were presented by bills of exception. This motion has been held up for a length of time, and is now considered with the merits, and the inquiry standing in advance of the merits is, whether the appeal shall be dismissed. The suit was commenced in a State district court according to a prescribed form of practice in Louisiana, and removed by the defendant from the State court to the Circuit Court of the United States, where the same mode of pleading and practice was necessarily pursued that would have been, had the cause continued in the State court, and been there adjudged; it therefore comes here as an anomalous case.

The proceeding was commenced by Lapice and Whittlesey; they asked to have a cloud removed from their title, which they alleged was embarrassed by a pretended and illegal claim of Surgett to a back concession, of anterior date to their title, and for the same land. Surgett came in, and set forth his claim; it was purely equitable in its character, in the sense of the term "equity," as denominated in the Constitution and acts of Congress; this claim Surgett (by a petition in his answer), by way of reconvention, asked to have enforced against Lapice and Whittlesey. He thereby became complainant. The character of Lapice and Whittlesey's title is not in controversy; both sides admit that it is a legal and valid title on its face, and as against the United States indisputable; but Surgett sets up a right of preference to entry of the same land at the time when the entries were made under which Lapice and Whittlesey claim, and the question is, how was the Circuit Court to deal with the matter when an appeal or writ of error was demanded, as the one or the other the judge was compelled to allow; he was called on for a decree by each *party, as on bill and cross bill in an [*65 ordinary chancery proceeding, and did decree that Lapice and Whittlesey should be quieted in their title to, and possession of, the land in controversy, and that Surgett should be forever enjoined from setting up any claim or pretension to the same; and so he might have decreed the other way; and although, by the laws of Louisiana, a jury might have been called in a State court to aid in ascertaining the facts, yet as none was required by the parties in the Circuit Court, and the cause was heard by the court alone, and a decree rendered, we think the mere fact that a State court might employ a jury does not affect the character of the proceedings actually had in the Circuit Court. In other States, juries are frequently employed by the chancellors when hearing causes, as in Kentucky, where it is required by a statute; yet if an ordinary suit in equity was removed from a State Court to the Circuit Court (United States), in a district where, by the State statutes, a jury was required to find contested facts; still the Circuit Court would not be required to resort to a jury, nor could it do so. And we take occasion here to say that had the Circuit Court submitted the cause to a jury in this instance, we should have deemed it improper, although demanded by either side. Our opinion, therefore, is, that there was litigated in the Circuit Court a mere equitable title, in a form impressed on the proceeding in a State court, and a decree pronounced as a court of equity would have done in a regular course of proceeding in chancery; and that the merits of the cause could only be reviewed on appeal.

But as several cases have been dismissed from this court because they were brought here by appeal instead of a writ of error, it is insisted that this rests on the same grounds of those that have been dismissed, and the case of The United States v. King, 3 and 7 How. 773 and 844, has been much relied on to show that this cause cannot be brought here by appeal. But that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had

claimed an equitable title in that case, it would 66*] have been no defense, *because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. The whole proceedings were necessarily proceedings at law, and could therefore be removed by writ of error only, and not by appeal. And substantially of the same character were all the cases relied on by counsel to dismiss this appeal; none of them resembled the case before us in any material degree—certainly not enough to govern it—and the jurisdiction is consequently sustained.

2. We come in the next place to discuss the merits; and here some general considerations present themselves. On the first settlement of Lower Louisiana, the nature of the country imposed on the governments who successively held it a peculiar policy in granting land to individual proprietors; the Mississippi River overflowed its banks annually, and to overcome this impediment to cultivation, and to reclaim the back lands, heavy embankments had to be thrown up on the sides of the river, so as to keep the water at flood tide within the channel; and these embankments had to be connected and continuous for a great distance, otherwise the whole country would be submerged; and the king's domain was resorted to as a means of securing the country from overflow, and of reclaiming it to a great extent; and individual proprietors were relied on to do that which, in other countries at all similarly situated, was a great national work; and it is matter of surprise how much the policy accomplished with such feeble and questionable means. The grants were not large, and fronted on the river only to the extent of from two to eight arpents as a general rule, and almost uniformly extended forty arpents back; to these front grants the Spanish government reserved the back lands, to another depth of forty arpents; and although few if any grants were made of back lands in favor of front proprietors, still they were never granted by the Spanish government to any other proprietor, but used for the purpose of obtaining fuel and for pasturage by the front owners, so that, for all practical purposes, they were the beneficial proprietors; subject to the policy of levees, and of guarded protection to front owners. We took possession of Lower Louisiana in 1804. In 1805, commissioners were appointed, according to an act of Congress, to report on the French and Spanish claims in that section of country, and by the Act of April 21st, 1806, it was made a part of their duty "to inquire into the nature and extent of the claims which may arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made," previous to the transfer of 67*] *government, "and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress, at their next ensuing session. And the lands which may be embraced by such report shall not be otherwise disposed of, until a decision of Congress shall have been had thereon."

The commissioners were engaged nearly six years in the various and complicated duties imposed on them, and then reported, that, by *the laws* and usages of the Spanish government, no front proprietor by his own act could acquire a right to land farther back than the ordinary depth of forty arpents, and although that government invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore they rejected claims for the second depth, as not having passed as private property to the front proprietor under the stipulations of the treaty by which Louisiana was acquired. As by the Spanish policy and usages the front owner had reserved to him a preference to become the purchaser of the second depth, Congress by the fifth section of the Act of March 3, 1811, provided that every person who "owns a tract of land bordering on any river, creek, bayou, or water-course," in the territory of Orleans, "and not exceeding in depth forty arpents, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions, as are, or may be, provided by law for the other public lands in the said territory." And inasmuch as the country had not to any material extent been prepared for sale in the ordinary mode by public surveys, it was made the duty of the principal deputy-surveyor of each of the two districts in the Orleans territory, to cause to be surveyed the preference rights claimed under the act; and where, by reason of bends in the river, bayou, creek, or water-course on which a front tract bordered, and where there were similarly situated tracts, so that each claimant could not obtain a quantity equal to his front grant, it was made the duty of the surveyor to divide the vacant land between the several claimants in such manner as to him might appear most equitable. To gratify pre-emption claims secured by the act, no township surveys in advance of an entry were contemplated, as they could not be regarded did they exist; and as the act was limited to three years' duration, *little of [*68 the country was likely to be surveyed before the time for making entries expired. By the seventh section of the Act of May 11, 1820, the fifth section of the Act of March 3, 1811, was renewed, and continued in force until May 11, 1822; and by the Act of June 15, 1832, the Act of 1811 was again renewed for three years, with some slight amendments; and by the Act of February 24, 1835, the time was further extended to June 15, 1836.

The township where the land in dispute is situated was offered for sale, according to the President's proclamation, in November, 1829; and as Surgett first offered to make his entry in 1836, it is insisted that, after the lands in the township were offered at public sale, no entry founded on a preference right was allowable at the land office; and such was the opinion of the court below, and is one of the reasons assigned for rejecting Surgett's claim. The Act of 1832 provides, that the claimant shall deliver his notice of claim to the register of the proper land office, stating the extent and situation of the tract he wishes to purchase, and

shall make payment; but it has this proviso—that all notices of claim shall be entered, and the money be paid thereon, at least three weeks before such period as may be designated by the proclamation of the President for the sale of the public lands in the township where such claim may be situated; and all claims not so entered shall be liable to be sold as other public lands. The proviso was an exception to a general law giving a right of entry; it was prospective, having reference to future public sales, and not to lands that had been previously offered, and remained unsold; Surgett could not comply with the condition, nor had it any application to such a case as his claim presents.

The manifest object of Congress was to disembarrass public sales by barring preference rights that would be a cloud on the title of lands thus offered.

The foregoing construction being the one adopted by the departments of public lands soon after the Act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the commissioner of the general land office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the President of the United States.

The court below rejected Surgett's claim to enter the back land on another ground. The acts of Congress securing the preference contain an exception—"that the right of pre-emption shall not extend so far in depth as to in-69*] clude lands fit for *cultivation bordering on another river, creek, bayou, or water-course." And the question is, To what description of water-course did the Legislature refer? The enacting clause provides that every person who owns a tract of land "bordering" on any river, creek, bayou, or water-course, shall have the right of pre-emption to the back land. The Act of 1811 has been construed, in the Department of Public Lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word "border," both in the enacting clause and in the exception, meant to front on a navigable water-course; that is to say, such waters as are described in the third section of the Act of February 20, 1811, by which Louisiana was authorized to form a State constitution and government, by which act the River Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and forever free, as well to the inhabitants of the said State, as to other citizens of the United States.

Similar provisions as respects navigable waters are common to other States where there are public lands, and the practice has been uniform to survey and sell the lands "bordering" on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the Department of Lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and, on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold. The registers and receivers were bound by recorded returns of the surveyors (as a concluded fact), to sell according to the surveys, nor could the register and receiver be allowed to hear evidence contradicting the surveys, as to whether the waters included by them were or were not navigable. Subject to this state of the law, Surgett offered (20th May, 1830) to enter the back land to front numbers 28, 29, 30, 31, 32, and 33; making 989 9-100 acres, which lots adjoin, and were included in one patent, together with two other lots, Nos. 34 and 35, also adjoining on the south, to which he did not claim any back land; that is to say, he claimed 989 9-100 acres as a back concession to a patent of 1,308 7-100 acres, so as to extend the six lots first named; and if neither the bayou, nor the existence of previous entries, stood in the way, he had a clear right to enter. Sparrow and Whittlesey's entries were in part fractions, not, however, produced by having bordered on a stream, but because they adjoined front lots on the Mississippi River not surveyed *in squares, but according to the second [*70 section of the Act of March 3, 1811.

In surveying township number five, the Mill Bayou was entirely disregarded, and the surveys of sections and quarter-sections were made in rectangular figures, and laid down and sold across that water, the channel of which was granted in part to Sparrow and Whittlesey, and in part to others. According to the rules, therefore, by which the register and receiver were governed, they had no right to refuse Surgett's entry for the reason that the land bordered on another navigable stream.

How far the powers of the court below extended to contradict the public surveys and records of the land office, we refrain from discussing in this case, as the parties on the one side and on the other affirmatively appealed to a court of justice to decide the fact, whether the bayou was of the description contemplated by the acts of Congress, and a water-course on which lands could front. It is between two and three miles long, and drains swamps, and a shallow pond, or rather lagoon; its greatest width is from seventy to eighty feet from bank to bank, and the channel in part is some fifteen feet deep from the top of its banks; but at no time of the year has it any claims to be a navigable stream, being nearly dry for a greater portion of the year, having no running water, or any water in it, except stagnant pools; it is an ordinary drain of the Mississippi swamp, and of shallow ponds. Near its mouth, at the Mississippi River, there is a levee—and so there is one near to the pond, at its further end from the river; both levees being on lands granted to Surgett. Before the lower levee was constructed, there had been a mill for grinding erected on the bayou, which gave it the name it bears; the flow of water was then from the Mississippi River through this outlet to the swamp, in times when the river was high. But it was never fit for any purpose, as a channel through which commerce could be carried on by water. The ground of defense must therefore fail, that the lands entered by Sparrow and Whittlesey bordered on a bayou, and were within the exception of the Act of 1832.

The Circuit Court also held that the back land was proved to be fit for cultivation, and

being so, was excepted from the enacting clause giving a perference of entry. The exception is, "that the right of the pre-emption shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course." There is no break in the sentence, and we hold that Congress clearly intended to make a single impression, whereas 71*] the court below divided the *clause cited into two exceptions; excluding a preference right, first, if a bayou, etc., intervened; and, second, if the land was fit for cultivation, whether there was a navigable water in its rear or not.

We only deem it necessary on this head to say, that, from 1811 to this time, the general land office has construed the exception as being single, requiring that the back land should border on another navigable stream; and also, that it should be fit for cultivation, before the preference of entry could be denied; and we take occasion here to declare, that, unless this uniform construction for so long a time by the Land Department was most manifestly wrong, we should not feel ourselves at liberty to disturb it, as, by doing so, titles might be shaken, and confusion produced.

For the reasons stated, it is ordered that the decree of the Circuit Court be reversed, and that the cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court is directed to cause a survey to be made under its supervision, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a survey legally made of said back lands; and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre, for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court, which have already accrued, and such as may hereafter accrue, shall be adjudged by the court below, on a future hearing, as law and justice may require. And it is further ordered, that in 72*] *all matters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall *proceed according* to the law and equity of the various matters presented, without being restrained by this decree.

Order.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Louisiana, and was argued by counsel; on consideration whereof, it is ordered that the decree of the Circuit Court be reversed, and that this cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court shall cause a survey to be made under its direction, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a suvey legally made of said back lands, and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum, from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court which have already accrued, and such as may hereafter accrue, shall be adjudged by the court below, on a future hearing, as law and justice may require. And it is further ordered, that in all matters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall proceed according to the law and equity of the various matters presented, without being restrained by this decree.

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*ASHER M. NATHAN, Plaintiff in [*73
Error,
v.
THE STATE OF LOUISIANA.

State law imposing tax on exchange and money brokers, constitutional.

NOTE.—Power of Congress to regulate commerce. State licenses. Power of State to tax commerce. See notes to 6 L. ed. U. S. 23, 678; 29 L. ed. U. S. 158; 32 L. ed. U. S. 229; 37 L. ed. U. S. 216; 38 L. ed. U. S. 1041; 39 L. ed. U. S. 538.

Power of States to tax. See notes to 7 L. ed. U. S. 939; 10 L. ed. U. S. 1022.

Bill of exchange, requisites of—what constitutes. See note to ante p. 199.

A tax imposed by a State upon all money or exchange brokers is not void for repugnance to the constitutional power of Congress to regulate commerce.

Foreign bills of exchange are instruments of commerce, it is true; but so also are the products of agriculture or manufacturers, over which the taxing power of a State extends until they are separated from the general mass of property by becoming exports.

A State has a right to tax its own citizens for the prosecution of any particular business or profession within the State.

Banks deal in bills of exchange, and this court has recognized the power of a State to tax banks, where there is no clause of exemption in their charters.

THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ or error issued under the twenty-fifth section of the Judiciary Act.

On the 26th of March, 1842, the State of Louisiana passed an act to increase the revenue of the State, the ninth section of which provided that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the State, in lieu of the tax heretofore imposed on them."

On the 3d of February, 1845, Isaac T. Preston, the Attorney-General of the States, filed a petition in the District Court of the first judicial district, stating that A. M. Nathan was justly indebted to the petitioner in the sum of $250, for pursuing or having lately pursued, within the year 1843, the business of a money and exchange broker. The petitioner then prayed that he might be cited to appear and answer, and be condemned to pay; also that he might answer the following interrogatories under oath, viz.:

"Were you a broker, as above stated, in 1843?

"Did you or not receive brokerage or commissions?

"State clearly the nature of the same; whether received in money transactions."

The same process was pursued to collect the tax for 1844.

On the 19th of April, 1845, the two suits were consolidated and the defendant answered as follows:

"The defendant for answer denies generally all the allegations in the plaintiff's petition contained. And further answering, he says, that so much of such parts of 'An Act to increase the revenue of the States,' under and by virtue of which this suit is brought to recover of this defendant the tax thereby imposed upon the business of a money and exchange broker, and especially the ninth section thereof, particularly referred to in the plaintiff's petition, so far as the said section and act impose a tax on that part of the business of a money and 74*] exchange *broker which consists in buying and selling exchange, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as give to Congress the exclusive power to regulate commerce and prohibit to the States all interference with the power so granted, and forbid them to impose, without consent of Congress, any duty on imposts or exports.

"And so far as the said section and act impose a tax on that part of the business of a money and exchange broker which consists in buying and selling money or foreign coin, or other currency, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as gives to Congress the exclusive power 'to coin money, regulate the value thereof, and of foreign coin.'

"And so far as said section imposes a tax, not uniform in amount with other State taxes on occupations, respondent avers that the same is contrary to so much of the treaties, laws, and Constitution of the United States as reserve and guarantee to the inhabitants of Louisiana all the rights, advantages, and immunities of citizens of the United States, particularly that of uniform taxation; and to so much of said Constitution as reserves to the people of the several States all powers not delegated to the States respectively, or to the Union.

"Wherefore he prays, that the plaintiff's demand be dismissed, with costs, and for all other and general relief which his case may require.

(Signed) "Richard Henry Wilde,
"Defendant's Attorney.
" "A. K. Josephs.
" "H. H. Strawbridge."

A. M. Nathan, defendant, for answer to the interrogatories to him propounded in the above entitled suit, says:

"I was a money and exchange broker in 1843 and 1844; I received a brokerage or commissions on money and bills of exchange sold by my agency.

"I will state clearly the nature of the same. My business, like that of money and exchange brokers in general, consists exclusively in negotiating and effecting for others the purchase and sale of exchange on other States or foreign countries. During the thirty years that I have been a money and exchange broker, I believe—nay, I am certain—that I have never, as such, sold a single bill drawn from one point of Louisiana on another.

*"I make myself acquainted with the [*75 current market value of exchanges. The purchasers and the sellers both resort to me for information on the state of the market of exchanges, and make me their common agent in the purchase and sale of bills, which are purchased for the purpose of making remittances to foreign parts, and usually so remitted immediately. On and out of the price of each bill, I receive a percentage or commission, varying from one fourth to one eight of one per cent., which is commonly paid on settlement. It is the same in money transactions.

(Signed) "A. M. Nathan."

On the 7th of June, 1845, the District Court decreed that the State of Louisiana should recover of the defendant, A. M. Nathan, the sum of five hundred dollars, and costs of suit.

An appeal was had to the Supreme Court of Louisiana, which, on the 15th of December, 1845, affirmed the judgment of the District Court. The defendant sued out a writ of error, and brought the case up to this court.

It was argued by Mr. Wilde (in a printed argument) for the plaintiff in error, and Mr. Coxe for the defendant.

Mr. Wilde contended that the law of Louisiana was repugnant to the Constitution of the United States, because it interfered with the

exclusive power of Congress to regulate commerce.

Congress has the exclusive power to regulate commerce. The power to regulate implies the power to preserve. An unlimited power to tax is a power to destroy. A State cannot have the power to impair or destroy that which Congress has the power to preserve and regulate; therefore, a State cannot tax the instruments whereby Congress exercises its constitutional powers. 4 Wheat. 428, 432.

Exchange is a necessary instrument of commerce. 4 Wheat. 147; 13 Peters, 531, 548, 563, 606.

The mind cannot conceive the possibility of carrying on commerce, in the present state of the world, without bills of exchange.

A bill drawn in one State, on the citizen of another, is a foreign bill. Buckner v. Finley, 2 Peters, 586.

The sole business of plaintiff in error, therefore, is buying and selling foreign exchange. (See answer to interrogatories.)

There is not a particle of testimony that he deals in domestic exchange, or in money. The court, consequently, in adjudging against him, could only have proceeded, and did, in fact, 76*] *proceed, upon the ground that, as a dealer in foreign exchange exclusively, he was subject to the tax; and that the act imposing it was constitutional.

Now, there is no difference between taxing the article and taxing the faculty to sell it. 4 Wheat. 399; 12 Wheat. 444.

To tax the trade or faculty of selling bills of exchange, then, is the same thing as to tax the bills themselves.

To tax bills of exchange is to tax a necessary instrument of commerce, and taxing that without which commerce cannot be carried on is imposing a tax on commerce itself. It is no answer to say, that the impost is moderate, though in the present case it is, in fact, excessive, because, if the State can tax at all, it may tax indefinitely, and an indefinite power to tax is a power to destroy. 4 Wheat. 428, 432.

Exchange is as necessary an instrument of commerce as ships or vessels.

Could the State of Louisiana levy a tax, in the shape of a license, to every consignee or ship broker in the city of New Orleans, prohibiting captains of vessels, and all others, from acting as consignees without such license?

Would it avail the State to say, such an imposition is not a tax on commerce, nor a duty on ships and vessels, but only a license on the faculty of acting as consignee on the trade of ship broker?

All useful regulation does not consist in restraint or taxation. That which Congress, in the exercise of their constitutional power, think proper to leave free, is as much regulated by them as that which they restrain or tax. 9 Wheat. 18. Were it not so, it would not be an exercise of the power to "lay duties," when certain goods are allowed to be imported duty free. Could a State tax the introduction of such goods?

Where there is a repugnancy between the State power to tax, and the federal power to *preserve*, regulate, and leave free, the State power *must give* way. If the State can tax in such a case, Congress is not supreme. 4 Wheat. 429, 432, 433.

A State can have no concurrent power over that in regard to which the power of Congress is exclusive. What sort of concurrent powers would those be which cannot exist together? 9 Wheat. 15.

Congress has no power of revoking State laws, as a distinct and substantive power. It legislates over subjects, and over those subjects which are within its constitutional province its legislation is supreme, and overrules all inconsistent or repugnant State legislation. 9 Wheat. 30.

*Its exclusive power to regulate com- [*77 merce carries with it the power to regulate exchange as an indispensable instrument of commerce, and the power being exclusive, a concurrent power in the State is a contradiction.

"Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."—Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat. 229, 230.

Thus it has been resolved, that a steamer employed in transporting passengers is as much engaged in commerce as a sail vessel freighted with merchandise, and as much exempt from State legislation obstructing her traffic. Gibbons v. Ogden, 9 Wheat. 215, 219.

Congress have not only the exclusive power to regulate commerce, but to make all laws which shall be necessary for carrying into execution that power.

[Mr. Wilde then proceeded to show that exchange was an essential part of commerce, and cited many decisions of this court to prove that a State could not retard, impede, or burden, by any device, the operation of the constitutional laws enacted by Congress.]

Mr. Coxe, for defendant in error:

The power of taxing persons carrying on a particular business has been often exercised, and the constitutional power of the States so to act has heretofore not been questioned. In Pennsylvania, for instance, the venders of foreign merchandise are compelled to take out a license, for which they pay a sum graduated according to the amount of their business. Act of May 4, 1841; Purdon, 1153, 1154. A similar tax is imposed frequently by State Legislatures, and even by the corporate authorities of cities, and is supposed to be unexceptionable as to its legality.

The provision of the Louisiana statute, which is now called in question, is to be found in a single section of a general revenue system act.

It does not profess to, nor in fact does it, impose a tax upon a bill of exchange, either in the shape of a stamp duty or otherwise.

It does not profess to, nor in fact does it, impose any restraint upon a party having funds in Louisiana, which he desires to remit abroad, from purchasing a bill of exchange as the instrument of remittance.

*It does not profess to, nor in fact does [*78 it, impose any restraint upon a party having funds abroad, which he desires to bring into

the State, from drawing a bill of exchange or selling it at his own discretion.

These operations are left wholly unaffected by this law. The section of the law which is objected to acts only upon the persons employed in conducting a particular business—the trafficking in exchange. They are not the drawers of bills of exchange—as such, they are not taxed; as buyers, they are not taxed; but as dealing in them, purchasing and selling, they are. It is as their business consists in buying bills drawn by others, on which they make a profit—as sellers of bills to others, who require them, on which they make a profit—that they become subject to the law.

That money and exchange brokers are a convenient machine in conducting an extensive commercial business may be true. But they are nothing more. A ship or a steamboat is not only a convenient, but an essential, means of importing foreign merchandise from abroad. Are they the less property, and taxable as such?

Stages and other carriages are not less essentially necessary instruments for the transportation of passengers and commodities between the different States of the Union. Are they therefore exempted from taxation by the States?

Stores and warehouses, in which merchandise is deposited on its arrival in our country from abroad, are absolutely necessary for the transaction of commercial business. Are they therefore beyond the reach of the taxing power of the State in which this kind of property is found?

Mr. Hamilton (Federalist, No. 32) says: "I am willing to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants; and, making this concession, I affirm that (with the single exception of duties on imports and exports) they would, under the plan of the Constitution, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the general government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause in the Constitution."

In this case, the law of Louisiana is not obnoxious to any of the objections which have been heretofore presented to the consideration of the court, growing out of the difficulty of giving a precise definition of the words "im- 79*] ports and exports," *and "commerce," or in drawing the almost shadowy lines which mark the boundaries of the exclusive powers of Congress. A bill of exchange is in no sense either an export or import. It is an instrument, rather than a subject of commerce. The dealing in bills of exchange constitutes no part of the commerce with foreign nations or between the States, however convenient an instrument it may be found in conducting either.

The article in which the plaintiff in error deals is a bill of exchange, originating, it may be, within the limits of the State, created and owned by a citizen of the State, and the entire negotiation of which, so far as he is concerned, conducted within the limits of the State.

If this law is objectionable because it affects bills of exchange on the ground that they are the subjects of commerce, upon what principle, it may be asked, can the validity of those State laws be vindicated which regulate the protest of such instruments, or prescribe damages for their dishonor? These are commercial regulations, affecting the interests of all parties to these instruments.

Stress seems to be laid, in the argument submitted on behalf of the plaintiff in error, on the circumstance that the business of his client was exclusively confined to buying and selling bills of exchange drawn on foreign countries or upon other States. He refers to 4 Wheaton, 147, in which a learned counsel in his argument says, that the most important medium of foreign commerce is foreign bills of exchange, which are, therefore, important subjects of commercial regulation. The same gentleman, however, adds, that Congress having neglected the duty of legislating on the subject, "the States may and do exercise it, and their rightful use of this power has been sanctioned by this court in innumerable instances." If there was any argument in the first citation bearing upon the case at bar, the additional remark makes the authority a strong one in favor of the judgment under review. Indeed, it may be asserted as a general, if not a universal proposition, that the law on the subject of bills of exchange, whether domestic or foreign, is regulated not by Congress, but is dependent on the local law of the several States, which have adopted, with such modifications as were thought expedient, the general principles of the commercial law of Europe.

Mr. Justice McLean delivered the opinion of the court:

This suit is brought before us, by a writ of error to the Supreme Court of Louisiana.

By an act of the Legislature of Louisiana, of the 26th of *March, 1842, entitled "An [*80 Act relative to the revenue of the State," it is provided in the ninth section, that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the State, in lieu of the tax heretofore imposed on them." The defendant below having failed to pay the tax for two years, a suit was brought against him in the District Court of the State, in which a judgment for five hundred dollars was rendered. That judgment, on an appeal to the Supreme Court of the State, was affirmed. The defense made was, that the sole business of the defendant was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the constitutional power of Congress "to regulate commerce with foreign nations and among the several States."

This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

The right of a State to tax its own citizens for the prosecution of any particular business, or profession, within the State, has not been doubted. And we find that in every State money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who

practice the learned professions, and every description of property, not exempted by law, are taxed.

As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from State taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship building, the same as the exercise of any other mechanical art? And also the traffic of ship chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his busi- 81*] ness, *within the State, on the ground that the products sold may be used in commerce.

No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on.

In the case of Briscoe v. The Bank of the Commonwealth of Kentucky, 11 Peters, 257, this court held that a State has power to incorporate a bank; and this power has been exercised by every State in the Union, except where it has been prohibited by its constitution. And the banks established, it is believed, have been, without exception, authorized to deal in foreign bills of exchange. And this court held in Providence Bank v. Billings and Pitman, 4 Peters, 514, that a State had power to tax a bank, there being no clause in the charter exempting it from taxation. In the case of The Bank of Augusta v. Earle, 13 Peters, 519, it was decided that the bank established in Georgia, having a right in its charter to deal in bills of exchange, could, through its agent and the comity of Alabama, buy and sell bills in that State.

If a tax on the business of an exchange broker, who buys *and sells foreign bills [*82 of exchange, be repugnant to the commercial power of the Union, all taxes on banks which deal in bills of exchange, by a State, must be equally repugnant.

The Constitution declares that no State shall impair the obligations of a contract, and there is no other limitation on State power in regard to contracts. In determining on the nature and effect of a contract, we look to the lex loci where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages, under the law of the State where the indorsement was made. Every indorsement on a bill is a new contract, governed by the local law. Story's Conflict of Laws, 314.

For the purposes of revenue, the federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the federal government can no more regulate the commerce of a State, than a State can regulate the commerce of the federal government; and domestic bills or promissory notes are as necessary to the commerce of a State, as foreign bills to the commerce of the Union. And if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State.

The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the Legislature to their constituents.

If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be there-

by essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of 83*] *property, real or personal, with the exception stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no federal power under the Constitution which can impair this exercise of State sovereignty.

We think the law of Louisiana imposing the tax in question is not repugnant to any power of the federal government, and consequently the judgment of the Supreme Court of the State is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

THE UNITED STATES, Plaintiffs in Error,
v.
McKEAN BUCHANAN.

Purser in navy not allowed commissions on drafts for funds while abroad or on sums paid laborers in navy yard—claims for unliquidated damage not allowed as set-off in suit by U. S.

Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished.

A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known, and certain.

There are two books for the government of the officers of the navy, usually known as the "Blue Book" and the "Red Book." The "Red Book," although later in date, did not repeal the "Blue Book," except in some few specified particulars.

The duty of paying mechanics and laborers at the navy yards was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed to a purser for performing this service.

The question, whether or not these acts were parts of the official duty of pursers, was one of law, to be decided by the court, and not of fact, to be left to the jury.

Losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond.

The statute of March 3, 1797, which allows setoffs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off.

It appears, also, that the government is not responsible for a wrong committed by one officer upon another. The party injured has other modes of redress than setting off the damages as a defense, when sued upon his bond by the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania, having 84*] *been carried there from the District Court, in which it originated.

It was a suit brought by the United States against Buchanan, who was a purser in the navy, to recover a balance of $11,535.50, alleged to be due by him. It was brought upon three several bonds, which had been executed by him on the 28th of February, 1836, the 24th of November, 1830, and the 24th of February, 1834. The defense was, that he was entitled to certain credits which the accounting officers of the government had refused to allow.

The items for which the defendant claimed credit were:

1. Charge of commission for drawing bills of exchange..... $1,601.86
2. Charge of commissions on payments to mechanics and laborers at navy yard, Pensacola..... 1,955.61
3. Loss of commissions and depreciation of property..... 9,360.31
4. Loss of commissions on sale of slops 385.52

It will be necessary to take up these several items in order, after a few general remarks.

The Act of Congress passed on the 7th of February, 1815 (3 Stat. at Large, 202), directed the Board of Navy Commissioners to prepare such rules and regulations as shall be necessary for securing responsibility in the subordinate officers and agents of the Navy Department. In obedience to this act, the Board of Navy Commissioners prepared a set of "Rules, Regulations, and Instructions for the Naval Service of the United States," which were published in Washington in 1818. This is the book which is referred to, both in the subsequent arguments of counsel and opinion of the court, as the Blue Book. Its bearing upon the several claims of the defendant, Buchanan, will be mentioned when they come to be noticed seriatim.

The Red Book was published at Washington in 1832. Its title was, "Rules of the Navy Department regulating the Civil Administration of the Navy of the United States." The order of the then Secretary of the Navy, prefixed to the book, contained the following sentence:

"The 'Rules, Regulations, and Instructions' for the naval service, as published in 1818, relate to other branches of administration in this department, and, in most particulars, are entirely distinct in their character. They are now undergoing a thorough revision; and when corrected and enlarged, if approved by the competent authority, they will be separately printed and forwarded to those interested in their contents."

In this Red Book, at p. 49, there is the following note to chapter 57, which treats of the printed regulations of 1818:

*"Note.—Except in these two par- [*85 ticulars [which are mentioned in the page to which the note is attached], and in others in which they have been expressly amended, these regulations are now in full force; their force being derived from the provisions of the Act of Congress of the 7th of February, 1815, and from the sanction of the President and Secretary of the Navy, who have power to adopt any naval regulations, though not within the purview of the Act of 1815, if not violating any law of Congress, and if supposed by them to be beneficial in their operation."

We will now take up the separate credits which were claimed by the defendant.

1st. Commission for drawing bills of exchange.

There was no dispute about the amount of bills drawn. A certificate of Mr. Dayton, the Fourth Auditor, stated them to amount to $65,074.34; that they were drawn on the Secretary of the Navy, at various times from the 24th of May, 1827, to the 9th of February, 1828, by whom they were duly honored, and the amount thereof charged to Purser Buchanan on the books of the office.

In 1826, the two following orders were issued by the Secretary of the Navy, in the form of a letter of instruction to the fourth auditor:

"Navy Department, 9th November, 1826.

"Sir,—Instructions have been transmitted to the commanders of our several squadrons abroad, to obtain the funds required for their support from the navy agent near their respective States.

"No percentage or premium will hereafter be allowed to officers of any grade making drafts upon the department, unless they are too remote from the residence of any navy agent to procure the money.

"I am, respectfully, etc.,

(Signed) "Samuel L. Southard.

"Tobias Watkins, Esq., Fourth Auditor of the Treasury."

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office. A. O. Dayton.

"Treasury Department, Fourth Auditor's Office, July 5, 1844."

"Navy Department, 10th Nov., 1826.

"Sir,—In reply to the inquiry contained in your letter of yesterday's date, I have to inform you that the allowance of premium, or percentage, to officers drawing bills on the department 86*] *would cease from the time the officers shall severally receive instructions on the subject. I am, respectfully,

(Signed) "Samuel L. Southard.

"Tobias Watkins, Esq., Fourth Auditor of Treasury."

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office. A. O. Dayton.

"Treasury Department, Fourth Auditor's Office, July 5, 1844."

2d. Charge of commission on payments to mechanics and laborers at the navy yard, Pensacola. These payments were made from October, 1835, to December, 1837, and amounted to $91,015.05, on which a commission of 2½ per cent. was charged.

The Blue Book, at page 100, when treating of the duties of a purser, said: "Every purser of a yard shall settle his accounts at the treasury every twelve months," etc., etc. But it nowhere recognized the allowance of a commission.

3d. Loss of commissions and depreciation of property.

4th. Loss of commissions on sales of slops.

These two items belong to the same head, and must be treated together.

The ship's stores under the purser's control are of two kinds, called public stores, or slops, *and private stores*. Both descriptions are purchased with the money of the government, but they are differently situated with respect to the commission which the purser receives upon their issue and consumption by the ship's crew. There was no dispute in this case about the first mentioned class. The purser claimed a commission of ten per cent., which was allowed to him in the settlement of his accounts. The controversy was confined to the second class.

In May, 1839, the frigate Constitution sailed for the Pacific. She was commanded by Captain Turner, and the defendant was the purser. On board of her was Commodore Claxton, the commander of the squadron on the Pacific station. Early in the year 1840, Commodore Claxton issued an order, that, upon clothing taken from the private stores of the purser, there should not be charged a greater advance than ten per cent. The defendant remonstrated, and a long correspondence ensued; but he was compelled to submit, and during the rest of the voyage he disposed of his stores at that advance, instead of the larger premium to which he considered himself entitled. It is unnecessary to state the particulars of the claim, or the reasons on which it was founded, because the court did not consider it a proper set-off in this action, even if the allegations of the defendant had been well founded.

*The suit was brought by the United [*87 States, in the District Court, in May, 1844. It was an action of debt brought upon the three bonds mentioned in the commencement of this statement. The defendant pleaded non est factum and performance, and claimed to set off the items of account above mentioned, which had been rejected by the accounting officers. Before the trial, the counsel filed the following agreement:

"It is agreed, that, under the pleadings in this case, the question to be submitted, tried, and determined, is the correctness of the credits, or any of them, claimed by the defendant in his account current with the United States under his old bond, and under the date of March 1, 1844, and which were disallowed in the reconcilement of his accounts by the Treasury Department, bearing date on the 27th of March, 1844; the said question to be considered as if arising under special pleadings in the cause. Credits claimed, if allowed, to be noted as of the date when they originated, with a view to future adjustment under his respective bonds. H. M. Watts,

"Of special Counsel for Plaintiffs.

"G. M. Wharton,

"For the Defendant.

"May 16th, 1845."

The counsel for the United States then offered in evidence—

1. The above agreement.
2. The three bonds of the defendant.
3. The treasury transcripts, which exhibited a balance due by the defendant to the United States of $11,535.50, with interest from the 1st of March, 1844.

The evidence on the part of the defendant consisted of the correspondence which had passed between himself and Commodore Claxton and others; and also testimony, oral and documentary, upon the respective binding authority of the Blue and Red books; and also upon the custom and usage of the navy with

respect to pursers' commissions. Upon the last point, the United States produced a great deal of counter evidence.

The evidence being closed on both sides, the counsel of the plaintiffs then and there respectfully prayed the court to charge the jury—

1. That the rules, regulations, and instructions for the naval service of the United States, prepared by the Board of Naval Commissioners, and approved by the Secretary of the Navy, on the 17th of September, 1817, and particularly those under the head of "Pursers," 88*] Nos. 12, 13, 14, were in full force, and *obligatory on defendant during the time he served as purser on the Pacific station, from 1839 to 1842, under Commodore Claxton.

2. That defendant had no right to issue slops wearing apparel, or materials of which wearing apparel was made, at a greater profit than ten per centum.

3. That the issue of slops and private purser's stores was under the control of the commander, and that it was his right and duty, if he thought the interests of the government and the crew required it, to restrict such issues of private stores.

4. That if the jury believe that upwards of seventy pieces of silk handkerchiefs were issued from the purser's stores without the approval of the commander, such an issue was contrary to the regulations of the service, and justified the commander in restricting the future issues by the purser.

5. That the order of Commodore Claxton and Captain Turner to Purser Buchanan, to limit his profit to ten per cent. on the cost of slops and wearing apparel, and the materials of which wearing apparel was made, was conformable to law and the regulations of the naval service.

6. That the United States are not responsible to the defendant for any supposed loss of commissions and depreciation of property arising out of the enforcement of the above order, or the conduct of Commodore Claxton.

7. That if the order of Commodore Claxton was illegal, and loss actually resulted to the defendant, the United States would not be responsible in this action.

8. That damages arising out of torts cannot be set off.

9. That unliquidated damages arising out of the conduct of Commodore Claxton to defendant cannot be set off against the claim of the United States in this suit.

10. That defendant, in an action against him by the government, cannot set off a claim which depends upon the pleasure of the government, and is not susceptible of legal enforcement.

11. That the defendant cannot set off prospective profits, which he might have made if he had been permitted to sell to the crew without restraint; nor is the government responsible for any depreciation of property.

12. That there can be no usage recognized by our courts which is contrary to law, and that the evidence given by defendant of a practice to charge twenty-five per cent. on wearing apparel, and materials of which wearing apparel is made, is of a practice contrary thereto.

13. That the charge of two and a half per cent. by defendant, for drawing bills of exchange upon the government, is not warranted by law, and ought not to be allowed.

*14. That the charge of commissions [*89 by defendant for disbursing money of the government, in payment of mechanics and laborers at the navy yard, Pensacola, is not warranted by law, and ought not to be allowed.

15. That the orders of the Secretary of the Navy, of the 20th of March, 1840, and 2d of December, 1840, were not intended by the Secretary, nor do they or either of them contain any assumption or agreement on the part of the government, to pay any loss of commissions or depreciation of property complained of by Purser Buchanan.

16. That the United States, by the agreement filed by the counsel of both parties in this cause, and the evidence, is entitled to recover a verdict for the sum of $11,535.50, with interest from March, 1844, as appears by the Treasurer's transcript referred to in said agreement.

And the learned judge charged the jury.

And thereupon the counsel for the plaintiffs excepted to said charge generally, and to every part thereof, and in addition to such general exceptions, and without prejudice thereto, specified the following exceptions, viz.:

That the said judge, in answer to the first, second, third, fourth and fifth, and twelfth prayer for instruction, charged the jury—

"That the commander of a vessel of war has a right to issue orders in relation to the discipline of his ship, and the conduct of his officers on board, and to enforce these orders, he being responsible for any abuse of it. It is also his right to control the issues of stores by the purser, and, if he thought the interest of the government or of the crew required it, to restrict the issues of such stores to a proper quantity; but he had no right to reduce or control the prices at which such stores should be issued, that being fixed by the rules and regulations, and the usages and customs, of the navy. Was there, then, a fixed price or rate of advance which the purser had a right to charge on these articles, and if so, what was it? And was it charged by the order of Commodore Claxton?

"On behalf of the United States, it is contended that the rules and regulations prepared by the Board of Navy Commissioners, and published in 1818, were in full force, and that by these, 'all articles of wearing apparel, and materials of which wearing apparel is made, to be charged as slops,' and an advance of ten per cent. only allowed.

"It is admitted, that, so far as these rules and regulations are not opposed to an act of Congress, and subsequent rules and regulations, they are in force; but it is contended that these *do not extend to the private stores *[90 of the purser, but only to those purchased by the government; or if they do, that the rule is superseded by the regulations issued in 1832, which were in full force in 1839–40.

"I deem it unnecessary to detain you by an examination of the first view, as I think the last is correct; although the rule or section referred to in the Red Book, on the face of it, purports to bear date 27th July, 1809, and may have been suspended by the rules of 1818, as to which, however, it is unnecessary to decide. I consider the incorporation of it in the rule of

1832 as a new issue of that date, and binding from the time of its promulgation, although it may conflict with the rules of 1818.

"Each successive secretary or head of a department has the same right as his predecessor to give a construction to the laws or regulations, or usages, of the business of his department; and the construction given by the last will be binding until changed by his successor. This construction of the rules of 1832 has been adopted, not only by the accounting officers of the government, but by Congress. See an Act for the relief of E. B. Babbit, March 2d, 1833. The rules of 1832 provide that twenty-five per cent. should be allowed upon articles of secondary necessity, embracing it, etc. See Red Book, p. 18.

"Are these articles of private clothing, and the materials of which such clothing is made, such as are furnished by pursers, articles of secondary necessity? This is a question for the jury to determine. From the evidence, it appears that the articles furnished by the purser are of a finer material than those provided by the government, and have generally been considered in the service as a holiday or shore dress for the seamen. They are not required to purchase them, but do so at their own pleasure. A number of witnesses have been examined, who proved it to have been the custom and usage to charge upon these articles an advance of twenty-five per cent. and that they were considered of secondary necessity. It is true there can be no usage recognized by the courts which is contrary to law. Usage cannot alter the law, but it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those who are within its limits. But it is said a different construction was given to these regulations by Secretary Paulding, and that he confirmed the view and construction of Commodore Claxton.

"If the order of Commodore Claxton had been confined to supplies purchased subsequent to the receipt of this general order, then there might have been force in this argument; 91*] but no *change of a usage, even by authority, can have a retrospective effect, but must be limited to the future."

And in answer to the sixth and fifteenth prayers for instruction, the learned judge charged the jury:

"It is, however, said, supposing all these doings by Commodore Claxton to have been wrong, still the government is not liable for his acts, and therefore the defendant is not entitled to a set-off in this action, although he may have sustained damages by them. For the purpose of this case, and with a view of obtaining your verdict on the merits of this claim, I state the law to be, that Commodore Claxton was the agent of the government in all this transaction, and although his acts may not have been previously authorized by the government, yet if they were afterwards ratified by the Secretary of the Navy, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders so ratified or confirmed."

In answer to the seventh, eighth, and ninth prayers of the plaintiffs for instruction, the judge charged the jury:

"Again it is contended, that, supposing all the allegations on part of the defendant to have been fully made out by the evidence, yet this is not such a claim as can be set off against the demand of the government in this action. However this might be in suits between individuals, the government of the United States does not resort to technicalities to screen it from a just claim by any of its citizens. The Act of 3d March, 1797, directs, not only that legal, but that equitable credits should be allowed to the debtors of the United States by the proper officers of the Treasury Department, and if then disallowed, that they may be given in evidence at the trial; and this whether the credits arise out of the particular transaction for which he was sued, or any distinct or independent transaction, which would constitute a legal or equitable offset or defense, in whole, or in part, of the debt sued for by the United States.

"If, therefore, you believe the defendant has sustained injury by the order of Commodore Claxton, which, according to these principles, was contrary to law in limiting the prices, and which order was subsequently approved by the Secretary of the Navy, having a full knowledge of the facts, you will, from the evidence, ascertain the amount of such loss, and credit the defendant with it as an equitable defense against the claim of the government. In ascertaining this amount, you will recollect that the prohibition of Commodore Claxton as to price applied only to clothing, or materials of which clothing is made, and to no other articles of secondary necessity."

*In answer to the tenth and eleventh [*92 prayers of the plaintiffs for instruction, the judge charged the jury:

"It is incumbent on the defendant to satisfy you of the amount of credit to which he is entitled under this head. In estimating it, you are to allow only the actual loss sustained by him, and not any prospective or anticipated profits which might have been made by the defendant, supposing his whole stock to have been sold at the prices claimed by him.

"If, in consequence of this order, the goods remaining on hand were injured or damaged, he is entitled to recover the amount of such damage; but the jury will determine whether such damage was caused by this order, and whether the sales were lessened in quantities in consequence of the reduction of price. The sales made on shore, and those to other pursers, are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made bona fide, with a view to reduce an anticipated loss, he will be entitled to be made good his actual loss on such sales."

In answer to the thirteenth and fourteenth prayers of the plaintiffs for instructions to the jury, the judge charged:

"The second and third items of claim are for commissions on moneys paid by the defendant to mechanics and laborers, when stationed at the navy yard at Pensacola, from October, 1835, to December, 1837; and a commission on the amount of bills of exchanges drawn by him on the government, from May, 1827, to February, 1830.

"These are alleged to be extra services, for which, by the custom of the department, he is entitled to extra compensation.

"From the rules and regulations of 1818, and 1832, as given in evidence, it appears that both the drawing of bills of exchange by the pursers when abroad, and the payment of mechanics and laborers by them, when stationed at navy yards, were duties devolved on and usually performed by pursers.

"But if, from the evidence, the jury believe that these duties were required of, and were performed by, the defendant, over and above the regular duties of his appointment, and that it has been the practice of the government or Navy Department to allow to pursers compensation or commissions over and above the regular pay, and that the defendant took upon himself the labor and responsibility of such payments and drawing of bills, with an understanding on both sides that he should be compensated for the same as extra services, then it is competent for the jury to allow such sum as they may find to be reasonable and conformable to the general usages of the government in like cases. But the custom and usage which 93*] has been *invoked by the defendant in his favor, must also operate when it is established against him. The usage, to be binding, must be uniform, and be applicable to all officers of the same grade, under similar circumstances. It is not sufficient that one, two, or half a dozen officers have been allowed an extra compensation for such services, unless the rule was a general one, so that each officer performing the service might be supposed to rely on the known practice of the government to allow extra compensation at the time the service is performed. The jury will say, whether the few cases in which extra compensation is proved to have been allowed are not rather exceptions to the general rule of refusing such compensation, than proof of the rule itself.

"My opinion is, that the weight of the evidence is against the claim of the defendant for either of these items."

And thereupon, the counsel for the said plaintiffs did then and there except to the aforesaid charge and opinions of the said judge, on the several points upon which his instructions were prayed for, to the jury. And inasmuch as the charge and opinions, so excepted to, do not appear upon the record, the said counsel for the plaintiffs did then and there tender this bill of exceptions to the opinion of the said judge, and requested the seal of the said judge should be put to the same, according to the form of the statute in such cases made and provided. And thereupon, the said judge being so requested, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such cases made and provided.

[L. S.] Archibald Randall,
District Judge.

The jury under the above instructions of the court, found the following verdict:

"We, the jury, impaneled in the case of The United States v. McKean Buchanan, a purser in the navy, find that there is due by the plaintiffs to the defendant the following sums, to wit:

"Commissions on the payment of mechanics and laborers at the navy-yard, Pensacola	$2,275.38
"Interest on the same	1,024.00
"Commissions on drawing bills of exchange	1,626.86
"Interest on the same	1,455.00
"Loss on sales on board the frigate Constitution	385.52
"Loss of commissions	5,277.46
	$12,044.22
"Deduct government claim	11,535.50
"Due Purser Buchanan	$508.72"

*The counsel for the United States [*94 then moved for a new trial, objecting, amongst other things, to the allowance of interest, where no such claim was made by the defendant. Whereupon the counsel for the defendant filed a remittitur for the two sums of interest, amounting together to the sum of $2,479, and agreeing that a judgment might be entered against him in favor of the United States for $2,148.99.

The court overruled the motion for a new trial, and directed a judgment to be entered accordingly.

By the above bill of exceptions, the case was carried to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court.

The United States brought the case up, by writ of error, to this court.

It was argued by Mr. Gillet and Mr. Johnson (Attorney-General) for the United States, and Mr. G. M. Wharton and Mr. Dallas for the defendant in error.

The brief filed by the Attorney-General made the following points:

I. That the court erred in the charge given as to commissions on bills drawn by the defendant, and payments made by him to mechanics and laborers at the navy yard; because, whether these commissions were to be allowed was a question of law for the court, depending upon the rules and regulations of the navy, which do not warrant them. 1st. By the rules and regulations it was the defendant's duty to perform the services for which the charges were made. 2d. No parol evidence was admissible to the contrary. 3d. And, in fact, there was no evidence from which the jury were at liberty to infer that the services for which the charges were made were extra to those which he was in duty bound to perform under the rules and regulations, or that there was any practice or usage under which he could be paid for the same. 4 Howard, 80; 2 Wash. C. C. 24; 3 Ib. 149; Gilpin, 372; 6 Binn. 417.

II. That the court erred in charging the jury that the rules on the subject of pursers' commissions on supplies furnished to the crew, established by the Blue Book of 1818, were superseded and repealed by the republication of the rule of 1809, in the Red Book of 1832; whereas the Red Book declares that the rules contained in the Blue Book, except in two particulars mentioned, and others which have been expressly amended, were in full force for the reasons assigned. That the regulations as to pursers' commissions on articles furnished to the crew in the Blue Book are questions of law, and the true construction *of them is, [*95 that pursers are entitled to dispose of slops, and articles of wearing apparel, and of materials of which it is made, at a commission or profit of

ten per cent. only. That the regulation of 1809, allowing twenty-five per cent. upon articles of secondary necessity, if it ever included wearing apparel, or materials of which it is made, was superseded and repealed by the regulations of 1818, which directed them to be charged as slops, and was not revived by the republication in 1832. And that the secondary articles mentioned in the regulations of 1809 were defined in the regulations of 1818 to be soap and the other articles enumerated (wearing apparel, or materials for it, nor being among them), and upon these, by the regulations of 1818, pursers were to be allowed to charge twenty-five per cent. profit.

III. That the court erred in charging the jury that the unliquidated damages for commissions and losses could be set off in this action at all; and also erred in charging that the United States were liable for them, if incurred by Commodore Claxton; and in stating the law to be, that the Commodore was the agent of the government; and that although his acts may not previously have been recognized, yet, if they were afterwards ratified, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders, so ratified or confirmed. 9 Pet. 319; 2 Wash. C. C. 131, 161; 13 Wend. 139, 156, 157; 4 Mason, 482; 5 Ib. 425, 439; 10 Pet. 80; 4 S. & R. 249; 5 S. & R. 122; 10 S. & R. 14; 4 Watts & Serg. 205, 214.

IV. That there was error in the judge's charge, in answer to the tenth and eleventh prayers; 1st. Because the tenth was not granted when it should have been; and, 2d. Because that part of a charge in which he told the jury that "the sales made on shore and those to other pursers are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made bona fide, with a view to avoid an anticipated loss, he will be entitled to be made good his actual loss on such sales," was erroneous—the United States, under the circumstances, not being liable for such loss, as the jury were, by this instruction, authorized to charge them with.

V. That the court erred in allowing the defendant to turn the verdict in his favor into a verdict against him, by allowing him to remit, without the consent of the United States, and by entering up judgment in their favor without their consent, and contrary thereto. And because the said judgment, even as so corrected, is erroneous, as it includes commissions on 96*] drawing *bills and making payments to mechanics and laborers at the navy yard, and losses on alleged sales on board, and loss of commissions.

The brief of the counsel for the defendant in error presented the following points:

1. That at the time when the alleged claim of the government against the defendant, and the alleged credits of the defendant, arose, there was no law of the United States expressly defining the duties or the emoluments of a purser in the navy of the United States; but that the said duties and emoluments were regulated by the rules and regulations of the navy, by orders from the Navy Department, and by usage or custom.

2. That the rules and regulations prepared by the Board of Navy Commissioners, and published in 1818, called the Blue Book, did not extend to the private stores of the purser, but only to those purchased by the government, and were not the rule regulating the charge of commissions by the defendant on the sale of private clothing, or the materials of which it was made, or of tea, sugar, and tobacco, during the period in which the present controversy originated.

3. That the said rules of 1818, if ever applicable to said subject matters, were superseded to that extent by the rules of 1832, called the Red Book; and that these latter rules regulated the duties of the defendant and his emoluments, as to the said subject matters of controversy in this suit.

4. That there is no error in law in the charge of the district judge, nor in the record, upon the subject of the credits claimed by the defendant for commissions on paying mechanics and laborers at the Pensacola navy yard, and on drawing and negotiating bills of exchange; that the said claims of the defendant depended upon the finding by the jury of certain facts in relation to which evidence had been submitted on both sides, and that the finding of those facts conclusively establishes the right of the defendant to claim said credits.

5. That this court cannot revise the finding by the jury of the facts in controversy, nor grant a new trial, nor reverse the judgment below, except for error in law appearing on the judge's charge, or on the record.

6. That the defendant was entitled to all the emoluments of his office, which, by express or implied contract with the United States, belonged thereto; and that the existing regulations of the naval service, and the existing custom and usage of the navy, defined and formed a contract between the government and the defendant in this respect.

*7. That the defendant properly ex- [*97
pended the money which he received from the United States for that purpose, and with which he is charged in account, and which is sought to be recovered back from him in this suit, in the purchase of the customary private stores; and that he was entitled to sell said stores, in conformity with the rules of the ship, to the officers and crew of the Constitution, at prices regulated by the existing rules and usage of the service; and that he could not lawfully be compelled to sell them at lower rates, nor without a breach of the contract with him.

8. That defendant, as an inferior officer, was by law obliged to submit to the orders of Commodore Claxton in the premises; and that by so submitting he lost none of his rights as purser, but is entitled to assert them in this suit.

9. That the ratification of the said Commodore's conduct in the premises by the Secretary of the Navy, with a full knowledge of the facts, rendered the United States liable for any loss sustained by the defendant resulting from a breach of contract as aforesaid, and from the orders of said Commodore, so ratified; and that the Secretary had no right to diminish the established rates of profit with respect to stores purchased by defendant prior to such diminution.

10. That, under the evidence in the cause, it was right to submit to the jury, as a question of fact, what were "articles of secondary ne-

cessity"; and also to charge them, that, if they were satisfied from the evidence of the existence of a usage to consider clothing, and the materials whereof clothing is made, as such articles, and to charge an advance thereon of twenty-five per cent., such usage was evidence of the construction given to the law, and regulated the rights and duties of those acting within its limits.

11. That there was no error in charging that the defendant was entitled to a credit for the actual loss proved by him to have been sustained in consequence of being compelled to sell his stores at the advance of ten per cent. only, if he were authorized to charge an advance of twenty-five per cent. on the same. Nor in charging that he was entitled to such credit for all actual loss in consequence of the said order of Commodore Claxton.

12. That there is no error in law in the charge of the district judge.

13. That the defendant was entitled to set off all equitable as well as legal credits which he had and had duly preferred against the United States; and that his claims in this case, if 98*] *found by the jury, were equitable credits, which he had a right to set off against the plaintiffs' claim.

14. That there was no error in allowing the defendant to remit a portion of his credits, as allowed him by the jury; nor in entering the judgment accordingly.

Upon the first point, the counsel for the defendant in error cited the case of United States v. Tingey, 5 Peters, 115, 126, and a circular from the Navy Department dated March, 1832.

The pay from the treasury to pursers was regulated by the Act of 18th April, 1814, sec. 1, 3 Stat. at Large, 136, which provided, that "the pay and subsistence of a purser should be forty dollars per month, and two rations per day."

By the Act of March 3d, 1835, 4 Stat. at Large, 755, 757, it was provided, that "no allowance shall hereafter be made to any officer in the naval service of the United States, for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States," etc.

The Act of August 26th, 1842 (5 Stat. at Large, 535), introduced a new system with reference to pursers, and provides, section 3, that, "in lieu of the pay, rations, allowances, and other emoluments authorized by the existing laws and regulations, the annual pay of pursers shall be as follows," etc. This act also provided for the purchase of all supplies for the navy to be made with the public money, under regulations to be prescribed by the executive. And pursers are prohibited thereafter from "charging any profit or percentage upon stores or supplies to persons in the naval service, other than those thereinafter prescribed."

The Red Book, p. 18, provides, under the head of "Allowance to Pursers," as follows:

Sec. 1. An allowance of commission of 2½ per cent. upon payments made by pursers is of ancient date.

Sec. 2. Pursers are allowed a commission of 5 per cent. on the amount of sales of dead men's clothes. They are also allowed 5 per cent. upon clothing distributed to the crew. January 29, 1803.

"25 per cent. upon articles of secondary necessity, embracing all articles not denominated luxuries, upon which 5 per cent. is not charged. 27 July, 1809.

"50 per cent. upon luxuries, such as tea, coffee, sugar and tobacco, when furnished either to officers or crew.

"In vessels of 20 guns, an additional allowance is made upon groceries of 5 per cent. and in vessels under 20 guns, of 10 per cent. upon the same articles."

*Red Book, p. 50: [*99

Sec. 1. Pursers must transmit to the Navy Commissioners a certified invoice of all articles provided by them for vessels bound on a cruise, including all articles procured to be sold for their own benefit. October 20, 1830.

Sec. 3. All bills of exchange drawn by pursers on the department must be in favor of and indorsed by the commander of the vessel or squadron. A separate letter of advice must accompany each bill, stating (among other things) the rate of exchange at which the bill is negotiated, etc., etc. August 10, 1824."

Upon the second point, the counsel for the defendant cited numerous passages from the Blue Book, to show the rate of advance which pursers might charge upon what are called "private stores"; but as the court did not decide the point, these references are omitted.

3d point. The counsel contended that the issue of the Red Book, by competent authority, superseded the Blue Book in the matter of the emoluments of pursers. United States v. McDaniel, 7 Peters, 14; Act of Congress of March 2, 1833, for the relief of E. B. Babbit.

Upon the fourth, fifth, sixth, seventh, and tenth points, on defendant's brief, it is submitted, that, if the duties and emoluments of the purser were regulated by no statute, but dependent upon rules and usage, it was the duty of the district judge to submit the question of fact to the jury, what the usage in the matter was, under the evidence presented on both sides; and that he was right in directing them to regulate their verdict in accordance with their view of the usage.

Although there can be no usage recognized by the court which is contrary to law—and usage cannot alter the law—yet it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those within its limits. 7 Peters, 14, 15, before cited.

Allowances and emoluments were recognized by statute, as belonging to pursers; and, of course, they were entitled to these, as matter of contract, whenever they rendered the proper service. As specially applicable to the fifth point, the counsel for defendant cited Henderson v. Moore, 5 Cranch, 11; Barr v. Gratz, 4 Wheat. 213; Blunt's Lessee v. Smith, 7 Wheat. 248; Brown v. Clarke, 4 How. 4; Zeller v. Eckert, Ibid. 298.

The jury have found the fact, that the defendant performed these duties upon request, over and above the regular duties of his appointment, that it has been the practice of the government to allow to pursers extra compensation, and that the defendant *per- [*100 formed these particular services, with an understanding on both sides that he should be compensated for them as extra services. Sure-

ly there can be no legal objection, under these circumstances, to the defendant's claim, upon this head.

As to the eighth and ninth points, it is remarked, that the Navy Commissioners' Rules, p. 21, section 10, provide: "If any officer shall receive an order from his superior, contrary to the general instructions of the Secretary of the Navy, or to any particular order he may have received from the said Secretary of the Navy, or any other superior, he shall represent in writing such contrariety to the superior from whom he shall receive said order; and if, after such representation, the superior shall still insist upon the execution of his order, the officer is to obey him, and to report the circumstances to the commander of the ship to the commander of the fleet or squadron, or to the Secretary of the Navy, as may be proper."

This mode was strictly pursued by the defendant; and he, of course, lost none of his rights by obeying the law.

Upon the eleventh and twelfth points on defendant's brief, it is submitted, that the defendant received, by the verdict and judgment below, no allowance or equitable credit, except as a compensation for actual loss theretofore sustained by him, in consequence of the erroneous construction of the rules regulating his compensation on the part of the officers of the government. He being entitled, by contract and law, to dispose of the stores, which had been purchased by him prior to any change of existing regulations, at a fixed rate; and having been compelled by his superior officer (whose orders were subsequently ratified by the government), to part with them at a less rate—or, in other words, the credit arising from sales made by him, to which he was entitled as an offset against the money placed in his hands by the government, being illegally diminished by the auditing officers of the United States—he is at liberty in a suit against him, brought to recover the balance of money in his hands, to assert his rights to the proper rate of profit, and to defalk that from the debit side of his account. The government having deposited in the purser's hands a sum of money, with authority and instructions to buy certain goods therewith, and to dispose of them at fixed rates, cannot, after his purchase and subsequent disposition of these goods, call upon him to refund the money, without an allowance to him of the rates of profit originally agreed upon between them. If, for example, he bought an article, with the government money, for fifty cents, which he was entitled to dispose of for 101*] *seventy-five cents, and the United States subsequently compel him to sell it for sixty-two and a half cents, they cannot, in calling him to account for the money intrusted to him, deny his right to charge them with the difference of twelve and a half cents, which would make up his legal profit on the transaction. They become, in equity, bound themselves to re-imburse him for the actual loss of profit accruing from their act. And such was the judge's charge. He instructed the jury to allow "only the actual loss sustained by the defendant, and not any prospective or anticipated profits." United States v. Hawkins, 10 Peters, 125, shows the manner in which the pursers' accounts are adjusted at the treasury.

Upon the thirteenth point, the following authorities are adduced (a part of these authorities are also applicable to the fifth point): United States v. Ripley, 7 Peters, 18; United States v. McDaniel, 7 Peters, 1; United States v. Fillebrown, 7 Peters, 28; United States v. Wilkins, 6 Wheat. 135.

The same general principle as to the right of set-off is laid down in United States v. Robeson, 9 Peters, 319; United States v. Bank of the Metropolis, 15 Peters, 377.

Mr. Justice Woodbury delivered the opinion of the court:

This is a writ of error, presenting three distinct grounds of exception to the judgment rendered in the court below.

Neither of these is claimed to justify us in revising the finding of the jury on the evidence, though the verdict was not acceptable in some respects to the district judge who tried the cause, but should have been scrutinized by him, if at all, and, if clearly wrong, submitted to another jury for correction on the motion for a new trial. The exceptions to be now considered, are, therefore, confined to the instructions given to the jury concerning the claims made in set-off by the original defendant, and are, that they all were, in point of law, incorrect.

Those claims were—

1st. For commissions for drawing bills of exchange.

2d. For commissions on payments made to mechanics and laborers at the navy yard at Pensacola.

3d. For loss of commissions on sales of slops, and loss by depreciation of property in the Pacific.

The claim for commissions for drawing bills of exchange is founded on such service, performed at times from May, 1827, to February, 1830. But it appears that such commissions were not, at any period, usually allowed to permanent pursers. And though one or two instances were given of such allowances under peculiar circumstances, they were limited to that number; and on the 10th of [*102 November, 1826, commissions to commanders of squadrons, and "officers of any grade," for drawing such bills, were expressly abolished. Red Book in the Navy, p. 10 and p. 27; see, also, letter of 4th Auditor, 26th June, 1844; Circular, 1st April, 1833.

When the present claim was presented to the department by Mr. Buchanan, in 1831, it was, therefore, rejected, and seems to have been abandoned by him for nearly ten years after, when, another difficulty arising as to other transactions of his in the Pacific, this claim was revived and offered in set off to a suit by the government for moneys then recently advanced to him.

On what ground, then, could the district judge properly leave its allowance to the jury, as he did at the trial in this case? It seems to us, that he should have instructed them that, in point of law, neither any act of Congress, nor any regulation of the department, justified the allowance; that the service performed was an ordinary one, connected with a purser's official duties, and consequently, for which, in point of law, he was entitled to no extra compensation by way of commissions or other-

wise. See Gratiot v. United States, 4 How. 112.

The two cases, often relied on to justify such an allowance, were both claims for what was deemed by the court extra service. United States v. McDaniel, and United States v. Fillebrown, 7 Pet. 16 and 28.

On the subject of a usage or custom, attempted to be proved, to overturn these principles and decisions, it seems to us that the judge should have ruled, that a usage ought not to be permitted to be set up, where a rule, as here, is not doubtful, but settled. Brown v. Jackson, 2 Wash. C. C. 24; 6 Binney, 417. And that a usage or custom, when admissible, must, in order to be valid, be ancient, be reasonable, and generally known (3 Wash. C. C. 149), and also be certain (United States v. Duval, Gilpin, 372). Consequently, when it appeared here that the compensation was fixed or clear, and when it appeared that only one, or, at the furthest, two extra allowances could be proved of commissions for such services by permanent pursers, and those under peculiar circumstances, he should have directed that, in point of law, these last did not constitute a valid usage or custom, and that there was nothing properly to be left to the jury on the subject. In The United States v. McDaniel, 7 Pet. 16, the usage had existed uninterruptedly for fifteen years.

There is a very good description of a custom or usage in ch. 1, art. 3, of the Civil Code of 103*] Louisiana: "Customs result *from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent." How imperfectly the evidence in the present case meets the requirements of such a definition as this, or of any legal view of a valid usage, is so obvious as not to need further explanation.

The second claim, for paying mechanics and laborers at the navy yard at Pensacola, from 1835 to 1837, stands in a similar condition. It was a service expressly imposed on a purser of a yard as official, by the Blue Book of the Navy, as early as 1818, p. 14.

But the judge instructed the jury, that this book had ceased to be in force. In this he erred. For the Navy Department, in 1831, had expressly and officially published, that it was still "in full force," except in two or three other particulars, specified in a note to the Red Book (p. 49, note). The latter, also, was then first printed, and not only did not profess to repeal the former, but such was not its legal effect. The Blue Book related chiefly to other matters than what were in the Red Book, and which were as necessarily to remain regulated by the former after the publication of the latter as before, and even now as then.

The Blue Book concerns the complement of officers and men for vessels of different sizes, the duties of those officers on shipboard and at yards, salutes, recruiting, etc.; and not, like the Red Book, relating to decisions in the civil administration of the department, and circulars, orders, etc., connected with it.

The latter was a mere collection of these latter matters, before existing dispersed and in manuscript; and being compiled and printed for the benefit of navy officers, as well as the department, the date of each decision and circular was given, so that officers might see, if decisions, regulations, or circulars conflicted in any degree, as they sometimes might, which was of most recent date, and consequently often modifying or superseding one made earlier. The Red Book introduced nothing new into the service, nor professed to do it, but merely arranged and made more generally known by printing, in 1831, what had before taken place on the matters described in it, as had been done in relation to some matters in the Blue Book, by printing and distributing that in 1818, as well as compiling and publishing in that other things new and permanently useful.

There being, then, no repeal of this part of the Blue Book relating to the duties of pursers at yards, the payment of *mechanics [*104 and laborers stood, as ever since 1818, if not longer, an official duty of pursers stationed at them.

The idea of attempting to set up a usage to pay commissions for this service, and leave merely one case of the kind to the jury as evidence of such a usage, was altogether untenable on sound principles, as before shown under the first claim. All the other cases referred to in support of such a usage or custom were not cases to allow commissions, though sometimes to sanction a sum of money for a clerk.

But even this last had been abolished as early as 1826, long before the service performed by the original defendant, and only an additional steward had been since allowed at yards where the workmen were numerous. Red Book, 52; see Letter of 4th Auditor, June 26, 1844, and Circular of 1st April, 1833.

There is, likewise, another defect in the instructions to the jury on both of these points, in permitting the testimony of naval officers, and sometimes of subordinate ones, rather than the head of the department, to go to the jury to enable them to decide what were and were not official duties, when it was rather the province of the court, after being duly informed from proper sources, to settle that as a question of law, and direct the jury upon it. 4 How. 80; 6 Binney, 417.

The third ground of claim, and the instructions upon it, are in some respects different, and remain to be considered.

This claim was for commissions lost on the sale of slops and for depreciation in property, caused by orders of Commodore Claxton in the Pacific in 1839.

The latter, finding that an unusual quantity of some kinds of clothing had been issued by the defendant from his private stores, on which an advance of twenty-five per cent. had been charged, and only a small quantity from the public stores, on which only ten per cent. advance was charged, interposed and issued an order against taxing the crew over ten per cent. advance on certain articles of wearing apparel, on which the defendant insisted he was entitled to twenty-five. This claim is for a loss of the difference between ten and twenty-five per cent. on what was and might have been sold, and loss by depreciation on articles not sold. Considering the views entertained by this court on the impropriety in law of allowing this claim to be put in at all in set-off to this

action, it is not necessary to decide here which percentage was the proper one.

On the one hand, the opinion of the Commodore was sustained by that of Mr. Paulding, then Secretary of the Navy—presumed to be best acquainted with the previous constructions 105*] in *the Navy Department—and by the express language of the Blue Book, pp. 103 and 105, and by some early decisions published in the Red Book, p. 18, as well as by the views of some of the members of this court; yet other constructions of these decisions tend to sustain the claim, as do the views of other members of this court.

Whichever of these constructions, then, may be correct, is not now settled, because we think it clear, that such a claim as this is not allowable at all by way of set-off to an action brought by the government.

The statute of March 3d, 1797, which allows set-offs, has had a very liberal construction by this court, extending it to matters even distinct from the cause of action, if only such as the defendant is entitled to a credit on, whether equitable or legal. United States v. Wilkins, 6 Wheat. 135; Ripley v. United States, 7 Pet. 25.

The object is to settle between the parties their mutual accounts or debts. See the Act of Congress.

But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. Butts v. Collins, 13 Wend. 156; McDonald v. Neilson, 2 Cow. 140; Heck v. Sheener, 4 Serg. & Rawle, 249; 10 Serg. & Rawle, 14. This rule prevails when the United States are plaintiffs, as well as individuals. United States v. Robeson, 9 Pet. 325.

Much less could wrongs done by others than the United States, and for whom it would be a very grave question whether the United States were in law responsible, be set off, and unliquidated damages allowed.

Such a transaction, whether sounding ex delicto or ex contractu, seems to be one between the two officers, rather than between one of them and the government. United States v. Hawkins, 10 Pet. 134; 9 Pet. 319.

It is certain that no action could technically be sustained against the United States for any wrong done here by Commodore Claxton. And, waiving their sovereignty to bar a suit, it is quite manifest that no claim exists as a matter of course against the government for a wrong done by one officer against another officer, or by one officer against an individual, when the liability of the officer himself for public acts is often questionable; and when the liability of the government for his acts, private or public, is still more in doubt. Garland v. Davis, 4 Howard, 148, and cases there cited; Story on Agents, 412, note; Duncan v. Findlater, 6 Clark & Fin. 903, 910.

Nor does it alter the case, if another officer, 106*] like a Secretary *of the Navy, approves of the wrong. Should a post captain go out of the path of his duty, or act beyond his legitimate authority, it appears on its face an affair between him and the sufferer, and not between the latter and the government.

The defendant, if he has really been wronged by Commodore Claxton, acting against and beyond his official authority, has not only the usual modes of redress against him in the judicial tribunals (Jones v. Bird, 5 Barn. & Ald. 837; 15 East, 384), but it is gratifying to reflect that resort to Congress is also open for relief, and with success, undoubtedly, should the defendant be able to satisfy Congress he was wronged by the Commodore, and that it is just and proper for the government to atone for any injury so done to him by another.

But some legislative sanction to this claim, or some recognition by Congress of a right to it, would seem an indispensable preliminary to its allowance in any form in the judicial tribunals against the government. See United States v. McDaniel, 7 Pet. 2 and 16.

Judge Story in his work on Agents (sec. 319) says: "In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasance, or wrongs, or neglects or omissions of duty, of the subordinate officers or agents employed in the public service."

This view is sustained by several adjudged cases, among which are The United States v. Kirkpatrick, 9 Wheat. 720, and 8 Wendell, 403; United States v. Vanzandt, 11 Wheat. 190; 1 Peters, 318; 5 Mason, C. C. 441; 15 East, 393; 6 Clark & Fin. 903.

Consequently, the judge in the District Court erred in law by permitting a set-off, composed of such a claim, to go to the jury at all. There being error in the instructions on all the three claims, and the judgment in the Circuit Court having affirmed that in the District Court, it must be reversed and one entered disaffirming it, and the case remanded thence to the District Court, in order that there may be a venire de novo in that court, and another trial had in conformity to these views.

Mr. Justice McLean and Mr. Justice Grier dissented from the above opinion.

Mr. Justice Wayne did not sit in the cause.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the *Eastern Dis- [*107
trict of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter a disaffirmance of the judgment of the District Court, and to remand this cause to the said District Court, with directions to that court to award a venire facias de novo, and for further proceedings to be had therein in conformity to the opinion of this court.

THOMAS WILLIAMS, Administrator of Benjamin J. Baldwin, Deceased, Appellant,

v.

JOHN W. and WILLIAM BENEDICT, Trading under the Firm and Style of Benedict & Benedict.

Lien of judgments in U. S. courts, what dependent upon—judgment in Mississippi against administrator, not lien on property of deceased if estate subsequently declared insolvent by State court.

The laws of Mississippi direct that, where the insolvency of the estate of a deceased person shall be reported to the Orphans' Court, that court shall order a sale of the property, and distribute the proceeds thereof amongst the creditors pro rata, and that in the mean time no execution shall issue upon a judgment obtained against such insolvent estate.

A judgment obtained against the administrator before the declaration by the Orphans' Court of the insolvency of the estate, is not, upon that account, entitled to a preference; but must share in the general distribution.

But this court expresses no opinion as to the right of State legislation to compel foreign creditors, in all cases, to seek their remedy against the estates of decedents in the State courts alone, to the exclusion of the jurisdiction of the courts of the United States.

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

The appellant, Thomas Williams, was complainant below, in a bill setting forth, that letters of administration on the estate of Benjamin J. Baldwin, deceased, were granted to him in October, 1838. That at the time he entered upon said administration and made an inventory of the estate, he confidently believed that his intestate's estate would be amply sufficient to satisfy all his creditors. That at November Term, 1839, the respondents obtained a judgment against him in the District Court of the United States, for a debt due to them by the intestate. That the complainant, having then discovered that the estate would not be sufficient to pay the debts of the deceased, suggested its insolvency to the Probate Court on the first Monday of December following; whereupon 108*] the court adjudged *the estate insolvent, and appointed commissioners to receive and audit the claims. That, to the great wrong of the intestate's other creditors, an execution has been since issued on the judgment of Benedict & Benedict, and levied by the marshal on a large portion of the most valuable property of the intestate, thereby preventing the sale of it by the administrator under the order of the Probate Court. Wherefore he prays the court to grant him a writ of audita querela, and to order a writ of supersedeas to issue to the marshal, to stay the execution, and for further relief.

On this bill, the judge ordered an injunction to issue. The respondents afterwards appeared and demurred to the bill for want of equity, and afterwards, at June Term, 1845, upon hearing, the court decreed that defendants' demurrer to plaintiff's bill of complaint be sustained, and the bill dismissed. At the same term, it was ordered that the final decree be enrolled, and an appeal allowed to this court. A writ of error was also issued.

The 80th section of the statute of Mississippi concerning the estates of decedents (Howard & Hutchinson, 409) provides that, "when the estate both real and personal of any person deceased shall be insolvent, or insufficient to pay all the just debts which the deceased owed, the said estate, both real and personal, shall be distributed to and among all the creditors, in proportion to the sums to them respectively due and owing; and the executor or administrator shall exhibit to the Orphans' Court an account and statement, etc. And if it appear to the said Orphans' Court that such estate is insolvent, then, after ordering the lands, tenements, etc., of the testator or intestate to be sold, they shall appoint two or more persons to be commissioners, with full power to receive and examine all claims of the several creditors of such estate," etc., etc. And the court are afterwards required to make distribution pro rata among the creditors, after paying the funeral expenses, etc.

The 98th section provides, that no execution shall issue on any judgment obtained against any such insolvent estate, but it shall and may be filed as a claim against it, etc.

The case was argued by Mr. Frederic P. Stanton for the appellant, and Mr. Featherston for the appellees.

Mr. Stanton said that the equity of this case was dependent upon the peculiar statutes of the State of Mississippi, which require the assets of insolvent estates to be divided among the creditors, in proportion to their respective demands. See Hutchinson's Miss. Code, ch. 49, sec. 103, p. 667.

This law creates a lien in favor of creditors from the time of *the debtor's decease; [*109 and a judgment by any creditor, against the administrator or executor, cannot affect the right of the other creditors to their due proportion of the estate. Same Code, p. 673.

The Supreme Court of the State has given an authoritative exposition of these several provisions, in the case of Dye's Administrator v. Bartlett, 7 Howard, Miss. 227.

Mr. Featherston, for the appellees:

It is contended for the appellees, Benedict & Benedict, that the court below did not err in sustaining the demurrer to the appellant's bill of injunction. It is rather a matter of surprise that said bill should have been granted by the district judge. Appellant shows, by the allegations and admissions in his bill, that the estate of his intestate was rendered insolvent by his own negligence and maladministration. The largest debt due the estate of said Baldwin, to wit, a note drawn by Henry A. Fowlkes, of Alabama, for seven thousand dollars, was lost to the estate by the refusal of the administrator to sue on it. Other acts of maladministration are apparent on the face of the bill.

Appellant has not, therefore, made out such a case as would entitle him to relief in a court of equity. Administrators are bound to exercise such prudence, diligence, and caution in the administration of estates, as a prudent man, looking to his own interests, would exercise in the management of his own affairs. See Bailey et al. v. Dilworth, 10 Smedes & Marsh. 404.

They are also required by the statutes of Mississippi, to be prompt in reporting the insolvency of the estates of their intestates

See Bramlet v. Webb et al. 11 Smedes & Marsh, 439.

But is said by the solicitor for the appellant, that "the equity of this case is dependent upon the peculiar statutes of the State of Mississippi, which require the assets of insolvent estates to be divided among the creditors in proportion to their respective demands." See Hutchinson's Miss. Code, ch. 49, sec. 103, p. 667.

It is equally true that the statutes of Mississippi give judgment creditors a lien on all the property of defendants from the rendition of the judgment. See Hutchinson's Miss. Code, 881, 882, 885, 890, 891, 894; Dye's Adm'r v. Bartlett, 7 Howard, Miss. 226.

Benedict & Benedict acquired a lien on all the property of Benjamin J. Baldwin, deceased, in the hands of Thomas Williams, his administrator, from the rendition of their judgment in November, 1839. This lien could not be de- [*110] feated by any *act of the defendant, Williams. The plaintiffs in the court below could alone by their acts raise their lien. See 1 Bland's Chan. Rep. 449, 452.

Nothing subsequent could devest plaintiffs' lien without their consent. This judgment was rendered before the appellant declared the estate insolvent. The other creditors, who had not obtained judgments, acquired a lien (if at all) from the time the Court of Probates declared the estate insolvent, and not from the death of the intestate, as insisted by counsel for appellant. See Hutchinson's Code, 673.

The plaintiffs, therefore, in the court below, acquired by their judgment a prior lien on the estate of Baldwin over the other creditors. A prior lien gives a prior right to satisfaction. See Andrews v. Wilkes, 6 Howard, Miss. 554.

This judgment was entitled to satisfaction, to the exclusion of all other creditors. Nor will it do injustice to other creditors to give it such preference.

The case would not be altered if Baldwin were alive; it would still be a prior lien. It is an advantage gained over other creditors by the superior vigilance of the appellees in the prosecution of their claim to final judgment—an advantage recognized and sustained by the law.

There is no provision of the statutes of Mississippi which operated per se as a stay of execution on this judgment in the court below. Nor is there any, it is believed, which would by any fair or rational construction authorize the district judge in enjoining it.

Section 103 of Hutchinson's Mississippi Code, pages 667, 668, relied on by appellant's counsel, provides that no suit shall be commenced against an administrator after his intestate's estate has been declared insolvent, etc., etc. This section can have no bearing on this case, because the judgment was obtained and the suit ended before the estate was reported or decreed insolvent.

Section 1, art. 2, of the same code, p. 673, is also relied on. This section provides, that, when suits are pending against administrators, and undetermined at the time the estates of their intestates are decreed insolvent, execution shall be stayed after judgment, etc. This provision is equally inapplicable to this case. This suit was determined, and judgment rendered, *before appellant reported the estate of Baldwin insolvent.*

Would not a decision, bringing this case within the meaning of the above sections (and they are the only statutes relied on), be an act of a legislative rather than a judicial character.

The decree of the district judge dismissing the bill of injunction *must therefore be [*111 sustained. No injustice will be done to the other creditors. They have their remedy against the administrator and his securities on his official bond, for all acts of maladministration, etc. See Edmundson v. Roberts, 2 Howard, Miss. 822; Lerhr v. Tarball, 2 Ib. 905; Prosser v. Yerby, 1 Ib. 87.

Mr. Justice Grier delivered the opinion of the court:

The only question raised in this case depends on the construction of the peculiar statutes of Mississippi. It is, whether a plaintiff who has obtained a judgment against the administrator of an intestate's estate, before it has been declared insolvent, has such a prior lien on the same as will entitle him to issue an execution and satisfy his judgment out of the assets, after the estate has been declared insolvent by the Orphans' or Probate Court, and commissioners appointed for the purpose of distributing the assets equally among all the creditors.

The process, both mesne and final, in the district and circuit courts of the United States, being conformed to those of the different States in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends, also, upon the State law, where Congress has not legislated on the subject. In some of the States, a judgment is not a lien on lands; in others, there is a lien coextensive with the jurisdiction of the court. In Mississippi, a judgment obtained in his lifetime is a lien, from the time of its rendition, on all the defendant's property; and the property of a decedent becomes liable for his debts from the time of his death. See Dye v. Bartlett, 7 How. Miss. 224. Consequently, the lien of a judgment obtained before defendant's death cannot be affected by a declaration of insolvency subsequently made by his administrator. But if, at the time of the death, the fund from which each of the creditors has an equal right to claim satisfaction is insufficient to pay all, equity requires that one should not be permitted, by a mere race of diligence, to seize satisfaction of his whole debt, at the expense of another. Hence, a declaration of insolvency must relate back to the death, in order that this equitable principle may have its effect. Such appears to be the policy of the legislation of Mississippi on this subject, apparent in her statutes and the decisions of her courts.

The case of Parker v. Whiting, 6 How. Miss. 352, decided in the High Court of Errors and Appeals of that State, presented the same point in a case parallel with the present.

In that case, as in this, it was contended that an administrator cannot report an estate insolvent after nine months, that *being the [*112 period within which he cannot be sued; and that a judgment obtained after that time became a lien on all the property of the deceased, which cannot be destroyed, raised, or superseded by the subsequent report of insolvency,

especially when it appeared that this insolvency might have been caused by the maladministration of the defendant.

But that court decided that the estate of a deceased person may be reported insolvent after the expiration of nine months from the grant of letters of administration; and that, when an estate is so reported, the lien of a judgment previously obtained against the administrator is held in abeyance, and must give way to the general and equal lien of all the creditors which existed at the time of the death, and to which the declaration of insolvency must relate. Also, that the action of the Probate Court on a report of insolvency cannot be collaterally impeached; and if the insolvency has been caused by maladministration, the remedy is by action for a devastavit, or on the administration bond.

In this exposition of the statutes of Mississippi, as given by her courts, we fully concur; and it is conclusive of the question now under consideration.

As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the Probate Court has ordered to be sold for the purpose of an equal distribution among all the creditors. The jurisdiction of that court has attached to the assets; they are in gremio legis. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction. But we wish it to be understood that we do not intend to express any opinion as to the right of State legislation to compel foreign creditors, in all cases, to seek their remedy against the estates of decedents in the State courts alone, to the exclusion of the jurisdiction of the courts of the United States. That will present an entirely different question from the present.

The decree of the court below dismissing the bill must be reversed, and a decree entered in favor of complainant continuing the injunction.

Order.

This cause came on to be heard on the tran-
113*] script of the record *from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said District Court, with directions to enter a decree in favor of the complainant, continuing the injunction in this cause, and for such further proceedings, in conformity to the opinion of this court, as to law and justice may appertain.

12 L. ed.

THE UNITED STATES, Appellants,
v.
THE HEIRS OF BOISDORÉ.

SAME, Appellants,
v.
THE HEIRS OF POWERS.

SAME, Appellants,
v.
THE HEIRS OF TURNER.

Private land claims in Missouri, acts respecting proceedings to try validity of—appeals from District Court.

In 1824, Congress passed an Act, 4 Stat. at Large, 52, entitled "An Act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims."

The second section provided that, in "all cases, the party against whom the judgment or decree of the said District Court may be finally given, shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States;" and the fifth section enacted that any claim which shall not be brought by petition before the said courts within two years from the passing of the act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred.

In 1844, Congress passed another act, 5 Stat. at Large, 676, entitled "An Act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama, south of the thirty-first degree of north latitude, and between the Mississippi and Perdido rivers."

It enacted, "that so much of the expired act of 1824 as related to the State of Missouri be, and is hereby revived and re-enacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act hereby revived and re-enacted shall be, and hereby are, extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude, and between the Mississippi and Perdido rivers."

The Act of 1824, revived and re-enacted by the Act of 1844, did not expire in five years from the passage of the Act of 1844, so far as regards appeals from the District Court to this court. It will continue in force until all the appeals regularly brought up from the district courts shall be finally disposed of.

THE first two of these cases were appeals from the District Court of Mississippi. One of them, viz., The United States v. The Heirs of Boisdoré, was the same case in which a motion to dismiss was made at the preceding term, as reported in 7 Howard, 658.

*The third was an appeal from the [*114
District Court of Louisiana.

A motion was now made to dismiss the whole three, upon a ground which was common to them all, viz., that the Act of 1844, reviving and re-enacting the Act of 1824, continued it in force for the term of five years, and no longer; and that, as the act was passed on the 17th of June, 1844, it expired upon the 17th of June, 1849. By reason of which expiration, it was alleged, this court had no longer any jurisdiction over the case.

NOTE.—Missouri private land claims. See note to 11 L. ed. U. S. 1051.

64 1009

By an act of June 17th, 1844 (5 Statutes at Large, 676), entitled "An Act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama south of the thirty-first degree of north latitude, and between the Mississippi and Perdido rivers," it is enacted, "That so much of the expired act of the 26th of May, 1824, entitled 'An Act to enable claimants to land within the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims,' as related to the State of Missouri, ... be, and is hereby revived and re-enacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act, hereby revived and re-enacted, shall be, and hereby are extended," to the States of Louisiana, Mississippi, etc., "in the same way, and with the same rights, powers, and jurisdictions, to every extent they can be rendered applicable, as if these States had been enumerated in the original act hereby revived, and the enactments expressly applied to them, as to the State of Missouri; and the District Court and the judges thereof, in each of these States, shall have and exercise the like jurisdiction over the land claims in their respective States and districts, originating with either the Spanish, French, or British authorities, as by said act was given to the court and the judge thereof in the State of Missouri."

The Act of the 26th of May, 1824, thus revived and re-enacted (4 Statutes at Large, 52), after describing the classes of cases embraced within its provisions, prescribes, that the claimants shall present a petition to the District Court, setting forth their claims; that proper parties, including the district attorney, shall be made; that the proceedings shall be conducted according to the rules of a court of equity; and that the said court shall have power to hear and determine the questions arising in the cause, and to make a decree. It then, in the latter part of the second section, enacts: "And in all cases, the party against whom the judgment or decree, of the said District Court may be finally given shall be entitled to an appeal, 115*] within one *year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

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

In the three cases above mentioned, petitions had been filed in the respective courts, and the district judge confirmed the claims to the *several petitioners*. The United States appealed to *this court*.

The motion to dismiss was sustained by Mr. Volney Howard and Mr. Henderson, and opposed by Mr. Gillet and Mr. Johnson (Attorney-General).

The motion and brief, as filed by Mr. Henderson, were as follows:

The appellees have presented their respective motions to dismiss these cases, in form as follows:

"And now at this term come the appellees, by attorney, and move the court to dismiss this case, because the court has no jurisdiction thereof, in this, to wit: That the court from which this case is brought here by appeal had but a limited and special jurisdiction of the case in virtue of two acts of Congress, the one of date 17th June, 1844, entitled "An Act to provide for the adjustment of land claims within the States of Missouri, Arkansas, Louisiana, and those parts of the States of Mississippi and Alabama south of the 31st degree of north latitude, and between the Mississippi and Perdido rivers," and which said act revived a certain other expired act therein recited of date 26th May, 1824, for five years and no longer, and during the operative existence of which two acts, the decree in this case was pronounced. And because by virtue of which said Act of 1824, so revived as aforesaid, and by no other law or authority whatever, this court was assigned to have a like special jurisdiction of this case by appeal; but which act, so revived as aforesaid, ceased and expired on the 17th of June, *1849, by express legislative [*116 limitation, without any saving clause for the adjudication of cases then pending."

Assuming the facts to be as set forth in this motion, we contend that there is now no law in force giving to this court jurisdiction of these cases, or of supplying any rule by which it can review them; and the same must therefore be dismissed.

It is well settled, that this court has no general jurisdiction in matters of appeal. That unless Congress authorize an appeal by statute, none can be entertained. 11 Pet. 165, 166; 3 How. 104; 6 Pet. 495; 1 Cranch, 212; 3 Cranch, 159; 6 Cranch, 307; 3 Dall. 321, 327; 1 How. 268; 3 How. 317; 7 Wheat. 38; 3 Pet. 193; 7 Pet. 568.

It is equally well settled, that the United States have no greater claim to assert the right of appeal, or any other legal right as a litigant, than a citizen has; and have no right of appeal unless expressly accorded to them by act of Congress. 6 Pet. 494; 11 Pet. 165, 166.

If, therefore, it be shown that the appeal given by the statute of 1824 was special, and had its origin with that statute, and that the statute conferred a special and peculiar jurisdiction, appellate as well as original, and that said statute has expired or is repealed, we suppose the legal conclusion of such showing to be demonstrative in favor of our motion to dismiss, unless some other law be shown to sustain the appeal.

A mere glance at the records and decrees in these cases, show them to have been adjudicated in pursuance of the authority conferred by these two statutes. And the reading of the statute of 1824 will certify the specialty of the jurisdiction it confers in every section.

It is special as to the States to which it ap-

plies, being but five in number. Special as to the classes of cases it submits for trial; and even excepts one case of the classes submitted.

It is special in designating the court to have cognizance of the cases, and directing the mode of procedure. Selecting the district courts of the United States, which have no general chancery jurisdiction, and directing them to adjudicate the cases in accordance with equity practice.

It is peculiarly special, also, in enlarging the field of equity power in the latitude given for the decision of these cases. Submitting them to be adjudged in "conformity with the principles of justice," and "according to the law of nations; the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; the laws and ordinances of the government from which it (the title) is alleged to have been derived; and all other questions properly arising between the claimant and the United States."

117*] *It is strikingly special in permitting the citizen to implead and litigate with the government.

The rules of evidence are special; the common law rules being relaxed in these cases.

The statute submitted, also, legal and complete titles to be tried under equitable rules.

The decree to be pronounced was special in its recitals and requirements.

The powers of the court were peculiarly special, also, in being permitted to decree the survey of the claims adjudged, though affecting the public domain.

And the operation and effect of the decree are also singularly special, when, after adjudging the title of the petitioner in his favor, it deprived him of so much of the claim as the United States had previously disposed of, and turned him over for reclamation upon the public lands; the decree, to this extent, thus operating as land scrip.

The time allowed for an appeal from decrees pronounced under this statute is special, being limited to one year.

Such are a portion of the peculiar and special rules under which proceedings in these cases have been carried on, and the decrees pronounced, pursuant to the Act of 26th May, 1824, and while it was in force. And such only must be the rules by which this court can review and revise these cases, if it assumes to review them at all. It must be certainly requisite, then, if this court is to review these cases by these rules (being the rules by which the court below adjudged them), the rules themselves must have vitality, and be in force. Because, from no other laws and from no other source of authority, can these rules be invoked, but from the Act of 1824. But this act, by the special limitation of the Act of 1844, which revived it, was prescribed in the precise measure and duration of its operative existence; and the act again became functus on the 17th of June, 1849.

This act, therefore, which conferred specially all the jurisdiction this court could ever entertain of these cases, is now as if it had never been, except as to the rights it conferred, consummated, or established, while in force.

This court, then, can have no right to retain these cases upon its docket, because it has no rule, law, or authority in existence by which it can try and adjudge them. In other words, the jurisdiction by which it was contemplated this court should have cognizance of these cases was wholly special, and the law which conferred it is extinct, and has ceased to be a rule. And this conclusion we think clearly sustained by the following *authori- [*118
ities: Miller's case, 3 Burr. 1456, 1 Hill, 328-336; 2 Pet. 523, 524; 5 Mart. La. 463; 4 Wend. 211; 6 Wend. 526; 1 Watts, 258; 4 Yeates, 392; 17 La. R. 478; Dwarris on Statutes, 676; 4 Mann. & Ryl. 586-588; 9 Barn. & Cress. 750; 12 Moore, 357-359; 4 Moore & Payne, 341, 351; 4 Bingh. 212.

We consider the court has already construed this statute of 1824 as conferring a special jurisdiction, as well as special remedy. United States v. Curry, 6 How. 113; and see 6 Pet. 493 and 11 Pet. 165, 166.

Congress, too, in extending this act of 1824, by the Act of 24th May, 1828 (4 Stat. at Large, 298), obviously discovers its opinion, that, with the expiration of the law, the jurisdiction also terminated.

And so, too, in repealing the bankrupt laws of 1800 and of 1841. In both instances, Congress inserted a saving clause, to save jurisdiction in cases pending at the time of the repeal; and without which, doubtless, those cases would have fallen with the repeal.

Mr. Gillet said it was not his purpose to controvert the correctness of the positions laid down in the cases cited for the motion. If there was no statute in force conferring jurisdiction upon the Supreme Court, he should not contend that these appeals could be heard. Nor should he insist that the Judiciary Act conferred any such power. It was found in the Act of 1824, or did not exist at all. It has been contended, that this act expired in five years from its approval, and was revived June 17, 1844, for five years only, and is not now in force. He denied the correctness of this assumption, and took issue upon it. The second and fifth sections of the Act of 1824 contain limitations upon the claimant, as to the time within which the petition shall be presented, and the cause heard and an appeal taken. The residue of the act is without limitation. As a whole, it is as permanent as any other statute. An examination of its provisions, and especially sections 2, 3, 5, 6, 7, and 11, will prove this. The fifth section contains an important limitation, while the seventh contains an important provision applicable to all bonds not determined to belong to claimants. There is no limitation upon the jurisdiction of this court, when a cause is lawfully brought here. The Act of 1844 revived and continued in operation provisions relating to proceedings in the court below only.

But if we are in error in this view of the statute, then these appeals, having removed the causes from the court below, *cannot [*119
be sent back to that court. If there is no law empowering this court to hear and determine them, then it has no power to act upon them at all, and it can perform no act which will entitle either party to any advantage which they did not possess, and could not enforce, on the day when the revival Act of 1844 expired. To dismiss the appeal, and thereby, furnish evidence that the causes had not been lawfully

brought here under the act, would lay the foundation for the claimants to contend that it was never properly made, and that they were therefore entitled to patents under the decision of the district judge.

Mr. Johnson (Attorney-General) said, that if the construction given to these laws upon the other side was correct, the result would be that they could stand upon the decree below as a final decree. But all these land laws did not contemplate that the decree of the court below was to be final, in case either party chose to appeal; and we had obtained an appeal when it was properly taken even upon the showing of the other side, and when this court had undoubted jurisdiction over the case. Let us look into the Act of 1824, and then examine what part of it was revived. The dispute is, whether the jurisdiction of this court, when once attached, stopped when five years expired after the passage of the Act of 1844. If we had now a case before us arising under the Act of 1824 alone, without any other act having been passed, this court could decide it and settle the controversy, provided the appeal had been taken in proper time.

[Mr. Henderson said he conceded that.]

Then if the opposite counsel concedes that, I think that the other consequences for which I contend must follow. What was the character of the Act of 1824? It describes the claims which are to be presented, the notice to be given, the proceedings to be had, the principles by which the decision is to be governed, and states the reason for granting an appeal to this court. The claimant had a year to decide whether he would appeal or not. The district attorney was directed to consult the Attorney-General whether or not an appeal should be taken in case the decision was adverse to the United States. If no appeal was taken, the decree below was final. If the claimant succeeded, a copy of the decree was to be presented to the land office, and he would receive his patent. If he succeeded by the judgment of this court, he was to present the certificate of the clerk of this court to the land office, before he could receive a patent. But how was this to be done, if the jurisdiction of this court was to cease after the expiration of five years from 120*] *the passage of the Act of 1844? It is admitted that, under the Act of 1824, the jurisdiction of this court would not have ceased. Therefore, the opposite counsel must contend that the two acts are not alike; and yet the Act of 1844 extends the Act of 1824 "in the same way, and with the same rights, powers, and jurisdictions to every extent they can be rendered applicable." Suppose a party were to put off the trial of his cause in the court below until a late period, or the court was so pressed with business that the case could not be taken up, or that the district attorney could not immediately report to the Attorney-General, a decree might be passed for millions which would be irrevocably lost to the government; and yet it is admitted that this would not have been so under the Act of 1824. These laws have always looked to a supervision, by this court, of the decree of the District Court; and if the opposite counsel are right, this Act of 1844 is an exception to all the laws, and Congress have committed a palpable blunder.

But reliance is placed by the opposite counsel upon the phraseology of the Act of 1844, namely, that the Act of 1824 is continued in force for the term of five years and no longer. What has this court said about the same expression in another law? The Act of 24th May, 1828 (4 Stat. at Large, 298), was to continue in force until the 26th of May, 1830, and no longer; and yet cases were decided here long after that day. This very question was involved and decided in those cases. If the court had no jurisdiction and the appellate power had expired, all these judgments are void. The titles will be lost to thousands of acres, which are now held under these judgments.

Mr. Chief Justice Taney delivered the opinion of the court:

A motion has been made to dismiss this case, for want of jurisdiction in this court to hear and decide it.

It appears that a petition was filed by the appellees in the District Court of the United States for the Southern District of Mississippi, pursuant to the acts of Congress of May 26, 1824, and of June 17, 1844, praying to have confirmed to them a large tract of land, which they claimed under a concession or grant which they alleged had been made to their ancestors, by the Spanish authorities.

The petition was filed on February 1, 1845, and on the 12th of November, 1847, the district judge passed his decree confirming the concession; and on the same day the United States appealed to this court. The motion is made to dismiss, *upon the ground [*121 that the Act of 1844, which extended to the State of Mississippi the Act of 1824, and re-enacted it as to the claims in that State, limited the duration of both acts to five years and no longer, and that both of these acts, so far as concerns such claims, expired on the 17th of June, 1849; and this court having no appellate jurisdiction, unless conferred on it by act of Congress, and having derived the jurisdiction it heretofore exercised in cases of this description altogether from the laws above mentioned, its power in this respect ceased when the laws expired; and there being no act of Congress now in force authorizing it to review the decree of the District Court for the Southern District of Mississippi, the appeal of the United States ought to be dismissed for want of jurisdiction.

It is true that this court can exercise no appellate power over this case, unless it is conferred upon it by act of Congress. And if the laws which gave it jurisdiction in such cases have expired, so far as regards claims in the State of Mississippi, its jurisdiction over them has ceased, although this appeal was actually pending in this court when they expired.

But the court is of opinion that the Act of 1824, re-enacted by the Act of 1844 for the State of Mississippi and the other States mentioned in that law, has not expired so far as regards appeals from the district court to this court; that it is still in full force, and unless repealed by Congress will continue in force, until all the appeals regularly brought up from the district courts shall be finally disposed of.

The Act of 1824 originally extended only to the Spanish and French grants in the State of Missouri, and the then territory of Arkansas

It contains no clause limiting generally the duration of the law. The fifth section limits the time within which the claimants may file their petitions to two years, and gives the petitioner three years from the time his petition is brought before the District Court, to prosecute it to a final decision in that court; but by the second section either party may appeal to this court, within twelve months from the time of the final decree in the District Court. And as many of the cases might and most probably would be decided in the latter period of the five years within which the party is required to present his claim and prosecute it to a final decision, it is evident that the jurisdiction of this court to hear and determine the appeal was not intended to be limited to the same period. And as there is no clause of limitation applying to the whole act, nor as to the time within which this court shall exercise the appellate power conferred on it, the Act of 1824, in this respect, is a perpetual one; and if any appeal were at this day depending, which had been 122*] *regularly brought up from the State of Missouri or the territory of Arkansas, the court would have jurisdiction to hear and decide it.

This construction of the original Act of 1824 is, indeed, not disputed. But it is insisted that it is otherwise when taken in connection with the Act of 1844, which re-enacted it for the States therein mentioned, in one of which this case has arisen. And it is contended that the duration of the whole Act of 1824, as thus re-enacted, including the appellate jurisdiction of this court, is restrictive to five years from the enactment of the law.

This construction cannot be maintained. In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. And it was evidently the intention of the Act of 1844 to place the claims under Spanish and French grants in the States therein mentioned upon precisely the same footing with the claims in Missouri and the territory of Arkansas, and to give the claimants the same rights and remedies, including the right to appeal to this court. For it declares in express terms, that the Act of 1824 shall be extended to them, "in the same way, and with the same rights, and powers, and jurisdictions to every extent they can be rendered applicable, as if these States had been enumerated in the original act thereby revived; and the enactments expressly applied to them, as to the State of Missouri." Now, if they had been included in the original act, and the enactments applied to them as to the State of Missouri, it is admitted that the appellate jurisdiction of this court would not be limited to five years. And if it would not, it necessarily follows that it is not limited by the act when re-enacted and extended by the law of 1844. For if it were to be so limited, and the jurisdiction of this court ceased in five years, the rights and powers and jurisdictions in relation to the claimants in these States would be different from what they would have been if they had been included in the original law. Such a construction would in effect take away the jurisdiction of this court, and deprive each party of the right to appeal within twelve months in the cases decided in the last year of the five, and would make the appeal in almost every case inefficient and nugatory. Certainly, there could be no reason of policy or justice for making such a difference in the jurisdiction of this court in different classes of similar cases; nor could such have been intended. The error of the appellees appears to have arisen from what is evidently an inaccuracy of language in the Act of 1844, when it speaks, in the beginning of the enacting clause, of "so much of the expired act *of 1824" as related to [*123 the State of Missouri. Now, the Act of 1824, as we have already said, had not expired, and is still in force. But the fifth section of the act, which gave the claimant two years from the date of the law to file his petition, and three more to bring it to a final decision, had expired. And the whole context and provisions of the Act of 1844 show that it was the intention of the Legislature to revive this portion of the Act of 1824, and to give to the claimants in the States there mentioned, as it had given to those in the State of Missouri, five years to establish their claims, and to subject them in other respects also to the same regulations and jurisdictions in prosecuting them in the courts of the United States. And the expression, "so much of the expired act of 1824," should have been, "so much of the Act of 1824 as had then expired," in order to make this clause consistent with the residue of the act. This evident inaccuracy ought not, however, to embarrass the court in expounding the act, which, taken altogether, is sufficiently plain in its objects and intention, as well as in its language.

The motion to dismiss this appeal must therefore be overruled.

The cases of The United States v. The Heirs of Powers, and The United States v. The Heirs of Turner, stand upon the same grounds, and the motions to dismiss them must therefore be disposed of in like manner.

Order.

On consideration of the motion made by Mr. Henderson, of counsel for the appellees, on a prior day of the present term of this court, to wit, on Friday, the 14th instant, to dismiss this cause for the want of jurisdiction, and of the arguments of counsel thereupon had, as well against as in support of the said motion, it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

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*JOHN H. BENNETT, Plaintiff in [*124 Error,

v.

SAMUEL F. BUTTERWORTH.

Where action was for chattels, valued at more than $2,000, and verdict was for less sum, defendant may have writ of error if plaintiff release judgment.

NOTE.—Jurisdiction of U. S. Supreme Court dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded can be shown. See note to 7 L. ed. U. S. 592.

Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2,700, and the jury found a verdict for the plaintiff "for $1,200, the value for the negro slaves in suit," and the plaintiff thereupon released the judgment for $1,200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court.

The plaintiff averred in his petition, that the slaves were worth $2,700, and by his releasing the judgment for $1,200, the only question before this court is the right to the property. And as the defendant below prosecuted the appeal, the plaintiff cannot be allowed to deny here the truth of his own averment of the value of the property in dispute.

THIS case was brought up by writ of error from the District Court of the United States for the District of Texas. The facts are stated in the opinion of the court.

A motion was made to dismiss it for want of jurisdiction, because the sum or matter in controversy was not of the value of two thousand dollars.

The motion to dismiss was sustained by Mr. Hughes and Mr. Howard, and opposed by Mr. Harris.

The reasons in support of the motion were the following:

The counsel for Butterworth move to dismiss the writ of error, because the sum or matter in controversy is not of the value of two thousand dollars. Bennett's counsel, on this motion, have taken affidavits to show the negroes to be worth two thousand dollars and upwards.

We contend, for the defendant in error, that the affidavits cannot be read—

1. Because they contradict the verdict of the jury, which is a part of the record. The error complained of is, that the court erred in giving judgment for the negroes, instead of for the value assessed by the jury; while, on the other side, it is insisted that the judgment was right, and properly for the negroes. The matter then in controversy is the negroes and their value. If the court should be of the opinion that judgment in the court below could only have been rendered for the value assessed, then the judgment will be reversed, and judgment rendered on the verdict below for that value; and thereby the plaintiff in error, by proving by affidavits what is insisted upon to be the true value, will get off with paying the twelve hundred dollars, though, by his own showing, the value is more than two thousand dollars. Such a result as this will certainly not be tolerated. Could the matter be so arranged, that, in the event the 125*] *judgment is reversed, a judgment could be rendered for the true value, it might be otherwise; for then in truth the matter in controversy in the Supreme Court would be of the value of two thousand dollars; but, as it stands, the plaintiff may be enabled to get clear of a delivery of the negroes, but in no event can be compelled to pay what he says is the true value.

2. Because the judgment in the court below was for the plaintiff; and that judgment it is which, by the writ of error, is in controversy in the Supreme Court; and upon an affirmance of the judgment below, if the affirmed judgment would be for the value of $2,000 or more, then the court would have jurisdiction; but in the case, in any event, there cannot be a judgment for more than twelve hundred dollars, or for the negroes, which the record proves to be of the value of $1,200, and the court cannot take jurisdiction. Gordon v. Ogden, 3 Peters, 33; Smith v. Honey, 3 Peters, 469; Knapp v. Banks, 2 How. 73.

3. Mr. Justice Story says: "To support the jurisdiction, it is necessary that it appear upon the face of the record, or upon affidavits to be filed by the parties, that the sum or value in controversy exceeds $2,000, exclusive of costs." Hagan v. Foison, 10 Peters, 160.

When the value appears upon the face of the record, that record must be the only evidence; but when it is silent, evidence aliunde may be looked to. When the plaintiff in his declaration or petition claims more than two thousand dollars, and the judgment is for the defendant below, the court has jurisdiction; because, as the court say in Gordon v. Ogden, the whole sum claimed "may be still recovered; and, consequently, the whole sum claimed is still in dispute." But the same court say, in the same case, "If the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court; and consequently, the matter in dispute cannot exceed the amount of the judgment."

From these rules it would seem that the record, when containing on its face evidence of the value, is conclusive.

The rule as to affidavits was adopted of necessity, and applies only in cases where the record does not furnish evidence of the value. This is shown by the case in which the rule was first laid down. See Williamson v. Kincaid, 4 Dallas, 20.

Mr. Harris, against the motion:

The counsel for the defendant in error have moved to dismiss the writ of error, because the sum or matter in controversy *is not of [*126 the value of two thousand dollars. But the same counsel admits in court, that, when the judgment was rendered, the slaves in controversy were worth more than said sum.

He contends, however, that affidavits to that effect cannot be read:

1. Because they would contradict the verdict of the jury.

2. Because the judgment of the court below was for the plaintiff for property which the record proves to be only of the value of twelve hundred dollars.

And, in support of these positions, he cites the cases of Gordon v. Ogden, 3 Peters, 33, Smith v. Honey, Ibid. 460; Knapp v. Banks, 2 Howard, 73; Hagan v. Foison, 10 Peters, 160, and Williamson v. Kincaid, 4 Dallas, 20.

Now, for the plaintiff in error it is contended, that these authorities do not sustain the position taken in the brief of the counsel for the defendant in error. In the first three cases, it was impossible to prove that the sum in controversy amounted to more than two thousand dollars, for judgments were rendered for money; in the first instance, for the sum of four hundred dollars; in the second, for only one hundred dollars; and in the third, for $1,720. In the fourth and fifth cases, the amount did not appear upon the face of the record, and the court held that the plaintiffs in error might prove by affidavits that the value of the property in controversy, in these respective causes, amounted to more than the sum of

$2,000. And it may be remarked, that, in the three cases cited first above, the only question was whether the sum claimed in the count, or that which was recovered, ought to be regarded as the amount in controversy; and to which sum the court should look in order to determine the question of jurisdiction. And the onus of proving that the value of the property amounted to more than two thousand dollars rested upon the plaintiff (who had alleged that its value was $2,700), and not upon the defendant in the court below. Now, for the first time, the burden of making that proof rests upon the defendant in that court, and he is prepared to make it.

It is respectfully suggested, that there can be produced no decision of this court refusing to permit the plaintiff in error to make such proof. And to deny the privilege, under the imposing circumstances of this case, would, we contend, be to deny to the plaintiff and the defendant a mutuality of rights under the statute, the benefits of which we are seeking to obtain.

The case of The United States v. The Brig 127*] Union, 4 Cranch, *216, bears a resemblance to this, and in that the court permitted affidavits to be read to prove the value of the property in controversy. See, also, Wilson v. Daniel, 3 Dallas, 401.

It is further contended, that the effect claimed for this verdict ought not to be conceded to it, for that it is illegal, and that it ought to have been set aside in the court below. It will be seen, by reference to the plaintiff's petition—particularly to the prayer thereof—that this suit was brought for the recovery of the slaves "in specie" (not for the recovery of their value), and for damages for their unlawful detention. The important issue, viz., whether the right of property was in the plaintiff or the defendant, was, in the verdict of the jury, entirely omitted. See Coffin v. Jones, 11 Pick. 45.

2. It did not embrace all the issues which it should have done. See Crouch v. Martin, 3 Blackford, 256; Patterson v. United States, 2 Wheat. 221; Jewett v. Davis, 6 N. H. 518.

3. It should have found the value of each of the slaves separately.

II. We further contend, that the judgment is illegal, because it is not responsive to the verdict.

And it is contended, on the part of the plaintiff in error, that he ought not to be estopped from proving the value of the property in controversy by a verdict which is illegal, and is not responsive to the issues; nor by a judgment which is entirely foreign to the verdict. Estoppels are not favored in law, because they tend to exclude the truth. That such would be the case here cannot be questioned. Again, estoppels, like contracts, must bind both parties, or they will bind neither.

Each court is the guardian of its own jurisdiction. Kendrick v. McQuary, Cooke, 480. And this proposition may be said to be universally correct in regard to appellate courts, established for the purpose of re-examining causes tried in inferior tribunals, and to correct the errors which may be there committed.

Mr. Chief Justice Taney delivered the opinion of the court:

The court have considered the motion made in this case to dismiss the writ of error for want of jurisdiction. From the mode of judicial proceeding adopted in Texas, the motion presents a new question, and one that is not free from difficulty.

The suit is not brought in any of the forms of action known to the common law. It is instituted by petition; and the plaintiff in the court below seeks to recover four slaves, which he alleges are his property, and are detained from him by the defendant. *The value [*128 of each slave is averred separately in the petition, the whole amounting to two thousand seven hundred dollars. The verdict of the jury is as follows:

"We, the jury, find for the plaintiff twelve hundred dollars, the value of the negro slaves in suit, with six and a quarter cents damages."

And the record states, that thereupon the plaintiff released the judgment for twelve hundred dollars in open court; and the court adjudged that he recover of the defendant the said slaves and the damages assessed by the jury and his costs.

This proceeding appears to be a substitute for the common law action of detinue, and resembles it in many respects. In that action, if the jury find that the property belongs to the plaintiff, and is detained from him by the defendant, they ought to find at the same time the value of each separate article in dispute, and the judgment of the court is that the plaintiff recover the property, or the value thereof as found by the jury, provided he cannot obtain possession of the property, together with his damages and costs. Upon such a judgment a writ of error certainly would not lie, when the value assessed by the jury was less than two thousand dollars. For the value of the property in dispute would be fixed by the verdict and the judgment of the court, and both parties would be bound by it.

But in the case before us, the finding of the jury and the judgment of the court differ from the proceedings in an action of detinue. The gross value of the four slaves is found by the jury, and not the separate value of each of them. And the value as found forms no part of the judgment of the court. The plaintiff was permitted to release it, and although it is said in the record that he released the judgment for this sum, yet it appears that no judgment was rendered for it, and that it was released before any was given.

The judgment of the District Court therefore decides nothing more than the right to the property specified in the petition; and whether that judgment is erroneous or not is all that this court can examine into upon the writ of error. The sum which the plaintiff below (who is the defendant in error here) is entitled to recover, if the property is placed beyond his reach and he fails to obtain possession of it, can form no part of the judgment of this court. The only matter in controversy is the four slaves; and their actual value, whatever it may be, is the value of the matter in dispute.

Now, if the judgment of the District Court had been for the defendant, the plaintiff would evidently have been entitled to maintain a writ of error. And as he sues for the specific property, *and avers the value to be $2,700, [*129 he would have been entitled to the writ, even if

he had laid his damages for the detention below $2,000. For the averment of value when he sues for property shows the value of the thing in controversy, as much as the averment of debt or damage, when he sues for money. And when he has rejected the value found by the jury, and refused a judgment for it, and is not bound by that finding, can he bind the defendant to it, and thereby deprive him of his writ of error, upon the ground that the property in dispute is not worth $2,000?

This is the question upon the motion before us.

In cases where the plaintiff sues for money, and claims in his pleadings a larger sum than $2,000, and obtains a judgment for a smaller amount, the sum for which the judgment is rendered is the only matter in controversy, when the defendant brings the writ of error. Because, if the plaintiff rests satisfied with it, and takes no step to reverse it, he is bound by it as well as the defendant. Both parties, therefore, stand upon an equal footing in that respect. But if the plaintiff brings the writ of error upon the ground that he is entitled to more than the judgment was rendered for, then his averment in his declaration shows the amount he claimed; and as that claim is the matter for which he brings suit, he is entitled to the writ of error if that claim appears to be large enough to give jurisdiction to this court. These principles have been settled in this court by the cases referred to in the argument.

In the case before us, the plaintiff avers in his petition that the slaves for which the suit is brought are worth $2,700. The right to these slaves must be the only matter in controversy here, whether the writ of error is sued out by the plaintiff or the defendant. If by the plaintiff, he would undoubtedly be entitled to it, upon the ground that the property in dispute, and which he is seeking to recover in this suit, is claimed to be worth more than $2,000; and he would be entitled, under the decisions of this court, to rely on the averment in his petition, to show that the amount in value of the slaves he claimed is sufficient to give jurisdiction to this court. Can he, then, be permitted to deny here the truth of his own averment, when precisely the same thing—the same property—is the matter in controversy upon the writ of error brought by the defendant? We think not. And as by his release he prevented a judgment from being entered, fixing the value, as between these parties in this suit, at $1,200, the averment in his petition must be regarded as determining the amount in controversy upon a writ of error brought by either plaintiff or defendant.

130*] *Consequently, this court has jurisdiction upon this writ, and the motion to dismiss it must be overruled.

Mr. Justice Daniel:

In the opinion of the court pronounced in this cause, I am unable to concur, regarding that opinion as reconcilable with neither the act of Congress (Judiciary Act, sec. 22) regulating the jurisdiction of this court, nor with the fundamental rules of pleading and evidence, but as in contravention of both. This cause is in effect, and in form except with regard to the frame of the petition, corresponding with the declaration at common law, in all its details and proceedings, an action of detinue for the recovery of four slaves. In every such action, the authorities tell us that it is requisite to describe the property demanded with so much certainty, that it may be delivered up in specie; and it was ruled by the older cases, that, where the property consisted of several articles, the plaintiff must show the value of each particular article, and not state the aggregate value. Subsequently, however, it has been ruled that the declaration may mention the separate value of each article, or it may state the value in gross; and this appears to be the established doctrine in England at this day. See Com. Dig. tit. Pleader, 2 X 2. So in 1 Chitty on Pleading, p. 377, it is said, that, "in actions for injuring or taking away goods or chattels, it is in general necessary that their quality, quantity, or number, and value or price, should be stated; the assigned reason is, that a former recovery could not else be pleaded in bar to a second action for the same goods; neither could the defendant properly defend himself." Then with respect to the verdict and judgment, to be rendered in the action of detinue, the law is thus given in Com. Dig. tit. Pleader, 2 X 12: "The judgment against the defendant shall be for the recovery of the thing detained vel valorem inde and costs; and if judgment be upon confession non sum informatus, demurrer, etc., a writ of inquiry shall be awarded to inquire of the values. And after judgment, if a distringas goes ad deliberandum bona, and the defendant does not, the plaintiff shall have damages taxed by the inquest, so that it lies in the defendant's election to deliver the goods or the value."

Sir William Blackstone, in treating of the action of detinue (Vol IV. p. 413), thus states the law: "In detinue, after judgment, the plaintiff shall have a distringas to compel the defendant to deliver the goods by repeated distresses of his chattels; and if the defendant still continues obstinate, then (if judgment hath been by default or demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's *dam- [*131 ages (which being so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrong-doer be very perverse, he cannot be compelled to a restitution of the thing taken or detained." So, too, in Chitty on Pleading, Vol. I. p. 124, it is said "The nature of this action requires, that the verdict and judgment be such that a specific remedy may be had for the recovery of the goods detained, or a satisfaction in value, for each parcel, in case they or either of them cannot be obtained. The judgment is on the alternative, that the plaintiff do recover the goods or the value thereof, if he cannot have the goods themselves."

The citation of these seemingly trite and familiar principles of law will not be deemed useless, when an application of them, and of the reasons on which they are founded, shall be made to the case under consideration. In the authorities above quoted, we have disclosed to us the propriety and necessity (resulting from the peculiar character of the remedy) for averring in the declaration, and of ascertaining

by the verdict and judgment, the value of the property sought; because that value is to become the measure of redress to the plaintiff, in one branch of the alternative, in the event that the other shall prove fruitless. It is indispensable, therefore, that this measure be ascertained upon legal testimony and solemn investigation before the court, and under its supervising authority—as indispensable, fully, as that the title to the property should be so ascertained; for both enter alike into the redress of the plaintiff, and flow from the same source. His right to the one rests upon the same foundation with his right to the other, and if he had no right to one, he had a right to neither. Nor can it be said that the measure of the plaintiff's redress rests mainly in the breast or in the action of the court; on the contrary, it rests rather in the opinion and action of the jury. The court cannot, even with the parties and witnesses before it, determine the value of the property, or the parties' right thereto. The court, by awarding a new trial, may correct an excess or irregularity of any kind on the part of the jury; but it could have no power to find for either party upon the issue before the jury, nor augment or diminish by one cent the measure of redress established by the jury. If, then, such a power belonged not to the court when in a course of regular judicial inquiry, with the parties and witnesses fully before it, does it not seem strange to contend, that such a power can be exercised collaterally by a different tribunal, neither trying the issue, nor weighing 132*] *the evidence which the jury had before them, and in the absence of all or any of the circumstances, exercised upon ex-parte affidavits before the jury, thereby overturning what twelve men upon their oaths, and in regular discharge of their functions, have done, and what the law through them has declared shall be the standard of value? And for what purpose, it may be asked, is this collateral inquiry to be allowed? Not, strange as it may seem, to settle any other alternate value of the property, nor to put any estimate upon it at all; but to let in other questions connected with the title, or with some proceedings in the court below, wholly disconnected with the value of the property. But it is said that the plaintiff below has released his right to the damages assessed by the jury, and therefore can no longer enforce them. What of that? What possible connection can exist between the power of the plaintiff to enforce his judgment, as affected by any act or indiscretion of his own, and the value of the property as assessed by the jury? Does the release of the estimated value render that value either greater or smaller than it was before? Possibly this act of the plaintiff may render his power to enforce the verdict and judgment less efficient; but to reason from that consequence to the value of the property as found by the jury, appears to me to be an argument as illogical as any that can be conceived. The estimated value, the true measure settled by the jury, remains unchanged, although it may have been released. The verdict has never been reversed or annulled. Moreover, it may not follow necessarily, that the release of the damages by the plaintiff below vitiates the judgment, or deprives the plaintiff of the power to enforce it; for we find by the authorities that a judgment may be by confession, or non sum informatus, or on demurrer, in either of which cases judgment may be entered, and that afterwards, if the defendant will not deliver the property, damages for the value and for the detention may be assessed; and such value, when assessed in the proper, regular, legal mode, is all for which execution can be had against the person or property of the defendant. But the inquiry is not properly instituted here whether the plaintiff, by error or indiscretion, has lost the power of enforcing his verdict and judgment; the question is purely one of jurisdiction, dependent upon the value of the subject, and that value ascertained by all the solemnities, and in the only mode known to the law—solemnities, as I contend, nowhere to be properly gainsaid. Let it be supposed that there had been no release of damages or value by the plaintiff below. The principles applicable to the action of this court would be precisely those involved in the case as it now *stands. Then let it be sup- [*133 posed that, after taking jurisdiction upon this collateral inquiry, this court should come to the conclusion that there was no error in the proceedings and judgment in the court below. What manner of mandate would be sent to that court? Would this court, upon its own estimate of the value of the subject founded upon affidavits, and because it had claimed jurisdiction upon such an estimate, order the Circuit Court to augment the damages assessed to the plaintiff below? Could they by so doing open again that which had become res judicata? If they should not do this, they would confessedly have effected a wrong to the plaintiff; and if they should attempt to do so, I desire to know their authority for such a proceeding, and what standard or measure for their mandate they would adopt; they would have repudiated the verdict of a jury and a judgment of the court, and what higher or other standard they would adopt I am at a loss to conceive. In defense of the proceeding permitted in this case, it has been contended that, by the practice of this court, in cases sounding in damages purely, a plaintiff is permitted to confer jurisdiction on this tribunal by laying his damages at an amount ad libitum, sufficient for that purpose. If the practice of this court is to be understood in the latitude in which it is just expressed, that practice must be deemed to be in consonance with neither the letter nor the spirit of the statute. In cases arising ex contractu or quasi ex contractu, which in their original form and magnitude might fall within the rule laid down by Congress, but which, in the progress of investigation by the application of payments or set-offs, should be brought below the minimum established by law, or in case of tort, which, from their peculiar character, might also come within the reason of the same rule (though the latter must be regarded as liable to strong doubt), jurisdiction may be claimed. But if either the practice or any express annunciation from this court, is to be apprehended as placing it at the option of parties, plaintiffs or defendants, to refer all their contests to this tribunal, however their character may be stamped and ascertained by the decision of the inferior courts, and in contravention of such solemn decisions, given upon

full investigation by courts and juries, why then, by the rules or the parties of this court, the act of Congress is substantially repealed, and the proceedings of the courts below are a mere mockery. The value of the subject of the controversy, as ascertained in the court below, supplies the only safe and uniform rule as to jurisdiction, in cases wherein jurisdiction is dependent on value. My opinion therefore is, that it is incompetent to either of the parties, 134*] or to this court, in the indirect *and collateral mode here attempted, and upon evidence entirely dehors and unconnected with the record, to impeach or inquire into the verdict and judgment rendered in the District Court of Texas; that such a proceeding is utterly subversive of the act of Congress limiting the right to appeals and writs of error, and equally subversive of the fundamental rule of pleading and of evidence, which establishes undeniable verity in the solemn proceedings of courts acting within the sphere of their jurisdiction, and establishes every fact and every conclusion embraced within the scope of those proceedings.

Order.

On consideration of the motion made by Messrs. Hughes and Howard, on a prior day of the present term of this court, to wit, on Friday, the 25th day of January last past, to dismiss this writ of error for the want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of as against the same, it is now here ordered by this court, that the said motion be, and the same is hereby overruled.

SAMUEL VEAZIE, Complainant and Appellant,
v.
NATHANIEL L. WILLIAMS and Stephen Williams, Defendants.

Puffing at auction sales—vendee without knowledge of can recover back money paid in excess of highest real bid.

Where false steps are taken to enhance the price of property sold at auction, a court of equity will relieve the purchaser from the consequences and injury caused by these unfair means.

Therefore, where the owners had instructed the auctioneer to take $14,500 for the property, and the real bids stopped at $20,000, and the auctioneer, even without the consent or knowledge of the owner, continued to make fictitious bids until he ran it up to $40,000, this was a fraud upon the purchaser.

These sham bids could not have been made by the auctioneer upon his own account. Even if they had been so, it is very questionable whether they would have been valid.

Being the general agent of the owners, the latter are responsible for his acts if they receive the benefit of them. By-bidding or puffing by the owners, or caused or ratified by them, is a fraud, and avoids the sale.

The sale being made on the 1st of January, 1836, but the fraud not discovered until 1840, and the bill being filed in 1841, there is no sufficient objection to relief owing to lapse of time.

A release given by the purchaser to the auctioneer, for the purpose of making him a competent witness, did not operate as a bar to a recovery against the vendors. He would have been a competent witness without it.

There was no necessity for making the auctioneer a defendant in the suit.

The various modes of relief examined.

THIS was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity. The complainant, Veazie, resided at Bangor, in the State of *Maine, and the defendants [*135 in Massachusetts, viz., Nathaniel L. Williams at Boston, and Stephen Williams at Roxbury.

The facts of the case were these:

On the 1st of January, 1836, Nathaniel L. Williams and Stephen Williams were the owners of two mill privileges, situated on Old Town Falls, in the town of Orono and State of Maine. On that day, they offered the property for sale, at public auction, in the town of Bangor. The whole controversy in the case having arisen respecting the manner in which the sale was effected, it is necessary to state the circumstances as they were disclosed by some of the witnesses. The owners employed Mr. Stephen H. Williams to proceed to Bangor and attend to the sale, who hired an auctioneer by the name of Head to effect it. The most material parts of the transaction are thus stated by Head, who was examined as a witness on the part of the complainant:

"I was employed, in the winter of 1836, by a son of one of the Messrs. Williams, to sell certain real estate in Orono, as an auctioneer. The estate sold was mill privileges, situated in Old Town, near Old Town Falls. It was put up at a minimum price of $14,500, but it is my

NOTE.—Auction sales, how effected by by-bidding or puffing.

By-bidders or puffers are persons who, without any intention to purchase, are employed by the vendor to raise the price by fictitious bids, thereby increasing the competition among the bidders, while they themselves are secured from risk by a secret understanding with the vendor that they shall not be bound by their bids. Story on Sales, sec. 482.

If their bidding operate to mislead and deceive the buyer, it will vitiate the sale. If all the bidders, except the buyer, be bidding for the vendor, or if the bid immediately preceding the last bid of the buyer, be by a by-bidder, the sale is voidable by the buyer. Story on Sales, sec. 482, citing Bramley v. Alt, 3 Ves. 624; Wheeler v. Collier, 1 Wood. & M. 125; Howard v. Castle, 6 T. R. 642; Bexwell v. Christie, Cowp. 396; Smith v. Clarke, 12 Ves. 477; Crowder v. Austin, 3 Bing. 368; 1 Sugden on Vend. 27, sec. 2.

According to Cicero, De. Off. 1, 3, a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate, intended to be sold. Moncreiff v. Goldsborough, 4 Harr. & McH. 282; Troughton v. Johnson, 2 Hayw. 828; Donaldson v. M'Roy, Browne, 346.

Huber (Prelectiones, xviii.) says if a vendor employs a puffer he shall be compelled to sell the estate to the highest bona fide bidder; because it is against the faith of the agreement by which it is stipulated that the highest bidder shall be the buyer. But if a person or persons be employed to bid up to a certain sum to prevent a sacrifice of the property, and the price be afterwards raised by real bidders, the sale will be valid. Story on Sales, sec. 482, citing Smith v. Clarke, 12 Ves. 477; Cooly v. Parsons, 3 Ves. 625, n.; Bramley v. Alt, 3 Ves. 622; Steele v. Ellmaker, 11 Serg. & R. 86.

The vendor may employ by-bidders, or puffers, if he give notice to the other bidders of his intention; since, in such a case it would not operate as a fraud. Story on Sales, sec. 482, citing Wheeler v. Collier, Wood. & M. 125; Crowder v. Austin, 3 Bing. 368; Oldfield v. Round, 5 Ves. 508.

But in all cases the employment of by-bidders or puffers is looked upon with suspicion by the courts.

impression that the minimum price was not fixed or named at the sale; but it commenced at a much lower sum, which I have now forgotten, and run on up to about eighteen thousand dollars; it might have been more or less. I then received from Samuel J. Foster bids, who was the only person that bid, to my recollection, after the sum last named. Foster bid a hundred dollars, and I then advanced upon him; he then bid again, another hundred dollars, or some other sum; I again advanced upon him, and so on, till the bid got up to forty thousand dollars, when it was struck off to Samuel J. Foster. I don't recollect the terms of sale. A certain per cent. was to be paid down, but what it was I don't recollect."

To the third interrogatory: "I don't recollect that said sale was conditional, except as I have stated. I don't recollect the sum first offered, but it is my impression that it was something like five thousand dollars. I don't recollect what the bids were from that sum. My impressions are, that Samuel J. Foster, Ira Wadleigh, John B. Morgan, and, I think, James Purrington, were the bidders. There might have been others. The highest sum bid by any person other than the purchaser was somewhere in the vicinity of eighteen thousand dollars, to the best of my recollection."

To the fourth interrogatory: "I have already answered, as near as I can recollect, as to the highest sum offered as a bid, except 126*] *that at which it was struck off. After other bidders stopped, he, Foster, bid a hundred dollars, or so. I then advanced upon him, and he then again bid, and so on up to forty thousand dollars."

To the fifth and a half interrogatory, viz.: "What was the highest sum offered as a bid at said sale, which you received as a bid, except the bids offered by said Foster?" "It was somewhere about eighteen thousand dollars, as I have already answered. The actual bidders were about to that sum, as near as I can recollect. It is my impression that I advanced from that sum, or thereabouts. I cannot say for a certainty from what sum I so advanced. But I think it could not have exceeded twenty thousand dollars at which the actual bidders stopped, and my impression is, that they ceased to bid beyond eighteen thousand dollars."

To the sixth interrogatory: "I never communicated said facts to said Veazie, to my knowledge. I cannot recollect when I first communicated them to anyone who would have been likely to have communicated them to Veazie. About six months ago, J. P. Rogers, Esq., came to me, and said that he had knowledge of certain facts that I knew. I did not know what he meant. He then referred to the sale of this property. I did not tell him anything about it at that time. He called on me again; I refused, as I did not know but I might implicate myself. Afterwards, he called again, and I then told him, if Veazie would give me a writing holding me harmless, I would state the facts. He said he would give me such a writing, as attorney for Veazie, which would be good. He did so, and I then went forward and gave my deposition in a case between the parties, as to the facts of the case."

To the ninth cross-interrogatory: "Said defendants, nor any agent of theirs, did not request me to employ any by-bidder at the sale, nor to use any other than fair and lawful means to enhance the price of the said property."

Samuel J. Foster, who was the person employed by Veazie, the complainant, to bid for him, thus testified:

To the second interrogatory: "I did attend said auction sale in the winter of 1836. It was held on the 1st day of January, 1836, at the Penobscot Exchange, in Bangor. Certain mill privileges and appurtenances, situate near or on the Old Town Falls, was the property sold."

To the third interrogatory: "The highest sum bid for said property was forty thousand dollars. I bid it, and was acting and bidding for Samuel Veazie."

To the fourth interrogatory: "Previous to the sale, I was *instructed by General [*127 Veazie to bid to the amount of twenty thousand dollars. At the time of the sale, after the bidding had gone up to twenty thousand dollars, Mr. Veazie came to me, under considerable excitement, and told me to advance and bid it off. I have no distinct recollection what my first bid was, but my impression is, that I commenced with about five thousand dollars. It advanced pretty rapidly, till it amounted to fifteen or sixteen thousand dollars. I think, between that point and twenty thousand, the bidding was not very prompt, but it went on finally from twenty thousand, till it was struck off to me at forty thousand dollars. I think I

Neither do the cases authorize the appointment of more than one person to guard the vendor's interests. The only possible object of appointing more than one is fraud. It is simply a mock auction. Sugd. Vend. 6th Am. Ed. 22, 23; 8 Term R. 93, 95; Wheeler v. Collier, 1 Wood. & M. 123; Jervoice v. Clarke, 1 Jac. & W. 389.

The employment of a single puffer, who bids at the sale, has been held to vitiate the sale, particularly if the estate is advertised to be sold without reserve. Rex v. Marsh, 3 You. & Jer. 331; Meadows v. Tanner, 5 Madd. 34; Sugd. Vend. 6th Am. ed. 23; and see Crowder v. Austin, 3 Bing. 368; 5 Madd. 34; Turning v. Morris, 2 Bro. C. C. 326; Mason v. Armitage, 13 Ves. 25.

Underbidding by the owner or auctioneer vitiates the sale. Trust v. Delaplaine, 3 E. D. Smith (N. Y.) 219.

The employment of a puffer to enhance the price of property sold at a public sale by auction, is a fraud upon the purchaser, and sufficient ground for relieving him from his bid. Fisher v. Hersey, 17 Hun, (N. Y.) 370; see 2 Kent's Com. 539.

A mere limitation of a price of an article, to be sold at auction, is not of itself illegal. Wolfe v. Luyster, 1 Hall (N. Y.), 146; Hasel v. Dunham, 1 Hall (N. Y.), 655.

The English statute, 30 and 31 Vict. c. 48, s. 4, enacts, that whereas there is a conflict between courts of law and equity in respect to the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that such sales are illegal, and courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled; and whereas it is expedient that an end should be put to such conflicting and unsettled opinions, therefore, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.

If the owner employes a person to bid for him, the sale is void, although only one such person is employed, and although he is to bid up to a certain sum only, unless it is announced at the time that there is a person bidding for the owner. Wheeler v. Collier, W. & M. 123; Howard v. Castle, 6 T. R.

did not communicate my relation to General Veazie to anyone, until the property was knocked off. I then notified Mr. Bright, the agent of the defendants, a Mr. Williams, the son of one of the defendants, and Mr. Head, the auctioneer, that I bid for General Veazie, and the parties made arrangement to meet, the afternoon of the same day, at the office of William Abbot, Esq., in Bangor, to settle and close the business."

To the fifth interrogatory: "John Bright, who acted as agent, and Mr. Williams, son of one of the defendants, were present, apparently acting for them. I have no recollection of their making any remark at the time of sale, nor that they did anything, at that time, about the sale."

To the fifth and one half interrogatory: "My impression is, that I saw or heard no bidding after it got up to sixteen or eighteen thousand dollars. The biddings, audibly, or by signs, then ceased to be known to me. I observed Mr. Wadleigh, and believe he was present from the beginning to the close of said sale. 'My impressions are very strong that I noticed Mr. Wadleigh's biddings till it reached to sixteen or eighteen thousand dollars. After that, I am positive that there were no signs, or open bids, that would enable me to discover who, or that anyone, was bidding against me. I endeavored to discover if Wadleigh was doing so, and could find no sign or nodding from him, or from anyone else."

Ira Wadleigh, also a witness on the part of the complainant, thus testified:

To the second interrogatory: "I know the property, and that it was sold to Samuel J. Foster at forty thousand dollars. About a month before the sale I was in Boston, and called on Nathaniel L. Williams to see if he would sell me the property. He said they thought of putting it up at auction, and would let me know in a few days, as soon as he could see his brother Stephen. I advised him to sell, so that mills could be built that winter. On coming out of Boston, I met Stephen Williams's 138*] *son, Stephen H. Williams, who was coming down to see to selling the property; and after he reached Bangor, I saw him here and talked with him about the property, and asked him if he would sell it at private sale. He told me he would sell it for fifteen thousand dollars or thereabouts; I think he told me so. Afterwards it was advertised to be sold at the Exchange in Bangor. Stephen H. Williams appeared to be acting for the defendants."

To the third interrogatory: "The property was sold at auction; I was present at the sale, and bid I cannot say how many times, nor what sums I bid; but somewhere from fifteen to twenty thousand dollars. I don't remember bidding over twenty thousand dollars, although I might have done so. Nicholas G. Norcross bid; I think Myrick Emerson bid, and Samuel J. Foster, and some others; but I do not recollect who. I cannot tell how much they bid, but from where it started up along, but how far I cannot say."

To the fourth interrogatory: "When they first commenced, the bids were audible, and properly made; but after they got up to twenty thousand dollars and over, it was by signs."

To the fifth interrogatory: "I saw General Veazie at the auction; he was about to room there; and was walking back and forth in the long entry part of the time. I did not see anything very particular in his manner. I did not mind much about it."

To the sixth interrogatory: "I talked with Head before the sale, and told him I wanted to buy it. He asked me how high I would go. I told him to seventeen thousand dollars, if I could not get it for less. I agreed with Norcross to take it at that sum; and told Head that I would hold my pencil between my thumb and forefinger, and turn it for a bid. I soon went up to twenty thousand and upwards, and stopped. I found the bidding was going on without my nodding, turning my pencil, or making any sign, and stepped up to Head, and asked him if he was bidding for me. He made no answer; and I said, 'For God's sake, don't bid any more for me,' and went and sat down and bid no more. After the sale I had a conversation with young Williams, and, I think, told him how the bidding went on; but he must have seen it, as he was sitting behind, and close to Mr. Head. He said he was surprised at the sale; that the property sold for much more than they expected."

To the seventh interrogatory: "There were four privileges; and they were not then actually worth more than two thousand dollars a privilege. I don't believe it would sell to-day for *four thousand dollars at auction—[*139 the whole property—that is, the four privileges."

Four other witnesses, viz., Myrick Emerson,

642; Crowder v. Austin, 3 Bing. 368; 11 Moore, 283; 2 C. & P. 208; Fuller v. Abrahams, 6 Moore, 316; 3 B. & B. 116; Rex v. Marsh, 3 Y. & J. 331.

Upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act, and vitiates the transaction. Green v. Baverstock, 14 C. B. N. S. 204; 32 L. J. C. P. 181; 8 L. T. N. S. 360; 10 Jur. N. S. 47.

Yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. Flint v. Woodin, 9 Hare, 618; 16 Jur. 719.

Property was put up for sale by auction subject to the condition that the highest bidder should be the purchaser and without any express stipulation as to a reserved price. The vendors employed a puffer to bid at the auction, and the auctioneer also announced, on behalf of the vendors other biddings which were fictitious. In a suit for specific performance against a bona fide bidder to whom *the property* was knocked down: Held, that the *sale was invalid.* Mortimer v. Bell, 11 Jur. N. S. 897; 35 L. J. Chanc. 25; 14 W. R. 68; 13 L. T. N. S. 348; 1 L. R. Ch. 10; Iceby v. Grew, 6 C. & P. 671.

Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserved price unless the right to do so is expressly stipulated for. Gilliat v. Gilliat, 9 L. R. Eq. 60; 39 L. J. Chanc. 142—R.

Landed property was sold by public auction under conditions which stated that the highest bidder should be the purchaser, and which reserved to the vendor the right to bid once by himself or his agent. The auctioneer bid three times with the sanction of the vendor, and then the vendor stated what the reserved price was, when a person bid beyond that sum, and was thereupon declared the purchaser. Held, that by reason of the biddings of the auctioneer the vendor had exceeded the limited right reserved to him by the conditions of bidding once by himself or his agent, and that therefore the sale was void at the option of the purchaser, both at law and under 30 and 31 Vict. C. 48. Parfitt v. Jepson, 46 L. J. C. P. Div. 529; 36 L. T. N. S. 251.

avi Young, Richard Moore, and Isaac Smith, ho were present at the sale, were examined i behalf of the complainants, whose evidence rroborated that of the preceding witnesses, far as mere spectators could have any owledge of the transaction.

Ten witnesses were examined on the part of e defendants. Stephen H. Williams, the au-orized agent of the owners of the property, us testified:

"My name is Stephen H. Williams. I am irty-four years old. I am a merchant, and side in Roxbury; I know the said parties. r. Veazie resides in Bangor, and is the presi-ent of a bank; I don't know his occupation. r. Williams resides in Boston, and is retired om business; he is my uncle.

"To the second interrogatory he says: In he winter of 1835-36, I was employed by the efendants to go to Bangor, and act as their gent in selling at auction certain mill privi-ges, at Orono or Old Town; I went to Bangor; he sale took place, January 1, 1836; the prop-rty was sold by Henry A. Head, as auctioneer, nd was knocked off to a man named Foster, ut Mr. Veazie was the purchaser. The price as forty thousand dollars.

"To the third interrogatory he says: On rriving at Bangor, being a stranger, I made nquiries of Mr. John Bright as to who was he most respectable auctioneer in the place, nd he referred me to Mr. Henry A. Head, as he person employed in disposing of the gov-rnment lands, and in his opinion the most de-irable auctioneer. I accordingly applied to him o dispose of the property, and he consented to lo so. On the day of the auction, previous to ommencing the sale, he asked me what amount as to be paid to him for his services; being nacquainted with the amount of commissions sually paid to an auctioneer, I told him that e should be paid what was customary. Noth-ng further was said respecting his fees previ-ous to the sale.

"To the fourth interrogatory he says: I have lready answer this interrogatory in my reply o the third interrogatory.

"To the fifth interrogatory he says: I did ot authorize, or request, or in any way sug-gest to the said auctioneer to bid himself on he said property, or employ any other person to do so, or to do or permit anything unfair, unusual, or in any way improper, to be done at the said sale to enhance the price of the said property; and I did not know, nor had I any reason to believe, that he intended to do so.

140*] *"To the sixth interrogatory he says: I did not, nor did anyone authorized by me, make any bid on the said property at the said sale.

"To the seventh interrogatory he says: I knew the said Wadleigh, at the time of the sale, so as to speak to him; he was present at the sale.

"To the eighth interrogatory he says: I did see the said Wadleigh, while the sale was going on, go up to the auctioneer and speak to him; the bid had then gone to thirty-nine thousand dollars. He did not go up and speak to him more than once; I am distinct in my recollec-tion on this point.

"To the ninth interrogatory he says: I did ask the auctioneer immediately after the sale what Mr. Wadleigh had said to him, when he came up to him during the sale, and he replied to me, that, on going into the room immediate-ly previous to the sale, Mr. Wadleigh gave him unqualified authority to purchase the property for him, or, in other words, had told him that, when the property was knocked off, it was to be his (Wadleigh's). He (the auctioneer) also told me that, when Wadleigh came up to him on that occasion, he said to him, 'For God's sake stop, and bid no more for me.'

"To the tenth interrogatory he says: The property was knocked off to a Mr. Foster, but after the sale, much to my surprise, I found that Mr. Veazie was the purchaser. He had told me previous to the sale, that he would not give more than twelve thousand dollars for it. He immediately desired a bond for the deliv-ery of the deed. The bond was accordingly drawn, with a penalty of fifty thousand dollars, for the delivery of the deed, at Bangor, within ten days or a fortnight. After receiving the bond, and while he was folding it up, he said to me that he thought it proper to state, now that he was secure himself, that an express had been fitted out for the purpose of purchasing this property before the news of the sale, by auction, could reach the owner; and it is my impression that he said that Mr. Wadleigh was engaged in it, but of this I am not positive. I left to go to Boston and obtain a deed and re-turn to Bangor. I remained in Boston a day or two to complete the deed, which having been done, I set out to return to Bangor. Be-tween Boston and Portsmouth I found, by some conversation with the passengers, that Mr. Veazie had passed us on the road going to Boston. I accordingly made arrangements to return to Boston and meet him, and thus save my journey to Bangor. On returning to Bos-ton I found he had left there an hour or two previous to my arrival. A day or two after, I started for Bangor again, and overtook Mr. *Veazie at Portland. We then traveled [*141 together to Bangor. During the journey, he told me that he had made up his mind to give forty thousand dollars for the property; that it had been canvassed in his family and arrange-ments been made to that effect, and that he had secured this Mr. Foster to hold him harmless to that amount, and that the journey he had made to Boston was to obtain knowledge that I had a deed for him, as he was suspicious, on the return of those who went on the express, that they had succeeded in their design. And by way of showing his anxiety, he told me that he had left Bangor for Boston on the evening of a large party given by his wife. He said that the value of this property to him was caused by a quarrel and lawsuit between him and Wad-leigh, which rendered it of vast importance to either of them to obtain the property. He also said, that he had traced the person who con-ducted the express as far as the Tremont House and there all trace of him was lost.

"To the eleventh interrogatory he says: Previous to and on the morning of the sale, Mr. Veazie manifested much indifference as to the purchase of the property, observing that he would give twelve thousand dollars for it, and no more. Of course I was surprised when I found he had given forty thousand dollars for it.

"To the fourth cross-interrogatory he says: Immediately after the sale, I was informed by the auctioneer, that, when Wadleigh stopped him at thirty-nine thousand dollars, he (the auctioneer) then bid the remaining one thousand dollars on his own responsibility, alternately with Foster. On my return to Boston, I related this (with everything else that had transpired) to the defendants, my employers."

John Bright, who was the agent for the owners of the property prior to the arrival of Stephen H. Williams, thus testified to the fourth interrogatory:

"I did not, nor did anyone to my knowledge or belief, request or authorize or in any way suggest to the auctioneer, or any other person, to bid at said sale, in behalf of the defendants, or to make any fictitious or pretended bid at the said sale, or to do anything, or permit anything to be done, unfairly, to enhance the price of the said property."

To the fifth interrogatory:

"I did attend the sale. I did not bid on the property, nor did I then know, nor had I cause to believe, that said auctioneer was himself bidding on the said property, nor that anyone was bidding on said property for the defendants, or was using any unfair means to run up said property, or to enhance the price thereof."

142] *The witnesses all concurred, that there had been a great depreciation in the market value of mills and mill privileges since January 1, 1836.

The terms of sale were ten per cent. of the purchase money payable immediately, and twenty per cent. more upon the delivery of the deed. These two sums together made $12,000, all of which was paid by Veazie. The balance, being $28,000, was divided into two notes of $14,000 each, payable in one and two years. The first was also paid, and the interest upon the second up to the 1st of January, 1840. The amount still due was, therefore, one note of $14,000, with interest from the 1st of January, 1840. Upon this note suit was brought against Veazie, prior to the filing of the bill in this case.

These were the circumstances attending the sale, as stated by the principal witnesses.

On the 21st of July, 1841, the following release was executed by Veazie to Head, viz.:

"Know all men by these presents, that I, Samuel Veazie, of Bangor, in the County of Penobscot, and State of Maine, Esquire, in consideration of one dollar to me paid by Henry H. Head and Nehemiah O. Pillsbury, both of said Bangor, auctioneers, and late copartners in the auction business, under the firm and style of Head & Pillsbury, the receipt whereof I do hereby acknowledge, do hereby release and discharge said Head & Pillsbury, jointly and severally, from all damages by me sustained, or supposed to be sustained, and from all action, or causes of action, to me accrued or accruing in consequence of any misfeasance, nonfeasance, or malfeasance, or any illegal management by them done, performed, or suffered, at the sale at auction of Nathaniel L. Williams and Stephen Williams's real estate, situated in Old Town, in said County of Penobscot, on or near Old Town Falls, so called, which was sold at auction on or near January 1st, 1836, by the said Head & Pillsbury, as auctioneers; hereby, also, releasing the said Head & Pillsbury from any claim for damage, by or in consequence of any of their proceedings relating to said sale of said property.

"In witness whereof, I have hereto set my hand and seal, this 21st day of July, A. D. 1841. Samuel Veazie. [L. S.]"

This release was introduced into the cause by agreement of counsel, filed at a subsequent stage of the proceedings; by which agreement it was admitted that neither the respondents nor their counsel had any knowledge of the existence of the *release until after the [*143 publication of the evidence in the suit, and also further admitted, that the release and circumstances under which it was given might be referred to and made use of in the cause with the same effect as if the same had been put in issue by a cross bill and admitted by the answer. It will be seen by referring to the third volume of Story's Reports, p. 66, that Mr. Justice Story did not consider this agreement as a proper mode of introducing the release into the cause, when it came up before him for argument. According to his suggestion, the proper steps to do so were immediately taken by filing a supplemental bill. These remarks are here made for the purpose of connecting the report of the case in 3 Story's Reports, 54, with this statement.

On the 23d of July, 1841, Veazie filed his bill of complaint on the equity side of the Circuit Court of the United States for the District of Maine.

The bill stated, that, on January 1, 1836, defendants owned two mill privileges in Maine, and on that day offered them for sale, at auction, at Bangor, in Maine, employing one Head as auctioneer, and, by themselves or agent, instructed Head to put them up, beginning with $14,500, minimum, and prescribed certain conditions of sale as to payment; that the complainant, relying on the good faith of defendants and of Head, attended the sale, and bid by one Foster as agent, and, the minimum having been offered, Head continued to announce a still higher sum, and Foster, supposing it fair and honest, made a still higher bid, and so on, until said property was struck off to Foster, for the plaintiff, at $40,000. And thereupon the complainant, supposing the sale had been conducted and the bidding made in good faith, complied with the conditions of sale, paid $4,000 in cash, $8,000 more on delivery of the deed, gave his note for $14,000 in one year, with interest, which he has since paid, and his other note for $14,000 in two years, with interest, on which he has paid the interest annually to January 1, 1840. And defendants executed a deed to complainant, and complainant a mortgage of same to defendants to secure said notes, and another of $1,900, received part of the $8,000 aforesaid.

The bill further alleges, that there was no real bid at said auction for more than $16,000 or $18,000; but that the auctioneer, by sham bids, run up said Foster from about $16,000 to $40,000, Foster's being the only real bona fide bids over about $16,000; by means of which pretended bidding and management of the auctioneer, defendants have received from the complainant a large sum of money which they ought not *to have received; and so the [*144 complainant has been deceived and defrauded.

The bill further alleges, that complainant discovered the fraud since January 1, 1840, and notified defendants of it, and hoped they would have refunded the money; but they not only refused to rescind, but have commenced a suit on the unpaid note, which is now pending in this court, and attached complainant's property.

The defendants are requested to answer specifically, 1. Whether they authorized the sale, and employed Head as auctioneer. 2. Whether the land was put up at the minimum stated, and if Head was directed not to sell for less, and authorized to bid for defendants to that extent. 3. What sum they agreed to pay Head, prior to the sale; what they did pay; was he to be paid any sum if there was no sale; how he was to be paid. 4. What amount, principal and interest, complainant has paid defendants. 5. Whether the note on which defendants have brought a suit is one of those given for said purchase. 6. Whether the whole purchase money was not paid and secured by complainant, and the deed given directly to him; and whether it was not stated and understood, at that time, that Foster acted simply as complainant's agent at said sale.

The prayer of said bill is, that said suit may be enjoined, the note delivered up, the sale rescinded, and the money paid back with interest.

The answer admitted the ownership, and that defendants employed one Bright to advertise the property for sale at auction on January 1, 1836. That a few days before the sale they sent Stephen H. Williams, a son of one of the defendants, to Bangor, to employ an auctioneer and make all necessary arrangements. The defendants denied having instructed, intimated, or suggested to Williams, Bright, or any other person, that there should be any by-bidding or other unfairness; or that, before said sale, said Williams, Bright, the auctioneer, or any other person, received from defendants any instruction or suggestion that said property should be run up by fictitious bids, or that anything unfair should be done.

They admit that they did fix $14,500 as a minimum, but aver that they gave no instructions to keep the same secret; that they believe the fact was well known at the sale; that they have been informed, and believe, that no bid was made by any agent of theirs in consequence of the fixing of the said minimum price, bids far exceeding that amount being immediately made by those desiring and intending to purchase.

The conditions of sale, as to payment, are admitted to have been as stated in the bill.

145*] *The answer admitted that Stephen H. Williams employed Head as auctioneer, who was said to be duly licensed, skillful, experienced, and believed to be honest. The defendants aver their belief that said Williams did not authorize or suggest any by-bidding or other unfairness by Head, but employed him as a public officer, duly empowered by the laws of Maine. They further aver, that they have been informed, and believe, that said Williams did not authorize Head to bid up to the minimum, or to make any bid on their account.

The defendants aver that they were not present at the sale; but deny that there was no real bid above $16,000, or $18,000, or any such sum; or that the auctioneer run up Foster, by sham bids, from $16,000, or any such sum, to $40,000; or that there was no real bid above $16,000, or any such sum.

Defendants admit that complainant informed them, after the sale, that Foster was his agent, and allege that complainant exhibited great anxiety to have the conveyance made; and they have been informed, and believe, that there was great competition at the sale, both on account of the intrinsic value and the local position of the property, and that complainant authorized Foster to bid as high as $40,000.

Defendants completed the sale, gave a deed, received payment of all but the last note, and interest on that to January 1, 1840; but complainant did not notify defendants that he considered the sale invalid until January 14, 1841, and they then brought a suit, as alleged.

That more than five years and six months have elapsed since said sale, and defendants have lost the benefit of evidence as to occurrences at said sale, and there has been a great depreciation in such property, owing to an increase in the number of mills, the scarcity of timber, and financial difficulties in that region, by which mill sites have much depreciated in value; and defendants believe that changes have been made in the property by building or altering.

The defendants do not know when, in particular, the complainant pretends to have discovered the alleged fraud; but whatever was done at the sale might have been known, on inquiry, at any time; and they pray for proof of diligence.

They believe that complainant, since the changes in value, would gladly annul the bargain, and compel defendants to repay the price, and pay for his expenditures; but they submit that this ought not to be, after such a lapse of time and the changes in condition and value, especially as they deny the fraud alleged, and any concealment, on their part, of anything done at the sale.

*That S. H. Williams agreed to pay [*146 Head for his services what was customary, and did pay him $200, after the sale, which defendants think was reasonable; and there was no agreement that Head was to receive nothing if no sale was effected.

It has been before mentioned, that when this cause came up for argument before Mr. Justice Story, as reported in 3 Story's Reports, 54, he suggested that a supplemental bill should be filed, for the purpose of properly introducing the release to Head into the cause.

The supplemental bill alleged that Head paid no consideration for the release, and made no satisfaction; that it was not intended as a discharge of any claim against the defendants; and if such was its effect, it was a fraud and a mistake; that it was given because Head refused to disclose the facts, on the ground that complainant might sue him, and complainant wished to obtain proof with a view to institute proceedings in equity against defendants; that the whole agreement with regard to it was between Head and complainant's counsel, and it was signed by complainant without inquiry, and without any negotiation between Head and complainant, and no indemnity against

Head's liability to defendants was asked or intended. The supplemental bill then prayed that said release may be reformed and restrained to the true intention of the parties.

The answer to this supplemental bill stated that the existence of the release was not discovered by defendants until after the testimony had been taken in the original case; that defendants now insist on it as a bar; do not know whether any consideration was paid for it; and as to the intentions of the parties, or any understanding as to its legal effect, no fraud was practiced to procure it to their knowledge, or any language used that was not intended by complainant, by whom it was signed by the advice of counsel and under no mistake of fact; and it is not competent for him to control or alter it by extrinsic evidence. They have no knowledge of the intentions of the parties to it, or what inducements or agreements led to it. They have been informed by Head, that Veazie's counsel promised him an indemnity, and this was accordingly given. They deny that Head expected that, after said release, he would be liable to any action by defendants, or any construction given to the release which would prevent his being held harmless against them.

To this answer there was a general replication.

On the 3d of August, 1844, a bill of revivor was filed against Louisa Williams, the widow 147*] and executrix of Stephen *Williams, deceased, and at May Term, 1845, the bill was revived by consent of counsel, and the cause set down for hearing.

At the same term it came on to be heard upon the bill, answer, pleadings, and evidence, when the judges of the court, being divided in opinion on the merits of the cause, ordered and decreed that the bill be dismissed, without costs to either party.

This decision is reported in 3 Story's Reports, 612.

An appeal from it by the complainant below brought the case up to this court.

It was very elaborately argued by Mr. Fessenden and Mr. Webster for the complainant and appellant, Veazie, and by Mr. Davies and Mr. Gilpin for the defendants.

The points on the part of the appellant were thus stated by Mr. Fessenden. They were stated somewhat differently by Mr. Webster, as will be mentioned afterwards.

As stated by Mr. Fessenden they were—

I. That the defendants were owners and sellers of the property described, at said auction sale, by and through Head, as auctioneer; and that the complainant was purchaser of the same through the agency of Foster.

II. That Head, the auctioneer, did, by pretended and illegal bidding at the sale, greatly enhance the price to the complainant; that he actually received no bid from any bona fide bidder, or person proposing to purchase, other than the complainant's agent, above the sum of twenty thousand dollars, or thereabouts; but, by illegal and fraudulent practices, induced the complainant's agent to bid, and the complainant to pay, a much larger sum than they would have done had said sale been fairly conducted.

III. That Head, the auctioneer, was the general agent of defendants for all the purposes of the sale, and in all the transactions connected therewith; and they are responsible for all his acts, and his knowledge, connected with the sale, and cannot avoid that responsibility on the ground that he was a public officer.

IV. That an auctioneer cannot legally be a bidder on his own account; and therefore, whether the bidding by Head was really for himself, as intending to purchase, or merely pretended, for the purpose of enhancing the price, it was equally a fraud upon the complainant, and vitiated the sale.

V. That defendants became actual parties to the fraud by having received information of one illegal act of the auctioneer at the sale, before the contract was closed, which they did not *communicate to the complainant, [*148 but concealed, and by which they were put upon inquiry.

VI. That equity will not allow the defendants to retain the proceeds of a fraud committed by their agent, whether they had knowledge of it or not.

VII. That Head was not a necessary party to the bill.

VIII. That the release to Head & Pillsbury is no bar—

1. Because equity will not extend its operation beyond its legal effect and the intention of the parties, which were a release of damages.

2. Because it was a release to the agent, and not to the principal.

3. Because the defendants would have no right of action against Head & Pillsbury, should the sale be rescinded.

4. The extent and design of a release, like a receipt, are explainable by extrinsic evidence.

IX. That the claim of the complainant to rescind the contract is not barred by lapse of time.

Because six years had not elapsed between the sale and the filing of the bill, or between the discovery of the fraud and the filing of the bill, and there had been no loss of evidence or change in the actual condition of the property, such as would justify the court in refusing relief; and because the circumstances attending the sale were not such as to excite the complainant's suspicions, or put him upon inquiry.

X. Even if there was no fraud, the sale should be rescinded for mutual mistake of a material fact.

As stated by Mr. Webster, they were:

1. That an auctioneer is the agent of the owner until the sale is made, and also afterwards, until he gives a memorandum in writing. This writing is given in order to avoid the statute of frauds, and in making it, the auctioneer becomes the agent of both parties.

2. That fraud by an auctioneer, committed whilst he is the agent of the vendor, vitiates a sale as thoroughly as if it had been committed by the vendor himself.

3. That it is not necessary to show that the principal was cognizant of the fraud.

4. That the auctioneer is the alter ego of the party who employs him. What he knows, the principal knows; or, as the rule is substantially stated in 6 Clark & Fin. 448, 449, if an agent made willfully false representations, and then made a contract, equity will relieve just as much as if the scienter were traced to the principal.

149*] *5. An agent to sell cannot buy. Therefore an auctioneer cannot bid for himself. This rule may not be very applicable in this case, because the auctioneer does not say that he intended to purchase the property for himself.

6. The owner of real estate, put up at auction, may protect himself in one of two ways.

1st. He may fix a minimum or starting point. If no bid is made for this amount, then it is no sale. This mode appears to have been pursued here. The minimum was fixed at $14,500, and this fact was made known to the purchasers at the sale. This fact is highly important.

2d. The owner may employ one person to bid up to the minimum, or he may bid himself. But in this mode, as in the preceding, where the bidding has reached the minimum, then all by-bidding or puffing is fraudulent, and vitiates the sale. The highest real bidder, after reaching that point, is entitled to the property.

The points stated and argued by the counsel for the defendants were the following:

1. That neither on the allegations or form of the complainant's bill, nor on the evidence, is he entitled in the Circuit Court of the United States, sitting in equity, to the relief he prays for.

2. That neither on the allegations of the bill, nor on the evidence, is there ground to charge the defendants with fraud.

3. That the evidence does not establish any fraud on the part of Head, the auctioneer, but if it does, it will not entitle the complainant to the relief prayed for in this suit.

4. That the release of Head is a conclusive bar to the complainant's prayer for relief.

5. That, both on the facts of the case and the well settled principles of equity jurisprudence, the decree of the Circuit Court, dismissing the bill, was correct, and ought to be affirmed.

Mr. Justice Woodbury delivered the opinion of the court:

This was an appeal from a decree of the Circuit Court in the Maine District, dismissing a bill which was brought originally by Veazie, the appellant.

As to the contents of the bill, and the evidence in its support, it may suffice to say here, that the bill asked the rescission of a sale at auction, made about the 1st of January, 1836, of certain mills, owned by the respondents, and a return of the money paid, and the notes still held by them for a part of the purchase money. It asked this, on the alleged ground 150*] of imposition in *the sale by means of puffing or by-bidding, so as to advance the price about $20,000 above what it otherwise would have been. In their answer, the respondents denied any such bidding by their procurement, or that it avoided the sale if happening; and further contended, that they had been discharged from any liability which might have existed by a release to the auctioneer, one of the persons implicated in the by-bidding. The answer insisted, also, that the auctioneer should have been made a party to the bill, and that any claim to relief by the plaintiff is barred by the lapse of time since the sale.

The leading point arising in this case involves so difficult questions both of fact and law, that they have, in some degree, divided this court, as well as the court below, and great care and discrimination will be necessary in order to reach conclusions that can be satisfactory.

The relief here is not sought, as has been objected, on account of inadequacy of price—though that may at times be so gross as to show fraud, and might here very well raise some presumption of it. Warner v. Daniels, 1 Wood. & M. 111; Coles v. Trecothick, 9 Ves. 234; 2 Ves. Sen. 155. But it is sought for a fraud practiced in augmenting the price; or, in other words, for taking false steps to enhance it; and it is the consequence and injury caused by these unfair means that the plaintiff would avoid.

How far, then, in point of fact, was the price increased above the real bids? and by what means? A minimum price of $14,500 is clearly proved to have been fixed by the owners. The weight of the testimony is, that the real bids went only $3,500 to $5,500 higher. There is no pretense that Wadleigh—the rival or competitor of the plaintiff—bid or authorized others to bid for him above eighteen or nineteen thousand dollars, though a statement of the auctioneer to one person has been relied on to the contrary. Wadleigh denies it—nobody testifies to it—and nobody is produced who bid or employed others to bid higher, unless the auctioneer himself did it. The true value, also, as fixed by the owners at $14,500, tends to confirm the idea that no real, fair bid would be likely to go above $20,000—or over $5,000 or $6,000 beyond the owners' own estimate.

It is, then, a leading feature in this case, that should not be overlooked, as it gives a stamp and character to the whole equity as between these parties in favor of the plaintiff, that the respondents fixed the minimum bid for the sale of their property at $14,500, and authorized the auctioneer to dispose of it for that amount, when in truth, by some means or other, and *without any real rival bids above [*151 $20,000, they obtained for it $40,000. Whether this extraordinary result was effected by any improper conduct on their part, or that of any agent for whom they may in law be responsible, is the next prominent inquiry.

In the outset, the probability certainly is, that property like this could not be sold at auction for from $25,000 to $26,000 more than the owner asked for it, unless under some imposition or great mistake. And the further presumption seems at first to be reasonable, that the respondents, whose property was thus sold, and by an auctioneer employed by themselves, and who have benefited by the large excess in the price given, by taking the money and securities, were either instrumental in causing the excess, or, having availed themselves of it and all its advantages, should be answerable civiliter for any wrong and error connected with it.

It is conceded, in point of fact, that some other bids than Veazie's went nearly to $40,000, and as no person is shown to have made them but the auctioneer, it follows that they must have been real bids by him for himself, or fictitious ones by him, with a view to increase the price to be obtained by the respondents, and to increase his own commissions on a

sum so much larger than had been anticipated when the sale began.

Looking to the supposition that the bids were real and for himself, that idea is not supported, but rather disproved, by the testimony. The auctioneer does not appear to be a man of wealth, able to buy so valuable property for investment, nor was such a purchase in the line of his business or profession, nor does he seem to have had the means or disposition for speculation, and especially on so large a scale; and he must have well known that the true value of this property was not considered by the owners above $14,500, nor its value to Wadleigh as enhanced by its locality in his dispute with Veazie, as above $18,000.

The weight of the testimony, then, is decidedly against the correctness of the supposition, that the bids above $20,000, except the plaintiff's, were by the auctioneer for himself and on his own account.

Had it been otherwise, it would be very questionable whether, in point of law or equity, an auctioneer can be allowed to bid off for himself the very property he is selling. It has been laid down that he cannot. Hughes's case, 6 Ves. 617; Oliver et al. v. Court et al. 8 Price, 126; 9 Ves. 234; 8 Ves. 337; Long on Sales, 228; Babington on Auctions, 164. The principles against it are stronger, if possible, and certainly were enforced earlier in courts of equity than of law. An opposite course 152*] *would give to an auctioneer many undue advantages. It would tend, also, to weaken his fidelity in the execution of his duties for the owner. He would be allowed to act in double and inconsistent capacities, as agent for the seller and as buyer also; and the precedents are numerous holding such sales voidable, if not void, and at all events unlawful, as opposed to the soundest public policy. See Michoud v. Girod, 4 Howard, 554; 15 Pick. 30; 1 Mason, 344; 2 Johns. Ch. 51; Tufts v. Tufts, Mass. Dist. 1848, and cases there cited; Long on Sales, 228; 9 Paige, 663; 1 Story's Eq. Jur. sec. 315; 3 Story's R. 625. That an auctioneer is a general agent for the owner usually, though questioned in the argument, cannot be doubtful. See Howard v. Braithwaite, 1 Ves. & Beam. 209; Story's on Agency, secs. 27, 28; 4 Burr. 1921; 1 H. Bl. 85. He is so till the sale is completed. Long on Sales, 231; Seton v. Slade, 7 Ves. 276; Babington on Auctions, 90; 20 Wendell, 43. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the statute of frauds (Williams v. Millington, 1 H. Bl. 84; 3 D. & E. 148; Cowp. 395; Long on Sales, 228, 60, 63; Emerson v. Heelis, 2 Taunt. 38; 1 Esp. 101), yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone. Nor is an auctioneer a public officer in Maine, and a license required to him. 2 Laws of Maine, p. 390, ch. 134. But whether a public officer or not is a circumstance that does not generally appear to have changed the liability of the principal for his acts, if taking the benefit of them.

Treating his bids, then, as made by the auctioneer, not for himself, and the proof having failed to show that they were for a stranger, the only remaining hypothesis is, that they were made by him while agent of the owners, with a view to their benefit particularly, though with hopes of some incidental gain to himself in increased commissions. How does this view accord with the evidence of the transaction, taken as a whole? It is the only plausible aspect of it existing. The auctioneer found Wadleigh willing, on account of his quarrel with Veazie and his interests near the property, to go about $5,000 higher than the owners' estimate, and then found Veazie, for like reasons, willing to go still higher rather than let Wadleigh purchase the premises, for whom he supposed the auctioneer was bidding. In the eagerness of competition and with ample capital, Veazie seems in this way to have been induced to go even as high as $40,000, under the exciting but delusive and false impression, that he thus was obtaining the property against the efforts of Wadleigh or others, real bidders and real competitors. That *impression the [*153 auctioneer sought to create, and did create, by deceptive means.

Residing on the spot and acquainted with the character of the parties, he doubtless suspected that Veazie, rather than let the property go to Wadleigh, might bid very high—and perhaps, by rumor, even to $40,000—and proceeded, after the real bids were over at about $20,000, to make by-bids, either on his own judgment, to benefit his employers and increase his own commissions, or on the suggestions or signs of Stephen H. Williams, who was present as agent of the respondents, and is proved to have sat behind and near the auctioneer at the sale.

Veazie being thus situated so as to be more easily duped by either of them, and his condition and fears and anxieties being probably known to Head, if not to Stephen H. Williams, the auctioneer, by the means before described, procured for his employers nearly treble what they expected or what had been agreed on as the minimum price. The next inquiry is, if such a transaction renders the sale in point of law void, either for fraud or mistake. In some countries, under the civil law, a buyer of immovables is of right entitled to a rescission of the sale if it turn out, though without fraud, that the price was more than fifty per cent. above the true value. Pothier on Contracts of Sale, part 5, ch. 2, sec. 2; and see Domat, tit. 6, sec. 3. Here the price was at least a hundred per cent. above—yet there must in this country be fraud also, or a mistake.

Though no evidence is seen of fraud practiced by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer.

Does this state of things, then, in point of law, require the sale to be relieved against, on sound principles of equity and public morals?

By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud, and avoids the sale. Cowp. 395; 6 B. Monroe, 630; 11 S. & R. 86; 4 Harr. & McH. 282; Babington on Auctions, 45; 3 Bingh. 368; 2 Carr. & Payne, 208; 6 D. & E. 642; Rex v. Marsh, 3 Younge & Jerv. 331; 11

Moor, 283. He may fix a minimum price, or give notice of by-bids, and thus escape censure. Ross on Sales, 311; Howard v. Castle, 6 D. & 154*] E. 642. *But this shows that, without such notice, it is bad to resort to them. Crowder v. Austin, 3 Bingh. 368; 3 Younge & Jerv. 331. "The act itself is fraudulent," says Lord Tenterden. Wheeler v. Collier, 1 Moody & Malk. 126.

The by-bidding deceives, and involves a falsehood, and is, therefore, bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest real bidder, without puffing. 2 Kent's Com. 538, 539. It does not answer to apologize and say that by-bidding is common. For, observed Lord Mansfield, "Gaming, stock-jobbing, and swindling are frequent. But the law forbids them all." Cowp. 397. In Bexwell v. Christie, Cowp. 396, the pole star on this whole subject, it is said: "The basis of all dealings ought to be good faith. So more especially in these transactions, where the public are brought together in a confidence that the articles set up for sale will be disposed of to the highest real bidder."

Even in a court of law, Lord Kenyon has, with true regard to what is honorable and just, said: "All laws stand on the best and broadest basis, which go to enforce moral and social duties." Pasly v. Freeman, 3 D. & E. 64; see, also, Bruce v. Ruler, 2 Man. & Ryl. 3. And in Howard v. Castle, 6 D. & E. 642, he held that Lord Mansfield's doctrine, that all sham bidding at auctions is a fraud, was a doctrine founded "on the noblest principles of morality and justice."

Nor does it lessen the injury or the fraud if the by-bidding be by the auctioneer himself. He, being agent of the owner, is equally with him forbidden by sound principle to conduct clandestinely and falsely on this subject. Cowp. 397. All should be fair—above board.

Indeed, in point of principle, any fraud by auctioneers is more dangerous than by owners themselves. The sales through the former extend to many millions annually, and are distributed over the whole country, and the acts accompanying them are more confided in as honest and true than acts or statements made by owners themselves in their own behalf, and to advance their own interests. Great care is therefore proper to preserve them unsullied, and to discourage and repress the smallest deviations in them from rectitude.

Here the auctioneer virtually said to his hearers, when he made a fictitious bid: "I have been offered so much more for this property." But he said it falsely, and said it with a view to induce the hearers to offer still more. He averred it as a fact, and not an opinion; and as a fact peculiarly within his knowledge. Now if, under such an untrue and fraudulent asser- 155*] tion, *persons were persuaded to give more—relying, as they had a right to, on the truth of what was thus more within the personal knowledge of the auctioneer, and was publicly and expressly alleged by him, and being of course more willing to give higher for what others had offered more, who probably were acquainted with such property and had means to pay for it—they were imposed on and injured by the falsehood. It is said: "A naked, willful lie, or the assertion of a falsehood knowingly, is certainly evidence of fraud." 1 Const. R., S. Car. 8. The following authorities support the views here laid down: 3 Younge & Jerv. 331; Moody & Malk. 123; 2 Carr. & Payne, 208; Bexwell v. Christie, Cowp. 395; Howard v. Castle, 6 D. & E. 642; 1 Hall, N. Y. 146; 1 Dev. (N. C.) 25; 6 Clark & Fin. 444, 329.

Some cases and some reasoning found in them, attempt to sanction a contrary doctrine, if the by-bids were made merely to prevent a sacrifice of the property—a "defensive precaution"—but not otherwise. Connolly v. Parsons, 3 Ves. 625, note; Smith v. Clarke, 12 Ves. 477; Steele v. Ellmaker, 11 Serg. & Rawle, 86; Woodward v. Miller, 1 Collier, 279; 5 Maddock, 34.

These exceptions still concede that the by-bidding, when an artifice to mislead the judgment and inflame the zeal of others—"to screw up and enhance the price," in the language of Sir William Grant—is fraudulent and makes the sale void. 12 Ves. 483; 2 Kent's Com. 537.

Some cases hold, too, that the by-bidding will not vitiate, if real bids beside those of the vendee occurred after. 3 Ves. 620. But neither of these excuses or apologies existed here. These by-bids were made after some thousands of dollars had been offered over the value of the mills, as estimated by the owners themselves, and were palpably made "to screw up," or enhance the price. Any other excuses, which have ever availed, either are anomalies, or rest on a false analogy. Thus, at one time in England duties on auctions were remitted, if the property was bought in by the owner. 3 Ves. Jun. 17, 621; 1 Fonbl. Eq. 226. This, however, was founded on the theory that no sale had taken place, and hence no duty should be paid, rather than that a sale under such circumstances was valid. It, therefore, strengthens rather than impairs the view taken of the present case.

It is no answer to this reasoning to say, as has been done, that Veazie bid voluntarily, or expressed satisfaction with his purchase, and was in haste to close it up. Because, in all this, he was laboring under a misapprehension that others *had honestly valued the prop- [*156 erty near the same price, and been in truth as anxious as himself to bid it off—and because he believed that he had thus succeeded against a real rival in securing the mills and some incidental advantages—when in reality there had been no such honest bids over $20,000, and he had been contending against a man of straw falsely set up by the auctioneer. In short, he had been imposed on by the agent of the respondents; and that by virtual falsehood, and in a point material, and in a manner likely to mislead. He was not allowed to exercise his judgment, and bid higher or not on the truth—on facts—but on falsehoods. 6 D. & E. 644. He was not the highest bidder at $40,000, except through deception wrought on him fraudulently. Ibid. Secrecy was practiced—privacy as to the real offers—stratagem—which, as already seen, is in the teeth of the great principles of a valid public sale. Bexwell v. Christie, Cowp. 396; 2 Kent's Com. 539.

A technical objection to the quantity rather than weight of the evidence has been urged,

which it may be well to dispose of here. It is said that fraud is denied as to the defendants, and is not proved against them by two witnesses. It is conceded that the denials that the respondents were personally guilty of fraud, or expressly directed falsehood and fraud, are not overcome, nor are they in controversy. But it is the puffing or by-bidding of the auctioneer, their agent, which is in controversy as a fact. As to that they can make no denial from any personal knowledge pro or con—not having been present; and hence their answer furnishes no evidence in respect to it, as an independent fact. But this fact being substantiated by the agent, and the matter proved by others, as to no real bids being made over $20,000, and by various other circumstances in the case, the amount of evidence for it is ample. It is true, they deny that they ordered it. It is to be remembered, however, that they are not held liable here merely by declarations of their agent, when not ordered by them or perhaps known to them at the time—though it is a sound doctrine that the verbal declarations of an agent at a sale often bind the principal. 1 Ves. & Beames, 209; 6 Clark & Fin. 448, 449; Story on Agency, sec. 107. And that the agent is bound to disclose all and to act as the principal is when present, and selling. 1 Metcalf, 560; Hough v. Richardson, 3 Story's R. 698; 3 Hill, 260; 1 Wood. & M. 353. And that a principal so acting in person cannot be justified in asserting what is false, and by which another is injured. Pasly v. Freeman, 3 D. & E. 51; Vernon v. Keys, 12 East, 632; 2 East, 92. And 157*] that what the *vendor may not do in person, or may not employ others to do in his absence—that is, make by-bids to enhance the price—his agent, the auctioneer, cannot rightfully do.

But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in statu quo; or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.

The principal in such case is profiting by the acts of the agent, and is hence answerable civiliter, for the acts of the agent, however innocent himself of any intent to defraud. 13 Wendell, 513; 1 Vt. 239; 1 Salk. 289; 7 Bingh. 543; Mason et al. v. Crosby et al. 1 Wood. & M. 342, and cases there cited; Doggett v. Emerson, 1 Ib. 1; Story on Agency, sec. 451; Doggett v. Emerson, 3 Story's R. 700; Olmsted et al. v. Hotailing, 1 Hill, 317; Taylor v. Green, 8 Carr. & Payne, 316. Whether the principal knew all those acts or not, is not the test in this case, as in 2 East, 92, notes, and 13 East, 634, note, though it may be in some others, as in 5 Bingh. 97; 6 Clark & Fin. 444.

But the test here is, Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. Wilson v. Fuller, 3 Adolph. & Ell. N. S. 68.

The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering.

Some miscellaneous objections to these results are yet to be considered. It is said to be justly deemed an extraordinary power in a court of chancery to rescind contracts at all, instead of leaving parties to a suit at law for their damages. Sugden on Vendors, 392; 11 Peters, 248. And that a fraud or mistake must be very manifest to justify it. 10 Price, 117; 13 Price, 349; 7 Cranch, 368; 2 Johns. Ch. 603; 12 Ves. 477. And that the burden of proof to show these grounds for a rescission rests on the plaintiff, and not on the defendant. Grant this. Yet all requirements appear fulfilled here. On satisfactory proof, also, executed, as well as executory, contracts may in such cases be set aside. One case is reported of its being done after twenty years. 8 Price, 125. And a defendant is likely, in most cases, *to [*158 suffer no more by a rescission in chancery, than by damages adequate to the loss or injury.

There is next the objection, that too long a time had elapsed here before seeking redress. More force would attach to this if Veazie had discovered the imposition sooner. The sale happened January 1st, 1836; the discovery of the fraud was after January 1st, 1840, and this bill was filed July, 23d, 1841, after demanding redress of the respondents in January, 1841.

Having effected his object in the purchase—to obtain the property rather than let his rival get it, who, he doubtless supposed, was bidding against him—and being a man of ample means, Veazie submitted, as feeling bound, to the excess of price. Nor did he suspect any imposition till informed of it within a few years; and then he seasonably applied for relief, and should not be barred from obtaining it by any lapse of time while the fraud or mistake as to the bids not being real remained undiscovered. Doggett v. Emerson, 3 Story's R. 740; Daniels v. Warner, 1 Wood. &. M. 90; Doggett v. Emerson, Ibid. 1; 8 Clark & Fin. 651; 1 Russ. & Milne, 236.

It is said that, after this lapse of time, the plaintiff is not in a proper condition to restore the mills. 16 Maine, 42. He is less likely to be, if they are ordered to be restored; but that is the fault of the fraud, and the concealment of it, rather than his fault. The defendant, too, if the property has deteriorated in value, is in no worse a condition that he would be where an avoidance of the sale takes place at law for fraud.

If the plaintiff has sold the property, or disabled himself from restoring it, when ordered by a decree, then the evil consequences will light on himself, and not the defendants. That is what is meant by inability to restore the property in 8 Cranch, 476. Nor is there any need he should aver substantively in his bill that he can restore it, this being presumed as a usual, if not necessary, consequence, when he applies to have the contract rescinded, and everything placed in statu quo.

The last exception to a recovery here by the plaintiff is, that the release to Head, the auctioneer, should be considered as discharging the respondents also. Neither the design of the parties to the release, nor the agreement or

consideration to make it, extended beyond the auctioneer. It was suicidal for the plaintiff to pay for a release to get a witness in a case, which release would destroy the case itself. 2 Iredell, 219. Sitting as we do in a court of equity, we cannot, without an open and gross departure from equity, give to the release any effect beyond the design in making it, and the 159*] literal words of it, reaching *only to the discharge of the release. It is a strict rule at law, and not of equity, which goes further in any case. 7 Johns. Ch. 207; 18 Wendell, 399; 22 Pick. 308. The operation was meant to be like a covenant not to sue him; and such a covenant is no bar to suing others when jointly liable. Ferson v. Sanger, 1 Wood. & M. 138.

Again, in the present instance, there was no joint liability at law by the respondents and the auctioneer. Their accountability was separate, and resting on different grounds; his on actual falsehood—theirs on the adoption of the benefits of it, and the accountability thus arising for it. The release of one, therefore, is not like the release of a joint contractor or joint trespasser. 1 Anstruther, 38. And in equity it may well be limited to the person released, and the person paying the consideration for it. Hopkins, 251, 334.

Beside this, Head was in law a competent witness for Veazie, without any release, his interest being against Veazie. This conclusion as to the release is an answer, likewise, to the objection, that Head ought to have been made a party to this bill. His liability resting on a separate ground, and not joint, he could not be united at law, nor is it always done in equity under like circumstances. See Mason et al. v. Crosby, 1 Wood. & M. 342; Ferson v. Sanger, Ibid. 138; Jewett v. Conrad, 3 Wood. & M.——; Small v. Atwood, 6 Clark & Fin. 352, 466.

All that remains is to decide upon the most equitable course to carry these views into effect, consistent with sound principles. One mode is to set aside unconditionally the whole sale, for the fraud practiced in it, and have the mills reconveyed by Veazie, and the money, notes, and mortgage returned by the respondents. Another mode is to treat as unjust only so much of the proceedings as was fraudulent; that is, the excess of price over $20,000 obtained by by-bidding, and to cause that excess only to be refunded.

To attain this last result in some way is preferable, considering the length of time which has elapsed here, and the probable deterioration in value of the mills by use and the fall of prices in the market since the inflation of 1836, and, though objected to by the respondents, is likely more than the other to secure them against loss.

To restore the excess of consideration, or to restore all and have back the mills, has in other respects much the same effect. The plaintiff in either way will obtain nothing which did not belong to him, nor the respondents lose anything which was theirs before the falsehood 160*]or mistake. It is, at the same time, * gratifying to find, that, by either of these courses, no incidental loss or inconvenience will fall on the respondents, except what has been occasioned by the misbehavior of their own agent, and the fruits of which they accepted, and which they cannot in foro conscientiæ retain against those injured by that misbehavior.

But there is one equitable operation before named, in relieving only as to what is fraudulent, which makes it most desirable, if legal. It is objected, first, that it will be giving damages, like a court of law, to the extent of the wrong, rather than rescinding the whole contract on account of fraud or an evident mistake.

We are inclined to think, unless under peculiar circumstances, that damages cannot be given in a court of equity, but the parties must be left to a court of law to recover them. 17 Ves. 203; 1 Russ. & Mylne, 88; 2 Keen, 12; 1 Cowen, 711; 5 Johns. 193. The exceptions of damages in part, under certain circumstances may be seen in the following cases, and the authorities there quoted: 2 Story's Eq. Jur. secs. 711, 779, 788, 794; 4 Johns. Ch. 460; 14 Ves. 96; 9 Cranch, 456.

But the course we propose, to have the sale stand so far as not fraudulent, and to make the defendants restore only what was obtained by the puffing and fraud, is not giving damages either eo nomine or in substance. It requires to be surrendered merely the money and interest on it, and the notes and mortgage unpaid, which were obtained by the deception of by-bidding. This, among other things, is prayed for in the bill. This course will only carry out the established rule on this subject, laid down in elementary treatises—that "the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith." 1 Story's Eq. Jur. sec. 420; 1 Maddock's Ch. Pr. 209, 210; Fonbl. Eq. book 1, ch. 3 and 4, notes.

Everything is thus relieved against, to the extent to which it is wrong or fraudulent, but nothing beyond it. Jopling v. Dooly, 1 Yerger, 289.

It is suggested, however, secondly, that this course does not set aside the whole sale, or whole contract, which ought to be done, if intermeddled with at all. It is true that, generally, a part of a deed, or contract, or sale, cannot be avoided without avoiding the whole. 2 Ves. Jun. 408; 1 Maddock's Ch. 262. Though at times there may be a division or break in them where fraud begins and good faith ends, and where beyond that line only it would seem just to annul them. 1 Yerger, 289.

*But if the whole must be annulled [*161 or none, it can be here, and yet equitable terms imposed on the plaintiff to let such part of the transaction remain undisturbed as is consistent with equity and good faith. This is justified, not only by the general principle that he must do equity who asks it (4 Peters, 328), but that it is one of the leading principles on this particular subject in a court of chancery, "if it should rescind the contract, to allow it only upon terms of due compensation, and the allowance of countervailing equities." 2 Story's Eq. Jur. sec. 694; Harding v. Handy, 11 Wheat. 126; Bromly v. Holland, 5 Ves. 618.

So it is said, that, "when the judgment debtor comes into court, asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify

or grant his prayer upon such condition as justice demands." The Mechanics' Bank of Alexandria v. Lynn, 1 Peters, 384.

This court on its equity side, says Chief Justice Marshall, is "capable of imposing its own terms on the party to whom it grants relief." Mar. Ins. Co. v. Hodgson, 7 Cranch, 336, 337. And it will not grant relief even in fraud, unless the party "wishing it will do complete justice." Payne v. Dudly, 1 Wash. Va. 196; Semb. 1 Johns. Ch. 478; Scott v. Nesbit, 2 Cox, 183. Here, then, in the decree, we can set aside the whole sale and contract; but, instead of doing it unconditionally, the plaintiff should be required first to do equity, and to allow any countervailing equities on the part of the respondents—which are, to let the sale itself stand at what was fairly bid for the property, and require only the residue of the consideration, being entirely fraudulent, to be restored. 1 Story's Eq. Jur. secs. 344, 699, and cases there cited; McDonald v. Neilson, 2 Cowen, 139, 192.

Thus, a borrower of money on usury will not be allowed relief in chancery, except on the payment of principal and legal interest. Scott v. Nesbit, 2 Cox, 183; 2 Bro. Ch. Cas. 649; 2 Story's Eq. Jur. sec. 696; Stanly v. Gadsby, 10 Peters, 521; Jordan v. Trumbo, 6 Gill & Johns. 106; 3 Ves. & Beames, 14; Fanning v. Dunham, 5 Johns. Ch. 143. Like terms are imposed on borrowers under void annuity bonds. See same cases. So, by analogy, the cases of specific performance frequently exhibit the enforcement of a part only, when just. Pratt et al. v. Law et al. 9 Cranch, 456; Hargrave v. Dyer, 10 Ves. 506; Harnett v. Yielding, 2 Sch. & Lefr. 553; 1 Maddock's Ch. 431. So, in respect to injunctions, one may issue against a judgment for land, and stay execution for a part, and allow it to stand for the residue. Dunlap et al. v. Stet-
162*] son, 4 Mason, C. C. *364. See other illustrations and cases, Com. Dig. Chancery, Appendix, 6 and 18; Fildes v. Hooker, 2 Meriv. 427, 14 Ves. 91; Wharton v. May, 5 Ves. 27.

The form of a decree nearly adapted to this case may be seen in Fanning v. Dunham, 5 Johns. Ch. 146.

The last real bid here being in some doubt as to its amount, whether eighteen or twenty thousand dollars, we think the weight of evidence is in favor of the last sum, and the computations are therefore to be made on that basis.

The judgment below must therefore be reversed, and a mandate sent down directing the proper decree, in conformity to these views, to be entered for the plaintiff.

Mr. Chief Justice Taney, Mr. Justice McLean, and Mr. Justice Grier dissented from this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the pretended sale of the two mill privileges, at and for the sum of $40,000, as set forth and described in the pleadings and proofs in this cause, was fraudulent, and should be set aside; but as equitable terms imposed on the complainant, he is to let the sale stand for the sum of $20,000, fairly bid by him; and that the balance of the moneys paid by the complainant over and above the said $20,000 should be refunded to him by the defendants, with legal interest thereon, and that the notes and securities given for the payment of any part of such excess should be cancelled and given up by the defendants to the complainant; that the defendants should pay the costs in this court, upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court.

Whereupon, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court dismissing the complainant's bill be, and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said Circuit Court ought to have rendered herein, doth now here order, adjudge and decree, that the aforesaid sale, as above set forth, be, and the same is hereby rescinded and set aside; that the said complainant shall, as equitable terms, retain the said property at and for the said sum of $20,000, part of the moneys paid by him to the said defendants, and that *the said [*163 defendants shall, on or before the third day of that term of the said Circuit Court next ensuing the filing the mandate of this court in said Circuit Court, refund and pay to the complainant all such sums of money over and above the said last mentioned sum of $20,000, as they or either of them shall have received from the said complainant on account of the purchase of said property, together with legal interest thereon from the time or times at which they were so received by the said defendants, and that the said defendants shall, on or before the same day of the same term of the said Circuit Court, cancel and deliver up the notes and securities given for the payment of any and every portion of the excess over and above the said $20,000. And this court doth further order, adjudge and decree, that the said defendants do pay the costs in this court upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court. And this court doth further order, adjudge and decree, that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to carry this decree into effect, and with power to make all such orders and decrees as may be necessary for that purpose.

JAMES PHALEN, Plaintiff in Error,
v.
THE COMMONWEALTH OF VIRGINIA.

Virginia statute limiting time of act authorising turnpike company to raise money by lottery to repair road, constitutional.

In 1829 the Legislature of Virginia passed an act appointing five commissioners to raise by way of lottery or lotteries the sum of $30,000 for the

benefit of the Fauquier and Alexandria Turnpike Road Company. Two of the commissioners declined to act, and the remaining three took no steps to execute the power for a long time.

On the 25th of February, 1834, the Legislature passed an act for the suppression of lotteries, which prohibited all lotteries and sale of lottery tickets after the 1st of January, 1837, saving, however, contracts already made which were by their terms to extend beyond the 1st of January, 1837, or contracts hereafter to be made under any existing law, which were to extend beyond that day. These were permitted to go on until the 1st of January, 1840.

On the 11th of March, 1834, the Legislature passed an act appointing two commissioners in the place of the two who had declined to act.

On the 19th of December, 1839, these commissioners entered into a contract with certain persons, authorizing these persons to draw as many lotteries as they might think proper, without limitation as to time, upon the payment of a certain sum per annum to the commissioners.

The right to draw lotteries under the Act of 1829 is not a contract the obligations of which were impaired by the Act of 1834.

It may be doubted whether it constitutes a contract at all. But if it was a contract, it was not unlimited as to time, and the Act of 1834, al-
164*] lowing the grant to continue *for a certain time, stands upon the same ground as acts of limitation and recording acts, which this court has said a State has a right to pass.

The privilege granted by the Act of 1829 had become obsolete from non-user, and the Act of 1834, appointing two commissioners, did not fully revive it, because the two acts of 1834 must be taken together; and the limitation contained in one must apply to the other.

The courts of Virginia have so construed these statutes, and this court adopts their construction.

HIS case was brought by a writ of error to the General Court of Virginia. The plaintiff in error had been convicted in the Superior Court for the County of Henrico and city of Richmond, on an indictment for selling lottery tickets contrary to the Act of Assembly of Virginia, passed on the 25th of February, 1834. The case was removed by writ of error to the General Court of Virginia, where the judgment was affirmed. That being the highest court of criminal jurisdiction in Virginia, the plaintiff in error brought his case into this court by a writ of error under the twenty-fifth section of the Judiciary Act; and now alleged that the Act of 25th February, 1834, under which he was convicted, is void, being contrary to the tenth section of the first article of the Constitution, which forbids a State to pass any "law impairing the obligation of contracts."

On the trial of the case below, the jury found a special verdict setting forth at length the several acts of Assembly of Virginia, and the contract under which the defendant in the enactment claimed a right to sell lottery tickets and to be exempted from the penalties of the Act of February, 1834, under which he was indicted.

It appears that in December, 1828, the President and Directors of the Fauquier and Alexandria Turnpike Road presented a petition to the Legislature of Virginia, setting forth the importance and value of their road to the public; that by the exertions of the directors and a few of the stockholders, and on their responsibility, money had been raised, and the road put in excellent condition, except three miles, which required much repair; and asked a law authorizing a lottery to raise $30,000.

On the 30th of January, 1829, the Legislature passed an act appointing five commissioners, "whose duty it shall be to raise, by way of lottery or lotteries, the sum of $30,000, for the purpose of improving the Fauquier and Alexandria Turnpike Road." After directing the commissioners to contract with fit persons for managing the lotteries, and to take bonds for the faithful performance of their duties, they are ordered to "pay over to the President and Directors of the said Fauquier *and Alexandria Turnpike Road Com- [*165
pany," the money raised by said lotteries, "to be by them appropriated in the improvement and repair of said road."

Two of the commissioners appointed by this act declined acting under it, and nothing was done under the license or authority granted therein during the five years which intervened between that time and the passage of the Act of the 25th of February, 1834, for the suppression of lotteries.

This act prohibits, under severe penalties, all lotteries and sale of lottery-tickets after the first day of January, 1837, with these provisos: 1st. "That nothing herein contained shall be construed to extend to or interfere with contracts already made for the drawing of any lotteries, the drawing whereof, by the provisions of such contracts, shall extend to a period beyond said first day of January, 1837;" and 2d. "That nothing herein contained shall be construed to extend to or interfere with any contract which may hereafter be made under or by virtue of any existing law authorizing the same, for the drawing of any lottery, the drawing whereof shall not extend beyond the first day of January, 1840."

A few days after the passage of this act, on the 11th of March, 1834, an act was passed appointing two commissioners in place of those who had declined, "to carry into effect the Act of 30th of January, 1829."

Nothing was done under these acts till the 19th of December, 1839, when the commissioners entered into a contract with the plaintiff in error and another, authorizing them to draw as many lotteries as they think proper, paying to the commissioners the sum of $1,500 a year, with covenants to increase the consideration, provided the Legislature of Virginia should pass an act exempting these lotteries from the penalties of the Act of February, 1834, or if this court should pronounce the Act of 1834 unconstitutional.

It is by virtue of this contract with the commissioners, that the plaintiff in error claims immunity; contending, "that the Act of 1829 confers a valuable right or franchise on an existing corporation, without limitation of time; that it is a contract; and that the Act of 1834 has attempted to limit and curtail the previous grant, and injuriously to abridge it, and is therefore void, as impairing the obligation of a contract."

The case was argued by Mr. Z. Collins Lee for the plaintiff in error, no counsel appearing for the defendant.

The points made by him were the following:

That this court has jurisdiction on this writ of error, because *the decision in the [*166
General Court involved the construction of a clause in the Constitution, and the decision was against the title or right specially set up or claimed under such clause of the Constitution.

That the Act of 1829 (sec. 10) confers a valuable right or franchise on an existing corporation, to wit, the Fauquier and Alexandria Turnpike Company, duly incorporated by the act of Virginia.

This grant of the right to raise the sum of $30,000 is unconditional, and without limitation of time, requiring only the action of the commissioners; and the law contemplated on its face the raising of the money by lotteries, from time to time, and confers the power on the commissioners to make just such contracts as they think proper. The Legislature, in its sovereignty, could do this. 4 Gill & Johns. 150.

The State had no power to revoke this grant because—

1. It is presumed to be accepted by the turnpike company, without proof. 12 Wheat. 70-72; Angell & Ames on Corp. 89, etc.

2. Special verdict shows, that the law passed on petition of the president and directors; and, moreover, that, relying on the terms of this grant, the company did, prior to the 25th of February, 1834, enter into contracts, and incur debts, to be paid out of this lottery. This vested an interest in the corporation. 11 Gill & Johns. 504.

3. The state is as much bound by her contracts, express or implied, as an individual. 4 Peters, 560; 4 Gill & Johns. 128; 9 Gill & Johns. 404, 405; 6 Cranch, 128. That this law of 1829 is a contract, see, also, 9 Cranch, 49; 2 Hayw. 310; 1 Murphy, 58; 11 Peters; 9 Gill & Johns. 408.

4. The Act of 25th February, 1834, impairs the rights vested under the previous contract.

The second proviso in this act excepts all contracts thereafter made, by virtue of any existing law for the drawing of lotteries, not extending beyond the 1st of January, 1840. See Green v. Biddle, 8 Wheaton, 1; 3 Wash. 319.

Yet if the contract under which this lottery was drawn be duly authorized, in all its terms and duration, by the Act of 1829, then the Act of 1834 has attempted to limit and curtail the previous grant, and injuriously to abridge it.

But the Act of 11th March, 1834, appointed two commissioners in place of those who had resigned, and therefore there could be no drawing until the vacancies were filled under the Act of 1829.

Hence the law of 11th March, 1834, which 167*] is subsequent *to the penal law of 25th February, 1834, appoints two commissioners to fill the vacancies and to carry the law of 1829 into effect; thus furnishing a legislative declaration, that the Act of 1829 was to be carried into effect. But the law of February, 1834, only allows time to carry the Act of 1829, into effect until the first day of January, 1837.

5. The contract was made in a reasonable time after the Act of 11th March, 1834, and was duly authorized by law in all its terms and duration; and the penalty sought to be enforced under the Act of February, 1834 (which directly prohibits all lotteries after the 1st of January, 1840), is not to be enforced, because it would violate the antecedent contract, made by the State in 1829.

Mr. Justice Grier delivered the opinion of the court:

It might admit of some doubt whether the Act of 1829 grants any franchise, or constitutes any contract, either with the commissioners therein appointed, or with the turnpike corporation. It imposes certain duties on each. The commissioners are required to use the license thus given, not for their own benefit, but for a public purpose. The money procured by the proposed lotteries is to be paid over to the Fauquier and Alexandria Turnpike Road Company, to be by them expended "in the improvement and repair of the road."

It is true, that the corporation might receive greater benefits from the repair of the road than the other citizens of the State; but the act imposed no duty on them as a previous consideration. They are not required to make any repairs till they receive the money.

But assuming that this would be too narrow a construction of this act, and that it conferred a privilege or benefit on the corporation in the nature of a franchise or irrevocable contract, yet in its very nature it could not be considered illimitable as to time. On the contrary, the object for which the license was granted called for immediate action. "Three miles" of a great public thoroughfare are represented to be out of repair, and the company without immediate means to effect it. The sum to be raised being fixed and finite, and the subject of its application demanding immediate attention, the time within which the license is given cannot claim to be unlimited. And yet the commissioners and corporation have suffered eleven years to pass, before any attempt is made to perform the duty imposed on them, or avail themselves of the license or franchise conferred, and now claim a further term of twenty years, to raise the money and repair the road.

*When the Legislature of Virginia [*168 passed this most salutary act for the suppression of lotteries, they, with commendable caution, protected all vested rights. And notwithstanding the neglect to perform the duties imposed by the Act of 1829, the Act of 1834 does not revoke the grant or annul the license, but limits the time to six years within which the duties must be performed and the privilege exercised.

It has been often decided by this court, that the prohibition of the Constitution now under consideration, by which State Legislatures are restrained from passing any "law impairing the obligation of contracts," does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this, whether the deed be dated before or after the act. Acts of limitation also, giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts, after a certain time, have received the sanction of this court. Such acts may be said to effect a complete devesture, or even transfer, of right, yet, as reasons of sound policy have led to their adoption, their validity cannot be questioned.

What is the act under consideration, but a limitation of the time within which a certain

privilege or license, limited in its very nature and purpose, may be exercised? If reasons of sound policy justify legislative interference with contracts of individuals, how much more will it justify the limitation of licenses so injurious to public morals.

The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.

It is a principle of the common law, that the king cannot sanction a nuisance. But, without asserting that a legislative license to raise money by lotteries cannot have the sanctity of a franchise or contract in its nature irrevocable, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy, as other acts of limitation which have received the sanction of this court.

There is, also, another view of this case, 169*] which concludes *the plaintiff in error from the benefit of a defense under this clause of the Constitution, even if it were tenable. The Act of 1829 had become obsolete by non-user. Without further legislation, the license granted by it could not be exercised. The plaintiff in error cannot claim a right to sell lottery tickets without invoking the aid of the Act of 11th March, 1834, passed a few days after the "act suppressing lotteries." The courts of Virginia have very properly decided, that "this dormant right to draw the lottery which was revived by the Act of March, 1834, must be taken as subordinate to, and limited by, the act of the 25th of the previous month; that those statutes must be taken in pari materia, and receive the same construction as if embodied in one act; that there is nothing repugnant in the provisions of the one to those of the other, where the first is taken as limiting the time within which the right under the second is to be exercised."

This construction of their statutes by the courts of Virginia is not only just and correct, but is conclusive on this court and on the case, as it estops the plaintiff in error from averring against the constitutionality of the limitation under which he claims his privilege.

The judgment of the General Court of Virginia is therefore affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the General Court of Virginia, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said General Court of Virginia in this cause be, and the same is hereby affirmed, with costs.

*THOMAS H. McCLANAHAN, Administrator of William J. McClanahan, Deceased, Complainant and Appellant, [*170

v.

RICHARD DAVIS, William D. Nutt, Administrator of George Coleman, Deceased, Elizabeth Blacklock, the Widow and Relict of Nicholas F. Blacklock, Deceased, Nicholas F. Blacklock the younger, Jane Lowe, late Jane Blacklock, David Lowe, her Husband, and Elizabeth Fox, late Elizabeth Blacklock, the said Nicholas F. the younger, Jane, and Elizabeth being the Children of the late Nicholas F. Blacklock the elder, Deceased, Defendants.

Virginia law—husband's right in chattels of deceased wife after life estate of third person—reducing to possession—Quære as to necessity of administration.

The assent of an executor must be obtained before a legatee can take possession of a legacy. But this assent may be implied, and an assent to the interest of the tenant for life in a chattel inures to vest the interest of the remainder. Therefore, where a bill averred the possession of the subject of the legacy by the life tenant in pursuance of the bequest in the will, and this bill was demurred to, it is sufficient to raise a presumption that the possession was taken with the assent of the executor.

By the laws of Virginia, where there is a tenancy for life in a slave, with remainder to the wife of another person, the interest of the husband in the wife's remainder is placed upon the footing of an interest in a chose in action. If, therefore, he survives the wife, he may reduce the property into possession at the expiration of the life estate; but if he be dead at such expiration, the property survives to the wife, and on her death passes to her legal representative as part of her assets.

Quære, whether the husband or his personal representative is not bound to administer upon the wife's estate, before bringing suit to recover property so situated in the State of Virginia.

Where there was no direct or positive averment that the defendants, or either of them, had any interest in the property claimed, or that it was in their possession, no ground of relief against those parties was shown, and the right to a discovery as incidental thereto, failed also.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and sitting as a court of equity.

The object of the bill was to reclaim the possession of certain slaves, and to compel an account and compensation for the value of certain other slaves, all of which were alleged to be the property of the complainant and appellant, in his character of administrator.

The facts were these:

In 1797, one Elizabeth Edwards, an inhabitant of Northumberland County and State of Virginia, by her last will and testament, bequeathed to her daughter, Sarah Nutt, a certain negro girl named Lavinia, a slave for life, with her future increase, for and during the life of

Note.—Of the title of executors in property left as legacies, and the necessity of their assent to vest the title in the legatee—assent which is once given cannot be retracted—Equity proper tri-

said Sarah Nutt, and at her death to Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix.

In the same year, viz., 1797, the testatrix died, and in June, 1797, the will was duly proved at the court of monthly session, and letters testamentary granted to Griffin Edwards, one of the executors named in the will.

171*] *At some period of time after the death of the testatrix, the record did not show when, Sarah Nutt, the daughter, removed the girl Lavinia from the County of Northumberland to Alexandria, in the District of Columbia, and there sold her to one Nicholas F. Blacklock. After such sale, Lavinia had a numerous family of children and grandchildren.

Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix, intermarried with William J. McClanahan, and died, leaving one child, an infant, who survived its mother but a short time. William J. McClanahan also died after his wife and child, but before Sarah Nutt, without having reduced any of the said slaves into his possession. After his death, the complainant administered upon his estate. The order in which the parties died was according to the following numbers:

Elizabeth Edwards (1)
|
Sarah Nutt (5)
|
Wm. J. McClanahan (4) = Elizabeth Faunt [Nutt (2)
|
Daughter (3)

Sarah Nutt, the last survivor of the five, died in 1840, and after her death Thomas H. McClanahan took out letters of administration upon the personal estate of William J. McClanahan, and also upon the personal estate of Elizabeth F. McClanahan, his wife; both letters being taken out from Northumberland County Court in the State of Virginia.

In April, 1845, the administrator filed his bill against all the representatives of Nicholas F. Blacklock, who was dead; and also against all those persons who were alleged to have purchased any of the slaves. The bill recited the above facts and averred, that, after the decease of the tenant for life, the rightful ownership of the slaves passed to William J. McClanahan, notwithstanding he never had the slaves aforesaid in his possession, by virtue of his intermarriage with, and survivorship of, his said wife and infant daughter, and only child, by the said Elizabeth, his aforesaid wife, according to the form and effect of the statute in such case made and provided, entitled "An Act to reduce into one the several acts directing the course of descents," passed the 8th of December, 1792. The said life estate having ceased and determined, as your orator avers, on the —— day of ————, 1840, by the death of the said Sarah Nutt, and that your orator, as the administrator of the said William J. McClanahan, deceased, now has good right and title to sue for the recovery and possession of the said Lavinia, and her children and grandchildren, no right of action having accrued until after the death of the said Sarah Nutt.

*The bill then prayed for a discovery [*172 of the number of slaves, in whose possession they were, and for an account of the value of their services, etc., etc.

In October, 1845, the defendants filed the following demurrer to the bill:

"These defendants, respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show—

"1st. That the said complainant hath not, in and by said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is sought and prayed for, from and against these defendants.

"2d. That the said complainant hath not, as appears by his said bill, made out any title to the relief thereby prayed.

"3d. That the said complainant, by his own showing in said bill, is not entitled to the discovery and relief therein prayed, but is barred therefrom by lapse of time, and the statute of limitation in such cases made and provided. Wherefore, and for divers other errors and imperfections, these defendants humbly demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray hence to be dismissed with their reasonable costs in this behalf expended.

"Francis L. Smith,"
"Solicitor for Defendants."

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bunal to enforce legacy before assent—after assent, action at law maintainable—right of legatee before assent—action to compel legatee to refund, for payment of debts.

Goods, chattels, and sums of money, to legatees, all pass to the executor, and he has them in nature of a trustee; and he alone has title in law to them, and nothing passes to the legatee, nor can any legatee take anything bequeathed to him, without the executor's assent. 6 Bac. Abr. tit. Legacies (L.); Godolph. Orph. Leg. 148; Off. Ex. 27; 2 Williams on Ex'rs, 1207, 1235, 1237, 1239, 1748; Dayton's Surrogate, 2d ed. 236; Redfield's Law of Surrogates, 318; 2 Perry on Trusts, sec. 809; Willard, Eq. Jur. 498, 500, 501; 2 Madd. Ch. 1, 2, Co. Litt. 111; Moore v. Barry, 1 Bailey, 504; Wilson v. Bird, 1 Harr. & J. 140; 3 Call, 220.

It is the executor's duty to apply the whole personal estate, in the first place, to the payment of the debts of the deceased, without regard to the testator's having, by his will, directed that a portion of it shall be applied to other purposes. He, necessarily therefore, must have title to the whole, and may dispose of it; and the portion of it bestowed as legacies cannot be followed by a legatee, either general or specific, into the hands of the alienee. Wms. on Ex'rs, 706, and cases cited: Knight v. Yarborough, 4 Rand. 566; McAllister v. Montgomery, 3 Hayw. 94; Dayt. Surr. 2d ed. 230; Tole v. Hardy, 6 Cow. 339; Wilson v. Rine, 1 Harr. & J. 138.

And therefore if the legatee take possession of the thing devised, without the assent of the executor, he may have an action of trespass against him. Dyer, 254; Kellw. 128; Dayt. Surr. 2d ed. 412.

The legatee cannot take the legacy without the assent of the executor. But as the executor only takes the title as trustee, and as it is the will of the testator which gives the interest to the legatee, the law does not require any exact form in which such assent must be given. Hence any expression or act done by the executor which shows his concurrence or agreement to the thing devised, will amount to an assent. Off. Ex. 29, 322; Godolph. 148; Plow. 53, 525; March. 136, 137, 138; 6 Bac. Abr. 331, tit. Legacies (L.); 1 Vern. 90, 94, 460; 2 Vent. 358; 5 Co. 29; 4 Co. 18; 8 Co. 96; Toushst. 455, 456; Cowp. 293; Lampet's case, 10 Rep. 47 a, 52 b; 1 Leon. 216, 129; Cro. Eliz. 602; Paramour v. Yardley, Plowd. 539; Younge v. Holmes,

In May, 1846, the cause came up for argument, when the court sustained the demurrer and dismissed the bill.

The complainant appealed to this court.

The cause was argued by Mr. Neale for the appellant, and Mr. Francis L. Smith for the appellees.

Mr. Neale, for the appellant, in reply to the first cause assigned for demurrer in the appellees' printed brief, argued, that notice could not have been given the purchasers of the slave Lavinia and her offspring, because those in remainder were kept in profound ignorance of the sale by the life tenant, until after her death, which happened in the year 1840; and as to its operating a fraud on the purchasers, he was at a loss to imagine how a charge so foul could be imputed to the appellant, or those whose interests he represented. He thought that the late Sarah Nutt, the life tenant, was alone properly obnoxious to the imputation of fraud, for that 173*] she, and she only, *was concerned in the transaction. That she was entirely regardless of her mother's last solemn bequest, and equally reckless of her own child's legitimate rights; and he asked, was this a "mother's love," which, in the beautiful language of poetry, is said to be a "living fountain of undying waters." So far from it, he contended, that the mean and detestable passion of avarice, which converted all the noble and generous feelings of our nature into the meaner passions of the soul, at once, in this case, quenched and dried up forever the holy fountain, which otherwise would have been, as it should be, a perennial stream.

And in regard "to the general policy of the laws of Virginia, in protecting bona fide purchasers of personal property without notice"—as reported in 5 Leigh, 520—he denies that it applied to the case then under consideration, reminded the opposite counsel of the maxim, Caveat emptor, and argued, that, while the law had been fully complied with as regarded the will of Elizabeth Edwards, not so as regarded the mortgage mentioned and reported in 5 Leigh, and that the two cases were entirely dissimilar, and then proceeded to show it by comparing them.

To the second cause of demurrer he insisted, that "every preliminary act necessary to make the plaintiff's title complete" was to be found in the bill. And to the objection that the bill did not aver the assent of the executor of Elizabeth Edwards, who died in the year 1797, and that, without such assent being averred, an action of detinue could not be sustained, he contended, that the possession of the slave Lavinia, from the time of the death of the testatrix in the year 1797, by the life tenant, until her death in 1840, was sufficient presumptive evidence at least of such assent, but at the same time he argued that no such averment was necessary in a chancery suit, but admitted that such assent was necessary, and should be averred, in a court of law. He also contended, that the title to the slaves in remainder vested in Elizabeth F. Nutt at the death of Elizabeth Edwards, and that it also vested in the appellant's intestate, upon his intermarriage with the said Elizabeth F. Nutt; that the possession of the life tenant was the possession of those in remainder; that the same remark applies with equal propriety to the purchasers, who by the purchase acquired no greater title than Sarah Nutt took under the will of her mother, Elizabeth Edwards; that it was, in technical language, a possessio fratris; that William J. McClanahan took by operation of law—had a constructive possession—and that no administration was necessary on the personal estate of Elizabeth F. McClanahan *either by [*174 her late husband when living, or by the appellant, who is his administrator. But even assuming, arguendo, that such administration was necessary, and under it a recovery of the slaves had been effected, in that event her administrator would have recovered and held the slaves, as trustee, for the administrator of William J. McClanahan or his next of kin, which might have caused circuity of suits, or actions, to prevent which is one of the heads of equity jurisdiction. O. R. Code, p. 168, sec. 3; Ibid. p. 164, sec. 27; 1 Tucker's Com. book 2, p. 318; 1 Munf. 98.

He also submitted, that, if the infant child, under the statute of distribution, succeeded to the property of the mother, if the father, under the third section of the statute of descents, was not the heir of his infant child.

To the plea of the statute of limitations, he relied on the savings of non-residence in said statute as conclusive in favor of the appellant. O. R. Code, p. 107, sec. 4; Ibid. p. 109, sec. 12; Laws of United States, old edition, p. 268, sec. 1.

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1 Strange, 70; Dayt. Surr. 2d ed. 412; Bank of England v. Lunn, 15 Ves. 569; 2 P. Wms. 532; Lev. 25; Hayes v. Sturgis, 7 Taunt. 217, and cases cited; Cooks v. Bellamy, Sid. 188; Eastwood v. Warry, Comb. 437, 438; Duppa v. Mayo, 1 Saund. 279, note 5; 1 Roll. Abr. 618 (A), pl. 1, 2; Sty. 55, 65; Wms. Ex'rs, 1178-1179 and cases cited, 480, 481; Johns v. Johns, 1 McCord, 136; Green v. Croft, 2 H. Black. 30; Alston v. Mumford, 1 Brock. 211.

When assent has been followed by payment or delivery, it cannot be retracted. March. 136, Cro. Jac. 614, 615; 2 Vent. 360; Leon. 130, 131; 1 Roper on Legacies, 743. Nor in such cases can it be sold on execution against the goods of the testator in his hands. Alston v. Foster, 1 Dev. Eq. 337; Baker v. Hall, 12 Ves. 497; Isenhart v. Brown, 2 Edw. 341.

The executor's assent to the first taker is an assent to all subsequent takers of a legacy, limited over by way of remainder or executory devise. Dunwoodie v. Currington, 2 Car. L. R. 469; Alston v. Foster, 1 Dev. Eq. 337; Saunden v. Gatlin, 1 Dev. & Bat. Eq. 86; Ingram v. Terry, 2 Hawks, 122; Adie v. Comwell, 3 Mon. 282; Ingram v. Terry, 2 Hawks, 122. But this rule does not prevail when, after the death of the first taker, the executor has a trust to perform arising out of the property. Allen's Ex'rs v. Watson, 1 Murph. 189; James v. Masters, 3 Murph. 110; Anon. 2 Hayw. 161; Black v. Ray, 1 Dev. & Bat. 334, see 1 Dev. & Bat. Eq. 94.

A court of equity can enforce payment of a legacy after it became payable, if there be sufficient assets, whether the executor assented or not. This is merely compelling the executor, who in respect to the legatees is a trustee, to execute his trust, which is the appropriate province of a court of equity. Equity, where there is no assent, is the proper tribunal. Willard Eq. Jur. 500; Day v. Trig, 1 P. Wms. 287; 7 Barn. & C. 544; 2 Saund. 137 b. note; Pelletrean v. Rathbone, 18 Johns. 426; Livingston v. Livingston, 3 Johns. 189; Deeks v. Strutt, 5 D. & E. 687-690; Brown v. Elton, 3 P. Wms. 202; Howard v. Moffat, 2 Johns. Ch. 206; 1 Atk. 491, 516; Reynish v. Martin, 3 Atk. 333; 1 P. Wms. 575, 544.

Where the executor has specially promised to pay the legacy, or assented to it, an action at law may be sustained for it. Childs v. Monins, 2 Brod.

And in reply to the forfeiture, for the removal out of the State of the slaves in question, he contended that it applied only to dower slaves, and not to legacies. O. R. Code, p. 191, sec. 44.

Mr. Francis L. Smith, for the defendants, contended, under the first ground of demurrer, that the plaintiff had not showed himself to be entitled to any relief.

The allegations of the bill are vague and indefinite throughout. There is no distinct and express averment that the defendants, or either of them, claim or are possessed of the negro woman Lavinia, or her offspring.

The nearest approach to an express charge is in reference to Betsey, but the bill does not expressly aver that she is either claimed or possessed by Davis or Nutt; it is said that she and the children whom she is said to have had, since her sale to Coleman, are in possession of either the one or the other.

There is still more uncertainty as to the other slaves; even Lavinia is not averred to be claimed by either of the defendants, or to be in their possession. But she and her daughter Maria are charged as hiring themselves about the town of Alexandria, and as accounting for their hires with the family of Nicholas F. Blacklock, deceased.

The bill is too loose and uncertain to require any specific answer. The allegations should have been direct and positive, both as to facts and parties. Story's Eq. Pleading, ed. 1840, secs. 244 to 251, inclusive; also sec. 510.

175*] *The case made by the bill should have traced the plaintiff's title, and shown his right to recover, with as much certainty as to the substantial facts, as pleadings at law. East India Co. v. Henchman, 1 Ves. Jun. 287; Mitf. Pl. 150; Ryves v. Ryves, 3 Ves. 343; McGregor v. East India Co. 2 Simons, 432; Hardman v. Elames, 5 Ib. 640; S. C. 2 M. & K. 732; Walburn v. Ingsby, 1 M. & K. 177; Jerrard v. Saunders, 2 Ves. Jun. 186; Mechanics' Bank v. Levy, 3 Paige, 606.

There must be an actual, not a pretended, necessity for a discovery, presented by a full statement of the case, and not by general averments. Meze v. Mayse, 6 Rand. 660; Webster v. Couch, 6 Rand. 524; Russell v. Clarke's Executor, 7 Cranch, 69, 89.

A defect in the charging part of a bill cannot be supplied by a subsequent interrogatory. Parker v. Carter, 4 Munf. 273. Whilst it is admitted, on behalf of the defendants, that there may be cases in which a court of equity can properly entertain jurisdiction for the recovery of slaves, yet they insist that this case does not fall within the rule.

The plaintiff's remedy was in a court of common law. Armstrong v. Huntons, 1 Rob. Va. 323; Wright v. Wright, 2 Litt. Ky. 8; Bass v. Bass, 4 Hen. & Mun. 478; Joyce v. Grinnals, 2 Richardson's Eq. 259; Parks v. Rucker, 5 Leigh, 140.

This is an effort to recover the slave Lavinia and her increase from bona fide purchasers, holding under Blacklock; the parties in remainder, having failed to give notice of their claim to the slave Lavinia or her increase, which would operate a fraud on such purchasers.

As to the general policy of the laws of Virginia, in protecting bona fide purchasers of personal property, without notice, see Lane v. Mason, 5 Leigh, 520.

The second cause of demurrer is, that the plaintiff has not made out any title in himself to the discovery and relief prayed.

Every preliminary act necessary to make the plaintiff's title complete should be averred in the bill, and the mere allegation that his title is complete is not sufficient. 1 Daniell's Ch. Prac. mar. page 422, and cases there cited.

Before the title to the slave Lavinia could, under the will of Elizabeth Edwards, be complete in Sarah Nutt or Elizabeth Fauntleroy Nutt, it is indispensable that the assent of the executors to the legacy should have been obtained, and so alleged in the bill. There is no such averment.

See 2 Lomax on Executors and Administrators, sec. 3, pp. 128 and 129, and cases there referred to, declaring that a legatee of a slave cannot, if the assent of the executor has not been obtained *to the legacy, maintain [*176 an action of detinue against one who unlawfully holds possession of the slave; nor will the assent in such case be dispensed with, though no one has taken out probate or letters of administration. Sutton v. Crain, 10 Gill & Johns. 458; Woodyard v. Threlkeld, 1 Marsh. Ky. 10, 11; Hasirton v. Hall, 3 Call, top page 188; side page 219.

But is the title to the slaves in the plaintiff? He must recover, if at all, either because William J. McClanahan, by virtue of his marital rights, during the coverture reduced the slaves into possession, or from his having obtained letters of administration on his wife's estate, not being compelled to make distribution. The bill expressly negatives the first, and is silent as to the second ground. There being no aver-

& Bing. 460; De Witt v. Schoonmaker, 2 J. R. 243; Beecker v. Beecker, 7 Johns. 99; Willard Eq. Jur. 500, 501; Atkins v. Hill, Cowp. 284; Hawkes v. Saunders, Cowp. 289; 2 Lev. 3; Vent. 120; Davie and Reyner, Sel. Cas. Ev. 59; 11 Mod. 91, pl. 15; M'Neil v. Quince, 2 Hayw. 153; Goodwin v. Chaffee, 4 Conn. 163; Doe v. Guy, 4 Esp. 154; 3 East, 120, and cases cited; Williams v. Lee, 3 Atk. 223; 6 Bac. Abr. 335.

An executor who had paid specific legatees, discovering a deficiency of assets to pay creditors, and a consequent overpayment to legatees cannot maintain an action at law to recover back such overpayment from a particular legatee; a court of equity is the proper tribunal. Somerville v. Somerville, 3 Gill (Md.) 276; Johnson v. Johnson, 3 Bos. & Pull. 179; Sele v. Guy, 3 East, 123; Story Eq. sec. 534.

Before the assent of the executor the legatee has an inchoate right to the legacy, which is transmissible to his personal representatives on his death taking place before it is paid or delivered. Dayton's Sur. 2d ed. 412; Wms. Ex'rs, 1176.

A legatee has no authority to take possession of his legacy without the executor's assent, although the testator, by his will, expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. Dayton's Sur. 2d ed. 411, 412; Wms. Ex'rs. 1176.

Even where the testator by his will discharges a debt, it is not discharged without executor's assent, for same reason. Idem.

Where executor voluntarily discharges a legacy, he cannot afterwards maintain a bill to compel the legatee to refund, unless it becomes necessary for the discharge of debts. Davis v. Newman, 2 Rob. (Va.) 664; 1 Eq. Cas. Abr. 239; Noel v. Robinson, 1 Vern. 94; Newman v. Barton, 2 Vern. 205; Coppin v. Coppin, 2 P. Wms. 292; Orr v. Kaines, 2 Ves. Sen. 194; Brisbane v. Darces, 5 Taunt. 144; Skyring v. Greenwood, 4 Barn. & C. 281.

ment that he so administered, we have a right to assume in this argument that he did not.

How else, then, can the plaintiff claim title to the slaves, in his character as administrator of William J. McClanahan?

If there be any outstanding valid title, legal or equitable, as against the defendants, it must be in the personal representative, or next of kin, of the deceased wife, Elizabeth Fauntleroy McClanahan, and if so, the plaintiff cannot maintain this suit. 2 Bl. Com. ed. 1847, p. 433; Wallace v. Taliaferro, 2 Call, 447; Upshaw v. Upshaw, 2 Hen. & Mun. 381.

Third, the discovery and relief prayed for are barred by lapse of time and the statute of limitations.

Both of these grounds of defense may be taken advantage of by demurrer. Wisner v. Barnet et al. 4 Walsh. C. C. 638, 639, and cases there cited; Humbert v. The Rector of Trinity Church, 7 Paige, 195; Dunlap v. Gibbs, 4 Yerg. 94.

The limitation to an action of detinue in Alexandria is five years. See Old Revised Code, ed. 1803, p. 107. And it is the settled doctrine in Virginia, that the adverse possession of a slave for that period, acquired without force or fraud, confers absolute title. Newby's Adm'rs v. Blakey, 3 Hen. & Mun. 57; Taylor v. Beal, 4 Grattan, 93; Ellmore v. Mills, 1 Hayw. 412; Halsey's Adm'r v. Buckley, 2 Hayw. 234; Orr et al. v. Pickett et al. 3 J. J. Marsh. 268; Kegler v. Miles, Martin & Yerg. 426; Shelby v. Guy, 11 Wheat. 361; Brent v. Chapman, 5 Cranch, 358.

The statute of Virginia, 1 Revised Code (ed. 1819), p. 431, sec. 48, declares the estate of the life tenant forfeited by a removal of slaves out of the State.

Assuming the removal to have occurred as stated in the bill, then the title to Lavinia was, by the forfeiture, immediately devested out of Sarah Nutt; and the party in remainder might forthwith have maintained detinue for the 177*] slave. Wilkins v. *Despard, 5 Term R. 112; Roberts v. Withered, 5 Mod. 193; S. C. 12 Mod. 92; and cases there cited. Also reported in 1 Salk. 225, by the name of Roberts v. Wetherall.

The statute of limitation, in case of a contingency, runs from the time the contingency happens. Fenton v. Emblers, 1 W. Bl. 354. So of usury, it begins to run the instant the money is paid. 6 Bac. Abr. Gwillim's ed. 1844, 372. And in actions for taking insufficient bail, from the return of non est inventus on the execution against the principle. Ibid. p. 373.

As soon as a trust ceases, action accrues, and the statute begins to run. Green v. Johnson, 3 Gill & Johns. 389. Trover is barred after six years, though the plaintiff was ignorant of the conversion, the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. Granger v. George, 7 Dowl. & Ryl. 729.

If an executor in trust for another neglects to bring his action within the time prescribed by the statute, the cestui que trust or residuary legatee will be barred. Wych v. East India Co. 3 P. Wms. 309.

The statute runs in favor of disseizors and tortfeasors. Harrison v. Harrison et al. 1 Call, top page 372, side page 423.

In all cases of concurrent jurisdiction at law and in equity, the statute of limitations is equally obligatory in each court. 2 Story's Eq. Jur. secs. 1520 and 1520 a; 6 Bac. Abr. 385.

This is nothing more than an action of detinue in the form of a suit in equity.

The lapse of time, and gross laches of the parties claiming in remainder, should of itself be a complete defense to the claim.

The bill is multifarious. On this point it is only necessary to cite 1 Daniell's Chan. Prac. pp. 438 to 451 inclusive, and the cases there cited.

Note.—Extract from 1 Revised Code of Virginia (ed. 1819), p. 431, sec. 48: "If any person or persons possessed of a life estate in any slave or slaves shall remove, or voluntarily permit to be removed, out of this Commonwealth such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit every such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the reversion or remainder thereof, any law, custom, or usage to the contrary notwithstanding.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the District of Columbia, and County of Alexandria.

*The bill was filed by the administra- [*178
tor of Thomas H. McClanahan against the defendants, to obtain possession of Lavinia, a slave, together with three children, Betsey, Polly, and Maria, and several grandchildren, which had been bequeathed by Elizabeth Edwards to Sarah Nutt, her daughter, for life, and after her decease to Elizabeth F. Nutt, a granddaughter, the wife of the complainant's intestate. Elizabeth, the granddaughter, died, leaving the intestate, her husband, surviving, who died also, leaving Sarah, the life tenant, surviving. The latter died in 1840.

The complainant took out letters of administration on the estate of the husband, September 9, 1839, and afterward upon the estate of Elizabeth, the wife, on the 9th of November, 1840, and filed this bill in April, 1845, claiming that the property and right to the possession of the slaves bequeathed to the wife in remainder became complete in him, as the representative of the estate of the husband, on the death of the life tenant.

The defendants demurred to the bill, and several grounds of objection have been taker under the demurrer.

1. That there is no averment that the executors of Mrs. Edwards assented to the legacy to the granddaughter, so as to vest the property in the legatee, and enable the personal representative to bring the suit. Hairston v. Hall, 1 Call, 188; Smith and Wife v. Towne's Adm'r, 4 Mun. 191.

The whole of the personal estate of the testator devolves upon the executor; and it is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate, without regard to the testator's having,

by the will, directed that a portion of it shall be applied to other purposes. Hence the necessity that the legatee, whether general or specific, and whether of chattels real or personal, must first obtain the executor's assent to the legacy before his title can become perfect. He has no authority to take possession of the legacy without such assent, although the testator by the will expressly direct that he shall do so; for, if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. 2 Williams on Executors, p. 843, ch. 4, sec. 3, and cases there cited.

But the law has prescribed no particular form by which the assent of the executor shall be given, and it may be, therefore, either express or implied. It may be inferred from indirect expressions or particular acts; and such constructive permission shall be equally available. An assent to the interest of the tenant for life in a chattel will inure to vest the inter- [*179] est of the *remainder, and eo converso, as both constitute but one estate. So an assent to a bequest of a lease for years carries with it an assent to a condition or contingency annexed to it; and it may be implied from the possession of the subject bequeathed by the legatee for any considerable length of time. Ibid. p. 847, and cases.

The bill, in this case, contains an averment of the possession of the subject of the legacy by the life tenant, in pursuance of the bequest in the will, and which is admitted by the demurrer; and, upon the principles above stated, lays a sufficient foundation for the presumption, that the possession was taken with the assent of the executors—a presumption of law from the facts admitted, and which assent inured to the benefit of the remainderman. This ground of objection is not, therefore, well taken.

2. The next objection is, that the complainant has shown no title to the slaves in question, upon the face of the bill.

Because the interest in the remainder did not vest in the intestate, the husband, before his death, so as to make the property a part of the assets of his estate, to be administered upon by his personal representative. He survived Elizabeth, his wife, the legatee in remainder, but died before the life tenant, and therefore had not, and could not have, reduced the subject of the legacy into possession in his lifetime.

This question is to be determined upon the laws of the State of Virginia; and, on looking into the course of the decisions of the courts in that State, it will be found that the interest of the husband in the wife's remainder of this species of property is placed upon the footing of an interest in a chose in action of the wife, which vests in the husband, if he survives, subject to be reduced to possession by him, if living at the termination of the life estate, and if not, by his legal representative, as a part of his personal estate. Dade v. Alexander, 1 Wash. 30; Wallace et ux. v. Taliaferro et ux. 2 Call. 447, 470, 471, 490; Upshaw v. Upshaw et al. 2 Hen. & Mun. 381, 389; Hendren v. Colgin, 4 Munf. 231, 234, 235; Wade v. Boxley, etc., 5 Leigh, 442.

In a very early case in the Court of Appeals, *Dade v. Alexander*, decided in 1791, it was resolved, a feme sole being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband. The President (Pendleton) stated, that this was the constant decision of the old General Court from the year 1653 to the Revolution, and has since been confirmed in this court, in the cases of Sneed v. Drummond, *and Hord v. [*180 Upshaw, and that it had become a fixed and settled rule of property. The case of Wade v. Boxley, etc., decided in 1834, affirmed the same principle. There the question was between the surviving husband and the children of the deceased wife, as to the slaves in remainder, the wife having died before the life tenant. The court held the wife took a vested remainder in the slaves, which at her death devolved to her husband, and not to the children.

There is some question in the books whether the husband can bring a suit in his own name, or, in case of his death, a suit can be brought in the name of his personal representative, to reduce to possession this species of property after the termination of the life interest; or whether he or the personal representative, as the case may be, is not bound to take out letters of administration upon the estate of the wife, and bring the action as such administrator.

That the husband, and, in case of his death, his personal representative, are entitled to administration in preference to the next of kin to the wife, was expressly decided in the case of Hendren v. Colgin, already referred to.

In the case of Chichester's Ex'r v. Vass's Adm'r, 1 Munf. 98, Judge Tucker expressed the opinion, that, in equity, letters of administration upon the estate of the wife were unnecessary; and he referred to several authorities in England, in support of the position, and especially the case of Elliot v. Collier, 3 Atk. 528; S. C. 1 Wils. 168; S. C. 1 Vern. 15. See, also, Squib v. Wyn, 1 P. Wms. 378, 380, 381; Harg. note to Co. Lit. 351; Whitaker v. Whitaker, 6 Johns. 112, 117, 118.

The cases of Dade v. Alexander, Robinson v. Brock, Drummond v. Sneed, and Wade v. Boxley, etc., already referred to, are cases in which the administration of the wife's estate seems to have been dispensed with.

The usual course, however, is to take out letters; though it is difficult to assign a reason for the requirement; except, perhaps, to give the creditors of the wife a remedy, as the surviving husband is liable for her debts in this representative character to the extent of her assets. Heard v. Stamford, Cases Temp. Talb. 173; 3 P. Wms. 409; 2 Williams on Executors, 1083, 1084; Gregory v. Lockyer, 6 Madd. 90. These are limited to her personal estate, which continued in action, and unrecovered at her death. Beyond this he is not responsible, after her decease, no matter what may have been the estate received by her. 2 Williams on Executors, 1084; Went. Off. Executors, 369; and cases before cited.

In this case the complainant took out letters of administration *upon the estate of [*181 Elizabeth, the wife, which are referred to in the bill, as well as the letters upon the estate of the husband; but there is no averment of a claim to the possession of the slaves in that right, the claim being placed exclusively upon

his right as administrator of the husband. The bill is, probably, defective for want of this averment; but as it is defective upon another ground, which we shall presently state, it is unnecessary to express a definitive opinion upon this one.

The will of Elizabeth Edwards bequeathed to Sarah Nutt, her daughter, the slave, Lavinia, together with her future increase, during her life, and, at her death, to Elizabeth, the granddaughter, the wife of the intestate, and to her heirs forever. And the daughter, before the termination of the life estate, and after the slave came into her possession, sold her to one Nicholas F. Blacklock, residing in the city of Alexandria, since deceased, leaving a widow and three children. These children and the husband of one of the daughters are made defendants, and also the husband of the only living child of George Coleman, who, it is charged, purchased Betsey, one of the children of Lavinia, and William D. Nutt, his administrator. These comprise all the defendants.

The bill prays that the defendants may be decreed to make restitution of the slave Lavinia, her children, and grandchildren, and also to make compensation for the services of the same since the right of the intestate accrued: and, further, that they discover the numbers and names of the children and grandchildren, and the person or persons in whose possession they are, or who own or claim them, or either of them; and also various other facts and circumstances tending to establish the title of the complainant to Lavinia, and her increase, which it is not material further to notice.

The ground of objection upon the demurrer, in this part of the case, is, that there is no direct or positive averment in the bill that the defendants, or either of them, have any interest in the slaves in question, or that the slaves themselves are in their possession, or under their control, or in the possession or under the control of either of them; and which ground of objection, we are of opinion, is well taken, and fatal to the relief prayed for.

There is not only no direct averment of possession or control, but the contrary appears upon the face of the bill. It is charged that Lavinia and her daughter Maria reside in the town of Alexandria, and go out to service, accounting therefor to the family of Nicholas F. Blacklock, for and in behalf of the widow, who is not a party to the bill; that Polly and 182*] her children *reside in the city of Washington, with persons unknown; and that Betsey and her children are either in the actual possession of Richard Davis, the husband of the daughter of George Coleman, deceased, or under the control of William D. Nutt, his administrator.

Possession is thus shown to be out of the defendants, with the exception of Betsey and her children, who are stated, as we have seen, to be either in the possession of Davis, or under the control of Nutt.

It is apparent, therefore, upon the face of the bill, that the complainant has set forth no title to relief against these defendants, or either of them, whatever may be the right which he has shown to the slaves themselves; as it is not averred that they or either of them have any interest in the slaves, the subject matter of the suit, or that they are in any way liable to account to him for the same, or chargeable for their services.

The purchase of Lavinia, by Blacklock, of the life tenant, was lawful, and vested in him the title and right to her service and increase, until the termination of that estate, in 1840. The sale by him of Betsey to Coleman was also lawful; and whether or not the others continued in the family and belonged to him at his decease, and passed to the widow and children, as part of his estate, is nowhere stated in the bill.

There is no averment that the children, who are made defendants, took any interest in them at his decease, as his heirs, next of kin, or legatees; and, as we have already stated, not even so much as possession. The only allegation in this respect is, "that, since the sale to Blacklock by Mrs. Nutt, the said Lavinia has had a numerous increase, to wit, children and grandchildren, most of whom have been sold, or otherwise disposed of, as your orator is informed and believes; and that some of them are now going at large, or are in the possession of the family of the said Blacklock;" but in the possession of what members of the family, or whether in the possession of any of those who are made defendants, are matters left altogether to conjecture and surmise.

The same vagueness and uncertainty exist in respect to the charges against the other defendants.

There is no averment that Betsey and her children belonged to Coleman at his decease, and passed to his widow and children, or that they had any interest in the same, the only allegation, in this respect, being, that they are said to be in the possession of Davis, the son-in-law, or under the control of Nutt, the administrator.

The radical vice in the bill is, that no case is made out *against these defendants, or [*183 either of them—no foundation laid creating a liability, legal or equitable, to deliver the slaves to the complainant, or to account for their value or services; they seem to have been made parties, one and all, as witnesses to establish a supposed right of the intestate to the property, under the idea that, from their connection with the families of the former owners of the life interest, they might be able to give some information on the subject. Story's Eq. Pl. secs. 234, 244, 245, 510, 519; Cooper's Pl. 41, 42; 2 Johns. Ch. 413.

There are other objections taken to the relief sought in this form, which are worthy of consideration; but as the ground above stated disposes of the case, it is not important that we should examine them.

The complainant having, in our judgment, failed to set forth any foundation for relief, the right to the discovery, which is claimed as incidental, of course fails with it. Story's Eq. Pl. sec. 312 and note; 17 Maine, 404; 3 Edw. 107; 3 Beav. 284.

The decree below must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia,

holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

CHARLOTTE TAYLOR, by James M. Walker, her next Friend, Appellant,
v.
JAMES TAYLOR, Julia Scarborough, Godfrey Barnsley and Julia, his Wife, Joseph Scarborough and William Scarborough, Robert M. Goodwin, Norman Wallace, and Andrew T. Miller.

Equity—conveyance to parents by female child just of age—not prima facie void—set aside.

A deed from a female child, just of age, and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation by the parents, and containing in its preamble a recital of false statements, ordered to be set aside, and the property reconveyed to the grantor.

The principles upon which a court of equity interferes to protect persons from undue and improper influences examined and stated.

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

184*] *The bill was filed in the Circuit Court by Charlotte Taylor, formerly Charlotte Scarborough, a resident of the State of New Jersey, to set aside a deed which she alleged had been obtained from her in an illegal and fraudulent manner. The defendants were James Taylor, her husband, some of the members of her family, Robert M. Goodwin, who had become the trustee under the deed after the death of William Taylor, the original trustee, and Wallace and Miller, who were the executors of William Taylor, the original trustee.

Prior to the year of 1819, William Scarborough, a merchant residing in Savannah, became embarrassed in his affairs, and on the 5th of June in that year executed a mortgage for the purpose of securing his indorsers upon certain notes; the indorsers being Andrew Low & Company, and William Taylor. The firm of Andrew Low & Company was composed of Andrew Low, Robert Isaac (who had married William Scarborough's sister), and James McHenry.

The property mortgaged consisted of certain stocks and real estate, amongst which was the following lot: "All that lot of land, and the buildings and improvements thereon, situated, lying, and being in the city of Savannah aforesaid, bounded on the east by West Broad Street, on the south by a street or lane thirty feet wide, and on the west and south by the lots contiguous to the same, containing ninety feet in front, and being the lot and buildings opposite Mr. Daniel Hotchkiss, and recently erected by the said William Scarborough."

On the next day, namely, the 6th of June, 1819, Scarborough confessed a judgment in favor of Andrew Low for $87,534.50.

On the 13th of May, 1820, Scarborough executed a deed in fee-simple of the above described property to Robert Isaac.

On the 16th of November, 1820, Scarborough was discharged as an insolvent debtor by the Chatham County Inferior Court.

On the 2d of January, 1825, a sale of Scarborough's furniture took place by the marshal, under an execution which had been issued by virtue of a judgment obtained against him by Andrew Low. The property was all purchased by Isaac, according to the following schedule. It is inserted here for the purpose of being compared with the inventory which was taken of Isaac's property after his death, and which will be stated in its proper place:

*Andrew Low v. William Scarborough.—[*185

Marshal's Sales.

Purchaser.	Tuesday, 2d January, 1825.	
R. Isaac, Esq.	To furniture in room No. 1 (dining)	$500 00
	To furniture passage, No. 2,	200 00
	To furniture in dining-room, No. 3	500 00
	To furniture in larger room, No. 4	850 00
	To furniture in up-stairs passage, 5, clock and lamp	60 00
	To furniture in bed-room, No. 1	110 00
	To furniture in bed-room, No. 2	100 00
	To furniture in bed-room, No. 3	60 00
	To furniture in bed-room, No. 4	75 00
	To furniture in bed-room, No. 5	30 00
	To kitchen furniture	25 00
	To silverware	400 00
	To carriage and gig	250 00
	To pair carriage horses	200 00
	To saddle horse	80 00
		$2,940 00

In February, 1826, an agreement was made amongst the partners constituting the firm of A. Low & Company, by which the house and lot, which had been mortgaged to the firm, and afterwards conveyed to Isaac, was to be held as the separate and individual property of Isaac, upon his paying to the firm the sum of $20,000.

On the 26th of August, 1827, Isaac made his will, which contained the following clause:

"Seventh. Item, I give and bequeath unto my beloved niece, Charlotte Scarborough, all my right, title and interest in and to the lot, dwelling-house, and all other improvements thereon, which formerly belonged to her father, William Scarborough, on West Broad Street, in the city of Savannah, known in the plan of said city as lot No. ——, together also with the plate, furniture of all kinds, books and prints, all which were purchased and paid for at marshal's sales by me."

On the 16th of October, 1827, Isaac died.

Eight persons were named in the will as executors, but only three acted, viz., William Scarborough, William Taylor, and Norman Wallace, to whom letters testamentary were granted on the 17th of January, 1828.

On the 9th of January, 1828, the will was proved, and on the next day, viz., the 10th, Charlotte Scarborough, the niece *and [*186

Note.—When a deed is void in equity for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, to trustee from cestui que trust, to executor from heir. See note to 16 L. ed. U. S. 429.

devisee of the deceased, addressed the following letter to her father, William Scarborough:

"My ever-honored Father,—From a sense of my unworthiness, I am convinced that the love my dear uncle bore me, and which dictated his bequest to me in his last will, would not, could he now see my conduct, condemn me for pursuing the feelings of a heart strongly and sincerely devoted in affection to the members of my family. Having arrived at an age when I may with impunity legally make a transfer of that which has been so generously placed at my discretion, I unhesitatingly follow this course of conduct, unbiased by any control whatsoever; and in the liberty I am now using, I am acting by my own free will, dictated by my feelings alone, and unknown to any person. Thus, then, I most emphatically transfer all my right to the said property (the gift of my ever-lamented uncle), to my beloved mother, to be used and enjoyed as her unquestionable right, during her lifetime; and at her death and yours, to be equally divided between my sisters, brothers, and myself, my right operating in no manner in my favor to the exclusion of the other members of our family.

"In thus making a transfer of the said property, I trust my much loved parent will acknowledge one slight proof of my gratitude for all his numerous kindnesses lavished on me. Most thankful do I feel for being made the simple instrument of accomplishing the will of him who has so kindly and generously placed his confidence in me; and in acting thus, convince the world that my devoted affection for him was pure, disinterested, and unbiased by any future expectation.

"I am, dear Sir, your most affectionate and grateful daughter,

"Charlotte D. Scarborough.

"Savannah, January 10th, 1828."

On the 22d of January, 1828, Charlotte executed the deed which it was the object of the present suit to set aside. It recited a proposed marriage settlement of 1805, and then proceeded as follows:

"And whereas, from neglect, the said deed was not recorded in Chatham County and State of Georgia, and whereas, in the year 1819, the said William Scarborough having failed in trade, and some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same as aforesaid, the said William Scarborough did, in consequence of such doubt, transfer and convey all his right, title, and interest, if any remained to him, in and to the aforesaid named and described lots of land, to his principal 187*] creditor, *Robert Isaac, of Savannah, his heirs and assigns, in part satisfaction of his debt; and whereas the said Robert Isaac hath recently departed this life, leaving the last will and testament, whereby he bequeathed and devised to the said Charlotte Scarborough, his niece, all his right, title, and interest in the said lots of land, the dwelling-house and improvements thereon, together with the plate, furniture of all kinds, books and prints therein, which were purchased by the said Robert at marshal's sales, in the city of Savannah, which said last will and testament has been duly proved before the Court of Ordinary of Chatham County; and whereas the said Charlotte Scarborough, to whom the aforesaid devise was made, being of lawful age, and being desirous of conveying or carrying the said marriage settlement into effect, according to the original intention of the parties thereto, hath determined to convey all her right, title, and interest in said property in trust for that purpose. Now, this indenture witnesseth, that the said Charlotte, in consideration of the premises, and from natural love and affection for her said beloved mother, Julia Scarborough, and her sisters and brothers, and also in consideration of the sum of one dollar, to her in hand paid by the said William Taylor of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, release, convey, and confirm, unto the said William Taylor, his heirs and assigns, all her right, title, and interest in and to the said lots of land hereinbefore described and set forth, together with the buildings and improvements thereon, with the appurtenances, and together with the plate, furniture of all kinds, books and prints, hereinbefore referred to; which lots, buildings, improvements, furniture, plate, books and prints, were devised to her by the said Robert Isaac, as hereinbefore set forth. To have and to hold the said lots of land, with the other premises and appurtenances, unto him, the said William Taylor, his heirs and assigns; in trust, nevertheless, to and for the use of the said Julia Scarborough, wife of the said William Scarborough, for and during the term of her natural life, not to be in any manner, or by any means, subject to, or liable for, the debts of the said William Scarborough, her said husband; and from and after the decease of the said Julia Scarborough, then in further trust to and for the use and benefit of said Charlotte Scarborough, and such of her brothers and sisters, children of the said Julia, as shall be living at the time of the decease of the said Julia Scarborough, equally to be divided between them, share and share alike."

The deed then contained a covenant for further assurances, *and was executed in [*188 presence of Andrew Low and John Guilmartin.

On the 25th of January, 1828, Scarborough, as a qualified executor of the estate of Isaac, exhibited an inventory to the court, from which the following is an extract:

"In the house formerly the property of Wm. Scarborough, and bought by Robert Isaac at Marshal's sales, as per his certified copy:

Furniture in room No. 1	$240	00
" passage, No. 2	205	00
" dining-room, No. 3	302	00
" large dining-room No. 4	494	00
" up-stairs passage, clock and lamp	40	00
" bed-room No. 1	187	00
" bed-room No. 2	90	00
" bed-room No. 3	12	00
" bed-room No. 4	68	00
" bed-room No. 5, included in above		
" kitchen	10	00
Silverware	426	00
1 gig, $10, carriage destroyed in hurricane 1 set China (table), $130, 1 lot glassware, $100	230	00

"Petit De Villers,
"W. Rose,
"J. B. Herbert,
} Appraisers."

In April, 1829, Charlotte Scarborough married James Taylor, one of the defendants in the present suit. They removed to New York to reside, in 1835, and afterwards to New Jersey, where the complainant resided at the institution of this suit. Julia Scarborough, the mother of the complainant, resided in the house in question, at and after the execution of the deed, as did William Scarborough, the father, with occasional absence, until 1835, when he rented it to Barnsley, who had married one of his daughters, and who was also one of the defendants in the present suit.

On the 12th of June, 1838, William Scarborough died.

In the early part of 1840, a petition was filed in the Superior Court of Chatham County, in the names of the different branches of the Scarborough family, stating the death of William Taylor, the trustee under the deed, and praying that Robert M. Goodwin might be appointed in his place; which was accordingly done. To this petition the name of Charlotte Taylor was signed as follows: "For Charlotte Taylor, Joseph Scarborough."

189*] *On the 4th of September, 1843, Charlotte Taylor filed her bill against all the parties enumerated in the commencement of this statement.

It recited the devises of the will, stated that she was the niece by marriage of Robert Isaac, and an inmate and resident of his family, with whom she continued to reside until his death, when she removed to the residence of her father and mother, being the house devised to her (the oratrix) by the will. It then averred, that, upon her return to the family of her parents, her reception was harsh and unkind; that she was charged with having dictated to the testator, Robert Isaac, the disposition of the property, with ruining the prospects of the family, and breaking the heart of her father. The bill then proceeded thus:

"And your oratrix further showeth unto your honors, that day after day your oratrix's situation in her father's family became more and more unpleasant and harassing, in consequence of their unkind and, as your oratrix charges, their cruel treatment of her; that your oratrix was at the time an infant under the age of twenty-one years, having been born, as your oratrix charges, on the 4th day of August, in the year of our Lord 1807; that your oratrix was closely watched by her father, mother, and sisters, secluded from society and the advice of friends, and even denied the liberty of communicating with the defendant, James Taylor, whom your oratrix was then under an engagement to marry; that your oratrix was importuned and urged by her mother, with the advice and the countenance of her father to relinquish your oratrix's rights under the will aforesaid, and to settle the property on your oratrix, her mother, brothers, and sisters; and with the view of effecting this object, it was particularly urged that the said Robert Isaac, by the said devise and bequest in the seventh item of his said last will and testament, had so conveyed the said property, believing that your oratrix would divide the same in the manner proposed by your oratrix's parents as before stated, although your oratrix at the time knew that the said Robert Isaac had, for a considerable time preceding his death, borne a decided antipathy to the said Julia Scarborough.

"And your oratrix further showeth unto your honors, that, when in answer to these and other repeated importunities most unkindly pressed upon your oratrix, your oratrix would hesitate or refuse to enter into and yield to the proposed arrangement, your oratrix's reluctance and refusal would be ascribed to the influence of the said James Taylor, who was described to be a merciless, grasping man, who would sacrifice anything for a gain.

"And your oratrix further showeth [*190 unto your honors, that when again, in reply to the urgent importunity of the said Julia Scarborough, your oratrix inquired of her what your oratrix should do, your oratrix, after a conference between the said Julia and William Scarborough, was informed that your oratrix should address a letter to the said William Scarborough, to the effect that, supposing the said Robert Isaac had intended the property should be divided between your oratrix, her mother, sisters, and brothers, your oratrix wished that he, the said William Scarborough, would consent that your oratrix should so have the property disposed of that the said Julia Scarborough should have it during her life, and that after her death it should be divided between your oratrix, her two sisters and two brothers.

"And your oratrix further showeth unto your honors, and expressly charges, that at this stage of the matter your oratrix sought an interview with the said James Taylor, and, after relating to him the circumstances above detailed, asked his opinion and advice as to the duty of your oratrix in the premises, and that his reply was, in substance, that individually he cared nothing about the course your oratrix might pursue, as he was well off, and that he would never meddle with a copper of the value of the property, but advised your oratrix, as she valued her own interest, not to yield to the arrangement proposed by the parents of your oratrix.

"And your oratrix further showeth unto your honors, that at the time referred to the affairs of the said William Scarborough were in a very deranged and embarrassed condition; that he was utterly unable to pay his debts; and that, as a consequence, his family having but very small resources independently of him, their pecuniary situation was pitiable and distressing; and that, urged by his consideration, by the unhappiness and even misery which your oratrix was suffering from the treatment of the family and their importunity, and influenced, too, by the hope that her marriage with the said James Taylor might thereby receive the consent of her parents, your oratrix finally yielded, and wrote the letter to her father, reciting, in substance, as your oratrix charges, that the said Julia and William Scarborough were to have the house, furniture, etc., during their lives, and that at their death the plate, with the crest of the family, was to be given to your oratrix's brothers as their share, and the house and lots divided between your oratrix and her sisters. Your oratrix charges the above to have been the substance of the writing, but that she cannot now ascertain the particulars, as the original draft, which was kept by *your oratrix, was de- [*191

stroyed by fire in the city of New York in the year 1835."

The bill then proceeded to state that a deed was drawn up, which she signed, without reading or hearing it read; that, so far from the marriage settlement upon her mother being an inducement to the execution of the deed, as is alleged, she now finds, in the recital, she had never at that time heard of any such marriage settlement; but, on the contrary, the deed was extorted from her by the most unfair and fraudulent means, and was executed by her as the price of peace with her father, mother, and family.

The bill then stated the marriage of the oratrix with James Taylor, on the 28th of April, 1820; that she had, soon afterwards, used all the means in her power to convince her husband that the deed was fraudulent and invalid, but that he objected to family disputes about property, and averred that his own individual property and means of support were sufficient for his family. It then stated that she did not discover the amount of injustice which had been practiced upon her until the year 1839, when she discovered that, under the deed, in case she died before her mother, her children would be cut off from all share in the property. It then stated the death of Taylor, the trustee, and the appointment of Goodwin in his place, and averred that she was entirely ignorant of the use of her name, which was signed to the petition without her authority.

The bill then stated that Godfrey Barnsley had intermarried with her sister, Julia Scarborough, and resided for a long time in the house in question; that he had committed waste upon the goods and chattels bequeathed to her (the oratrix), had sold or otherwise disposed of a considerable portion of the stock of liquors, and that waste had also been committed by Julia Scarborough, the mother; that Barnsley knew that the oratrix had a claim to the personalty; that she had applied to Goodwin, the trustee, to come to an account with her, which he had refused to do.

The bill then contained a number of interrogatories for the defendants to answer; prayed that the deed might be decreed fraudulent and void, and that the defendants might come to an account with her, and that the real estate, goods, chattels, plate, furniture, books, prints, rents, and profits, might be decreed to be the separate property of the oratrix, not subject to the debts or liable to the creditors of her husband, James Taylor, etc., etc.

Sundry intermediate steps were taken to bring the defendants all into court, which it is 192*] not necessary to mention. At *length they all came in and answered, except Julia Scarborough, the mother and Joseph Scarborough, against which two parties an order was obtained, taking the bill pro confesso.

Robert M. Goodwin, the trustee, filed his answer on the 6th of November, 1843, admitting the existence of the trust deed, and that it was under his control; and stating that he consented to act at the request of Horace Sistare, who married the complainant's sister, and of Joseph, her brother, and that he supposed he was acting with her consent, not only because her brother signed her name to the petition for his appointment, but because, in conversations with her, she never expressed the least objection to the appointment. That William Taylor left no accounts, never having interfered with the property, or received it into his possession, or any of the rents, issues, or profits, the same being left in the custody or possession of the cestuis que trust entitled thereto. He denies that the trust deed was made by compulsion or undue means, or that it was made by her when under age; but, on the contrary, avers that the same was made freely and voluntarily, and that she was then of full age, as would more fully appear by a letter written by her to her father, dated 10th January, 1828, a copy of which he annexed to his answer.

The answer of the executors of William Taylor was filed 6th November, 1843, and states that they do not believe their testator acted as trustee, though he may have assented to the trusteeship; that they have never seen any account of his as trustee, and do not believe he left any; for he regarded the matter as a mere family arrangement, and left everything in the hands of the cestui que trust, then entitled to the use of the same. They deny the right of the complainant to call on them for an account of the personal property conveyed in trust, because by the trust deed Julia Scarborough, who is still living, has the use of it for life; nor can they give any account of said property, or the rents and profits of the real estate, because the said real and personal property never passed into the hands of their testator in his lifetime, nor into their control or possession since his death, but had always been in the possession and management of Julia Scarborough, the cestui que trust, entitled to the same under the deed.

The joint answer of Godfrey Barnsley and Julia, his wife, was filed 19th February, 1844, and in substance states that the complainant always called her mother's house her home, and lived as much there as with her uncle; that she was not an infant at the time of the execution of the deed, having been born on the 4th of August, 1806; that they do not know of any *consideration other than that stated in [*193 the deed; that Julia Scarborough lived on the premises at the time of its execution, and that William Scarborough sometimes resided in Darien, and sometimes on the premises, until 1833, after which he generally resided on the latter; and that complainant never, as far as they know, pretended to have any claim thereto; and as late as April or May last, 1843, when defendant, Julia Barnsley, in consequence of rumors which had reached her, asked complainant "if it was true, as she had been informed, that she (the complainant) intended to attempt to set aside said deed," she stated, "she had no such intention." They deny, as utterly and entirely untrue, the statement of the complainant of unkind treatment by her family, and never heard or knew of any, or of any importunity or coercion used towards her to induce her to sign the deed; that they always believed the execution of the deed was the free, voluntary act of the complainant, and intended to fulfill the design of Robert Isaac, whose title they insist is more than doubtful, in consequence of the marriage settlement of 1805; that they are advised that the said deed was and is valid, as between the parties to the same, and

therefore William Scarborough could not make any conveyance to Robert Isaac; and that he always held the premises subject to the marriage settlement, and that they have always heard it in the family, and so believe, that the complainant executed the deed freely and voluntarily, with a view to carry out the wishes and intentions of her uncle, which would have otherwise been defeated. They further allege that no marriage settlement between the complainant and her husband was ever executed, and he having been recently declared bankrupt, any interest which she may have in the property, or any claim against them, belongs to the said James Taylor, or his assignee in bankruptcy. The answer then explains the defendant Godfrey Barnsley's actings and doings with respect to the property.

The answer of James Taylor, the husband of the complainant, admitted all the material facts charged in the bill, and stated that before the marriage he had advised her not to execute the deed, believing, from her representations, that she was unkindly treated by the family; that he had been requested by William Scarborough to be a witness to the execution of the deed, but declined to be so, and that his belief of the unhappy situation of the complainant operated upon him in a great measure to consummate his engagement to marry her twelve months prior to the period before intended.

Several witnesses were examined on the parts of the complainant and defendants. The fol-
194*] lowing were the answers of *the subscribing witnesses to the deed, viz., Andrew Low and John Guilmartin, touching its execution.

Andrew Low:

"To the fourth direct interrogatory the witness answering saith: I was intimate in the family of the late William Scarborough, both before, in, and after 1828; I was a subscribing witness to the signing of the deed, and after it was signed the complainant expressed to me that she was then satisfied, and was glad that she had done it, or words to that effect.

"To the fifth direct interrogatory the witness answering saith: I was present, as stated before, at the execution of the deed; it is impossible, at this distance of time, to remember all that then transpired, but this I am certain of, that the complainant knew the contents of the deed, and approved of it; in fact, as I have before said, she herself told me so.

"To the fourth cross-interrogatory the witness answering saith: I became acquainted with the circumstances I have stated, relative to the property, from my personal intimacy with William Scarborough and his family, and upon my connection in business with the late Robert Isaac. I was a subscribing witness to the deed at the instance of William Scarborough.

"To the fifth cross-interrogatory the witness answering saith: I do not know by whom the deed was drawn; the other subscribing witness was Mr. Guilmartin; he was requested to be so by William Scarborough. There was a change of one of the witnesses of the deed, in consequence of James Taylor, who had previously arranged to be a witness, declining to be so *after* his arrival at William Scarborough's *house, for* that purpose. I do not remember that he gave any reason for declining. The parties present, when the deed was executed, were the complainant's father and mother, and the witnesses. I did not see or hear the complainant read the deed, but I was then, and still am, satisfied that she knew the contents, and approved of it.

"To the sixth cross-interrogatory the witness answering saith: I do not recollect the question being put to the complainant, whether she knew the contents of the deed, nor do I recollect whether any consideration money was offered; if there was, it was a piece of coin, probably a dollar, in the usual way, in such cases; I think I was in William Scarborough's house about two hours previous to signing the deed, and left soon after.

"To the seventh cross-interrogatory the witness answering saith: James Taylor, now the husband of the complainant, had been asked by Mr. Scarborough to attest the deed as a witness, and he consented to go with me to the house for that purpose; *after closing [*195 our place of business, I asked him to accompany me; he said he would soon follow me, which he did; he did not express himself opposed to the execution of the deed, that I am aware of; I certainly never heard him. It was not known or understood by me, that he was under an engagement to marry the complainant; the previous year there was something of the kind spoken of, but he and the complainant had disagreed, and I was given to believe that it was all broken off. At the dissolution of the partnership of Low, Taylor & Company, in 1834 or 1835, James Taylor was largely indebted on private account to the said firm; and sometime in 1835 I granted him a discharge from the said debt, in consideration of his giving up to me every description of property belonging to himself and his wife, except his household furniture, which I allowed him to retain; he did not at this time mention to me that he or his wife had any claim to the property in question, or I should have claimed it in conformity with our agreement. I had never heard of his making any claim to the property conveyed by the said deed, or any part of it, until advised of it by William Robertson, under date of the 16th February, 1844."

John Guilmartin:

"To the first direct interrogatory the witness answers and says, that his name and handwriting is to the instrument as a witness, and that he subscribed as a witness, at the instance of William Scarborough, the deed now presented to him, being the original deed from complainant to Wm. Taylor, in trust.

"To the second direct interrogatory the witness answers and says, he cannot say positively he does, but it strikes him that there was a question or two asked Miss Charlotte Scarborough, viz., whether it was with a free will; he does not recollect the time; but that he does not recollect that Andrew Low, senior, was present when he came in; Mr. Scarborough said he had sent for witness, as such to a deed from Miss Scarborough to her mother, of property, which as a dutiful child she had made. Witness asked Miss Scarborough if it was her voluntary act. Mr. Lowe replied, that witness was called in to witness the deed, and for no other purpose; she did not read the deed, or hear it

read in witness's presence. It was executed at Mr. Scarborough's house, in West Broad Street."

At the April adjourned Term of 1846, the cause came up for argument before the Circuit Court, when the bill was dismissed.

The complainant appealed to this court.

It was argued by Mr. Holmes for the appellant, and Mr. Johnson (Attorney-General) for the appellee.

196*] *Mr. Holmes first remarked upon the lapse of time, which he contended was not sufficient to bar a recovery. 3 Atk. 558; 2 Eden, 285; 2 Story's Eq. secs. 1520, 1521; 1 Howard, 189; 4 Howard, 560.

The points raised by the pleadings in behalf of complainant, for cancellation of the deed, were:

1. Duress.

2. Want of consideration

3. Fraud, growing out of the relation of the parties as parent and child, trustee and cestui que trust.

1. Duress. [Mr. Holmes commented upon the evidence in the case, to establish this.]

2. Want of consideration. It is admitted that mere inadequacy of price is not of itself a distinct ground of relief in equity. But, under peculiar circumstances, it may amount to such fraud as will be relieved against. 1 Story's Eq. sec. 246; 1 Desaus. Eq. Rep. 651; 11 Wheat. 124.

3. The relation of the parties; and,

1st. Of parent and child. All contracts and conveyances, whereby benefits are secured by children, to their parents, are objects of jealousy. 1 Story's Eq. Jur. sec. 310; 2 Atk. 85, 258; 4 Wash. C. C. 397; 12 Peters, 253; 2 Johns. C. 252.

2d. The relation of trustee and cestui que trust. Taylor, the grantee in trust, and Scarborough, were two of the executors of the will of Isaac. The will was proved only five days before the execution of the deed. Executors are trustees for legatees. 1 P. Wms. 544, 575; 1 Story's Eq. sec. 322; 7 Ves. 166; 1 Story's Eq. sec. 423; 10 Peters, 639.

Both executors and ordinary trustees are prohibited by the rules of courts of equity, from considerations of general policy, from dealing with those whose interests are intrusted, during the continuance of the fiduciary relation. 1 Story's Eq. secs. 321, 322; Hatch v. Hatch, 9 Ves. 292; 1 Johns. Ch. 497, 620; 4 Johns. Ch. 303; 7 Johns. Ch. 174; Lewin on Trustees, 376, Willis on Trustees, 163; Fonbl. Eq. book 2, sec. 7, and notes; 1 Madd. Ch. 110 et seq. 2 Madd. Ch. 132; Sugden on Vendors, 421 to 436; Wormley v. Wormley, 8 Wheat. 421; 1 Peters, C. C. 364; 4 Desaus. 654; Ex-parte Bennett, 10 Ves. 381, 385, 386; 14 Ves. 91, 273; 13 Ves. 47.

The case of Hatch v. Hatch, 9 Ves. 292, proves that the rule of prohibition extends to conveyances without consideration of money, as for friendship, kindness, and regard, etc., etc. And it is settled in Ex-parte Bennett, 10 Ves. 393, that, in order to set aside the sale, it is not necessary to show that the trustee has made any advantage. And see 1 Story's Eq. sec. 322.

197*] *The conduct of the executors having been a breach of trust, it is unnecessary to consider the distinction, if any really exists, between actual and constructive fraud. There is no difference, legally, in the degree of the fraud, and the distinction is between the same kind of fraud, one supported by evidence of actual imposition, and the other being inferred from circumstances. In neither case does the court regard the morality or immorality of the transaction. Ex-parte Bennett, 10 Ves. 393; 8 Wheat. 463. All such cases are forbidden by "the morality and policy of the law, as it is administered in courts of equity." Michoud v. Girod, 4 Howard, 503.

The whole doctrine on this subject has been condensed and illustrated by this court, in the case of Michoud v. Girod, 4 Howard, 503. The case is too recent to require any particular examination. There the executors, being themselves co-heirs and legatees, bought the estate of their testator at a public sale judicially ordered, denied any fraud in fact or intention, declared that the purchases were rightfully made for a fair price, and yet this court say, in reference to such a transaction, that "an executor or administrator is in equity a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale." Ibid. 553, 557. This language covers the whole ground contended for, though the purchase in that case having been per interposition personam was the reason, probably, why the court declared that it "carries fraud on the face of it." And in the same case this court, commenting upon Davoue v. Fanning, said: "The inquiry in such a case is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the cestui que trust, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court." Ibid. 557.

It would be difficult in principle to recognize a distinction between Davoue v. Fanning and the case at bar. In that case a purchase was made per interposition personam for the wife of the executor; here a voluntary conveyance (by which is meant a conveyance without consideration) is taken to one executor for the benefit of the wife of another—that is, for the benefit of that other, and who himself procured the conveyance to be made. If Scarborough had taken the conveyance directly to himself, or through Taylor, the executor, for his own benefit, *such a transaction [*198 could not stand. Will it be permitted to stand, his wife being the cestui que trust for life?

[Mr. Holmes then argued that the marriage settlement, which was stated in the deed to be one of the considerations thereof, had been treated by all parties for a long time as a void instrument; and then proceeded to examine the doctrine of estoppel as applicable to the case.]

If, then, for any of the reasons assigned—duress, the relation of the parties, fraud actual or constructive—the deed of complainant cannot be upheld as a family compromise, between which and the present case there is not the

least analogy, the question then recurs, To what relief is complainant entitled?

1. She is entitled to have the deed cancelled.

2. To an account of the personal property, and

3. To an account of the rents and profits of the real estate from the executors of William Taylor, the trustee, and

4. To a settlement of the entire fund upon trustees for her separate use during life, and after her death to her children, or such other equitable settlement as the court may decree.

Mr. Johnson, for the appellees, contended:

I. That, as it is now admitted that complainant was of age at the time the deed of 22d January, 1828, was executed by her to William Taylor, the character of the said deed takes it out of the principles by which, in certain cases, deeds are in equity considered void, because of the relations of the parties to the same. Pratt v. Barker, 1 Sim. 1; 2 Cond. Eng. Ch. 1; Hunter v. Atkyns, 8 Cond. Eng. Ch. 303, 313, 321; Tendril v. Smith, 2 Atk. 85; Manners v. Banning, 2 Eq. Cas. Abr. 282; Smith v. Low, 1 Atk. 490; Cory v. Cory, 1 Ves. Sen. 19; Brown v. Carter, 5 Ves. 876; Hotchkiss v. Dickson, 2 Bligh. 348; Tweddell v. Tweddell, 11 Cond. Eng. Ch. 1-8; Jenkins v. Pye, 12 Pet. 241, 253.

II. That if the deed was at any time within such principle, the long acquiescence, with knowledge, derives the grantor of the right to avoid it on that ground. Peck v. Randall, 1 Johns. 165; Mooers v. White, 6 Johns. Ch. 372; 2 Story's Eq. 736; Elmendorff v. Taylor, 10 Wheat. 168, 169, 171; Bank of United States v. Daniels, 12 Pet. 32; Foster v. Hodgson, 19 Ves. 185; Gregory v. Gregory, Coop. 201; Prevost v. Gratz, 6 Wheat. 497.

III. That there is no evidence of duress in fact, or of undue influence, or of fraud; that the deed was in all respects a fair and proper deed, being supported by the consideration of love and affection; and if that of itself was not 199*] sufficient, it is valid *by reason of the marriage contract between the father and mother of the complainant, of the 18th April, 1805, which was omitted to be recorded in Georgia, where the property lay.

Mr. Justice Daniel delivered the opinion of the court:

The object of the complainant below (the appellant here), as disclosed in her bill, is to vacate the deed, executed on the 22d day of January, 1828, by her before her marriage, conveying to William Taylor in trust for the use of the mother of the grantor for life (exempt from the debts of her father), and after the death of her father and mother, for the use in equal portions of the said grantor, and of her brothers and sisters, all the property real and personal which was given to the said grantor by the will of her uncle Robert Isaac, whose will is made an exhibit in the cause and referred to in the deed.

The grounds on which this deed is impeached are the following: "That it was founded on no real consideration; was executed during the non-age of the complainant, and whilst she was living in the family of her parents; that it was extorted from her by false representations, both as to her filial duties, and her rights to the property left her by her uncle; and of extreme urgency and harsh treatment on the part of her parents, to procure its execution; and of the hope, by a compliance with their importunities, of reconciling her parents to her marriage with her husband, which marriage they had theretofore opposed. The objection of non-age must be surrendered in this investigation, it being ascertained that the complainant was some few months over majority when the deed was executed. The other allegations, as resting upon the proofs in the cause, and upon the law as applicable to them, remain for consideration.

The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side, whether applicable to the relations of parent and child, trustee, and cestui que trust, attorney and client, or principal and agent, have been laid down in various cases in the courts both of England and of our own country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the extent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry. They are aptly exemplified by the late Justice Story, in his treatise on Equity Jurisprudence, Vol. I. sec. 307, where, speaking of frauds which "arise from some peculiar confidence or fiduciary relation between the parties," "he re- [*200 marks: "In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands independent of any such ingredients, upon a motive of public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will therefore often interfere in such cases, where, but for such peculiar relations, they would wholly abstain from granting relief, or grant it in a very modified and abstemious manner." He proceeds (sec. 308): "It is undoubtedly true, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, nor affect to sit, in judgment upon cases as custodes morum, enforcing the strictest rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor

would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance." Applying the principles thus annunciated and drawn from an extensive collection of the English cases to the relation of parent and child, and to transactions occurring in that relation, the same author remarks (sec. 309): "The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable 201*] under the circumstances, they will *be set aside, unless third persons have acquired an interest under them."

The same principle has been clearly put by Justice Washington, in the case of Slocum and Wife v. Marshal, 2 Wash. C. C. 400, where, in stating that case, he remarks: "The grantor, a young lady who from her birth had not but on one occasion left the roof of her father—bound to him by the strong ties of filial affection—accustomed to repose in his advice and opinion the most unbounded confidence, and to consider his request ever as equivalent to a command—is informed by him that a certain portion of her property had been conveyed to him by her mother, but that the same, from some legal objection, had failed to take effect. She is then requested to confirm this title, and at the same time is assured by her father, that his design in obtaining this confirmation is to promote her interest as well as his own. She reflects upon the proposal, and, influenced by the double motive of promoting her own interests and that of her father, and of fulfilling the intentions of her dead mother, she makes the conveyance." He proceeds: "A transaction attended by such circumstances will naturally excite the suspicions of a court of equity." It has been insisted that, for the principles just stated, the sanction of this court cannot be avouched; but that, on the contrary, they have been weakened, if not rejected, by the doctrines ruled in the case of Jenkins v. Pye, 12 Peters, 241. The peculiar features of the last named case, which may in some respects distinguish it from the one now under consideration, and be thought to bring it less obviously within the principles above stated, need not be pointed out; but we inquire what are in truth the doctrines ruled in the case in 12 Peters; and whether they are not substantially, nay literally, those propounded by Justices Story and Washington. In the case of Jenkins v. Pye, this court refuse to adopt the rule which they said had in the argument been assumed as the doctrine of the English Chancery, viz., that a deed from a child to a parent should, upon considerations of public policy arising from the relation of the parties, be deemed void. They deny, indeed, that this is the just interpretation of the English decisions relied on, but declare that all the leading cases they have examined are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and showing reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child. But the court, whilst they deny that a deed from a child to a parent should prima facie be held absolutely void, as unequivocally declare that "it is undoubtedly *the [*202 duty of courts of equity carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance." Between the doctrine here ruled and the principles stated by Justices Story and Washington, no difference, much less any contradiction, can be perceived. For why this watchfulness, thus enjoined as a duty, this severe and peculiar scrutiny as applicable to contracts between parent and child, but that they are justly "objects of jealousy," rendered so by the relation of the contracting parties—a relation aptly and naturally productive of powerful influence on the one hand, and of submission on the other—subjecting such transactions to presumptions never attaching a priori to contracts between parties standing upon a perfect equality.

And now let the character of the contract under consideration, and of the circumstances surrounding the execution of that contract, be subjected to the test rationally and justly imposed by the rules above stated.

This is a contract between parent and child, operating by its terms exclusively for the benefit of the former, and to the prejudice of the latter; for it transferred from her a valuable interest, by the very terms of the transaction admitted to be legally and absolutely hers, and by the same terms transferred it without the shadow of an equivalent received or proffered; and for which, the testimony conclusively shows, none could possibly be given. Thus far the provisions of the contract.

With regard to the circumstances attending and surrounding its execution. It is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents—her only home; and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would control the depositions and conduct of a youthful female thus situated. She might be moulded to almost anything, in compliance with the earnest wishes (with her habitually yielded to as commands) of her parents. Those parents, who once had lived in affluence and luxury, had, with all the habits and necessities which such a condition naturally creates, by commercial reverses been brought to indigence; from the date of the purchase by Robert Isaac of the property in dispute, had been permitted by him to occupy and enjoy it. In fact, it was apparently their only means of shelter or support. In this state of the family Robert Isaac by his will bestowed the whole of this property upon the complainant; and it has been *argued that, with her knowledge [*203 of the situation of her parents, the impulses of

filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the law does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operation. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor; and would have been satisfied with a concession, as to which there probably would never have existed a difficulty—one, indeed, that seems to have been assented to in practice—the occupation and enjoyment of the property during their lives, by the parents of the grantor. Nay, it would seem that proper parental tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. And in the estimate of motives which may have led to the transaction under review, it should not be without weight, that this same filial duty and affection, however commendable in themselves, and however their spontaneous action may be recognized and binding, strengthen the probability of their being converted into means of wrong and oppression; and this very probability it is which challenges the duty of watchfulness and jealousy in the courts, in scanning the transactions of those whose peculiar situation exposes them to danger from such means.

Immediately after the death of Robert Isaac, it seems that the various appliances designed to withdraw from the complainant the fruits of the bounty of her affectionate uncle were put into strikingly active operation. Directly following the death of Isaac, it is charged in the bill, came the urgency of the complainant's family, and their reproaches against her for having intercepted, as they said, the bounty which but for her would have flowed to the family; and for having dictated to her uncle the disposition of his property; thereby having ruined their prospects, and broken the heart of complainant's father. The natural effects of such appeals upon the feelings of an affectionate and sensitive girl, or even upon a spirit awake to the impulses of pride alone, can easily be comprehended. Then, as is alleged, was the reluctance of the complainant to despoil herself of her property ascribed to the avarice [*204] of her intended husband; and then, too, amidst her perplexity and distress, upon consultation between both her parents, was suggested to her the device of a letter from her, declaring her belief of the wish of the testator, Isaac, to bestow the property for the benefit of the family; and asking the consent of the father of the complainant to a settlement of the property in conformity with such a wish. Although these allegations are not supported by direct statements of witnesses, yet the intrinsic evidence flowing from other conduct of *the parties* to these transactions, and that presented by the written documents in this cause, impart to the above allegations a force equal, if not surpassing, that which an explicit narrative by witnesses could give them. And here it is worthy of remark, that the will of Robert Isaac contains no expression nor hint of a desire, or intention, that the property should go according to the supposition assumed; or according to the provisions of the deed subsequently executed. This circumstance alone should be one of controlling influence, even if the testator could be regarded as a person of a capacity and character of the most inferior grade. But none can fail to perceive, from the proofs in this cause, that the testator was a man of intelligence and sagacity, extensively practiced in the business of life. He strongly declares his affection for his niece, and as clearly gives to her, and to her only, the property in dispute. What room is here for assuming, that others, and not this niece, were the chief objects of his bounty? Such an assumption is forbidden by every rule of law, or of common sense; it goes very far, of itself, to stamp with fraud and contrivance the means resorted to in order to divert that bounty to other ends.

We will next consider the letter (Exhibit A, filed with the answer of Goodwin) addressed by the complainant, then Charlotte Scarborough, to her father; concocted, as is alleged by the complainant, between her parents, as preparatory and introductory to the wrong about to be consummated; in which letter she professes her readiness and her desire to settle the property derived from her uncle to the use of her parents for their lives, and after their deaths to the use of all the children equally. The will of Robert Isaac was admitted to probate on the 9th day of January, 1828, and amongst the persons who qualified as executors of that will, were William Scarborough, the father of the complainant, and William Taylor, the trustee in the deed now sought to be vacated. These men, the depositaries of the solemn trust reposed in them by Isaac—fully capable of comprehending his will, and one of them sustaining the further obligation of a parent to protect the interests of this young woman—make [*205] themselves the ready instruments to betray this confidence, and this in violation of the clearest language in which their duty could possibly have been prescribed. How far this conduct can be excused or palliated under the pretext of duty to Mrs. Scarborough, founded on the alleged marriage contract, or on any supposed intention of Isaac flowing from the same source, will hereafter, be shown in the conduct of Scarborough and Taylor in reference to this very property, when dealing with it for their own personal advantage. This conduct will furnish a most efficient clew in unraveling the texture of the deed in question.

On the 10th of January, 1828, the day succeeding the probate of the will of Robert Isaac, was written the letter above mentioned from Charlotte Scarborough to her father. It seems impossible to resist the evidence furnished by this singular production, that it was a fabrication, designed to conceal the very facts and circumstances which it palpably betrays. In the first place, it may be inquired why such a letter should be written, and whether it would be usual or probable in a transaction between persons thus situated, if dictated solely by an

admitted sense of propriety, and sanctioned by a willingness of both the parties to it. Can we accredit the probability of a formal diplomatic communication from a daughter just grown, to her father, residing under the same roof, to justify an act which they both believed it a sacred duty to perform? Again, let us look at the declaration here so anxiously and pompously paraded, that, in the act about to be performed by this daughter, she "was unbiased by any control whatsoever; and that, in the liberty she was then using, she was acting by her own free will, dictated by her feelings alone, and unknown to any person," and we shall perceive an apprehension, or consciousness of suspicions, which it was believed the simple transaction itself would neither prevent nor allay. Here are the very clausulæ inconsuetæ pointed to in Twyne's case, as the sure badges of that which they are intended to hide. Why should this young woman have taken such deliberate pains to declare, and to place as it were on record, a history of her motives—her entire exemption from persuasion, authority, or even advice, in what she was about to do in obedience to affection and a sense of duty? If these had constituted the real incentive to her act, would they have left room for one thought or surmise of dishonor, connected with the objects of that affection and duty? Such suspicions and surmises are rather the offspring of colder calculation, and of the "compunctious visitings" that wait on contemplated wrong. And again, in the concluding paragraph of this 206*] *letter, may be seen a strong corroboration of this charge in the complainant's bill, of the painful and discreditable imputations which have been made against her, as inducements to come into the proposed arrangement. The language of this paragraph is as follows: "Most thankful do I feel for being made the simple instrument of accomplishing the will of him who has so kindly and generously placed his confidence in me, and in acting thus, convince the world that my devoted affection for him was pure, disinterested, and unbiased by future expectation." It will naturally occur to everyone to inquire, why this young woman should accuse herself, or fancy herself accused by others, of unworthy motives or conduct, because she had been the object of her uncle's affection? The rational solution of the matter would seem to be this: that the assumption of such motives on the part of those around her, represented by them, too, as entering into the opinions of the world, had been pressed as an efficient means of influence; and that a vindication from their existence furnished a plausible coloring for the proceeding about to be effected. The tone, the language, the artificial structure of this letter, its familiarity with the terms peculiar to the business of life, all bespeak it, in our judgment, not the production of an inexperienced girl, but of a far more practiced and deliberate author. Lastly may be mentioned, with respect to this letter, the care with which it has been preserved, and placed beyond the control of this daughter, as a prop to a transaction which could not stand alone, and as a means of stilling the murmurings of future complaint; the very ends for which it at last emerges from its secret recess.

Next in the chain of evidence, and closely following its harbinger and herald, we will notice the deed itself from the complainant, conveying from her every description of property derived from her uncle; and it is one of the peculiarities of this conveyance, not without significance, that it was executed before there was an inventory made by the executor, to inform the grantor specifically what she had a right to claim or to bestow. Turning then to the recitals of this deed, they must be regarded as wholly irreconcilable with truth; and especially with that uberrima fides, that fullness of candor and fairness, required in transactions between parent and child; transactions upon their face, too, operating to the disadvantage of the latter. This deed sets out a marriage contract entered into between Scarborough and his wife, anterior to their marriage, purporting to cover a portion of the property in dispute; it then states the failure of this contract by reason of an omission to record it, and *proceeds to declare, [*207 that, some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same, the said William Scarborough did, in consequence of such doubts, transfer and convey all his right, etc., to the said Robert Isaac, and that the said Isaac, having departed this life, had left this property, with certain personal estate, to his niece Charlotte Scarborough; and that she to whom the devise and bequest had been made, being desirous of carrying the marriage settlement into effect according to the original intent of the parties, had, on coming of age, determined to convey all her right, title, and interest in the property derived from her uncle, for that purpose.

The deductions from these recitals—nay, their necessary meaning, we may add, their literal import—are these: That the conveyance from Scarborough to Isaac was with the sole view of effectuating the marriage settlement, and of curing any defects attributable to that contract; that Isaac took the property clothed with this trust, and for no consideration moving from himself; and vesting in him an absolute title or estate; that his devise and bequest to his niece were purely to secure the same objects, and that she, fully aware of all these acts and intentions, had, as soon as she could legally do so, determined upon their accomplishment. Such are the declarations and recitals contained in this deed; not one of which, save the statement of a project of a marriage settlement, that is not by the evidence on the record shown to be palpably false. Thus, if we look to the deed from Scarborough to Isaac, of the 13th of May, 1820—to the agreement between Isaac and McHenry as the agent of A. Low & Co., in February, 1826—and to that between Robert Isaac and Andrew Low, on the 8th of March, 1827—and also to the return of the marshal of the sale under execution of the personal property in dispute, we find that Isaac was the purchaser and exclusive owner of all this property, for a pecuniary consideration paid by him of nearly twenty-three thousand dollars. Looking next from the recitals of this deed to the will of Robert Isaac, we find no ambiguity, no declaration, hint, or implication in the will to sustain these recitals; but everything to falsify and condemn them. We there see clearly the motive of the testator; his affection for his

favorite niece, and the subjects and the mode with and by which he designed that his affection should be manifested. He gives to her, clear of all trusts or incumbrances, "the lot, dwelling-house, and all other improvements thereon, which formerly belonged to her father, together also with the plate, furniture of all kinds, 208*] books and prints, all of which *were purchased and paid for at marshal's sale by me." If this clause of the will were shown to and clearly understood by the complainant, it is difficult to conceive how it could be made rationally to express or imply a duty on her part to disrobe herself of this bounty, as being clearly designed for others, and not for herself. The conduct of these persons, Scarborough and Low, and of Taylor, who was named as trustee both in the marriage settlement and in the deed from Charlotte Scarborough, furnishes convincing evidence of the light in which they viewed any obligation supposed to be adhering to this property, and forming a binding consideration, either legal or moral, for the deed now impunged; that is, an obligation to bestow it in conformity with the stipulations of the marriage contract. But it may be naturally asked, if this supposed obligation was limited to Charlotte Scarborough. Did it not, if existing at all, extend equally to her father and to the trustee in the settlement, and to others acquainted or connected with that contract? In a moral view, at least, no difference is perceived in the position of these parties, and it is not pretended that Charlotte Scarborough sustained any legal obligation to convey away this property. Yet it is seen by the record, that William Scarborough, to serve his convenience or his interest, had no difficulty in subsequently encumbering it both to Low and to Taylor, the trustee in the marriage settlement, or in subsequently selling it out and out to Isaac; and that this same trustee, Taylor, manifested as little scruple for the sanctimony of his trust, in its application for his own benefit. And it seems to us to be a most pregnant state of facts connected with this deed, that, when it was to be executed, Taylor and Low, who had so dealt with this property as to be necessarily cognizant of the falsehood of the recitals it contained, were carried to the house of Scarborough to become, the first the trustee, the second a witness to this instrument. The other witness to this deed, John Guilmartin, seems to have been taken under the stress of necessity, from the refusal of James Taylor to attest the deed, and the manner in which the transaction impressed itself upon Guilmartin is evinced in his deposition, in which he says that he inquired of Miss Scarborough whether this deed was her voluntary act, but was permitted to have no answer from her, and was silenced in his inquiries by the remark from Low, that the witness had been sent for to attest the deed, and for no other purpose. This witness further swears, that the deed was not read to nor by the grantor in his presence. He states, moreover, this uncalled for remark on the part of the father (although witness was not permitted 209*] to obtain information *from the child) —that he, Scarborough, had sent for the witness to attest "a deed from Miss Scarborough to *her mother*, which as a dutiful child she had *made.*" *Again*, when this deed from Charlotte Scarborough was to be proved, the only witness to its execution called on was Andrew Low; he who knew that its recitals were inconsistent with truth, he who deemed all inquiry about the willingness of the grantor to make it to be impertinent. John Guilmartin was passed by; he might have revealed, if called, circumstances coeval with the transaction, which would be calculated to remove or to weaken the influence of seeming acquiescence, or of the lapse of time; circumstances which time alone, in the absence of direct impeaching testimony, would be competent entirely to cover up. The testimony adduced in support of the deed from the complaintiff falls far short of the object for which it was intended; much of that evidence, too, seems to have been given under influences necessarily detracting from the weight which it otherwise might have had. It wholly fails to countervail the evidence arising from the statements of witnesses on the other side; from the relative positions of the parties; and, more than all, from the intrinsic nature and force of the documents relied on both by plaintiff and defendants in the court below. From a careful analysis of the facts and circumstances of this case, we think the conclusion cannot be resisted, that the deed from Charlotte Scarborough to William Taylor, of the 22d of January, 1822, was not a fair and voluntary transaction; but was drawn from her by means and under influences which render that conveyance void. We are, therefore, of the opinion, that the real property conveyed by that deed should be reconveyed to the said Charlotte, now Charlotte Taylor; and that the several articles of personal property bequeathed to her by her uncle, Robert Isaac, so far as the same are now in existence, and in the possession or under the control of Mrs. Julia Scarborough, or of any other person acting under her authority, or claiming from her and not for a valuable consideration without notice, or claiming under like circumstances from any person by virtue of the provisions of the deed of trust above mentioned, should be delivered up to the complainant as her own property; but it is the opinion of this court, that rents and profits for the use and occupation of the real estate above mentioned, or compensation for the use and enjoyment of the personal property bequeathed to the complainant, should not be allowed her under all the circumstances attending this case; they are accordingly hereby denied her. It is therefore, upon consideration, adjudged, ordered and decreed, that the decree of the Circuit Court *for the Sixth Circuit and Dis- [*210 trict of Georgia, pronounced in this cause at the April Term of that court in the year 1846, be, and the same is hereby reversed; and this cause is remanded to that court, with directions to decree therein in conformity with the opinion hereinabove expressed.

Mr. Justice Wayne remarked that the decree given in this case was that which he wished to be given in the court below. But the judges of the Circuit Court not being of the same opinion, the bill of complaint was dismissed, that there might be an early appeal to the Supreme Court. He concurs altogether in the reasoning and conclusions which have just been announced by the court.

Mr. Justice Nelson and Mr. Justice Woodbury dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to decree therein in conformity to the opinion of this court.

JOHN MAXWELL, Administrator de bonis non of Robert Maxwell, Deceased, Appellant,
v.
JOSEPH S. KENNEDY, Jesse Carter, Mary L. Carter, his Wife, Daniel E. Hall, and Delphine Hall, his Wife, and Martha Kennedy.

One asking aid of court of equity to enforce judgment, must show diligence—defendant may demur where laches appear on face of bill.

A lapse of forty-six years is a bar to relief in equity, although the creditor, during all that time, supposed the debtor to be insolvent and not worth pursuing, where it appears that for a considerable portion of that time he was in a condition to pay, and the creditor might, by reasonable diligence, have discovered it, and recovered the money by a suit at law.

Where, upon the case stated in the bill, the complainant is not entitled to relief by reason of lapse of time and laches on his part, the defendant may demur.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The bill was filed in the court below by Max-
211*] well, the appellant, *against the above named defendants, as the heirs of William E. Kennedy. Joseph and Martha Kennedy were his children, and Jesse Carter and Daniel E. Hall had married his daughters.

As the sole question which came up to this court was the correctness of a judgment of the Circuit Court in sustaining a demurrer to the bill, it is only necessary to state the substance of it.

The bill averred, that on the 10th of November, 1797, Robert Maxwell, the intestate of the complainant, recovered a judgment in South Carolina, against William E. Kennedy, the ancestor of the present defendants. The judgment was for £1,000 sterling, and costs, £114 9s. 2d., no part of which was ever paid.

That immediately after the rendition of the judgment, in order to avoid the service of a capias ad satisfaciendum which had been issued, and also to avoid being apprehended for the murder of the said Maxwell, for which he had been indicted, Kennedy fled from South Carolina. Two or three years afterwards he was apprehended in Georgia, brought back to South Carolina, tried and acquitted. At this time he was stated in the bill to have been insolvent. Immediately afterwards, he returned to Georgia, where he remained for four or five years, still insolvent, so that no effort could have been successfully made to collect the above mentioned judgment.

That after the expiration of that time Kennedy left Georgia, without its being known to anyone in that part of South Carolina where he had gone, until about three years before his death, when, sometime in the year 1822, it was ascertained that he was living in Mobile. That he was then residing with his brother, one Joshua Kennedy, and apparently dependent upon him for support. That when Kennedy went to Mobile, it was in a foreign country, and little or no intercourse existed between it and South Carolina; nor was there for a long time after it had been ceded to the United States. That while Florida was yet a Spanish province, viz., in the year 1806, the said Kennedy acquired an imperfect title to a considerable estate in land, of which, however, the complainant was entirely ignorant. That on the 13th of December, 1824, he conveyed this estate to his brother, Joshua Kennedy, for the consideration of $10,000, which, the bill averred, had never been paid.

That it was not until after the date of this deed, that the complainant discovered that William E. Kennedy was living, and he was then wholly without property.

That in the year 1805, he had married a female subject of *the crown of Spain, [*212 who owned considerable real and personal estate; all of which was settled upon her previously to the marriage.

That on the 9th of April, 1825, William E. Kennedy died. Joshua Kennedy administered upon the estate, and returned an inventory to the Orphans' Court, amounting in value to $267. Up to the time of Joshua's death, which took place in 1839, he constantly represented his brother William to have died insolvent, and these representations prevented the complainant from attempting to enforce the long standing judgment.

That on or about the 22d of April, 1839, the heirs of the said William E. Kennedy, viz., the defendants in the present suit, filed a bill in the Court of Chancery of the First Chancery Division and Southern District of the State of Alabama, against the heirs and executors of Joshua Kennedy, and obtained a decree against them, which, on an appeal to the Supreme Court of Alabama, was confirmed. This decree adjudged that the deed of 13th December, 1824, was not made upon any consideration valuable in law, but for the purpose of securing an adequate provision for the children of the said William. It therefore further adjudged, that the heirs of William were entitled to one half of the unsold land, and one half of the proceeds of all which had been sold.

The bill then proceeded to aver, that a compromise had been made by the heirs and representatives of these two brothers, a discovery of which was prayed; and that, when made known,

Note.—Limitation of actions in equity. See note to 6 L. ed. U. S. 287; 42 L. ed. U. S. 711.
Statute of limitations in cases of fraud in equity cases. See note to ante, p. 928.
When relief of will be denied from lapse of time in equity. See note to 3 L. ed. U. S. 627.

the share of the lands so conveyed to the heirs of William E. Kennedy might he held bound to satisfy the judgment obtained by the intestate of the complainant. It concluded with a general prayer for other and further relief.

One of the exhibits attached to the bill was a copy of the decree just mentioned, in the case of Joseph S. Kennedy et al., Heirs of William E. Kennedy, Complainants, v. The Executors and Heirs of Joshua Kennedy, which decree was passed on the 28th of November, 1840.

To the bill filed by Maxwell in the Circuit Court of the United States against the heirs of William E. Kennedy, the defendants demurred.

In May, 1845, the cause came up for argument upon the demurrer, when the Circuit Court sustained the demurrer and dismissed the bill.

From that decree the complainant appealed to this court.

The case was argued by Mr. Dargan and Mr. Bibb for the appellant, and by Mr. Sherman for the appellees.

213*] *Mr. Dargan, for appellant:

The only question that can be successfully raised to the bill is the statute of limitations.

The idea of staleness is rebutted by the allegations of the bill. On this I will offer no remarks other than those contained in the bill itself.

If I can overcome the statute of limitations, the decree must be reversed. And I contend that the claim is not barred, because it is not within the statute. It is not every action of debt that is barred by our statute. But, on examination, it will be found that actions of debt, founded on lease under seal, bill single, and penal bill for the payment of money only, awards under seal shall be barred, if not sued within sixteen years. See Clay's Digest, p. 327, sec. 81. And in section 82, page 327, it is enacted, that scire facias in debt on a judgment rendered in the State of Alabama shall be barred after twenty years. In neither of these sections, nor in any part of the act, is a bar created to an action of debt founded on a judgment rendered in a sister State, or a foreign country.

I think the rule of construing statutes of limitations is well settled, and is this: that all actions of debt founded on the grounds, or cause of action, named in the statute, are barred. But that a statute that bars an action of debt on a foreign judgment only would not bar an action of debt on a domestic judgment; and vice versa. To this distinction, Pease v. Howard, 14 Johns. 479, is a strong case. The court here say: "It is not every action of debt that is barred by the statute; but those actions of debt alone, founded on the grounds named in the statute." Hence, if a statute should bar an action of debt founded on a bond, this statute would be no bar to an action on a judgment; or if the statute created a bar to an action of debt founded on a judgment, this act would not bar a debt on a bond or lease; nor will an action of debt founded on a statute be barred by a statute barring debt on a lease, etc. 2 Harr. & McH. 154; 1 Mason, 289.

In 2 Saunders's Reports, p. 64, we find this case: Debt on award; plea, statute of limitations; and demurrer to the plea. The court held, that debt on award was named in the statute, and therefore not barred. So in 2 Mod. Rep. 212, we find: Debt on a sheriff's return of fieri facias. The court say: "This is an action of debt founded on the breach of a legal duty as an officer of the court, and not on a contract. The statute, therefore, that bars debt on a contract, does not embrace or bar this action, founded on breach of a legal duty."

This distinction is supported by so many adjudged cases, *and seems to be so well [*214 founded on reason—that is, that a bar created by statute to debt on one cause of action, named in the statute, does not bar debt on another or different cause of action, not named in the statute—that I submit it with some confidence it will be sustained by the court.

Now, courts adopt, but do not create, statutes of limitations. If a demand is not barred at law by statute, it cannot be barred in equity. If, then, there is no statutory bar, is there any other bar to a recovery? Staleness of demand, when the demand is clear and definite, and it has not been asserted because of acts of defendant (in running off, covering his property, and superinducing the belief of insolvency), I do not think will be sustained by this court. What circumstances is there alleged in the bill that will take away the right of recovery, in the absence of any bar by statute? It was on this ground that the decree proceeded.

Mr. Charles E. Sherman, for defendants:

This case presents, in a striking point of view, the wisdom of the rule of chancery as to the effect of lapse of time in barring demands. Half a century has passed away since the judgment sought to be now recovered was rendered. The parties are long since dead, as well as those who administered their estates. The complainant and defendants in the present suit were not born till long after the remote times spoken of in the bill, and can know nothing of what was then done. An entire generation has gone, and with it the evidences of its transactions. In such cases, courts of chancery refuse to interfere. The bill, indeed, admits this, but relies on certain circumstances stated in it, to avoid the conclusions arising from lapse of time, and to excuse the delay and neglect which have occurred. But from the allegations and admissions appearing on the face of the bill itself, and in the exhibits, they will not avail the complainant. The bill admits the fact that Dr. Kennedy's place of residence in Georgia was known; that he was brought back to South Carolina to be tried, no doubt at the instance of the family of Maxwell, and that he was there with an execution against him for this debt in the hands of the sheriff of the district where he was tried and acquitted. He was thus completely within the power of complainant's predecessor for the enforcement of the execution.

It was two or three years before he was brought back from Georgia, and when he returned there, he remained for four or five years more. Here are seven or eight years, during all which time his residence was known, and also during which *he was subject to an [*215 action of debt on the judgment in the courts of Georgia, which it was the duty of complainant's predecessor to have brought, if he wished to keep the debt alive. The poverty of a debtor presents no legal excuse for the failure of a creditor to take the means necessary for the preservation of his rights.

There is no distinct or specific allegation as to the time when Dr. Kennedy left Georgia, and none that any pains whatever were taken to discover or ascertain his residence. However, it is admitted that he was discovered to be living in Mobile in 1822; and that he had no property or means is contradicted by the complainant himself, for he admits that he had, as early as 1805, married a Spanish lady, the owner of considerable real and personal estate, which, however, he had settled upon her before marriage; and that he, Kennedy himself, had "acquired an imperfect title to a considerable amount of real estate." And by turning to one of the exhibits annexed to and made a part of the bill, it will be found that, on the 6th of May, 1814, he had acquired, along with his brother, a certain Spanish grant made to one McVoy, and in his own name two other Spanish grants, made to one Price and one Baudain. By the Chancellor's decree in the suit by his heirs against the heirs of his brother Joshua, among the exhibits, the same thing is established. The decree also declares, that he had the reputation of being a physician of some eminence; that he was fond of ease, careless of wealth and generous; and that, after the death of his wife, he went to live with his brother, depending upon him for everything, although he had means enough of his own. Having discovered his residence, it would have been but reasonable diligence to have taken the means to ascertain his ability to pay, and to have enforced the judgment against him.

How long Dr. Kennedy lived under the dominion of Spain will best be shown by a reference to the historical facts connected with that part of the country where he lived. From the treaty for the cession of Louisiana, the United States claimed the Perdido as the eastern boundary of that cession. In 1810, Mr. Madison, by his proclamation, declared it a part of the United States. And by an act of Congress of 14th May, 1812, all that portion of country lying east of Pearl River, west of the Perdido, and south of the thirty-first degree of latitude, was annexed to the territory of Mississippi, embracing the city of Mobile. And on the 12th of February, 1813, Congress passed an act authorizing the President to take possession of the same. In the same year, the Spanish offi-
216*] cers finally *retired. At this date, therefore, Dr. Kennedy ceased to be under the dominion of Spain, and became subject to the laws of the territory of Mississippi, and liable to be sued in her courts. In 1817 the Territory of Alabama was created, and in 1819 it was admitted as a State into the Union. As to the deed made by Dr. Kennedy to his brother Joshua, in 1824, the exhibits show the object for which it was made. There is no charge of fraud against Dr. Kennedy in the bill, for acting as he did. The decree of the Chancellor shows the reasons and motives in which the deed originated; and that it was secret is contradicted by the same decree, which says, that, "very soon after the deed was executed, Joshua Kennedy declared to many of those very friends whom he had consulted before, and to others at various times, that he had succeeded in his purpose; that the Doctor had made over his property to him, and that now his, the Doctor's children would have plenty; that they would soon be rich." The decree also shows, that, in the spring of 1829, Joshua caused an advertisement to be inserted in a public newspaper in Mobile, offering for sale and lease, some of the lands, in which, speaking of the land to be leased, he states: "At the expiration of which period, the property shall revert to the legal heirs and representatives of William E. Kennedy, deceased, and to the undersigned in equal proportions."

One portion of the lands conveyed by that deed—the McVoy claim—was, as appears by the deed itself, acquired by Dr. Kennedy in 1814, when, beyond all question, the country was part of the United States, and when there could have been no impediment to the acquisition of the property by Joshua in his own name. But what is still more remarkable, the conveyance was made to the two brothers jointly. As to the other claim, the Chancellor says: "Whether Joshua Kennedy originally had any interest on the Price claim or not, does not seem to be clear from the evidence; but about the year 1818 or 1819 there seems to have been a deed of partition, which is now lost, by which an equal interest on that claim was recognized between the brothers."

The bill is full of contradictions. In one place it admits that Dr. Kennedy's residence in Mobile was discovered in 1822, whilst it says in another that it was not until after the deed of 1824. It says in one place that Joshua who became the administrator of his brother, never settled the estate, and in consequence the personal assets remained in his hands at the time of his death; whilst in another, exactly the contrary is stated.

It will be observed there is no allegation in the bill, that *either the complainant or[*217 his predecessor ever presented this claim to Joshua as administrator, or took any measures to enforce payment out of the personal estate, which, by the laws of Alabama, required to be exhausted before resort can be had to the realty. And there is no charge of fraud whatever, either against Dr. Kennedy or his heirs, but that its whole scope and tendency is to offer excuses for the delay and neglect of the complainant and his predecessor. No exemplification of the judgment was produced.

The defendants have demurred to the bill, and under the state of facts apparent on its face and in the exhibits, it is contended that the claim is barred by lapse of time. In South Carolina, the payment of a judgment is presumed after the lapse of twenty years. This is the common law presumption, and is the rule in most of the States of the confederacy. In the State of Alabama, the statute of limitations bars domestic judgments in twenty years. Nothing is said as to judgments of sister States. It cannot be pretended they should be placed on a better footing than domestic. The bill admits a knowledge of the residence of Dr. Kennedy for a period of seven or eight years in Georgia, immediately after the judgment was obtained; and also a knowledge of his residence, and that of his administrator and heirs, in Alabama, from 1822; so that the complainant has slept upon his rights for a period of more than thirty years, even if the time during which it is alleged the residence of Dr. Kennedy was unknown is deducted. The fact,

that a creditor is ignorant of the domicil of his debtor, is not regarded in the courts of the country where the debtor resides; they make no presumptions in favor of strangers. The highest effort of legal comity is to place the stranger in the same situation as the citizen. Statutes of limitation and presumptions arising from lapse of time belong to the lex fori. The citizen of another State is not to be placed on a better footing than citizens of the State where suit is brought. McElmoyle v. Cohen, 13 Pet. 327.

The well recognized doctrine of courts of equity, as to the effect of lapse of time in barring judgments and other claims, as well in analogy to statutes of limitation as where no such statutes exist, will be found laid down in 2 Story's Equity, sec. 1520; and by this court in McKnight v. Taylor, 1 Howard, 167; and in Bowman v. Wathen, Ibid. 189. See, also, Cholmondeley v. Clinton, 2 Jac. & Walk. 141, 151; Foster v. Hodgson, 19 Ves. 184, 186; Smith v. Clay, Amb. 645; Carr v. Chapman, 5 Leigh, 164; Hayes v. Goode, 7 Leigh, 452.

The objection of lapse of time, apparent on 218*] the face of the *bill, may be taken on demurrer. Story's Eq. Pl. secs. 484, 503, 751, and cases there cited. Where there is no relief, there is no discovery. McClanahan v. Davis, decided at the present term.

Mr. Bibb, for the appellant, in reply, laid down the following propositions:

I. The frame of the bill, and the equity thereof, apart from the length of time or the statute of limitations.

II. That the statute of limitations of Alabama does not apply to the case.

III. That the length of time, when no statute of limitations can be applied as a positive bar, and when compared with the facts stated in the bill and confessed by the demurrer, is no bar to the discovery and relief prayed.

Upon the first head, Mr. Bibb proceeded to show that, upon the averments of the bill, confessed by the demurrer, the appellant was without remedy at common law; but although the remedy was gone, the right remained.

Upon the second point, he relied upon the argument of Mr. Dargan.

Upon the third point, he contended that length of time, without any statute of limitation, was no reason for a demurrer. In this case it admitted all the causes stated in the bill, why the judgment was still unsatisfied. 3 Bro. Ch. Rep. 646; 3 Atkyns, 225; 2 Ves. Sen. 109.

Mr. Chief Justice Taney delivered the opinion of the court:

The facts stated in the bill are admitted by the demurrer, and the only question is whether the complainant is entitled to relief in a court of equity, when so many years have elapsed, since the judgment was obtained against the father of the defendants.

The judgment was rendered in South Carolina on the 10th of November, 1797, and this bill was filed against the appellees in Alabama on the 22d of February, 1844. A period of more than forty-six years had therefore elapsed, during which neither the plaintiff who obtained the judgment, nor his administrator, nor the present complainant, who is administrator de bonis non, made a demand of the debt, or took any step to procure its payment.

It is not alleged in excuse for this delay, that his residence was, during all the time, unknown. On the contrary, it is admitted that it was known for some six or eight years after the judgment was obtained; and although he was afterwards lost *sight of for a long [*219 time, and supposed to have gone beyond sea and died in parts unknown, yet he was again discovered in 1822 residing in the State of Alabama, where for three years afterwards he was accessible to the creditor, and amenable to judicial process.

Neither is it alleged that he designedly and fraudulently concealed his place of residence from the creditor; nor that the conveyance of his property was made for the purpose of hindering or preventing the recovery of this debt. The delay is accounted for and sought to be excused altogether upon the ground, that, when his place of residence was known, he was always in a state of poverty and insolvency, which made it useless to proceed against him.

It is, however, not necessary, in deciding the case, to inquire whether even this state of poverty would justify the delay of so many years without some demand upon the party, or some proceeding on the judgment, to show that it was still regarded as a subsisting debt, and intended to be enforced whenever the debtor was able to pay. The facts stated in the bill, and those which appear in the exhibits filed with it by the complainant, do not show this continued condition of utter destitution and want which the complainant relies upon. For when he was discovered in 1822, in Alabama, his situation as to property was such as to make it highly probable that the debt might then have been recovered by an action at law—if it was not already barred by the Act of Limitations of that State.

This appears from the decree of the Chancery Court of the State, in a controversy between the heirs of William E. Kennedy, the debtor, and the heirs of his brother Joshua, which decree is one of the complainant's exhibits. It shows that in 1818 or 1819 the debtor held in his own right an undivided moiety of the real estate, which he conveyed to his brother, Joshua Kennedy, in 1824, as mentioned in the bill. And this conveyance upon the face of it purported to be in consideration of the sum of ten thousand dollars; a sum sufficient to pay the principal of the judgment, and a large portion of the interest. It is true that the complainant, in that part of the bill in which he speaks of this conveyance, states that he did not discover that the debtor was living and residing at Mobile until after the conveyance was made. If this allegation was consistent with the other statements in the bill, and could be regarded as a fact in the case, admitted by the demurrer, still, as he died in 1825, reasonable diligence required that the creditor should have taken some measures to ascertain whether the ten thousand dollars had been paid; and to compel his administrator, who was also the grantee *in the deed, to account for [*220 it. The creditor had no right to presume, without inquiry, that his debtor, who had sold property for so large a sum of money, had within a year afterwards died utterly insolvent

and almost penniless, so as to make it useless to investigate the state of his affairs, or to take any step towards the recovery of his debt. There is reason for believing, from the facts stated in the decree above mentioned, that, with proper efforts, he would at that time have learned the trust upon which the conveyance was made, and discovered that the debtor had left property of sufficient value to be at all events worth pursuing.

But the complainant cannot put his claim upon the ground that the residence of the debtor was not known until after he had made the conveyance and parted from this property. For in a previous part of his bill he admits that this information was obtained in 1822, which was two years before the deed was executed. And whatever might have been the wasteful and dissolute habits of the debtor, he yet at that time owned the land which at this late period the complainant is seeking to charge with this debt; and continued to hold it until the conveyance to his brother in 1824. And if the creditor chose to rest satisfied with information as to his habits and manner of living, instead of using proper exertions to find out his situation as to property, his want of knowledge in this respect was the fruit of his own laches. The fact that he held the title to these lands could undoubtedly have been ascertained with ordinary exertions on his part. And he moreover might have learned, according to the statement in his exhibit before referred to, that after the death of Wm. E. Kennedy, his brother, the grantee in the deed frequently spoke of this conveyance as intended merely to prevent the property from being wasted by the careless habits of his brother, and to preserve it for his family. And as late as 1829, in an advertisement in a newspaper of the place, offering some of this land for sale or lease, he described it as property of which the children of Wm. E. Kennedy were entitled to one half. With all these means of information open to him from 1822 to 1829, the creditor cannot be permitted to excuse his delay in instituting proceedings upon the ground that he supposed the debtor to have lived and died hopelessly insolvent, until he obtained information to the contrary about the time this bill was filed. If he remained ignorant, it was because he neglected to inquire. If he has lost his remedy at law by lapse of time, or the death of the debtor, it has been lost by his own laches, or that of the administrator who preceded him.

221*] *It is the established rule in a court of equity, that the creditor who claims its aid must show that he has used reasonable diligence to recover his debt, and that the difficulties in his way at law have not been occasioned by his own neglect. A delay of twenty years is considered an absolute bar in a court of equity, unless it is satisfactorily accounted for. But here there has been a delay of more than forty-six years; and under circumstances, for a part of that time, which evidently show a want of diligence.

Indeed, if the court granted the relief asked for, the complainant would not only be protected from the consequences of his own neglect, but would derive a positive advantage from it. For if, when the debtor was discovered in Alabama in 1822, the complainant had then brought an action at law against him and recovered judgment, and then suffered that judgment to sleep until the time when this bill was filed, his claim would have been barred by the statute of limitations of that State. And if he could now avoid that bar, upon the ground that the Act of Limitations of Alabama applies only to domestic judgments, and could obtain the aid of a court of equity to enforce the judgment rendered in South Carolina, upon the ground that it is not within that act, he would derive an advantage from his omission to proceed against the debtor when he discovered, in 1822, the place of his residence. He would obtain relief, because he neglected to sue at law when the debtor appears to have been in a condition to pay the debt; and when that fact could have been ascertained by reasonable exertions on his part. In the eye of a court of equity, laches upon a judgment of South Carolina cannot be entitled to more favor than laches upon a judgment in Alabama, and both must be visited with the same consequences. Relief in a court of equity, under the circumstances stated in the bill and exhibits, would be an encouragement to revive stale demands, which had been abandoned for years. The property now sought to be charged might not, in the lifetime of the original parties, have been thought worth pursuing; and in the changes in value continually occurring in this country, it may, after the lapse of so many years, have become of great value in the hands of the heirs of the debtor. And if under such circumstances it could be made liable, an old and abandoned claim, with the accumulated interest of near half a century, might become a tempting speculation. Sound policy, as well as the principles of justice, requires that such claims should not be encouraged in a court of equity.

It is unnecessary, in this view of the case, to determine whether the statute of limitations of Alabama does or does not *apply to this [*222 judgment. For the reasons above stated, we think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations.

Another question has been made in this case; and that is, whether the objection arising from lapse of time, apparent on the bill and exhibits, can be taken advantage of on demurrer. Undoubtedly the rule formerly was that it could not; and that doctrine was distinctly laid down by Lord Thurlow, in the case of Deloraine v. Browne, 3 Bro. Ch. R. 646. The rule was perhaps followed for some time afterwards.

It was placed upon the ground, that this defense was founded upon the presumption that the debt must have been paid, and as a demurrer admits the fact stated in the bill, it admits that the debt is still due; and if admitted to be due, the debtor in equity and good conscience is bound to pay it.

But the presumption of payment is not the only ground upon which a court of chancery refuses its aid to a stale demand. For there must appear to have been reasonable diligence, as well as good faith, to call its powers into action; and if either is wanting, it will remain passive and refuse its aid. This is the principle recognized by this court in Piatt v. Vattier,

9 Pet. 416, McKnight v. Taylor, 1 How. 168, and in Bowman et al. v. Wathen et al. 1 How. 189. If, therefore, the complainant by his own showing has been guilty of laches, he is not entitled to the aid of the court, although the debt may be still unpaid.

Upon this principle, the proper rule of pleading would seem to be, that, when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in the assertion of his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court. Accordingly, the rule stated by Lord Thurlow has not been always followed in later cases. In Hovenden v. Annesley, 2 Sch. & Lefr. 638, Lord Redesdale says: "If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required on demurrer whether the defendant ought to be compelled to answer the bill." And in Story's Eq. Pl. sec. 503, and the note to it, he states the rule as laid down by Lord Redesdale to be now the established one. In the opinion of the court, it is the true rule. It is evidently founded upon sounder principles of reason than the one maintained by Lord Thurlow, and is better calculated to disembarrass a suit from unnecessary forms and technicalities, 223*] *and to save the parties from useless expense and trouble in bringing it to issue, and applies with equal force to a case barred by the lapse of time, and the negligence of the complainant, as to one barred by a positive act of limitations.

In the case before us, therefore, the demurrer was proper, and must be sustained, and the decree of the court below affirmed.

Order.

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

SAMUEL MARSH, William E. Lee, and Edward C. Delavan, Plaintiffs in Error,

v.

EDWARD BROOKS and Virginia C. his Wife, formerly Virginia C. Reddick, Charles P. Billou and Frances E., his Wife, Formerly Frances E. Reddick, Walter J. Reddick and Dabney C. Reddick by Eliza M. Reddick, their Guardian, Heirs at Law of Thomas F. Reddick, Deceased, Defendants in Error.

Ejectment—patent from U. S.—adverse claim under U. S. grant to Sac and Fox Indians—recitals in patent—evidence.

The plaintiff in a writ of right produced a patent from the United States, dated in 1839, which contained sundry recitals, referring to titles of anterior date derived from acts of Congress for the adjustment of claims to lands. But the patent itself was issued under an act of Congress in 1836.

The defendant, in order to show an outstanding title, gave in evidence a treaty between the United States and the Sac and Fox Indians, in which this, with other lands, was reserved for the half-breeds, and an act of Congress passed in 1834 relinquishing the reversionary interest of the United States to these half-breeds.

This was sufficient to show an outstanding title.

The recitals in a patent are not enough to show that the title is of an earlier date than the patent itself, although they are evidence for some purposes. Nor was it necessary for the defendant to show that any of the half-breeds were in existence at the time of the trial.

THIS case was brought up by writ of error from the Supreme Court of Iowa. It was a proceeding in the nature of an ejectment, to recover 640 acres on the right bank of the Mississippi River. The suit was brought by the heirs of Reddick against one Kilbourn, who was the tenant in possession. By agreement of counsel, filed after the suit was brought, it was admitted that the defendants in error were the heirs of Thomas F. Reddick, and the plaintiffs in error were substituted in the place of Kilbourn.

*The facts were these: [*224

On the 4th of August, 1824, a treaty was made between the United States and the Sac and Fox Indians, by the first article of which the Indians ceded to the United States the lands described as follows, viz.: "Within the limits of the State of Missouri, which are situated, lying, and being between the Mississippi and Missouri rivers, and a line running from the Missouri at the entrance of Kansas River north one hundred miles to the northwest corner of the State of Missouri, and from thence east to the Mississippi. It being understood, that the small tract of land lying between the rivers Des Moines and the Mississippi, and the section of the above line between the Mississippi and Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nations, they holding it, however, by the same title and in the same manner that other Indian titles are held."

On the 30th June, 1834, Congress passed an act (4 Stat. at Large, 740) entitled, "An Act relinquishing the half-breed lands." It relinquished all the right, title, and interest which might accrue to the United States in the above reservation, and vested the land between the rivers Des Moines and Mississippi, above mentioned, in the half-breeds of the Sac and Fox tribes of Indians, who were, at the passage of the act, entitled by the Indian title to the same, with full power and authority to transfer their portions thereof, by sale, devise, or descent, according to the laws of the State of Missouri.

Both of these documents covered the land in dispute.

On the 1st of July, 1836, Congress passed an act (6 Stat. at Large, 661), relinquishing to the heirs of Thomas F. Reddick all the right, title, claim, and interest which the United States had to a certain tract of land (understood to be the land in dispute), with the following proviso:

"Provided, nevertheless, if said lands shall be taken by any older or better claim not emanating from the United States, the government will not be in any wise responsible for any remuneration to said heirs; and provided, also,

that should said tract of land be included in any reservation heretofore made, under treaty with any Indian tribe, that the said heirs be, and they hereby are authorized to locate the same quantity in legal subdivisions on any unappropriated land of the United States in said territory, subject to entry at private sale."

On the 7th of February, 1839, a patent was issued by the United States to Thomas F. Reddick, for the land in controversy, which contained the following recital, viz.:

225*] *"The United States of America, to all to whom these presents shall come, greeting:

"Know ye, that Thomas F. Reddick, assignee of the estate of Joseph Robidoux assignee of Louis Honore Tesson, has deposited in the general land office, a certificate numbered one thousand one hundred and fifty-seven, of the recorder of land titles at St. Louis, Missouri, whereby it appears that, in pursuance of the several acts of Congress for the adjustment of titles and claims to lands, the said Thomas F. Reddick, assignee of the estate of Joseph Robidoux, assignee of Louis Honore Tesson, has been confirmed in his claim to a tract of land containing six hundred and forty acres, bounded and described as follows, to wit," etc., etc.

On the 10th of July, 1839, the defendants in error brought a writ of right (a proceeding recognized by the statutes of Iowa, in the nature of an ejectment) against the tenant in possession under Marsh, Lee, and Delavan. After sundry proceedings, which it is not necessary to state, the cause came on for trial at September Term, 1843, of the District Court, when the jury, under the instructions of the court, found a verdict for the plaintiffs.

A bill of exceptions was taken which set out the evidence offered by the parties, respectively, as follows, viz.:

The plaintiffs offered in evidence the above patent; proved that the land claimed was included within it; the heirship of the plaintiffs; and that the defendant was in possession when the suit was brought, and then vested.

The defendants, in order to prove an outstanding title, offered in evidence—

1. The Treaty of 1824.
2. The Act of Congress of June 30, 1834.
3. The Act of Congress of July 1, 1836.

And also offered parol testimony to prove that the northern line of said half-breed reservation was an actually marked line, in accordance with said plat, and called by the neighborhood, along and on each side of said line, the half-breed line; and thereupon prayed the court to instruct the jury as follows, to wit:

Refused.

1st. That if the jury believe, from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent, as authorized by the said Act of 1st July, 1836.

226*] *Given.

2d. That under the report of the recorder of land titles, dated February 2d, 1816, offered by plaintiffs in evidence, plaintiffs are not entitled to recover, unless the same has been confirmed by an act of Congress.

Given.

3d. That the true construction of the Act of 29th of April, 1816, does not confirm the plaintiffs' title to the land sued for in this action, if the Indian title was not then extinguished in said land.

Given.

4th. That the Treaty of 1824, with the Sac and Fox Indians, is a recognition by the United States of the Indian title to the land in controversy at the date of said Treaty of 1824.

Refused.

5th. That if the jury believe, from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent.

Given.

6th. That if the jury find for the plaintiffs, and that said plaintiffs are entitled to damages from defendants for withholding or using or injuring their property, the jury shall then set off the value of any permanent improvements defendants may have made on said land, at their fair value, against said damages.

Refused.

7th. That the plaintiffs cannot recover in this action, unless they show conclusively that the land in controversy is not within the Sac and Fox half-breed reservation.

Given.

8th. Instruct the jury, that, when it is proved that the land claimed by Reddick's heirs was within the bounds of the map given in evidence in this case, as a survey of the half-breed tract, and that it has proved that such a line does exist, and is recognized by persons residing on each side of the line as the true north line of said tract, that no reputation or opinion of the citizens residing south of said line, or north of said line, that said line is incorrect, would be evidence to impeach the correctness of the line on the map, and proved to actually exist.

Given.

9th. That if the jury believe that Honore Tesson had no marked or known boundaries, which included the land in controversy, the jury must find for the defendant.

The first, fifth, and seventh of which instructions the court *refused to give to the [*227 jury; to which refusal and opinion of the court the defendants, by their counsel, except, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record.

Charles Mason, Judge. [Seal.]

The defendants sued out a writ of error, and carried the case up to the Supreme Court of Iowa, which, on the 26th of January, 1846, affirmed the judgment of the District Court.

The defendants in the District Court, viz., Marsh, Lee, and Delavan, then brought the case, by writ of error, up to this court.

It was argued by Mr. Wood for the plaintiffs in error, and Mr. May and Mr. Geyer for the defendants.

Mr. Wood made the following points:

I. The possession of the defendants in the original suit was sufficient to entitle them to a verdict, unless the plaintiffs should show a title

II. An outstanding valid title, paramount to

that of said plaintiffs, was sufficient to protect the possession of defendants below against the plaintiffs' title. Schauber v. Jackson, 2 Wend. 12.

III. The title of the Indian half-breeds, under the Act of 1834 and the Treaty of 1824, was valid and complete, and being prior in time to the patent of the plaintiffs of 1839, which issued in virtue of the Act of 1836, is paramount thereto, and ought to prevail against it. 1 Doug. Mich. R. 555; Hoofnagle v. Anderson, 7 Wheat. 212; 2 Peters, 263; 9 Wheat. 673; 9 Peters, 715, 716.

IV. Even if the plaintiffs below had shown a defective title prior to the Treaty of 1824, such defective title would not, as against the said title under the Act of 1834, be made valid by the plaintiffs' patent of 1839, because such patent passed only the title of the United States then existing; more especially, inasmuch as the Act of 1836, under which it issued, reserved rights previously acquired under treaty with any Indian tribe. Lee v. Glover, 8 Cow. 189; Mitchel v. United States, 9 Peters, 748; Johnson v. McIntosh, 8 Wheat. 578.

The counsel for the defendants in error contended—

I. The court did not err in refusing the said prayers, because—

1. They are based on a part only of the evidence. Greenleaf's Lessee, v. Birth, 9 Peters, 292.

228*] *2. It appears on the plot, by the prayers of plaintiffs in error, and on the face of the patent, that the land in dispute had been, by acts of Congress, confirmed to Reddick prior to the Treaty of August, 1824.

The patent being founded on a confirmation, the facts recited may be considered. United States v. Clarke, 8 Pet. 448. A public grant, if submitted in evidence, must be received by court and jury as evidence both of the facts it recites and declares leading to the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face. United States v. Arredondo, 6 Pet. 729; see Act of March 2d, 1805, ch. 26, 2 Stat. at Large, 324; Act of April 21st, 1806, ch. 39, 2 Stat. at Large, 391; Act of February 15th, 1811, ch. 14, 2 Stat. at Large, 617; Act of June 13th, 1812, ch. 99, 2 Stat. at Large, 748, authorizing Recorder to report on claims to land in Missouri; Reports of Recorder of November 1st, 1815, and February 2d, 1816, in favor of Reddick's claim; 3 Am. State Papers, 345; Act confirming Claims reported by Recorder, April 29th, 1816; ch. 159, 3 Stat. at Large, 328.

The report of recorder adds to his approval of Reddick's claim "if Indian right extinguished." As to the effect of this proviso, see Report of J. M. Clayton, Chairman 23d Congress, 2d Sess. Report, No. 31, Ho. Reps.; United States v. Fernandez et al. 10 Pet. 303; Chouteau v. Eckhart, 2 Howard, 374; Report of Solicitor of Land Office, MSS. vol. No. 75, dated June 9, 1837.

Did not the Act of April 29th, 1816, include Reddick's claim?

It was approved by the recorder, acting as commissioner, as a valid claim, subject only to Indian rights, on the contingency that they are or may thereafter be extinguished. "All grants of land by the government are to be understood as being subject to Indian rights." Fletcher v. Peck, 6 Cranch, 87; Mitchel v. United States, 9 Peters, 711; Johnson v. M'Intosh, 8 Wheat. 574.

If, before the confirmation to Reddick, the title was only inchoate and addressed itself to the Political Departments of government (see Le Bois v. Bramell, 4 Howard, 449), yet it was such an equitable title as the government was bound to protect. Mitchel et al. v. United States, 9 Peters, 714.

But what was the effect of the confirmation by the Act of April 29th, 1816, if restricted by the proviso of the recorder, to wit, "if Indian right extinguished?" Did it not at least grant the ultimate fee, which was in the United States, subject to Indian right of possession? Could the United States afterwards *deal [*229 with the fee, and reserve or in any way dispose of it? Mitchel et al. v. United States, 9 Peters, 713; Grignon v. Astor, 2 Howard, 344.

Indians have only a right of occupancy, and no power to dispose of the soil. Johnson v. M'Intosh, 8 Wheat. 543. Indians cannot sue on their aboriginal title in courts of the United States. Cherokee Nation v. Georgia, 5 Pet. 20.

Grants of land by the government are to be understood to convey a title to the grantees, subject only to the Indian right of occupancy. When that is ended by cession to the government, or otherwise, it is to be enjoyed in full dominion by the grantee. Ibid.; Fletcher v. Peck, 6 Cranch, 87; Mitchel v. United States, 9 Pet. 711; United States v. Fernandez, 10 Pet. 304.

The act confirming Reddick's title was passed in 1816. After this, by the Treaty of August 1824, the Indians cede all their title, reserving only a small tract for the use of their half-breeds, they holding it as "other Indian titles are held." Reddick's land was located before this, and well known to the government by its metes and bounds. See additional article of Treaty with Sac and Fox Indians, dated November 3d, 1804, 7 Stat. at Large, 87.

Was not the reservation subject, then, to his locations? Otherwise, would it not be a fraud on the part of the United States?

The confirmation of the claim of Reddick, either by the recorder or Congress, was a location of the land. Les Bois v. Bramell, 4 Howard, 463.

The grant, then, by Act of April 29th, 1816, is prima facie a good legal title, and standing alone will support an ejectment. Strother v. Lucas, 12 Peters, 454; Chouteau v. Eckhart, 2 Howard, 372. It is a higher evidence of title than a patent, and is a direct grant of the fee. Grignon v. Astor, 2 Howard, 344.

But the plaintiffs below relied upon their patent, issued 7th February, 1839. It is the superior and conclusive evidence of legal title. Bagnell v. Broderick, 13 Peters, 436; Wilcox v. Jackson, Ibid. 499. It is conclusive proof that the act of granting is by authority of the United States. United States v. Arredondo, 6 Pet. 728; Patterson v. Winn, 5 Pet. 241. And is evidence that every prerequisite has been performed. United States v. Arredondo, 6 Pet. 730, 731; Polk v. Wendal, 9 Cranch, 87.

It will not be presumed that the government

has conveyed the same land twice. United States v. Arredondo, 6 Peters, 691.

The court will not construe the patent as conflicting with other rights. Ibid.

230*] *The patent is prima facie evidence of title, and also that any former grant of the same land by the government was extinguished. Hall v. Gittings' Lessee, 2 Harr. & Johns. 112.

This court has repeatedly decided that at law no facts behind the patent can be investigated. Boardman et al. v. Lessees of Reed and Ford, 6 Pet. 328, 342; Stringer v. Young, 3 Pet. 320.

But it ought to be presumed, in cases of disputes about lands granted by government on Indian titles, that a patent carefully describing the lands does not interfere with other public grants, or specially with Indian reservations.

Intercourse with the Indians should be carried on by the government. Worcester v. State of Georgia, 6 Peters, 315.

It is for the officers of government to say when land shall be reserved, and what is so reserved. Indian affairs belong to the Political Department. The United States deal with Indian titles in their political and sovereign capacity. It is for the land officers to decide on facts on which a patent is to issue. Cherokee Nation v. Georgia, 5 Pet. 1; Wilcox v. Jackson, 13 Pet. 499; Les Bois v. Bramell, 4 Howard, 461.

Though grants are subject to Indian title, yet it is for the proper officers of government to say when such title is extinct by succession, or abandonment, by boundary, or rejection of claim, and the lands have reverted to public fund. United States v. Arredondo, 6 Pet. 747, 748.

The officers of government have determined that the Indian right was extinguished to Reddick's claim, if the Act of April 29, 1816, had not already so determined; and, by issuing the patent, have at least put the burden of proving the contrary on those who dispute it. United States v. Arredondo, 6 Pet. 727, 728; Strother v. Lucas, 12 Pet. 437; 3 State Papers; Report of Solicitor of the Land Office, MSS. vol. No. 113, dated September 21, 1837; also No. 209, dated October 30, 1838; Opinion of Attorney-General Grundy, dated January 2, 1839, vol. of "Opinions of Attorneys-General," p. 1230; Order of Secretary Woodbury, dated February 6, 1839, to issue patent to Reddick's heirs, "by command of the President without any further suspension," and order of Commissioner of Land Office in pursuance thereof, on the files of land office.

Presumptions are in favor of the integrity and fidelity of public officers in fulfilling their duties. Bank of the United States v. Dandridge, 12 Wheat. 64; Martin v. Mott, Ibid. 19; Buller's N. P. 298; 1 Greenleaf on Ev. sec. 40.

If the patent is prima facie evidence, and is not rebutted, it remains sufficient to maintain the title. Kelly v. Jackson, 6 Pet. 632.

231*] *II. The outstanding title set up by the plaintiffs in error in the court below, under the Treaty and law of June 30, 1834, does not necessarily negative a title in the United States at the date of the patent.

It must be a clear subsisting title outstanding in another, to defeat a plaintiff in ejectment, and that means such a title as the stranger could recover on in ejectment against either of the contending parties. Hall v. Gittings' Lessee, 2 Harr. & Johns, 112.

III. The Act of June, 1834, does not necessarily include in the half-breed reservations the land in dispute.

IV. The burden of showing that there was no title in the United States at the date of the patent, and also that the land is within the half-breed reservation, was upon the plaintiffs in error (defendants below). Greenleaf v. Birth, 6 Pet. 302; Hawkins v. Barney, 5 Pet. 468, 469.

Mr. Justice Catron delivered the opinion of the court:

This case comes before us on a writ of error to the Supreme Court of Iowa. The suit originated in a writ of right issued by the District Court of Lee County, at the instance of the heirs of T. F. Reddick, to recover possession of certain lands wrongfully withheld from them, as they alleged, by the defendants, Marsh and others. The venue was subsequently changed to the County of Henry, where the cause was tried in September, 1843. The plaintiffs claimed possession, as owners, under a patent to their ancestor, signed by the President and issued from the general land office on the 7th of February, 1839, which they exhibited, and also proved the premises in question to be covered by such patent, and in possession of defendants.

The defendants produced in evidence, 1st. An act passed by Congress on the 1st of July, 1836, relinquishing to the heirs of T. F. Reddick the right and interest of the United States in six hundred and forty acres, being the land in controversy; which act contained the following provisos: "Provided, nevertheless, if said lands shall be taken by any older or better claim, emanating from the United States, the government will not be in any wise responsible for any remuneration to said heirs; and provided, also, that should said tract of land be included in any reservation heretofore made under treaty with any Indian tribe, the said heirs be, and they hereby are authorized to locate the same quantity, in legal subdivisions, on any unappropriated lands in said territory subject to entry at private sale." 2d. The Treaty of August 4, 1824, between the United States and the Sac and Fox Indians, and a plat showing the *premises in question [*232 to be within the limits of a tract reserved by said treaty for the half-breeds belonging to the Sac and Fox nations. 3d. The Act of June 30, 1834, relinquishing the revisionary or contingent interest of the United States in the reservation above mentioned to the half-breeds, and authorizing them to sell and convey the same. The defendants then requested the court to give to the jury several instructions; the first, fifth, and seventh of which were as follows:

"1st. That if the jury believe from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent, as authorized by the Act of 1st June, 1836."

The fifth is to the same effect as the first.

"7th. That the plaintiffs cannot recover in this action, unless they show conclusively that

the land in controversy is not within the Sac and Fox half-breed reservation."

The court refused to charge the jury upon the above mentioned points as requested, and a verdict was rendered for the plaintiffs; whereupon the case was carried by the defendants to the Supreme Court of Iowa, where the judgment of the District Court was affirmed.

From the foregoing statement it appears that, by refusing to give the first, fifth, and seventh instructions, the court below decided that the patent obtained from the United States by Reddick's heirs was a better title than the reservation to the Sac and Fox half-breeds.

The patent of 1839, was, prima facie, a conclusive title; but by the Treaty of 1824, with the Sac and Fox Indians, the land in dispute was admitted by the United States to lie within the territory ceded by the treaty; and the Indian title, such as it was before the treaty, is reserved to the half-breeds. This Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in Johnson v. McIntosh, 8 Wheat. 574, and was the question directly decided, in the case of Cornet v. Windon, 2 Yerger's Tenn. Rep. 143, on the effect of reserves to individual Indians of a mile square each, secured to heads of families by the Cherokee treaties of 1817 and 1819. Here, however, in addition to the reserved Indian right, 233*] the Act of 1834 vests the ultimate *title remaining to the United States in the half-breeds of the Sac and Fox tribes; thereby giving them a perfect fee-simple. And this act of 1834, being older than the patent, must prevail, unless the plaintiffs below can go behind their patent; and on this assumption the controversy has been made to turn. No evidence of title was introduced in the District Court other than the patent itself; and its recitals are relied on to overreach the half-breed title. In the argument here, reports found in Congressional documents, and laws passed by Congress operating on such reports and documents, have been adduced and insisted on as confirming Reddick's claim, long before the Treaty of 1824 was made. The patent recites that Reddick (assignee of Robidoux, who was assignee of Tesson) had deposited in the general land office a certificate (No. 1157) of the recorder of land titles at St. Louis, Missouri; and that, in pursuance of the several acts of Congress for the adjustment of titles and claims to land, said Reddick has been confirmed in his claim to a tract of land containing six hundred and forty acres, etc.

For the purpose of showing the consideration on which the patent is founded, and the authority by which it issued, the recitals are indisputable on a trial at law; but standing alone, they do not furnish sufficient evidence to establish that the title can take an earlier date than the patent, and thereby overreach an elder title, as that of the half-breeds. As another trial will probably bring out a different case from the one now presented to us, we refrain from making any further remarks on the extraneous matters adduced on the argument.

Nor can the Act of 1836, in favor of Reddick's heirs, help the patent, it being of later date than the treaty; and the confirming act to the half-breeds is, of course (when standing alone), inferior to the Indian title.

It was also insisted on the argument here, that, as it did not appear that any half-breeds, or their heirs or assigns, were in existence when the trial below took place, the outstanding title relied on could not be set up by the defendants. To which it may be answered, that it was necessary for the plaintiffs to show themselves to be owners of the land, and to recover on the strength of their own title; and if the land had been previously granted, nothing was left to pass by the second patent, unless there had been an escheat, or forfeiture of title to the United States, by the first grantees; and certainly a court of justice could presume neither of these things to have taken place between 1834 and 1839, such being the respective dates of the confirming act to the half-breeds, and the patent of Reddick's heirs. The general rule is, that, where the same land has been *twice granted, the elder patent may [*234 be set up in defense by a trespasser, when sued by a claimant under the younger grant, without inquiring, as to who is the actual owner of the land at the time of the trial.

It is therefore ordered, that the judgment be reversed, and the cause remanded for another trial to be had therein.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded for further proceedings to be had therein in conformity to the opinion of this court.

MOSES WANZER, Plaintiff in Error,
v.
TULLIUS C. TUPPER and John H. Rollins, under the firm of Tupper & Rollins.

Mississippi statute as to protests.

By the statutes of Mississippi, the holder of an inland bill of exchange is entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice. A protest is necessary only for the purpose of enabling him to recover the five per cent. damages given by the act.

The case of Bailey v. Dozier, 6 Howard, 23, confirmed.

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

It was an action brought by Wanzer upon a bill of exchange drawn by him upon Silverbury

& Co., accepted by drawees, and indorsed by Tupper & Rollins to Wanzer.

The cause was tried in the Circuit Court in November, 1846, when the court refused to permit the bill, although admitted to be an inland bill of exchange, to be given in evidence to the jury, because there was no valid protest thereof.

It is unnecessary to state any further facts in the case.

It was argued in this court by Mr. Coxe for the plaintiff in error, no counsel appearing for the defendants.

Mr. Chief Justice Taney delivered the opinion of the court:

In this case, the Circuit Court for the South-
235*] ern District of *Mississippi decided, that the holder of an inland bill of exchange drawn and accepted in that State was not entitled to recover against the indorser, unless the bill had been regularly protested for nonpayment. This decision was made before the case of Bailey v. Dozier, reported in 6 Howard, 23, came before this court. In that case the court held, upon full consideration of the question, that, under the statute of Mississippi, the holder of an inland bill of exchange was entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice; and that the protest was necessary only for the purpose of enabling him to recover the five per cent. damages given by the act.

The case of Bailey v. Dozier must govern this, and the judgment in the Circuit Court is therefore reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a venire facias de novo.

ELI CLARK, William Green, and Hugh McGill, Plaintiffs in Error,

v.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE MANUFACTURERS' INSURANCE COMPANY, Defendants.

Fire Insurance—material misrepresentations adopted by subsequent purchaser—vitiate policy—evidence of—unusual practice as to use of premises must be communicated.

Where an action was brought upon a policy of insurance against fire, by the assignees of the person originally insured, and in the policy it was said that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," it was proper to prove by parol testimony that the representations alleged to have been made by the party originally insured were actually made by him.

And if the assignees, by their acts, adopted these representations, when renewing the policy from time to time, the evidence was equally admissible, because the subsequent policies had reference to the one first made.

Therefore, where the representation upon which the original policy was founded was, that "the picker is inside of the building, but no lamps used in the picking room," it was a correct instruction to give to the jury, that the use of lamps in the picker room rendered the policy void.

But if no representations were made, or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picker room, although the risk might have been thereby increased, unless the use of them in that way was unusual.

THIS case was brought up by writ of error from the Circuit *Court of the [*236 United States for the District of Massachusetts. It was an action upon a policy of insurance against fire. The plaintiffs in error, who were also plaintiffs below, resided at Malone, in the county of Franklin and State of New York, and the insurance company was at Boston, in Massachusetts.

The property insured was a cotton factory in Malone, owned originally by Jonathan Stearns, who applied for insurance on the 28th of April, 1834.

There were fifty questions asked by the insurance company, and answered by Stearns. The thirty-fourth question and answer were as follows:

"34. Is the picker inside the building? If within, state where situated and how secured; if in a separate building, state if the passage-way communicating with the factory is secured by an iron door at each end, or how otherwise secured."

"34. The picker is inside of the building, but no lamps used in the picking room; the doors are wood, and not covered."

The following was written in pencil at the close of the application by the agent at Pittsfield:

"The assured warrants that the waste shall be removed as often as once in forty-eight hours to a safe distance from the mill, and that the lamps in the carding rooms shall be inclosed in glass. (This condition is required.)"

A policy was issued to Stearns from July 1, 1834, for one year, for $3,000, on the factory building and fixtures, including water wheel, drums, shafts, and gearing; $11,000 on the movable machinery, and $1,000 on the stock in the various stages of manufacturing.

On the 8th of July, 1834, Stearns assigned the policy to the Ogdensburg Bank, to which the company assented.

On the 17th of June, 1835, the cashier wrote to Mr. Hall, the agent of the insurance company, inclosing a check for $263, and requesting a continuance of the policy for one year; and in August, 1836, a similar letter, requesting a renewal or continuance of the policy.

In August, 1837, the cashier of the bank inclosed a draft for $263, and requested a new policy. One was accordingly issued, containing the same clauses as the preceding.

On the 13th of August, 1838, Stearns informed Mr. Hall, the agent, that the property insured

Note.—Material misrepresentation avoids policy. See notes to 7 L. ed. U. S. 98, 335.

had passed out of his hands into those of the bank.

On the 25th of August, 1838, the cashier wrote to Mr. Hall, requesting a continuance of the policy, but omitting the $1,000 on stock, as the mill was not then in operation.

In August, 1839 and 1840, similar letters were written. In the policy issued in 1840, the fol-
237*] lowing clause was inserted: *"It is understood that the factory is not in operation, and that the assured have liberty to put the same in operation, agreeably to the representation heretofore made by Jonathan Stearns." Upon the receipt of this policy, the cashier returned the following answer:

"Ogdensburg Bank, August 27th, 1840.
"Parker L. Hall, Esq., Agent, etc.

"Dear Sir,—Will you do me the favor to send me a copy of the original survey and application, as made by Jonathan Stearns, at the time Stearns effected an insurance on the cotton factory, etc., at Malone, as I observe that the first policy made out for us specifies 'agreeably to the representations heretofore made by Jonathan Stearns.' This institution does not know what those representations are, and as the factory is soon to be put in operation by Stearns, we having leased the same to him for one year, we wish you to send us a copy of the survey and application, in order to have Stearns act within those representations. We also wish you to send us your abstract of having the factory put in operation by Jonathan Stearns, under the policy that will take effect on the 30th instant, for one year from that time. If, on receipt of a copy of survey and application, it shall not be found sufficiently correct, you will be notified, and we shall expect you will consent to have the policy adapted to the corrected application, etc. In the policy of 1839 you say, 'contained in their application.' I am not aware that this institution has made any specific application, and suppose you intended the one given as to details by Stearns. Yours, etc.

"John D. Judson, Cashier."

The reply of the agent was as follows:

"Pittsfield, 31st August, 1840.
"John D. Judson, Esq., Cashier.

"Dear Sir,—Herewith I inclose to you a renewed policy, No. 622, on cotton factory, etc.; I have inserted the clause agreeably to your direction.

"Dear Sir,—I had deposited this letter in the postoffice when I received your favor of the 27th instant. The policy is made out by inserting liberty of putting it in operation, as requested. The original survey I have not in my possession. It is in the office at Boston. Perhaps Mr. Stearns may have kept a copy; if so, you will be able to obtain it of him; if not, I may procure for you a copy at Boston. You will, of course, see to it that the waste is removed according to the warranty, and that the lamps be inclosed in glass. Respectfully,

"P. L. Hall."

238*] *It appeared that the cashier then wrote to Stearns for a copy of his representation, but Stearns replied that he had none. No further inquiries were made about it.

In August, 1841, the cashier wrote to the agent, saying, "Please send me a new policy or a renewal receipt for the continuance of the same policy for one year from 30th instant. The factory is now and has been in operation the last year, under a lease to Colonel Jonathan Stearns. His lease will expire soon, and whether the bank will lease it again is more than I can say at present; but still we wish the same clause in the new policy that is in the present one, viz., that we have the right to put the mill in operation, etc., should we wish."

A policy was issued according to the above request, containing amongst other things the following: "It is understood that the mill is under lease to Jonathan Stearns, and may again be leased to him or some other tenant, the assured being answerable for the warranty as above."

On the 18th of March, 1842, an indorsement was made upon the policy, that the assured had made a contract for sale, and given possession of the property to Eli Clark, William Green and Hugh McGill, to which the approbation of the company was requested; which was given by Mr. Hall.

On the 19th of August, 1842, the cashier wrote again for continuance of policy No. 704 P, and requested a new policy to be made out in the names of Clark, Green, and McGill; in case of loss, the money to be paid to the bank. The policy was issued accordingly, containing the same clause as before, with this remark added: "This policy is issued upon the representation formerly made by Jonathan Stearns, the former owner, which representation is binding on the assured."

In August, 1843, 1844, and 1845, similar letters were written by the cashier, and similar policies issued, except that the last remark above quoted was not attached to them.

In March, 1846, the property was destroyed by fire, and soon afterwards notice thereof given to the company.

In October, 1846, the insured brought an action of assumpsit against the company, counting on the policy, and also containing the common money counts; under which a judgment was obtained for a return of premiums, to the amount of $1,200.

In October, 1847, the case came up for trial, upon a plea of non assumpsit and issue. The plaintiffs ordered in evidence the policy, the contract between the bank and Clark, Green, and McGill, and the payment of part of the purchase money by the latter.

The plaintiffs also proved the loss of the property by fire, notice *of the loss, that [*239 the waste was removed, and that the lamps in the carding room were inclosed in glass, as required by the policy. Everything was proved or admitted that was necessary to make out a prima facie case for the plaintiffs.

The evidence showed, likewise, that the fire originated in the picking room, which was situated in the center of the building, and in which a glass lamp was frequently suspended from the ceiling, and into which room a glass lantern was carried that evening, and placed by the workman on the window sill while the picker was in operation; around the top of this lantern he first saw the light and fire, as if the cotton dust had become ignited through the air holes, and the fire was communicated with such rapidity to the whole cotton he was unable to extinguish it. The evidence showed

further, that when the picking room had been occasionally used to work in during the night time, this lantern, or one like it, had for three years been carried in, and that the globe lamp had been long used there suspended, with a reflector over the top, and was lighted when they worked at night in the picking room, as well as the lantern. This appears to have been the practice soon after 1834 or 1835, but no evidence was offered that it had been before. When the plaintiffs bought the property in 1842, they found the lamp hung and ready for use, and they continued to use it as it had been used before.

The defendants then offered in evidence the application of Stearns for insurance, his written answers to the fifty questions, and the policies and letters above mentioned.

The defendants then called Parker L. Hall, who testified that, prior to the first policy to Stearns, he was agent of the defendants in Pittsfield, and that his authority did not extend to the taking of new risks on this species of property.

It was admitted that such a use of lamps in the picker room as appeared in this case, enhanced the danger of fire, and was material to the risk.

To the admission of all this evidence the counsel for the plaintiffs then and there objected, on the ground that the policy contained no representations made by Jonathan Stearns, and had no reference whatever to any such representations, and that to admit extrinsic evidence of the representations of the said Stearns, and other extrinsic evidence to connect the plaintiffs with those representations, and thus affect their rights by such representations, was not only to vary, enlarge, or modify the contract, as contained in the policy, but was in fact to set up and show, by extrinsic evidence, a distinct and different contract from that contained in the policy, and of which the 240*] policy *is the written evidence on which the parties relied; and, as the printed clause in the policy referred only to representations of the assured, representations in form by the assured were the only representations which could legally be shown, and evidence that the parties did not mean the representations in form by the assured, or expressed in the policy, but meant representations of Stearns, was not admissible, because that would clearly be to enlarge or change the contract in the policy, or rather to set up a distinct and different contract.

But the court admitted all the evidence as proper and legal, and to this ruling and decision of the court the counsel for the plaintiffs excepted.

The plaintiffs also proved that it was customary for these defendants, and other insurance companies in Boston, to issue policies on property, with which the underwriters were acquainted, in the printed form, like that in this case, with the clause referring to the "representation of the assured, contained in their application, to which reference is to be had," where no written application has in fact been made by the assured, and where there is no written representation to which reference can be had. The counsel for the defendants objected to the admissibility of the evidence by which these facts were proved.

The counsel for the plaintiffs requested the honorable justice who presided at the trial to instruct the jury—

1. That whether the printed clause in the policy—"that this policy being made and accepted upon the representation of the said assured, contained in their application therefore (to which reference is to be had)"—was to be taken as referring to the representation of Stearns, in 1834, was matter of law to be determined by the court, the construction and application of written contracts and instruments being wholly within the province of the court.

2. That, in the opinion of the court, the said clause was not to be taken as referring to the said representation of the said Stearns; that these representations are not to be taken as a part of the said policy, or as in any way binding on the plaintiffs, whose right to recover in this case could not be in any way affected by said representation.

3. That the evidence introduced by the defendants was not sufficient in law to bar the plaintiffs' right to recover.

But the honorable justice declined giving these instructions to the jury, and instructed them that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy; that, if those representations were adopted by the plaintiffs, they formed a part of *the present policy in the same manner [*241 as if incorporated into it, and the use of lamps in the picker room, in the manner testified to, in violation of these representations, rendered the policy void, and the plaintiffs would not be entitled to recover, except for a return of the premiums paid for the last four years. And the jury were further instructed, that if they found the policy declared on did not refer to the said representations of Stearns, and that no representation was in fact made or adopted by the plaintiffs respecting the use of lamps in the picker room, they would then take the law to be, that, as it was agreed by the parties that the use of lamps in the picker room in the manner found was material to the risk, it was the duty of the plaintiffs to disclose the fact of such use to the defendants, or their agent, when the policy was applied for, provided such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and occasioned the loss in question; and that each failure of the plaintiffs, even without any fraudulent intent on their part, to make this fact known to the defendants, would avoid the policy. Thereupon the jury returned a verdict for the plaintiffs, for a return of four years' premium.

To these instructions, and to the said refusal to instruct, as well as to the admission of the said evidence, the plaintiffs then and there excepted; and prayed that their exceptions might be allowed and sealed by the said justice, and the same were allowed and sealed accordingly.

In witness whereof I have hereunto set my hand and affixed my seal, this 10th day of November, A. D. 1847. [Seal.]

Levi Woodbury,
Associate Justice Supreme Court U. S.

Upon these exceptions the case came up to this court.

It was submitted on printed arguments by Mr. Gillet for the plaintiffs in error, and Mr. Curtis and Mr. D. A. Hall for the defendants in error.

It is only possible to give a brief sketch of the points taken respectively by the counsel.

Mr. Gillet, for plaintiffs in error:

The first question presented by the record for the consideration of the court is, whether the evidence offered by the defendants was legally admissible.

The policy of insurance which is the foundation of this action is in the ordinary form, most [*242 242*] of it being in print, and is *plain, unambigious, and complete in itself. It is susceptible of but one construction, and is as definite as any contract can be made. The defendants, for the purpose of defeating our claim upon it, were allowed to introduce twenty-eight distinct pieces of evidence, with the view of tacking to the contract certain representations made by a former owner of the property, more than eleven years previous to its date. What the object of this evidence was appears from the charge of the learned judge who tried the cause. He instructed the jury, "that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy; that if those representations were adopted by the plaintiffs, they formed a part of the present policy, in the same manner as if incorporated into it." Thus the jury were left to decide, as a question of fact, whether the representations of Stearns were defunct and obsolete, or a living member of the defendants' contract of insurance. And thus a perfect written contract was nullified and destroyed by a mass of parol evidence of facts, which occurred mostly between other parties, long prior to its execution.

The general principles of law excluding parol evidence when offered to vary, add to, or modify written contracts, are laid down in 1 Greenleaf on Evidence, part 2, ch. 15, where many cases are also collected. The case of Miller v. Travers, 8 Bingham, 244, is strongly in point. This rule has always been applied in cases on policies of insurance, and often when it operated with great hardship. It was so applied in Finney v. Bedford Commercial Ins. Co. 8 Metcalf, 348; Bryant v. Ocean Ins. Co. 22 Pick. 200; Alston v. Mechanics' M. Ins. Co. 4 Hill, 329; New York Ins. Co. v. Thomas, 3 Johns. Cas. 1; Higginson v. Dall, 13 Mass. 96; Dow v. Whetten et al. 8 Wend. 160; Cheriot v. Barker, 2 Johns. 346; Jennings v. Chenango Ins. Co. 2 Denio, 75, and rigidly and harshly was it adhered to in Ewer v. Washington Ins. Co. 16 Pick. 502. Mr. Duer, in the first volume of his Treatise on Insurance, p. 71, says, the policy from the time of its execution constitutes the sole evidence of the agreement of the parties, and that no previous letters or communications between them, not even the written application or agreement, can be used to vary or control its interpretation. Now, according to this rule, if the parties had agreed in writing to be bound by Stearns's representations, and the fact had been omitted in the policy, it could not be proved by reference to the prior written agreement.

II. The next question to be discussed is the effect of the evidence, supposing it admissible. [The counsel then commented upon the different terms in the policies.]

*Each policy was a separate and dis- [*243 tinct contract. Neither could be modified by another. If the defendants intended to make the last policy like that of 1842, by binding the plaintiffs to the representations of Stearns, and omitted it by mistake, such mistake cannot be corrected on the law side of the court. Nor would this court, sitting in equity, modify the policy by inserting Stearns's representations in it. If the omission of all reference to Stearns in this policy was at the request of the plaintiffs, such omission forms a part of the contract; if it was the voluntary act of the defendants, they are bound by it; and if it was done by their mistake, the plaintiffs are not responsible for the results of their slovenly mode of doing business. Andrews v. Essex F. and M. Ins. Co. 3 Mason, 6; Hogan v. Delaware Ins. Co. 1 Wash. C. C. 419; 1 Duer on Ins. 132, note xi.; Graves v. Boston Marine Ins. Co. 2 Cranch. 419.

III. The representations of Stearns form no part of this policy, because they are not incorporated into it, nor are they in any way referred to in the policy as forming a part of it. Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Snyder v. Farmers' Ins. and Loan Co. 13 Wend. 92; Farmers' Ins. and Loan Co. v. Snyder, 16 Wend. 481; 3 Kent's Com. 373; Alston v. Mechanics' Mutual Ins. Co. 4 Hill, 329. In the case of Houghton v. Manufacturers' Mutual Fire Ins. Co. 8 Metcalf, 114, it was held that the representations of the assured were legally adopted and embodied into the policy as a part of the contract. But in that case the representations were annexed to the policy, and the court say, that "the policy, by the manner in which it refers to the application and representations, does legally adopt and embody them as a part of the contract." But in this case there is no reference whatever in the policy to Stearns's representations.

IV. There being no written agreement by the plaintiffs to adopt Stearns's representations, it was only a verbal promise to make them good. But this is contrary to 4 Hill, 329, and 22 Pick. 200.

V. There was error in the last instruction of the court to the jury.

The counsel for the defendants in error argued in support of the following points:

1st. That the insured had made certain representations, which were to be deemed part of the contract, and which being false, and the loss occurring by means of their falsehood, no recovery could be had.

2d. That the insured failed to make known to the underwriters, *when the policy [*244 was obtained, a fact material to the risk, known to the assured and unknown to the underwriters, and which was the cause of the loss, and therefore the policy was void.

I. The first proposition was subdivided into the following three branches:

1. That the plaintiffs, by accepting the policy of August, 1842, made Stearns's representation their own, so that it might be, and in fact was, afterwards correctly described in the re-

newal policy declared on as the representation of the assured.

2. That by applying for a continuance of the policy, which was based solely on these representations, they did, in legal effect, adopt these representations into, and make them a part of, their application; so that it might be, and in fact was, correctly said in such renewal policy, that the representation was contained in the application.

3. That it clearly appearing, by the policy itself, that the original policy to the plaintiffs was issued upon the representation of Stearns, which thereafter was to be binding on the plaintiffs, and was referred to therein as the representation of the assured, and that the subsequent policies, including the one declared on, were merely continuations of that contract; and it further appearing that no representation was ever made except the one made by Stearns, and that therefore this important clause in the policy could refer to no other, and is senseless and void unless it refers to that; the jury were rightly instructed that they would be warranted in finding that the plaintiffs had adopted the representation of Stearns as a part of this policy. It may be, that, upon the actual posture of the evidence, it was not a question for the jury, because there was no fact in controversy; but this is wholly immaterial if the jury have found, under the instructions of the court, a verdict, right in point of law; the only difference being that they were instructed they might so find, instead of being told they must so find.

II. Upon the second ground of defense. This seems too clear to require much argument. The case in this aspect is, that the assured make no disclosure respecting the fact that lamps were used in the picker room; that such use was a fact material to the risk; that such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and that it occasioned the loss. A policy made under such circumstances is void. It is not necessary to show that a contract of sale, or any other contract, would be void for a similar cause. It is enough that a contract of [*245] *insurance is thus avoided. 1 Wash. 161; 1 Phil. on Ins. 214; 2 Duer, 380, 506; 6 Cranch, 279, 338; 1 Pet. 185; 2 Pet. 25, 49; 10 Pet. 507, 512; 16 Pet. 496.

Mr. Justice Woodbury delivered the opinion of the court:

The original action in this case was assumpsit by the plaintiffs in error on a policy of insurance, made August 13, 1845.

From the detailed statement of the facts, it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834, by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names—stipulating that any loss should be paid to the bank.

In April, 1834, when application was first made for insurance, the defendants, doing business in Boston (Mass.), put numerous written interrogatories to Stearns, who lived in Malone (New York), where the factory was situated, and to one of them he replied, that no lamps were "used in the picking room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," etc., etc.

No new representations appear to have been made at the different renewals, but only a general reference to representations, like that just named; and in three or four instances, when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiff objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court, that, if they were adopted by the plaintiffs, the present policy as well as the original one must be considered as founded on them and void, if they were not true.

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered.

*Without meaning to impugn the [*246] great elementary principle, that written instruments are not to be varied or contradicted by parol, it suffices to say here that this testimony was not admitted to vary or contradict any portion of what had been written. See Phillips v. Preston, 5 Howard, 291.

It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. 13 Wendell, 92; Jennings v. Chenango Ins. Co. 2 Denio, 82; Phillips on Ins. 47; 16 Pick. 502; 1 D. & E. 343; 2 Brod. & Bingh. 553; 4 Russ. 540; 20 Pick. 121; 1 Paige, 291; 8 Metcalf, 114, 350; 4 Howard, 353; 3 Barn. & Ald. 299; Wigram on Ext. Ev. 54, 55; 1 H. Bl. 254; 2 H. Bl. 577; 6 D. & E. 710; 1 Duer on Ins. 74.

It added to what was written nothing, it substracted nothing, it changed nothing, and we think its admission was legal.

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction. If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to these; if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used

in all of them, it surely must comport with justice, as well as law, to have them govern.

The cases of like subsequent adoptions and ratifications of what had been done before by others are very numerous. Among them see those collected in Story on Agency, secs. 252, 253. Even "slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." Ward v. Evans, 2 Ld. Raym. 928; 3 Wash. C. C. 151; 13 Wend. 114; 3 Chitty Com. L. 197.

This view of the case, standing alone, would entitle the defendants to be discharged, for the picking room, contrary to these representations, had a lamp, and indeed lamps, in it; and their use was proved to be the cause of the fire which destroyed the factory.

We should, therefore, affirm the judgment below without further inquiry, did not the bill of exceptions disclose another ruling, which, as the record now stands, requires consideration. When the judgment below is, as here, well sus- [*247 tained by the *opinion entertained on a decisive point, it is usually of no consequence whether another point was correctly ruled or not. But as the bill of exceptions in this case was drawn up by the plaintiffs, it states that the jury were instructed to find a verdict for the defendants on the last ground, if on the facts the first one failed; and hence, looking to the record, the last ground may have been passed on by the jury, and have influenced their verdict. To be sure, the report of this case below, in 2 Wood. & M. 472, shows that a verdict was taken by agreement of parties, or only pro forma, in order to bring the questions of law to the Supreme Court; and therefore, that no jury could in truth in this case have been thus influenced or misled. Yet this fact not appearing on the record brought here, the case, till revised and corrected below in this particular, must be considered as if the jury had actually examined both grounds, and had really decided upon them. But even on that hypothesis, if the second point was properly ruled, no occasion would exist for sending the case back for correction in the statement as to the verdict, in connection with the first point.

Whether it was properly ruled or not involves a question of much novelty, being in one aspect of it a case, perhaps, of the first impression, and without any precedent to govern us, and is of so much importance in insurances as to deserve great caution in settling it. From the report of the case below, before referred to, the Circuit Court, though alluding to the last point, do not appear to have gone into any critical discussion and opinion on it.

But the bill of exceptions being so drawn up as to exhibit a positive instruction given on it by that court to the jury, it is necessary for us to examine with care whether an instruction like that presented here could legally be given.

First, then, what is the substance of that supposed instruction?

It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover, if lamps were in truth used in the picking room, which were conceded to be material to the risk, and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued, and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists, that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking room, where one or more was in truth used, makes the policy void, not only *for misrepre- [*248 sentation, but misdescription and concealment. 1 Marshall on Ins. 481; Ellis on Fire and Life Ins. 58; Dobsen v. Sotheby, 1 Moody & Malk. 90; 6 Cowen, 673; 4 Mass. 337.

A false representation avoids the policy, because it either misleads or defrauds. Livingston et al. v. Mar. Ins. Co. 7 Cranch, 332.

In such a state of things, also, the insured—knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and if so, at what premium—must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself, and will be forced to act in the dark more than himself, and probably to misjudge. 1 Marshall on Ins. 473, 474, note; Lynch v. Dunsford, 14 East, 494; Maryland Ins. Co. v. Ruden's Ad. 6 Cranch, 338, and Livingston v. Mar. Ins. Co. Ibid. 279; Columbian Ins. Co. v. Lawrence, 10 Peters, 516; McLanahan v. Universal Ins. Co. 1 Peters, 185; 2 Peters, 59; 2 Duer, 388, 379, 411; 2 Caines, 57; 1 Wash. C. C. 162.

Concealment thus would operate in some cases as a fraud, and in all will make the risk very different from what the insurer knew and agreed to. 3 Burr. 1905; Ellis on Fire and Life Ins. 38.

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not, in the state of facts exhibited in the record, meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. Columbian Ins. Co. v. Lawrence, 2 Peters, 49; S. C. 10 Peters, 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & Cress. 693.

It is fair to presume, that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." 1 Marsh. on Ins. 450.

But the relation of the parties seems entirely changed, if the *insurer asks no informa- [*249 tion and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it.

and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the insured. 8 Peters, 582.

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. Hazard's Adm. v. New England Mar. Ins. Co. 8 Peters, 557; 2 Duer on Ins. 379, 478; 3 Kent's Com. 285, 286; Green v. Merchants' Ins. Co. 10 Pick. 402; 4 Mason, C. C. 439; Buck et al. v. Chesapeake Ins. Co. 1 Peters, 160. Nor on any special usage proved, as in Long v. Duff, 2 Bos. & Pull. 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril.

It has been justly remarked, in a case somewhat like this in principle, "With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself," etc. 1 Marshall on Ins. 481, 482; Carter v. Boehm, 3 Burr. 1905.

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. 1 Harr. & Gill. 295; Burrit v. Saratoga M. F. Ins. Co. 5 Hill, 192.

It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists enhancing 250*] *the risk; and hence, as in this case, if lamps are used in the picking room, which do enhance it, he must show that their use in the manner practiced was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where suppressio veri would be as improper and injurious as suggestio falsi. Livingston v. Mar. Ins. Co. 6 Cranch, 281.

So if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. Bufe v. Turner, 6 Taunt. 338; Walden v. La. Ins. Co. 12 La. 134. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits; because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants would be entitled to be discharged under the second point on the ground, which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made according to what is hypothetically suggested in the record. The judgment below must therefore be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this *court, that the judg- [*251 ment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, for the purposes of correcting what is defective in the manner of stating how the verdict was taken, and how the last question stood by itself on the facts proved, and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

NATHANIEL LORD, Plaintiff in Error,

v.

JOHN W. VEAZIE, Defendant.

Judgment in feigned suit—when nullity—writ of error dismissed on petition of one not a party to suit.

Where it appears to this court, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed.

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

A motion was made by Mr. Moor, upon his own account, and also as counsel for the City Bank, at Boston, to dismiss the appeal, upon the ground that it was a fictitious case, got up between said parties for the purpose of settling legal questions upon which he, the said Moor and the City Bank, had a large amount of property depending. The motion made by Mr. Moor upon his individual account was to dismiss the appeal; that made by him as counsel for the City Bank was in the alternative, either to dismiss the suit, or order the same back to the Circuit Court for trial, and allow the said City Bank to be heard in the trial of the same.

It appeared upon the documents and affidavits filed, that, in 1842, the Bangor and Piscataquis Canal and Railroad Company, in the State of Maine, which had been chartered by the State, executed a deed to the City Bank, at Boston, by virtue of which that bank claimed to hold the entire property of the company.

In 1846, the Legislature of Maine granted to William Moor and Daniel Moor, Jun., their associates and assigns, the sole right of navigating the Penobscot River.

In July, 1847, an act was passed additional to the charter in the first named company, by virtue of which a re-organization took place. The City Bank claimed to be the sole propri-
252*] etors *or beneficiaries under this new charter, and John W. Veazie, who held a large number of shares in the original company, claimed that the management and control were granted to the stockholders.

In August, 1848, John W. Veazie and Nathaniel Lord executed a written instrument, which purported to be a conveyance by Veazie to Lord of 250 shares of the stock of the railroad company, for the consideration of $6,000. This deed contained the following covenant:

"And I do hereby covenant and agree to and with the said Lord, that I will warrant and defend the said shares, and all property and privileges of said corporation incident thereto, to the said Lord, his executors, administrators, and assigns, and that the said shares, property, and privileges are free and clear of all incumbrances; and I further covenant with said Lord, that the stockholders of said company have the right to use the waters of the Penobscot River within the limits mentioned in their charter for the purposes of navigation and transportation by steam or otherwise."

In September, 1848, this action on the above covenant was docketed by consent, and a statement of facts agreed upon by the respective counsel, under which the opinion of the court was to be taken, viz., that if the claim of the City Bank was valid, then the plaintiff was entitled to recover; or if the canal and railroad company, or the stockholders thereof, had not a right to navigate the river, then the plaintiff was also entitled to recover. This last prayer involved Moor's right.

In October, 1848, the court, held by Mr. Justice Ware, gave judgment for the defendant pro forma, at the request of the parties, in order that the judgment and question might be brought before this court, and the case was brought up by writ of error, as before mentioned.

On the 31st of January, 1849, the record was filed in this court, and on the 2d of February, printed arguments of counsel were filed, and the case submitted to the court on the 5th. It was not taken up by the court, but continued to the next term.

On the 28th of December, 1849, Mr. Wyman B. S. Moor filed, with the motion to dismiss, as above mentioned, an affidavit, stating the pendency of a suit by him against Veazie in the courts of Maine, which involved the same right of navigating the river which was one of the points of the present case. He further stated his belief, that this case was a feigned issue, got up collusively between the said Lord and Veazie, for the purpose of prejudicing his (Moor's) rights, and *obtaining the judg-[*253
ment of this court upon principles of law affecting a large amount of property, in which he and others were interested.

When the motion came on for argument, a number of affidavits were filed in support of and against the motion. It is unnecessary to state their contents, as they were not particularly commented on by the court. They proved that none of the persons whose interest was adverse to that of the plaintiff and defendant had any knowledge of these proceedings, until after the case was removed to this court, and submitted for decision on printed arguments, although one or more of those most deeply interested resided in the town in which Lord, one of the parties, lived.

The motion was argued by Mr. Moor, in support of, and Mr. Bradbury and Mr. Hamlin against it.

In support of the motion to dismiss, these points were taken by Mr. Moor:

1. That a fictitious suit, or a foreign issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion. Hoskins v. Lord Berkeley, 4 Term R. 402; 3 Bl. Com. 452; R. J. Elsam, an attorney, 3 Barn. & Cress. 597; 2 Inst. 215; Brewster v. Kitchin, Comb. 425; Cox v. Phillips, Cas. Temp. Hardwick, 237; Fletcher v. Peck, 6 Cranch, 147, 148.

2. That any person as amicus curiæ may make the motion. Rex v. Veaux, Comb. 13; Dove v. Martin, Comb. 170; Brown v. Walker, 2 Showers, 406; Cox v. Phillips, before cited.

3. A suit may be shown to be fictitious, either by inspection of the record or by evidence aliunde, or by both. The case of R. J. Elsam, before cited; Hoskins v. Lord Berkeley, before cited; Fletcher v. Peck, before cited; Cox v. Phillips, before cited.

4. That this is a fictitious suit, or a suit amicably instituted and conducted, to affect the rights of other parties, will appear from the record.

5. That it is an amicable or fictitious suit appears from the facts that the suit in equity in the Supreme Judicial Court of Maine, Moor v. Veazie, involves the same question as to the construction and constitutionality of the act set forth in printed case, and marked G, as are involved in the case at bar, and that the plaintiff in error is the son-in-law, and the defendant in error is the son, of said Samuel Veazie.

That said suit was in contemplation before the institution of this suit.

254*] *That the defendant in error has heretofore set up the same claim to the property of said railroad company against the City Bank as is involved in this suit.

That the existence of this suit was kept from the knowledge of the parties really interested, till the writ of error was entered here.

This court sits for the correction of errors of inferior courts, and not to adjudicate upon the agreement of parties.

There has been no such judgment in this suit that this court will revise by writ of error. Judiciary Act of 1789, sec. 22, 1 Stat. at Large, 84; Act of April 29, 1802, ch. 31, sec. 6, 2 Stat. at Large, 159; Lanusse v. Barker, 3 Wheat. 137, 147; McDonald v. Smalley et al. 1 Pet. 621; Shankland v. The Corporation of Washington, 5 Peters, 390; Stimpson v. Westchester Railroad Co. 3 Howard, 553; DeWolf v. Usher, 3 Peters, 269; Zeller's Lessee v. Eckert, 4 Howard, 298.

Mr. Chief Justice Taney delivered the opinion of the court:

The court is satisfied, upon examining the record in this case, and the affidavits filed in the motion to dismiss, that the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in the question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defense of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision by the court. It is a question, too, in which it appears that property to a very large amount is involved, the right to which depends on its decision.

It is proper to say that the counsel who argued here the motion to dismiss, in behalf of the parties to the suit, stand entirely acquitted of any participation in the purposes for which these proceedings were instituted; and indeed could have had none, as they were not counsel in the Circuit Court, and had no concern with the case until after it came before this court.

255*] And *we are bound to presume that the counsel who conducted the case in the court below were equally uninformed of the design and object of these parties; and that they would not knowingly have represented to the court that a feigned controversy was a real one.

It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, with incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the Circuit Court, undoubtedly *suffered the [*256 judgment pro forma to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.

This writ is therefore dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel, and it appearing to the court here, from the affidavit and other evidence filed in the case by Mr. Moor, in behalf of third persons not parties to this suit, that there is no real dispute between the plaintiff and defendant in this suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the persons aforesaid, it is the opinion of this court, that the

judgment of the Circuit Court entered pro forma in this case is a nullity and void, and that no writ of error will lie upon it. On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error be, and the same is hereby dismissed, each party paying his own costs; and that this cause be, and the same is hereby remanded to the said court, to be dealt with as law and justice may require.

ELIJAH PEALE, Trustee and Assignee of The President, Directors and Company of the Agricultural Bank of Mississippi, Plaintiff in Error,

v.

MARTHA PHIPPS and Mary Rice, who is authorized and assisted in the Suit by her Husband, Charles Rice.

Louisiana practice—errors in citation—misnomer.

An error in a citation, calling Mary Rice the wife of Charles Bowers, whereas she was the wife of Charles Rice, is not fatal in a case coming from Louisiana. The practice there is for the husband to assent when the wife brings a suit, so that his name is merely a matter of form.

Nor is it a fatal error when the citation was issued at the instance of E. Peale as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi.

The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension.

THIS case was brought up by writ of error from Louisiana, and a motion was made by Mr. Henderson to dismiss it, upon the grounds stated in the opinion of the court.

257*] *Mr. Justice McLean delivered the opinion of the court:

A motion is made to dismiss this writ of error on three grounds:

1. Because there is no citation to the defendants in error, as the law requires.

2. Because the citation is addressed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted," who are not the persons or parties defendants in the record.

3. Because said citation is stated to have been issued at the instance of E. Peale, as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi, etc.

The suit was brought by Martha Phipps and Mary Rice; and in the petition they are called Martha Phipps and Mary Bowers, wife of Charles Rice, "who is authorized and assisted in this suit by her said husband, Charles." The defendant is named "Elijah Peale, in his capacity of Trustee and Assignee of the President, Directors and Company of the Agricultural Bank of Mississippi." The decree is in favor of Martha Phipps and Mary Rice.

The citation appears to have been issued by E. Peale, and was directed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted." And the service of the citation was accepted by S. S. Prentiss, plaintiff's attorney, at New Orleans, the 22d of October, 1849.

The names of the defendants in error are correctly stated in the citation, except that Mary Rice is represented as the wife of George Bowers, instead of the wife of Charles Rice. Under the procedure in Louisiana, the husband is named in the petition as assenting to the suit brought in the name of his wife. He is not a party to the suit, nor is he responsible for costs. The use of the name of the husband is merely formal, and the misnomer alleged could not have misled the defendants in error. Nor could they have been misled by the omission in the notice in the capacity of trustee, in which the defendant below was sued, and in which he necessarily prosecutes the writ of error. The acceptance of the service of the notice by the counsel of the defendants in error, without exception, shows that there could have been no misapprehension in regard to it.

The motion to dismiss the case is overruled.

Order.

On consideration of the motion to dismiss this writ of error, submitted to the court by General Henderson, on a prior day *of [*258 the present term of this court, to wit, on Friday, the 28th ultimo, it is now here ordered by this court, that said motion be, and the same is hereby overruled.

JACOB P. WILSON, Complainant,

v.

DANIEL BARNUM.

Jurisdiction—certificate of division of opinion—question of fact.

The following question, sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court, viz.: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent," is a question of fact, over which this court has no jurisdiction.

The jurisdiction given to it by statute in certified cases only extends to points of law.

THIS case came up from the Circuit Court of the United States for the Eastern District of Pennsylvania upon a certificate of division in opinion between the judges thereof.

It is not necessary to do more than insert the statement of facts and point of division, as they are found in the record.

Statement of Facts and Point of Division of Judges.

United States of America, Eastern District of Pennsylvania.

At a Circuit Court of the United States, begun and held at the city of Philadelphia, for the Eastern District of Pennsylvania, on the 13th day of November, in the year of our Lord 1849.

Note.—Appearance cures defects in service of process, and its non-service does not cure want of jurisdiction of subject matter. See note to 2 L. ed. U. S. 510.

Effect of appearance by counsel or attorney in an action. Unauthorized appearance. What is an appearance. See notes to ante, 387, and 21 L.R.A. 848.

Present, the Honorable Robert C. Grier, and the Honorable John K. Kane.

Jacob P. Wilson v. Daniel Barnum.
Statement of Facts.

This was a suit in equity. The bill was filed April 5th, 1849, by the plaintiff, as assignee of letters patent issued to William Woodworth. After due notice, a motion was made for a special injunction, which was fully heard before his Honor, John K. Kane, at a regular Circuit Court, on the 21st, 22d, 23d, 24th, and 25th days of May, A. D. 1849, His Honor Judge Grier being absent. The defendant resisted the motion, and filed affidavits on his part, when, after a full hearing of the parties and arguments of counsel, on the 1st day of June, 1849, a special injunction was granted, a copy of which is annexed to this statement. Afterwards, on the 4th day of June, 1849, the defendant filed an answer, setting up the fact of his having a patent for his machine, and deny-
259*] ing all similarity between *it and that of the plaintiff; which same defense had been previously set up by the said affidavits, on the hearing of the motion for the injunction. Afterwards, on the 29th day of June, 1849, a motion was made by the defendant to dissolve the injunction, which motion was duly argued on the bill and affidavits on the part of the plaintiff, and on the answer and affidavits on the part of the defendant; and on the 1st day of August, 1849, an order was made in the cause directing an issue to be tried by a jury, for the purpose of ascertaining whether the machines of the defendant were or were not infringements of the machine of the plaintiff, and ordering the injunction to stand, on the plaintiff giving security to the defendant in the sum of ten thousand dollars, which was done.

The issue came on to be tried by a jury on the 17th day of October, 1849, and after a protracted trial, the jury was discharged, not being able to agree.

At this present term of the court, both of the judges being present, a motion was made by the defendant to dissolve the injunction, and arguments of counsel were heard thereon. Thereupon, without any decision being had on said motion, and upon an agreement of the parties, with the consent and by the direction of the court, this cause was brought to a final hearing on the pleadings and the proofs which had been taken herein, as well as on the proofs and evidence which were put in on the trial of the issue before the jury and which last named proofs and evidence were, for the purpose of said final hearing, considered as proofs in this cause.

The pleadings were a bill, an answer, and a replication, copies of which are hereunto annexed, and a copy of all the proofs and evidence used on said final hearing is also hereunto annexed.

On said final hearing, it appeared and was determined by the court as matter of fact—

1. That letters patent of the United States were issued to William Woodworth, on the 27th day of December, 1828, of the tenor and effect mentioned in the bill.

2. That William Woodworth died intestate, on the 9th day of February, 1839, in the city of New York, and that William W. Woodworth, his son and one of his heirs at law, was thereupon duly appointed his administrator by the surrogate of the city and County of New York.

3. That on the 16th day of November, 1842, an extension of the said letters patent for seven years from the 27th day of December, 1842, was duly granted by the United States, under the eighteenth section of the Patent Act of July 4, 1836, to *the said William W. Wood- [*260
worth, as administrator as aforesaid.

4. That by an act of Congress of the United States, passed February 26th, 1845, the said letters patent were further extended to the said William W. Woodworth, as administrator as aforesaid, for seven years from the 29th day of December, 1849.

5. That on the 8th day of July, 1845, the said letters patent were surrendered for a defective specification, and renewed letters patent were thereupon issued on the same day, on an amended specification, to the said William W. Woodworth, as administrator as aforesaid; which renewed letters patent were of the tenor and effect set forth in the bill. An authenticated copy of the said renewed letters patent of July 8th, 1845, and of the specification and drawings thereto, and an authenticated copy of the said original letters patent of December 27th, 1828, and of the specification and drawings thereto, were produced on the hearing, and may be produced on argument, before the Supreme Court of the United States.

6. That the exclusive right of the said renewed letters patent of July 8, 1845, for the district of Southwark, in the County of Philadelphia, and Eastern District of Pennsylvania, was vested in the plaintiff.

7. That the defendant had erected, within the said district of Southwark, and used and operated therein, since the said exclusive right became vested in the plaintiff, and before the filing of the bill, a machine for tonguing and grooving boards and plank, and also a machine for planing boards and plank. The machine for tonguing and grooving boards and plank was constructed as stated in the evidence. [A model thereof was produced on the hearing by the plaintiff, and the machine itself was produced on the hearing by the defendant. The same are certified by the clerk of the court, and may be used on argument before the Supreme Court of the United States.] The machine for planing boards and plank was constructed as shown by a model produced on the hearing by the plaintiff, and by the machine itself on the hearing by the defendant. (The same are certified by the clerk of the court, and may be used on argument before [the] Supreme Court of the United States.)

8. That letters patent were issued to the defendant on the 13th day of March, 1849, which are referred to in, and a copy of which is annexed to, his answer herein.

On the final hearing, the following question occurred, to wit:

Whether, according to the true construction of the Woodworth *patent, as amended, [*261
the machines made or used by the defendant, at the time of filing the bill, or either of them singly, do or do not infringe the said amended letters patent.

On which question the opinions of the judges were opposed.

Whereupon, on a motion by William H. Seward and St. George Tucker Campbell, plaintiff's counsel, it was ordered that the point on which the disagreement hath happened may, during the term, be stated, under the seal of the court, to the Supreme Court to be finally decided.

R. C. Grier.
J. K. Kane.

Mr. Chief Justice Taney delivered the opinion of the court:

The case comes before the court upon a certificate of division, and has been submitted on printed arguments.

The plaintiff, who claims as assignee of what is generally called the Woodworth patent, filed a bill in equity, praying an injunction against the defendant to restrain him from using a certain machine, in which, as the complainant charged, boards were planed, tongued and grooved in the same manner as in the Woodworth machine; the machine of the defendant operating in the same way in every respect as the one for which the complainant held the patent.

The defendant, in his answer, denied that his machine was substantially like and upon the plan of the Woodworth machine. Other defenses were also taken in the answer. But it is not necessary to notice them, as they do not concern the question certified.

A great mass of testimony was taken on both sides in the Circuit Court, and models and drawings produced of the two machines; all of which have been sent up for the examination and consideration of this court, with the certificate of division.

On the final hearing of the case, the judges of the Circuit Court differed in opinion on the following question: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them singly, do or do not infringe the said amended letters patent."

The question thus certified is one of fact, and has been discussed as such in the arguments offered on both sides. It is a question as to the substantial identity of the two machines. And its decision must depend upon the testimony of witnesses; the examination of the models and drawings, or of the machines themselves; and the application of mechanical principles and combinations, which the court could learn only 262*] *from the testimony of persons skilled in the science of mechanics.

The jurisdiction of this court to hear and determine a question certified from the Circuit Court is derived altogether from the Act of 1802, ch. 31, sec. 6 (2 Stat. at Large, 159); and that act evidently gives the jurisdiction only in cases where the judges of the Circuit Court differ in opinion on a point in law. The language of the whole provision upon this subject so clearly requires this construction, that it is unnecessary to comment on it. And it would be utterly inconsistent with the well known and established proceedings of courts of equity, as well as courts of common law, to take out of a case during its progress a single question of *fact, and send* it here with the evidence upon that point only, for the final decision of this court. In the case before us, a great number of facts must be ascertained and determined from the evidence, before a final opinion could be formed upon the question certified.

Besides, this act of Congress has been in force for nearly half a century, and has been repeatedly acted on in this court; and it has uniformly received the construction we now give to it. In the multitude of questions which have been certified, this court has never taken jurisdiction of a question of fact. And in a question of law is requires the precise point to be stated, otherwise the case is remanded without an answer.

The question now certified being one of fact, we have no jurisdiction; and the case must therefore be remanded to the Circuit Court, to be there proceeded in as law and justice may require.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no point in the case, within the meaning of the act of Congress, has been certified to this court, the point or question being one of fact, it is thereupon now here ordered and decreed by this court, that this cause be, and the same is hereby dismissed, and that this cause be, and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

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*JOHN DOE, Lessee of Jacob Cheesman,[*263 Peter Cheesman and Sarah, his Wife, Beersheba Parker, Ward Pearce, John Clark and Margaret, his Wife, Ann Jackson, William Jackson, Seward Jackson and Mary Jackson, —— Watson and Sarah, his Wife (late Sarah Pearce), William Pearce, Ward Pearce, Miraba Edwards, James Edwards, Richard Pearce, William, James, and Margaret Pearce, Thomas Morris and Mary, his Wife (late Mary Pearce), Elizabeth Powell (late Elizabeth Pearce), Jacob Williams and Elizabeth Williams, Sarah Smallwood, Deborah Bryant, George L. Hood and Letitia, his Wife, in her Right, Joseph Smallwood, Joseph Hurff, Jane Turner, John Brown and Mary, his Wife, in her Right, William Smallwood, Isaac Hurff and Elizabeth, his Wife, in her Right, Richard Sharp and Mariam, his Wife, in her Right, Randall Nicholson and Drusella his Wife, in her Right, Jacob Mattison and Jemima, his Wife, in her Right, Joseph Nicholson and Mariam, his Wife, in her right, Thomas Pearce and Matthew Pearce (all citizens of New Jersey), Plaintiff in Error,

v.

THOMAS WATSON, Defendant.

Devise to infants, if both should die before age, then over—where devisees lived to full age devise never took effect.

Where a testator made certain devises to his two grandchildren, "provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three fourth parts shall be equally divided between Sarah Smallwood and others," etc., and the two grandchildren lived many years after they arrived at full age, and then both died without issue, the devise over to Sarah Smallwood, etc., never took effect, because the two grandchildren both arrived at full age.

The plaintiffs below having claimed the whole as the heirs of Sarah Smallwood, the court instructed the jury that they could not recover. But the plaintiffs below claimed, in this court, that they were entitled to recover a part, because they were a portion of the heirs of the two grandchildren. This point was not made in the court below, and therefore cannot be made here.

The Supreme Court of Pennsylvania decided, with regard to this very will, that the devise over to Sarah Smallwood never took effect. This decision was made in 1795, and the acquiescence of half a century would seem to close all litigation under the will. But even if it did not, this court is of the same opinion.

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

It was an enactment brought by the lessee of Cheesman, &c., to recover certain lots in the city of Philadelphia. As the defendant below offered no evidence but contested the validity of the title shown by the plaintiff, it is necessary to set that forth. It was as follows, viz.:

The plaintiff gave in evidence the deed of conveyance from the Proprietors of Pennsylvania, Thomas and Richard Penn, to James Parrock, bearing date 5th September, 1749, under the great seal of the province.

264*] *Also, the last will and testament of James Parrock, bearing date 24th May, 1754, admitted to probate 24th January, 1755.

One of the arguments of the counsel for the plaintiff in error being founded upon the presumed intention of the testator, as gathered from a comparison of several clauses in the will, it becomes necessary to insert them.

The devises contained in the will material to this controversy are, in substance, the following:

1. To his wife, Hannah Parrock, of his dwelling-house, kitchen, and lot of ground in Second and Sassafras streets, together with various rent charges issuing out of lots of land, to hold during her life, with remainder of the said dwelling-house, kitchen, and lot of ground, and certain of those rent charges, to his granddaughter, Sarah Parrock, and her heirs; and as to the other of said rent charges to his grandson, John Parrock, and his heirs.

2. To his wife, Sarah Parrock, for life, the use of certain goods and chattels; and to his grandson, John Parrock, certain other goods and chattels.

3. To his grandson, John Parrock, and his heirs, his bank and water lot in the Northern Liberties of said city, in breadth 50 feet, and depth into the Delaware 254 feet, and his piece of upland and meadow in the Northern Liberties of about fifty-six acres, and his bank and water lot in said city, in breadth 71 feet, in length or depth into the Delaware River 250 feet; also certain rent charges.

4. To his granddaughter, Sarah Parrock, and her heirs, a tenement and lot of ground, adjoining the messuage and lot before devised to her; also another piece of ground, in breadth, north and south, 22 feet, in length and depth, east and west 51 feet, bounded westward by an alley, etc., northward by M. Hilliga's lot, etc.; also his bank and water lot in said city, in breadth 40 feet, in length 250 feet, into the River Delaware, bounded by Sassafras Street, by Front Street, and by Leeches' lot; with certain other rent charges.

5. He then devised to his said granddaughter Sarah, and his said grandson John, all that his pasture or piece of land in the Northern Liberties, by Oldman's land, Daester's land and the York road, containing three acres, to be equally divided between them, to said John and his heirs, and to said Sarah and her heirs.

6. The testator then devised, in these words and figures:

"And I do hereby empower and order my said executors, and the survivor of them, to sell and dispose, as soon as my said grandchildren shall come of age, all that my piece or lot *of ground, situate on the south side of [*265 Vine Street aforesaid, about seventy-one feet from said Second Street corner, and extending east sixteen feet and one half, to Preserve Brown's lot; south, fifty-one feet, to John Denton's lot; west, by said Denton's lot, sixteen feet and an half; and north, fifty-one feet, by John Marle's lot; together with the appurtenances, to any person or persons that will purchase the same, and for the best price that they can reasonably get; to hold to such purchaser or purchasers, his heirs and assigns, forever; and to give good deeds, or other sufficient conveyances; and the moneys arising by reason of said sale shall be equally divided between my said two grandchildren, John and Sarah Parrock, share and share alike."

7. He devises a house and lot to "Mary Parrock, the widow of my son John Parrock, deceased, and mother of my said grandson, John Parrock," and to Lydia Cathcart, a house and lot, "to hold the said messuage so devised to said Mary Parrock during the term of her natural life, if she shall so long continue my said son's widow. And to hold the said last mentioned messuage unto the said Lydia Cathcart, during the term of her natural life, if she shall so long continue a widow. And from and immediately after their, or either of their (the said widows') decease, day or days of marriage, then I give and bequeath all and singular the said two messuages unto my said grandson, John Parrock, to hold to him and his heirs and assigns forever."

8. The testator gives pecuniary legacies to said Mary Parrock and Lydia Cathcart; to the children of John Smallwood, deceased, his wearing apparel; and pecuniary legacies to the children of William and Mary Paschal; to Sarah Smallwood, the widow of John Smallwood, deceased, and to Sarah James, and Hannah James, he gives pecuniary legacies.

9. "And it is my will that the several and respective legacies herein before devised unto my grandson John Parrock, and unto my granddaughter Sarah Parrock, shall be paid and delivered to them as they shall respectively come of age."

10. The testator devised all the rest and residue of his personal estate unto his wife

Hannah, his said grandson John, and his granddaughter Sarah, to be equally divided between them.

11. "Provided always, nevertheless, and the several legacies hereinbefore devised unto my said grandson John Parrock, and my said granddaughter Sarah Parrock, are on this special condition, that if both my said grandchildren shall happen to die under age, and without any lawful issue, then it is my will" that the one fourth part of all and singular the real [*266] and personal *estate unto them herein before devised shall go to the monthly meeting of the people called Quakers, at Philadelphia; and the other three parts of said real and personal estate shall be equally divided between "the said Sarah Smallwood, the widow of John Smallwood, and their children; the children of Thomas Smallwood; the children of Benjamin Richards; the children of William Paschal, deceased; the said Sarah Paschal, said William Paschal; widow Lydia Cathcart and her children; Joseph Fordam and his children; Richard Fordam and his children; the children of Isaac Ashton, deceased, Sarah Thomas and her children, Mary Lee and her children, Lydia Davis and her children, John Spencer and his children, and to the survivor of them, and to the heirs and assigns of such survivors or survivor, as tenants in common (and not as joint tenants), forever; anything heretofore contained to the contrary thereof in any wise notwithstanding."

In addition to that written evidence, the lessors of the plaintiff gave evidence by the mouths of witnesses, conducing to prove that the grandchildren of the testator, John Parrock and Sarah Parrock, both died without issue and unmarried; that both said John Parrock and Sarah Parrock had attained full age before their respective deaths, and died long after the death of the testator; that said John Parrock died about the year 1790; that Peter Cheesman and wife (who was Mary Smallwood) were both related to John Parrock—said Peter Cheesman married his relation; that John Smallwood and James Parrock were half-brothers; with other evidence of the genealogy of the lessors of the plaintiff; and that John Smallwood was dead when the will of James Parrock was made.

The defendant gave no evidence.

The counsel for the plaintiff then prayed the court to give the following instruction to the jury, viz.:

"If the jury believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are entitled to recover; it being proved by plaintiffs that both John Parrock, the grandson, and Sarah Parrock, the granddaughter, died over age, and without issue."

But the said learned judges refused to charge the jury as so requested, and gave in charge to the jury, that under the said will the plaintiffs could not recover, inasmuch as the devise over to plaintiffs' ancestors, in the said will mentioned and contained, never took effect, by reason of the devisees therein named, viz., John Parrock and Sarah Parrock, having both arrived at full age.

To this instruction the counsel for the plaintiff excepted, and *upon it brought the [*267 case up to this court. The jury, of course, found a verdict for the defendant.

It was argued by Mr. Bibb for the plaintiff in error, and by Mr. Wharton and Mr. Meredith for the defendants.

Mr. Bibb made the following points:

I. That the charge as actually given by the court was erroneous, because it limited and confined the derivation of title of the lessors of the plaintiff solely to the question of their being devisees of James Parrock, to the total exclusion of the right of each and every of the lessors, as heir or heirs of either said Sarah Parrock or of said John Parrock, the immediate devisees of James Parrock, who, or one of which said grandchildren, became the stirpes or root of descent and inheritance.

II. That the court erred in the construction of the will and testament of James Parrock as given in charge to the jury, and in refusing the charge as moved by the counsel for the plaintiff.

It is not necessary to state Mr. Bibb's argument upon the first point, because this court decided that the point had not been made in the court below, and therefore could not be made here.

II. That the court erred in the construction of the will and testament of James Parrock, as given in charge to the jury, and in refusing the charge as moved by the counsel for the plaintiff.

This leads to the inquiry into the true intent of the testator. The intention of the testator is to be sought upon the whole instrument, taken in all its parts as one whole. The words must follow the intent of the devisor. The sentences may be transposed to preserve the meaning of a will. One part of a will shall be expounded by another.

These rules are to be observed: "1st. No will ought to be construed per parcellas, but by entireties. 2d. To admit of no contrariety or contradiction. 3d. No nugation, or any nugatory thing, ought to be in a will." 8 Vin. Abr. Devise F. a, p. 181, pl. 11, 12, 13; 5 Bac. Abr. F. p. 522, pl. 13; Sparks v. Purnell, Hobart, p. 75, pl. 93; Bamfield v. Popham, 2 Freeman, 267; Frogmorton v. Holyday, 3 Burr. 1622.

To effectuate the intent of the testator, the word "or" shall be taken for "and," and the word "and" for "or." Out of the multiplicity of decisions and examples on that of "or" instead of "and," and "and" instead of "or," the following will suffice: Jackson v. Jackson, 1 Ves. Sen. p. 217, case 113; Maberly v. Strode, 3 Ves. 450–454; Bell v. Phyn, 7 Ves. 458; Read v. Snell, 2 Atk. 642, case 351; 8 Vin. Abr. Devise F. a. 2, p. 187, pl. 1.

*Construing the will of James Par- [*268
rock by the rules aforementioned—not looking to this or that parcel, or this or that devise alone, but viewing all its parts as one whole, to find the intent of the testator—the just conclusions are—

1st. That if his grandson John had died leaving issue at his death, that issue should have taken the part devised to him. So, likewise, as to the part devised to the granddaughter Sarah, if she had died leaving issue at her death, her issue would have taken that part. That intent is manifested by the devises to

them respectively, and their heirs, in the forepart of the will.

2d. That the testator intended, by the after clauses in his will, to qualify the estates respectively devised to his said grandchildren, both real and personal, by annexing the contingency to each estate, of having lawful issue of their respective bodies living at their respective deaths.

3d. That he intended, if the one or the other of said grandchildren should die, leaving no issue lawfully begotten, the survivor should take the whole, subject to the contingency of leaving lawful issue at his or her death.

4th. That, in the event that both his said grandchildren should die leaving no lawful issue, then the estate, real and personal, should go, one fourth to the Quaker Society at Philadelphia, and the other three fourths to be equally divided between the persons named in the devise over to Sarah Smallwood and others.

5th. That the testator intended to give to each of his said grandchildren only estates tail in the lands; and that the survivor of the two should, in case of the prior death of the other, without leaving lawful issue at his or her death, take but an estate tail, or an estate subject to the executory devise.

6th. The testator did not intend to give to either of his said grandchildren a clear, unencumbered, vendible estate, upon which either could raise money by sale at full age; but intended to continue and perpetuate the estate in the family, as far forth as the law would tolerate such a perpetuity; and so intending, he therefore empowered and ordered his executors to sell a specified parcel of his real estate "as soon as my said grandchildren shall come of age," and divide the money thence arising equally between his said grandchildren.

Mr. Wharton and Mr. Meredith, for defendant in error:

The only question before the court below was the construction of the will of James Parrock. The plaintiffs' lessors pretended no other title than that of devisees of the said James Parrock. They did not claim, nor pre-[*269] tend to claim, as heirs at law, or statutory heirs of John and Sarah Parrock, or either of them. After the evidence on their part was closed (the defendant having offered none), the plaintiffs' counsel requested the court to charge the jury, that, "if the jury believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are entitled to recover; it being proved by plaintiffs, that both John Parrock, the grandson, and Sarah Parrock, the granddaughter, died over age, and without issue." The court refused so to charge, but instructed the jury that, under the will, the plaintiffs could not recover, inasmuch as the devise over to the plaintiffs' ancestors never took effect. And to this charge the plaintiffs excepted; and it is the only exception or point of law arising from the record. So that the plaintiffs in error cannot now raise a new point in this court, which they never took below, and thus shift their ground of claim and title. Their evidence was directed to the point of establishing their right as heirs of the devisees named in the will, and not as heirs of John and Sarah Parrock, and they made out no such title by their evidence.

Then, as to the construction of the will of James Parrock. What was the intention of the testator?

He had given certain property to his wife, for life; and, after her decease, he had devised certain portions of it to his grandson, John, in fee, and certain other portions of the same to his granddaughter, Sarah, in fee. With respect to the Vine Street property, he had ordered that to be sold by his executors, so soon as John and Sarah came of age, and the money arising from the sale to be equally divided between the two grandchildren. There was, thus, with respect to this property, an equitable conversion of the realty into personalty, in case the devisees attained their majority. See Burr v. Sim, 1 Wharton, 252; Simpson v. Kelso, 8 Watts, 247; Reading v. Blackwell, 1 Bald. 166. Having thus provided for his two grandchildren, he looked to the contingency of both dying under age, and without issue; and, in that event, and in that event alone, he declared that one fourth of the property devised to them should go to the monthly meeting of the people called Quakers, at Philadelphia, and the other three fourths should be divided between Sarah Smallwood and the other persons named and described in the will.

The title of the plaintiffs, even if they should establish their pedigree, depends altogether upon their showing that both John and Sarah Parrock died under age, and without any lawful issue. And upon the trial they distinctly showed, that neither of said devisees died under age. Where, then, is their title?

The construction of this will is set- [*270] tled by adjudicated cases, in Pennsylvania and elsewhere. Lessee of Cheesman v. Wilt, 1 Yeates, 411, in 1795, is a case upon this very will, and was an ejectment for part of the property claimed under the executory devise to the plaintiff's lessors. The Supreme Court of Pennsylvania held the case to be "extremely clear," and that the remainders could only take effect upon the happening of both contingencies, namely, the dying under age and without issue. Having no doubt, the court refused to reserve the point upon the construction of the will.

In Welsh v. Elliott, 13 Serg. & Rawle, 205, under a devise of certain land to the testator's son, Robert, after the death of his mother, and in case Robert "departs this life before he is of age, or without lawful issue," the land was given to another son, in fee, upon certain conditions. Robert having attained the age of twenty-one, but died without issue, it was held that he took an estate in fee-simple indefeasibly. Chief Justice Tilghman, in this case (p. 206), says: "That the estate in fee of Robert would have become indefeasible, either by his attaining the age of twenty-one or having issue, has been so repeatedly decided, that, on that point, I will only refer to two cases." The cases referred to by him are Holmes v. Holmes, 5 Bin. 552, and Hauer v. Sheetz, 2 Ib. 532.

In the last of these cases, under a devise to one son of testator, F., and in case he should die under the lawful age of twenty-one, or without issue, his share should go to another son, P., it was held that or should be construed

and, and that F., having attained twenty one, and died afterwards without issue, an indefeasible fee vested in him, and descended to his heir at law. "This has been the uniform construction of this clause in wills," says Tilghman, Ch. J. 2 Bin. 544, from the case of Price v. Hunt, Pollexfen, 645, in the year 1684." To the same effect are Carpenter v. Heard, 14 Pick. 449, and Dallam v. Dallam, 7 Harr. & Johns. 220, and many other cases.

There was no looking on the part of the testator to an indefinite failure of issue, as one of the contingencies. On the contrary, the intent was, to provide for their contingency within a limited time, namely, at the death of the devisees; inasmuch as the devise over was to persons in being. But the rule of construing the first devise an estate tail has no application, where the contingency mentioned in the will is that of "dying under age and without issue"; for, as is shown by the authorities, the estate becomes an indefeasible fee in the first taker, upon the occurrence of either of the two events.

271*] *Mr. Justice McLean delivered the opinion of the court:

This is a writ of error, which brings before us a judgment of the Circuit Court of the Eastern District of Pennsylvania.

The lessors of the plaintiff brought an action of ejectment to recover certain premises, generally described in the declaration, and situated in the city of Philadelphia. To sustain the right claimed by the plaintiff, a deed of conveyance from Thomas and Richard Penn, the original proprietors of Pennsylvania, for the premises in controversy, dated the 5th of September, 1749, to James Parrock, was given in evidence. The will of James Parrock, dated the 24th of May, 1754, was then read to the jury, in which, after making several devises to his grandchildren, John Parrock and Sarah Parrock, their heirs and assigns, he adds, "Provided always, and the legacies hereinbefore devised to the said John and Sarah are upon this special condition, that if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that one fourth part of all and singular the real and personal estate to them before devised shall go to the monthly meeting of the people called Quakers; and the other three fourth parts to be equally divided between Sarah Smallwood and others, and to the survivors or survivor, as tenants in common forever.

It was proved that John Parrock and Sarah Parrock lived many years after they arrived at full age, and that both died without issue, long after the death of the testator. Evidence was offered conducing to prove that the Smallwoods named in the will descended from John Smallwood, the half-brother of the testator, and that the lessors of the plaintiff were connected with the persons to whom the devise over was made. No evidence was given by the defendant. And the lessors of the plaintiff prayed the court to instruct the jury, "If they believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are *entitled to* recover; it being proved by the plaintiffs that both John Parrock, the grandson, and Sarah Parrock, the granddaughter, died over age and without issue."

"But the court refused to charge the jury as so requested, and gave in charge to them, that under the said will the plaintiffs could not recover, inasmuch as the devise over to plaintiffs' ancestors, in the said will mentioned and contained, never took effect, by reason of the devisees therein named, viz., John Parrock and Sarah Parrock, having both arrived at full age." To which an exception was taken.

The form of the charge prayed is not free from objection. It assumes the sufficiency of the evidence to prove the heirship *of [*272 the lessors of the plaintiff if the jury should believe it. Now, the evidence was somewhat vague and uncertain, and the jury might well have doubted whether the heirship was proved. But the instruction given waives this objection. From the instruction, as well as the prayer, it is clear that the claim of heirship was as descendants of the persons named in the will, to whom the property was devised over.

In the argument here, the counsel for the plaintiff asks the reversal of the judgment, on the ground that the instruction was against the right of the lessors, or any part of them, to recover, although proved to be the heirs at law of John and Sarah Parrock.

The attention of the Circuit Court was not drawn to this point, no instruction was asked in regard to it, and it cannot now be made. The construction turned upon the contingent devise, and as that was held not to have taken effect, the court instructed the jury that the lessors of the plaintiff could not recover. This instruction was explicit, and could not have been misunderstood by the counsel in the Circuit Court; and as this was excepted to, and no other one prayed, it presents the only question for our consideration.

This devise was brought before the Supreme Court of Pennsylvania at January Term, 1795, in the case of The Lessee of Cheesman v. Abraham Witt, and the court then held that the devise over did not take effect. They decided "that the remainders over could only take place on the happening of both contingencies—the grandchildren who were the primary devisees dying under age and without issue." 1 Yeates, 411.

A decision thus made, and which seems to have been acquiesced in for more than half a century, within which time the property by descent or otherwise must have passed through the hands of persons who belonged to two or three generations, and which has necessarily become a rule of property, would seem to close all litigation under the will. But if the question remained open and unaffected by the lapse of time, the change of owners, and the great increase of value in the property, we should have difficulty in coming to any other decision than the one above stated.

We assent to the rule, that, in construing a will, the intention of the testator must govern. And that intention is to be ascertained from the whole instrument. If the intent of the testator be apparent, effect will be given to it, though he may have used inappropriate terms to attain his object. Under such circumstances, the conjunctive "and" may be read as

the disjunctive "or," or the disjunctive may be 273*] changed into the conjunctive. *But this latitude of construction is never exercised where the language of the will is explicit, and the intent of the testator is not doubtful. In such a case, the import of the words used must be taken.

In the fore part of the will, specific devises are made of real property to his two grandchildren by the testator, and when "they shall come of age" he directs his executors to sell a certain lot and divide the proceeds between them; and certain other pecuniary legacies are given to them to be paid at the same time; also, they are declared to be the residuary legatees of the testator. The condition then follows, that "if both my grandchildren shall happen to die under age, and without any lawful issue, then it is my will that," etc. This devise over includes the personal as well as the real estate devised.

That the testator intended to give the property devised to his grandchildren and to their issue is clear, and from this it is argued, with some force, that he intended the devise over to take effect on the contingency that they should die without issue, though after they become of full age. To effectuate this, it would be necessary to change the word "and" into "or," so that the devise over should read, "if both my grandchildren shall happen to die under age, or without any lawful issue," etc.

To this reading is opposed the explicit language of the testator, which limits the condition of the devise over to the death of his grandchildren under age and without any lawful issue. These two events must happen, as constituting the contingency on which the devise was to take effect. The language is so explicit, and the intention of the testator so obvious, that it would seem he could not have been mistaken. Is there anything in any part of the will to control this language?

From the specific devises to his grandchildren and to their issue by the testator, his intention is inferred, in opposition to the language used, that on their death, at any time, without issue, the devise over was to take effect. This view is not sustained by the tenor of the will.

Several of the legacies to the grandchildren were money, to be paid when they became of full age. These, as well as the real estate, were devised over "on their death under age and without lawful issue." Now, is this devise consistent with the supposition that it was to take effect at any future period, however remote, on the death of the grandchildren? They were to receive their legacies, and the real estate devised to them, when of age; and they had a right to use their property, and especially their pecuniary legacies, as their convenience 274*] might require. *The testator could not have intended to devise over property thus received and necessarily appropriated. He did not intend to withhold from these children, the objects of his regard and of his bounty, during their lives, the use of the property he gave them. The nature of this devise goes strongly to show that the testator intended it should take effect "on the death of the grandchildren before they became of age, having no lawful issue."

The judgment of the Circuit Court is affirmed.

Order.

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

JONATHAN M. REED, Plaintiff in Error,
v.
THE PROPRIETORS OF LOCKS AND CANALS ON MERRIMAC RIVER, Defendants.

Deed—construction of—application of terms—duties of court and jury—boundaries indefinite—latent ambiguity—verdict, no judgment entered, no estoppel—adverse possession—widow must account to heirs for rent received.

It is the duty of the court to give a construction to a deed so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed.

Therefore, there was no error in the following instructions given by the court to the jury, viz.: "That if the jury believed from the evidence, looking to the monuments, length of lines and quantities, actual occupation, etc., that it was more probable that the parties to the mortgage intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

Where a claim to land was maintained upon an uninterrupted possession of forty years, the death of the original holder and subsequent reception of rent by his widow did not break the continuity of possession. She is liable to account for the rent to the heirs.

THIS case was brought up by writ of error from the Circuit Court of the State of Massachusetts.

It was a suit brought by Reed, a citizen of Michigan, against an incorporated company, called "The Proprietors of Locks and Canals on Merrimac River," in a plea of land, wherein the said Reed demanded against the proprietors a certain piece or parcel of land in the city of Lowell and State of Massachusetts, containing seven acres and one hundred and forty-two and a quarter square rods.

*The state of the case was this: [*275

It was admitted that the demanded premises were part of the farm of Thomas Fletcher, who died seized thereof in 1771, leaving a widow and two daughters, Rebecca and Joanna.

Thomas Fletcher.

Rebecca—	Joanna—
Jacob Kittredge.	Benjamin Melvin.

NOTE.—Parol evidence as to recorded plat to show mistake, and to prove trusts as to a deed, or to explain ambiguous words or description; to show mistake in deed. See note to 3 L. ed. U. S. 690.

In 1778, Rebecca married Doctor Jacob Kittredge, and removed to Brookfield, Worcester County, Mass., where they lived and died—he in the summer of 1813, and she in September, 1818—leaving eight children and the heirs of two deceased children as their heirs at law, and under them the tenants claim to derive their title.

In 1777, Joanna married Benjamin Melvin, Senior, who removed home upon the farm. She died in September, 1826, and he died in April, 1830, leaving seven children, as their heirs at law, under whom the plaintiff claims to derive his title.

On the 27th of April, 1782, two transactions occurred which were the source of this dispute. Kittredge and wife conveyed to Melvin one half of 130 acres (which appeared to be the paternal estate), for the consideration of £300. In order to secure the payment of this £300, Melvin (who now owned one half by virtue of the deed just mentioned, and the other half in right of his wife) united with his wife in executing upon the same day to Kittredge a mortgage of a part of the land which is thus described, viz.: "A certain tract or parcel of land lying and being in Chelmsford, in Chelmsford Neck, so called, in said County of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece, without any division, except only one county bridle road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased; together with all the buildings of every kind, and all the privileges, appurtenances, and commodities thereunto belonging, or in any wise appertaining."

The great question in the case was, whether or not this mortgage included the demanded premises. On the part of the plaintiff in error, who claimed under Melvin, it was contended that it did not, and that of course the residuum belonged to Melvin.

On the part of the tenants, it was contended that the mortgage included them, and if so, that the estate afterwards became absolute in Kittredge.

276*] *In 1789, Kittredge entered upon the property mortgaged, for condition broken, and on the 17th of April, 1789, leased the property to Melvin for one year, and on the 17th of April, 1793, renewed the lease for a year.

In 1794, Kittredge brought an action against Melvin to recover the premises, in which suit judgment was rendered by the Supreme Judicial Court of Massachusetts in favor of the plaintiff, and an habere facias possessionem issued on the 19th of April, 1796.

It is not necessary to state the vast number of leases and deeds, and other evidence, introduced into the cause by both sides, to show that the mortgage did or did not include the demanded premises; because it will be perceived, by referring to the opinion of this court, that they considered the question to be one appropriately falling within the province of a jury, and not one of construction of a deed to be settled by the court.

The tenants also took defense upon another ground, namely, that if the demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseisin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever Farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin, and their wives, would be barred.

The title of those claiming under Melvin (as Reed, the present plaintiff in error, is already stated to have done) was brought formerly before the Massachusetts courts, as appeared by the following agreement, which was filed in the cause.

"It is also admitted by the tenants, that the heirs of Benjamin and Joanna Melvin entered into the demanded premises in July, A. D. 1832, claiming the same; and in May, A. D. 1833, commenced writs of entry upon their own seisin for the recovery of the same; and that they prosecuted the same suits until the April Term of the Supreme Judicial Court, Middlesex County, A. D. 1835, when they became nonsuit; and thereupon commenced a writ of right, in which they joined, and prosecuted the same until the October Term, Supreme Judicial Court, 1836, *when Rufus Melvin, one [*277 of the heirs, executed a release of said action to the tenant.

(Signed) "John P. Robinson,
"Attorney for the Tenants.
"October 31st, 1845."

In October, 1845, the cause came on for trial in the Circuit Court, when the jury found a verdict for the tenants. The court, however, gave certain instructions to the jury, which were excepted to, and are thus stated in the record.

"Upon this evidence the court gave full instructions to the jury; and among them the demandant excepts to the following:

"1st. That if they believed, from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, etc., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants.

"2d. That the verdict of a former jury introduced by the tenants was not evidence to control this case or the issue.

"3d. But if they should believe the testimony of James Melvin, that Doctor Jacob Kittredge pointed out on the land of his father certain monuments as the southern boundary of his mortgage, it would be strong evidence that the parties to the mortgage intended originally to limit the mortgage to the line from these monuments; and that this evidence was strengthened and supported by the other testimony concerning the boundary south on Jonathan Williams.

"4th. That if the tenants under their respective leases from Kittredge occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseisin, it would in law enure to the benefit of Kittredge and his heirs, and would be the disseisin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissell, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of Melvin [*278 278*] and wife, in 1832, it constituted *in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises, by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardian discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if the tenants, who held leases from Jacob Kittredge, and entered under them, remained in possession after his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence to be weighed by the jury of a continued occupation by the lessees for and in behalf of those entitled in law to the rights which Kittredge claimed when alive.

"To which instructions of the court, given as aforesaid, the said plaintiff at the trial excepted, and prayed this, his bill of exceptions, to be signed and sealed by the court. All which, being found true, the same is accordingly signed and sealed.

"In testimony whereof, I have hereunto set my hand and seal.

[Seal.] "Levi Woodbury,
"Ass't Justice of Supreme Court."

Upon these exceptions, the case came up to this court.

It was argued by Mr. Parker and Mr. Jones for the plaintiff in error, and Mr. Robinson and Mr. Webster for the tenants.

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

As to the first instruction. That the presiding judge erred *in submitting the ques- [*279 tion of the extent of land embraced in the mortgage from Melvin and wife to Dr. Kittredge, to the jury, as he did.

1. Because the mortgage and deed of the same date from Kittredge and wife to Melvin, Senior, constituted in law one transaction, and the mortgage, viewed in this connection, called for some limit short of the whole land described in the deed from Kittredge and wife, which fact the tenants were estopped to deny; and if the jury were satisfied that the town bridle road existed at the date of the transaction, at the place contended for by the plaintiff, and that it constituted as much of a division as the bridle road expressly excepted by the parties as making a division—the evidence showing no other division answering the call of the mortgage—the town bridle road became the southern boundary of the mortgage by intendment of law and legal construction, and the jury were bound to find it so; and the presiding judge should so have instructed them, instead of leaving to their decision the meaning of the language of the mortgage.

2. Because, if the jury believed of the testimony of James Melvin—viz., "That his father and Dr. Kittredge, just before the making of the first lease between them, went upon the land and established the stake and stones and black oak stump with stones on it, at the place testified to by him as the southern boundary of the land claimed by Kittredge"—then this fact, with the subsequent indentures of leases between them, recognizing these monuments and the Williams land as the southern boundary of the land claimed by Kittredge, and the writ and judgment thereon, with the solemn and repeated recitals and statements contained in them, the admission of the tenants that the Williams land extended as far north as these monuments and included the demanded premises, and the fact that Melvin subsequently, in November, 1794, repurchased the demanded premises of Williams for a valuable consideration, constitute in law a conclusive presumption, against Kittredge and all claiming under him, of the extent of the land then owned by Kittredge, and that both Kittredge and all claiming under him were thereby estopped to say that Kittredge at that time owned the demanded premises, or that his mortgage included them. And the presiding judge should have so instructed the jury on the evidence.

3. Because the law gives a preference to actual monuments, over length of lines, quantities, etc.; and the presiding judge ought to have so instructed the jury.

4. The burden being upon the tenants to satisfy the jury *that the mortgage from [*280 Melvin and wife to Kittredge included the demanded premises, the instruction of the presiding judge—"That if, from the evidence looking to monuments, length of lines, quantities, actual occupation, etc., the jury should

believe that it was more probable that the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants"—was wrong, and did not in law satisfy the burden of proof resting upon the tenants.

To Point No. 1: Levy v. Gadsby, 3 Cranch, 180; McCoy v. Lightner, 2 Watts, 347; Welsh v. Dusar, 3 Binn. 337; Dennison v. Wertz, 7 Serg. & Rawle, 372; Roth v. Miller, 15 Ib. 100; 4 Ib. 279; Fowle v. Bigelow, 10 Mass. 384; Adams v. Betz, 1 Watts, 425; Poage v. Bell, 3 Rand. 586; Doe v. Paine, 4 Hawks, 64; Cockrell v. McQuin, 4 Monroe, 69; Hurley v. Morgan, 1 Dev. & Batt. 425; Waterman v. Johnson, 13 Pick. 261; Peyton v. Dixon, Peck, 148; Hart v. Johnson, 6 Ham. 87; Etting v. Bank of the United States, 11 Wheat. 59; Cherry v. Slade, 3 Murphy, 82; Carroll v. Norwood, 5 Harr. & Johns. 163; Pennington v. Bordley, 4 Harr. & Johns. 458.

To Point No. 2, under the first instruction, we cite the following authorities: Boyd v. Graves, 4 Wheat. 513; Commonwealth v. Pejepscutt Proprietors, 10 Mass. 155; Houston v. Mathews, 1 Yerger, 116; Wilson v. Hudson, 8 Yerger, 398; 1 U. S. Dig. by Met. & Perkins, 474; Carroll v. Norwood, 5 Harr. & Johns. 163; Smith v. Murphy, 1 Taylor, 303; Pennington v. Bordley, 4 Harr. & Johns. 457; Bates v. Tymason, 13 Wendell, 300; Flagg v. Thurston, 13 Pick. 145; Cherry v. Slade, 3 Murphy, 82; Clark v. Munyan, 22 Pick. 410; Slater v. Rawson, 1 Metc. 450; Crosby v. Parker, 4 Mass. 110; Houston v. Pillow, 1 Yerger, 481; Davis v. Smith, 1 Yerger, 496; 1 Greenleaf on Ev. 18, 19, 25, 26; 4 Starkie on Ev. 30; Braman v. Taylor, 2 Adolph. & Ell. 278, 289, 291; Loinson v. Tremere, 1 Adolph. & Ell. 792; Peletreau v. Jackson, 11 Wendell, 117; 4 Kent's Com. 261, note; Carver v. Jackson, 4 Peters, 83; Shelly v. Wright, Willes, 9; Crane v. Morris, 6 Peters. 598; Stowe v. Wyse, 7 Conn. 214; McDonald v. King, Cox, 432; Henrick v. Johnson, 11 Metc. 26; Willison v. Watkins, 3 Peters, 43; Denn v. Brewer, Cox, 182; Kinsell v. Daggett. 2 Fairfield, 309; Dewey v. Bordwell, 9 Wend. 65; Parker v. Smith, 17 Mass. 413; Gerrish v. Bearce, 11 Mass. 193; Jackson v. Hasbrook, 3 Johns. 331; Adams v. Barnes, 17 Mass. 365; Howard v. Mitchell, 14 Mass. 241; Shelton v. Alcox, 11 Conn. 290; Howe v. Strode, 3 Wilson, 269; Poole v. Fleger, 11 Peters, 209; Root v. Crock, 7 Barr. 378; Fitch v. Baldwin, 17 Johns. 161; Singleton v. Whitesides, 5 Yerger, 18.

281*] *And to the point that, as the tenants now hold under and are privy in estate with all the parties who established the boundary and dividing line as aforesaid, they are estopped to deny the line so established by the respective parties, the following: Cox, 431; 6 How. 88; 2 Murphy, 251; 2 Serg. & Rawle, 44.

To Point No. 3, under the first instruction, we cite Graham on New Trial, 278, and cases there cited.

To Point No. 4, under the same instruction, 1 Greenleaf on Evidence, 4; 1 Starkie on Evidence, 14; Jackson on Real Actions, 157, 161.

As regards the second instruction. The presiding judge erred, because the verdict of a former jury introduced by the tenants was evidence to control this case and the issue.

We contend that the verdict of a former jury put in by the tenants, rendered against them in favor of a party under whom the present demandant claims, is evidence for the demandant in the present case; as it appears from the record, also put in by them affirmatively, that such verdict was in all respects conformable to law. Such verdict is competent evidence. See Filler v. Milliner, 2 Johns. 181; 4 Com. Dig. 89; Outram v. Morewood, 3 East, 446.

It is equivalent to an award of arbitrators upon a submission by the parties under a rule of court, which concludes the parties, and all claiming under them, by estoppel, as to boundary at least. Goodridge v. Dustin, 5 Metcalf, 363; Shelton v. Alcox, 11 Conn. 240, and the cases there cited.

That it inures to the present demandant. Carver v. Jackson, 4 Peters, 83; Somes v. Skinner, 3 Pick. 52.

As regards the third instruction. The demandant contends it was wrong, because, if the jury believed the testimony of James Melvin, then the monuments established by his father and Dr. Kittredge, with the Williams land, there being no evidence of any others answering the calls in the subsequent leases, writ, and judgment, were to be regarded by them as the southern line of the land embraced in the lease, writ, and judgment; and by the solemn recitals and statements made in them by Kittredge, the admission of the tenants that the Williams land included the demanded premises, and the subsequent repurchase of Williams by Melvin of the demanded premises, with the balance of the Williams lot, which the tenants now claim, and hold under that purchase, both Kittredge and all claiming under him were concluded and estopped to say that Kittredge at the time of these transactions owned any of the land recited and recognized in said leases, writ, and judgment as belonging to Jonathan Williams, and which lies immediately south of *the monuments aforesaid, or that his [*282 mortgage originally included it, and if it had, the fact was immaterial.

See cases cited to the first and second points under the first instruction.

But the tenants contend further, that, if the mortgage from Melvin and wife does not include the demanded premises, they have acquired a title thereto by disseisin and the statute of limitations; that they and those under whom they claim have had the actual, open, notorious, and exclusive possession of the demanded premises under claim of title, with such legal privity of title between the successive occupants as will constitute a bar.

This position the demandant denies, and contends that the evidence, all of which touching this point appears upon the record, is entirely insufficient in law to constitute such a disseisin as to bar. [The counsel then went into an examination of the evidence.]

As regards the fourth instruction. The demandant will contend it was wrong, 1. Because the question submitted to the jury to decide necessarily involved a construction of the leases, which was matter of law, and should have been determined by the court. 2. Because

such an occupation by the tenants, under their respective leases from Kittredge for the space of thirty years, would not necessarily constitute a bar to the demandant's right to recover in this case, even if a sufficient legal continuity of title in the lessors had been shown, especially the moiety derived from Mrs. Melvin, she having been under coverture. 3. Because there was no sufficient legal continuity of title shown to have existed in the lessors, through whom the tenants claim to derive their title, and because it assumed the existence of facts which the whole evidence in the case expressly negatived, was foreign and did not conform to the evidence in the case, and tended to mislead the jury.

As regards the fifth instruction. The demandant contends it was wrong, because the presiding judge assumed to tell the jury, "that Kittredge claimed to have a deed which included the demanded premises, and had turned Melvin out of possession," of which facts there was no evidence, but evidence showing directly the reverse; and that if there had been any evidence tending to show these facts, it was for the jury to pass upon; and that, without the existence of these facts, the possession of the demanded premises by the lessees under the lease was not the possession of Kittredge or his heirs, so as to constitute them disseizors except at the election of the true owner. And that even if these facts had been shown to have existed, they would not have operated a disseisin 283*] of Mrs. Melvin *during her coverture. And because the court left it to the jury to decide what facts constitute in law a disseisin.

As regards the sixth instruction. The demandant contends it was wrong, 1. Because the question submitted to the decision of the jury involved a construction of the written leases, which was matter of law, to be determined by the court. 2. Because the evidence did not tend to show that the same possession, or any possession, possessing the same legal elements, or having the same legal effect, had been continued by the subsequent lessees, down to the entry of the heirs of Melvin and wife in 1832, or for any time sufficient to bar, and would not constitute in law such a continuity of possession as would bar the demandant's right to recover. 3. Because the question of legal continuity of title and possession submitted to the jury to decide was matter of law, and should have been decided by the court.

As regards the seventh instruction. The demandant contends it was wrong. 1. Because there was no evidence in the case from which the jury could properly infer the fact that Mrs. Kittredge ever settled with the heirs of Dr. Kittredge for, or paid the rents which she had received from the tenant, or that the tenant repaid the rents to the heirs.

2. Because the possession and claim of Mrs. Kittredge, the widow, whether under a mistake or not, and express disclaimer on the part of the heirs, as disclosed by the evidence, which was uncontradicted, did interrupt and disturb the continuity of adverse possession, if any existed before.

3. Because the evidence shows that the last written lease from Kittredge to Cheever, the tenant, terminated in April, 1812, more than a year before Kittredge died, and if Cheever was tenant at all to Kittredge of the demanded premises, which the plaintiff denies, it was only a tenancy at will, which terminated by the death of Kittredge in 1813, and Cheever's remaining in possession afterwards, under the claim of the widow, and paying the rent to her —the heirs of Kittredge, as appears, expressly disclaiming any title—would not, against their wish and consent, make Cheever tenant at will or sufferance to them, or establish any other relation which would involuntarily enforce on the innocent heirs the character of wrong-doers and disseizors, and that the law would not properly regard them as such.

4. Because the whole transaction of the widow's claim and receipt of the rent, and express disclaimer on the part of the heirs, as shown by the evidence, was not evidence, to be weighed by the jury, of a continued occupation by the lessees *for and in behalf of [*284 those entitled by law to the rights which Kittredge claimed when alive.

The demandant will further contend that the instructions aforesaid were unwarranted by the evidence, and misled the jury, and that their verdict was against law and the evidence in the case, doing great injustice to the plaintiff.

To the second ground of the tenant's defense, the plaintiff cites in support of his exceptions to the fourth, fifth, sixth, and seventh instructions, the following authorities:

The point of submitting the construction of the leases to the jury: Commonwealth v. Porter, 10 Metc. 263; Graham on New Trials, 288; McCormick v. Sisson, 7 Cowen, 715; Pangborn v. Bull, 1 Wend. 345; Hill et ux. v. Yates, 8 Taunt. 182; and cases cited to point No. 1, under the first instruction.

What constitutes an actual ouster and disseisin, so that the statute begins to run? Mass. Stat. 1786, ch. 13, sec. 4; Mass. Rev. Stat. ch. 119, sec. 3; 2 Greenleaf on Ev. sec. 430; Taylor v. Hord, 1 Burr. 60; Cowper, 689; Jerritt v. Weare, 3 Price, Ex. R. 575; 4 Kent's Com. (1st ed.), 482, 489; Proprietors of Kennebec Purchase v. Springer, 4 Mass. 416; Same v. Laboree, 2 Greenl. 275; Little v. Libby, Ibid. 242; Same v. Megquire, Ibid. 176; Norcross v. Widgery, 2 Mass. 506; Coburn v. Hollis, 3 Metc. 125; Bates v. Norcross, 14 Pick. 224; Prescott v. Nevers, 4 Mason, 326; Poignard v. Smith, 6 Pick. 172; Brown v. Gay, 3 Greenl. 126; Gale v. Butler, 3 Murphy, 447; Ross v. Gould, 5 Greenl. 204; Blood v. Wood, 1 Metc. 528; 1 Roll. 663; L. 27; 6 Com. Dig. 27, Seisin, F. 4; Stearns on Real Actions, 6; Ricord v. Williams, 7 Wheat. 107; Blunden v. Baugh, Cro. Car. 302; Goodright v. Forrester, 1 Taunt, 578; Doe v. Lynes, 3 Barn. & Cress. 388; Podger's case, 9 Coke, 104; 5 Cowen, 374; 6 Johns. 118.

That Melvin had acquired a life estate in his wife's half, and the statute would begin to run only as to him: 2 Bl. Com. 127; Co. Litt. 670; Melvin v. Locks and Canals, 16 Pick. 137; Babb v. Perley, 1 Greenl. 6; 15 Pick. 23; 22 Ib. 565; 2 Cow. 439.

There cannot be an actual ouster of the reversion, so that the statute will run during the continuance of the life estate. Stearns on Real Actions (2d ed.), 323; 1 Preston's Ab. 266; Doe v. Elliot, 1 Barn. & Ald. 86; 2 Kent's Com. (2d ed.). 110: Tilson v. Thompson, 10

Pick. 357; Stevens v. Winship, 1 Pick. 238; Jackson v. Schoonmaker, 4 Johns. 402; Jackson v. Johnson, 5 Cowen, 74; Wallingford v. Hearl, 15 Mass. 472; Wells v. Prince, 9 Mass. 508; Jackson v. Selleck, 8 Johns. 262; Starkie on Ev. 886, 887; Co. Litt. 39 a, 246 a, 246 b, 350 a, 351 a, 352 a, 356 b.

285*] *That there must be a legal privity of title between successive occupants, so the one legally enters upon his predecessor, and not as a trespasser: Angel on Limitation, 88; Potts v. Gilbert, 3 C. C. R. 475; Ward v. Bartholomew, 6 Pick. 415; Jackson v. Leonard, 9 Cowen, 654; Brandt v. Ogden, 1 Johns. 156; Doe v. Hall, Dowl. & Ryl. 38; Sargeant v. Ballard, 9 Pick. 251; Allen v. Holton, 20 Pick. 465; Melvin v. Locks and Canals, 5 Metc. 115; Wade v. Lindsey, 6 Metc. 407.

That it is error for the court to instruct the jury that they may make inferences which the evidence does not warrant: Graham on New Trial, 271; Harris v. Wilson, 7 Wend. 57; Hollister v. Johnson, 4 Ib. 639; Levingsworth v. Fox, 2 Bay, 520.

That on Kittredge's death Cheever's tenancy ceased, and he became tenant at sufferance: Rising v. Stannard, 17 Mass. 282; Ellis v. Page, 2 Pick. 42.

That between Cheever and the heirs at law there was no privity of title: Co. Litt. 170 b; 1 Cruise on Real Property, 288. That upon the heirs abandoning any prior disseisin by Kittredge became purged: Small v. Procter, 15 Mass. 495.

If the widow entered, she would be a new disseizor, as she had no right to enter as the successor of her husband: Gibson v. Crehore, 5 Pick. 146, 149; Parker v. Obear, 7 Metcalf, 24. That neither married women, nor minors, nor a non compos mentis, can become disseizors by adopting and consenting to the acts of others: 6 Com. Dig. 271, Seisin, F. 4; 1 Roll. 160, 161.

That the deeds, through which the tenants claim to derive title from the Kittredge heirs, did not include the demanded premises: 2 Bl. Com. 388; 6 Rules for construing Deeds; Ognell's case, 4 Coke, 50, Shepherd's Touchstone, 248, 249; Roe v. Vernon et al. 5 East, 51; Doe v. Greatherd, 8 East, 91; Gascoyn v. Barber, 3 Atk. 9; Wilson v. Mowitt, 3 Ves. Jun. 191; Worthington v. Hylyer et al. 4 Mass. 191; Barnard v. Martin, 5 N. H. 536; Woodman v. Lane, 7 Ib. 241; Allen v. Allen, 14 Maine, 430; Thorndike v. Richards, 13 Ib. 430; Field v. Huston, 21 Ib. 69; Jameson v. Balmer, 20 Ib. 425; Low v. Hampstead, 10 Conn. 23; Benedict v. Gaylord, 11 Ib. 60; Stearns v. Rice, 14 Pick. 411, 412.

That the verdict of the jury was against law and the evidence in the case: Bryant v. Commonwealth Ins. Co. 13 Pick. 543.

[The argument of the counsel for the tenants, tending to show, from other leases and evidence, that the demanded premises were included in the mortgage, is omitted.]

286*] *II. The second position of the tenants is, that if the demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseisin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin and their wives would be barred.

It is the settled law of Massachusetts, that a married woman, by joining with her husband in a deed, may pass the lands of which the husband and wife are jointly seized, in her right. Fowler v. Shearer, 7 Mass. 14.

It is also the settled law of Massachusetts that the right of a married woman and her heirs to make an entry upon lands of which she has been disseized jointly with her husband, is absolutely barred after thirty years' adverse possession. Stat. of Mass. 1786, ch. 13, sec. 4; Melvin v. Propr. of Locks and Canals, 16 Pick. 161; Same v. Same, 5 Metc. 15; Kittredge v. Same, 17 Pick. 246.

A married woman may be disseized at the same time with her husband. Podger's case, 9 Coke, 104; Runnington on Ejectment, 60; Adams on Ejectment, 48, 49, note; Jackson on Real Actions, 25; Polyblank v. Hawkins, 1 Dougl. 329; Registrum Brevium, 197; Rastell's Entries, 318; Co. Litt. 30 a; 2 Inst. 342; Langdon v. Potter, 3 Mass. 219; Rolle's Abr. Assize, E. O. 13.

With respect to the Williams mortgage, and the testimony of James Melvin, as mentioned in the third instruction, the instruction of the judge was right, if it was not too favorable to the demandant, because Williams's mortgage was subsequent to Kittredge's, and could not be set up against it, if it included a portion of the same lands, as the tenants contend; and the testimony of James Melvin as to the southern boundary is totally inconsistent with the written documents made by the parties themselves at the time. This relates to the first and third instruction.

As to the second instruction, that the verdict of a former jury in the State court was not evidence to control this case, the *ten- [*287 ants contend it was correct, because the judgment of the State court which contained this verdict was in favor of the tenants, notwithstanding this verdict.

In support of the fourth, fifth, and sixth instructions, the tenants will take the positions and rely upon the authorities cited before, under the second general head of this abstract, to which the court are referred.

As to the seventh instruction, the tenants make the following points: That by the death of Kittredge, in 1813, the land descended to his heirs at law; that he died seized, the possession being in his tenant, Cheever; that Cheever continued in possession till after the death of Mrs. Kittredge, in 1818; that there was no evidence that Mrs. Kittredge was ever on the land after the death of her husband; that she was entitled to a life estate in one third part of the farm, and was, therefore, legally entitled to one third

part of the rents; that she cannot be considered as an abator, because an abatement is an entry by a stranger, nor as a disseizor, because she did no act which can be construed as a disseisin of the heirs; that there was no evidence of any disclaimer of the heirs; nor any evidence of an adverse possession on the part of Mrs. Kittredge, but that the legal seisin remained in the heirs as it descended from their father. 5 Metc. 23-35.

Mr. Justice Grier delivered the opinion of the court:

The plaintiff in error was demandant below in a writ of entry, in which he claimed about eight acres of land in the city of Lowell.

The demandant claimed under Benjamin Melvin, who, it is admitted, was seized of the land in dispute, as part of a larger tract, in 1782. One undivided moiety of this tract Melvin held in right of his wife, and the other in his own right.

The tenants claimed under a mortgage given by Benjamin Melvin and wife to Jacob Kittredge, on the 27th day of April, 1782. In 1789, Kittredge entered under his mortgage, and leased the premises to Melvin. In 1796, Kittredge recovered the possession from Melvin on an action of ejectment, and had possession delivered to him by writ of habere facias.

From that time Kittredge and those claiming under him, now represented by the tenants or defendants in this action, claim to have had the peaceable possession of the demanded premises; and there is no evidence of any occupation by Melvin or his heirs, or claim thereto, till 1832, although they lived in the immediate neighborhood. On the trial below, the tenants relied on two grounds of defense, both of which they claim to have established by the evidence:

288*] *1. That the demanded premises were included in the mortgage given by Melvin and wife to Kittredge, in 1782.

2. That even if the land in controversy was not embraced within the deed of mortgage, yet that the entry of Kittredge in 1796, and the ouster of Melvin and wife operated as a disseisin, and that by the uninterrupted and adverse possession of the tenants, and those under whom they claim, for more than thirty years before the entry of demandant, or those under whom he claims, his right of entry was barred by the statute of Massachusetts of 1786, ch. 13, section 4; which limits the right of any person under no disability to make an entry into lands, etc., to twenty years next after his right or title first descended or accrued, with a saving to femes covert, etc., of a right to make such entry at any time within ten years after the expiration of said twenty years, and not afterwards.

The court gave "full instructions to the jury" on the principles of law applicable to the complicated facts, and somewhat contradictory testimony submitted to them on the trial; to certain portions of which the demandant's counsel excepted, and has here assigned as error.

We shall proceed to examine them in their order.

I. "That if the jury believed from the evidence, looking to the monuments, length of lines and quantities, actual occupation, etc., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

It is objected to this instruction, that it submits the construction of the deed to the jury; and permits them to conjecture the probable intention of the parties from facts and circumstances not contained in the deed. Whereas the intention of the parties is to be found in their deed alone, which it is the duty of the court to construe.

Taking this sentence of the charge as it stands, without reference to the facts of the case, it may be admitted that it affords some color to this objection. But when we look to the issue submitted to the jury, and the testimony exhibited by the record, the exception will be seen to be without foundation.

It is true, that it was the duty of the court to give a construction to the deed in question, so far as the intention of the parties could be elicited therefrom, and we are bound to presume that, in the "full instructions" which the record states were "given to the jury," and not contained in the bill, because no objection was made to them, the court performed that duty correctly. But after all this is done, it is still a question *of fact to be dis- [*289 covered from evidence dehors the deed, whether the lines, monuments, and boundaries called for include the premises in controversy or not. A deed may be vague, ambiguous, and uncertain in its description of boundary; and even when it carefully sets forth the lines and monuments, disputes often occur as to where those lines and monuments are situated on the ground; and it necessarily becomes a fact for the jury to decide, whether the land in controversy is included therein, or, in other words, was intended by the parties so to be.

The mortgage referred to by the court describes the land as follows: "A certain tract or parcel of land lying and being in Chelmsford, on Chelmsford Neck, so called, in said County of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece without any division, except only one county bridle road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased."

The description of the land conveyed by this deed is of the most vague and indefinite character; it sets forth no monuments to indicate the line which divides it from the remainder of the tract owned by the mortgagor, and not intended to be included in the deed.

Hence, the demandant, in order to show what land was intended by the parties to be included, produced witnesses to prove the existence in former times of another "bridle road," which he contended was the southern boundary of the mortgaged land, because a hundred acres lay north of this road, and the land was described as intersected but by "one county bridle road," which ran through the northerly part of the farm. He produced a witness, also, to prove that Kittredge, the grantee, had pointed out a certain monument near this road as marking his boundary.

The tenants contended that the deed was un-

certain as to quantity, and did not call for the road as its southern boundary. They also gave evidence to show the actual practical location by the parties of the land included in the mortgage, as early as 1789, which included the eight acres in controversy. For this purpose they produced the leases from Kittredge to Melvin, the mortgagor, dated, in 1789 and 1793, and subsequently to the other tenants of Kittredge, setting forth courses and distances which included the demanded premises, as they contended, and proved by witnesses a possession held accordingly since 1796.

It cannot be doubted, that, where a deed is indefinite, uncertain, or ambiguous in the de-290*] scription of the boundaries of the *land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.

From this view of the case, as exhibited by the record, it clearly appears that the question, whether the demanded premises were included within the limits of the mortgage, or intended so to be, was submitted by the parties, and by the nature of the case, to the jury; and that, in order to a correct decision of the issue, the jury should be instructed to weigh the testimony as to the "monuments, length of lines, and quantities, actual occupation, etc.," and decide according to the weight of evidence. And such is the meaning, and no more, of the language of the court now under consideration. We can perceive no error in it.

II. The second matter of exception is to the instruction, "That the verdict of a former jury, introduced by the tenants, was not evidence to control this case or the issue."

On the trial, the tenants gave in evidence the record of a former writ of entry, brought by Benjamin Melvin, Jr., against them in 1833, for this same land, on which a judgment was rendered in favor of the tenants. In the trial of that case, the question had been submitted to the jury "whether the demanded premises were intended by the parties to be conveyed by the deed of mortgage," and the verdict was in favor of demandant; the court, nevertheless, on other points reserved, gave judgment for the tenants.

We understand the principle asserted by the court in this instruction to be, that this verdict in favor of Melvin was not conclusive upon the defendants in this suit, and did not operate by way of estoppel as to the facts stated therein.

The correctness of this instruction cannot be questioned. For, assuming that a verdict and judgment in a writ of entry sur disseisin to be conclusive between parties and privies in Massachusetts, and that they operate by way of estoppel, yet the record in this case would have no such effect; 1st. Because it was neither pleaded nor given in evidence by the demandant for that purpose. 2d. All estoppels are mutual; the demandant was not party to the *suit, nor privy* except as to one fourteenth of the premises, and would not therefore have been *estopped as to the remainder; so, [*291 neither could the tenants. 3d. There was no judgment of the court upon the verdict, which alone could give it the force or effect of res judicata.

III. The third exception is to an instruction in favor of the demandant, and ought not to have been taken, or urged here.

IV. The fourth, fifth, sixth, and seventh instructions excepted to have reference to the statute of limitations, and may be considered together. They are as follows:

"4th. That if the tenants, under their respective leases from Kittredge, occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseisin, it would in law inure to the benefit of Kittredge and his heirs, and would be the disseisin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissells, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of Melvin and wife, in 1832, it constituted in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardians discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if the tenants, who *held leases from Jacob Kittredge, and [*292 entered under them, remained in possession after his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence

to be weighed by the jury of a continued occupation by the lessees, for and in behalf of those entitled in law to the rights which Kittredge claimed when alive."

We can perceive no error in these instructions, when taken in connection with the evidence exhibited by the record.

It cannot be denied, that an adverse possession may be kept up without a personal residence where the disseizor gives leases to tenants, puts them in possession and receives the rents, claiming the land as his own.

The law is also well settled by the courts of Massachusetts, that the entry of a married woman is barred by the statute of limitations of that State, after thirty years, notwithstanding her coverture. Also that by the marriage the husband and wife become jointly seized of her real estate in her right, and their title must be so stated in pleading; and therefore, if a stranger enters and ousts them, it is a disseisin of both, and a right of entry immediately accrues to both or either of them. See Melvin v. Proprietors, etc., 16 Pet. 161; also 5 Metcalf, 15, and cases there cited.

Nor can we discover anything in the evidence in this case, that could entitle the demandant to maintain that the continuity of the adverse possession has been broken by the death of Kittredge, and the fact that the widow may have received the rents without objection for some time after his death.

There was no abatement by a stranger after the death of Kittredge, nor entry or disseisin of his heirs by the widow.

"If a guardian by nurture makes a lease by indenture to one who is already in under title of the infant, rendering rent to the guardian, which is paid accordingly, this is no disseisin; for there is no actual ouster consequent on such demise, and the rent paid to the guardian must be accounted for to the infant." Roll Abr. 659; Bac. Abr. tit. Disseisin, A.

So if the mother, by mistake of her rights, and without objection, receives the rents jointly due to herself and children, this constitutes no ouster of them, she being liable to account to them.

293*] *The judgment of the Circuit Court is therefore affirmed, with costs.

Order.

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

AMÉDÉE MENARD'S HEIRS, Plaintiffs in Error,
v.
SAMUEL MASSEY.

Spanish concession, surveys, when binding—title under patent issued prior to confirmation act is superior to incomplete Spanish title—act reserving from sale, etc., application of—form of complete Spanish title.

A concession, having no defined boundaries, made by the Lieutenant-Governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as "property," and, as such, protected by the courts of justice, without a sanction by the political power, under the third article of the treaty with France made in 1803.

The Lieutenant-Governor of Upper Louisiana had the authority, as a sub-delegate, to grant concessions, direct surveys, and place grantees in possession; but no perfect title to the land passed until the concession and a copy of the survey were delivered to the Intendant-General at New Orleans, and also a proces verbal attesting the fact that the survey was made in the presence of the commandant, or in that of a syndic and two neighbors. On these the legal title was founded, and then perfected and recorded.

Upon the transfer of Louisiana, the United States succeeded to all the powers of the Intendants-General, and could give or withhold the completion of all imperfect titles at their pleasure. In order to exercise this power with discretion, boards of commissioners were established in order to enlighten the judgment of Congress, and special courts were organized in which claimants might prosecute their claims.

But in all the legislation upon the subject, the claimants were never considered as possessing a legal title, until the final assent of Congress was expressed in some mode or other to that effect.

*The date of such legal title commences [*294 with the ratification by Congress, and does not extend back to the date of the imperfect title.

Therefore, the title of Cerré, being confirmed in 1836, must give way to patents for the same land, issued before that time, unless Congress had, by some law, protected the land from the location of patents.

But the acts of Congress did not so protect it, because the concession of Cerré called for no boundaries, and had never been surveyed. Before land could be reserved from sale, it was necessary to know where the land was.

The Confirming Act of 1836 declared that it should convey no title to any part of the land which had previously been surveyed and sold by the United States. This the United States had a right to do, because, having the plenary power of confirmation, they could annex such conditions to it as they chose.

Where claims were confirmed according to the concession, a subsequent survey made in the mode pointed out by law is conclusive upon the United States and the confirmee, to show that the land included in the survey was the land the title to which was confirmed. But it does not follow that other persons, who may previously have purchased portions of the land from the United States, subsequent to the confirming act and before the survey, are equally concluded.

The form of a Spanish title given.

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

It was one of those cases arising from the conflict between an old Spanish concession and a title otherwise acquired. The acts of Congress, passed from time to time to regulate these claims, are all set forth in the report of the case of Stoddard v. Chambers, 2 Howard, 317, and need not be repeated. It is only necessary now to state the respective titles of the plaintiffs and defendant, as exhibited by themselves.

This was an action of ejectment brought by Amédée Menard, a citizen of the State of Illinois, as assignee of Pascal L. Cerré, against the defendant, Samuel Massey, a citizen of the State of Missouri, for the recovery of a piece of land situated in the County of Crawford, and State of Missouri, containing three thousand and one acres and seventy-five hundredths of an acre, being survey number three thousand one hundred and twenty, of three thousand five hundred and twenty-eight arpents of land originally granted to Pascal L. Cerré, in township thirty-eight north, of range five west, and town-

ships thirty-seven and thirty-eight north, of range five west, of the fifth principal meridian. This tract of land was confirmed by the Act of Congress of the 4th of July, 1836, to Pascal L. Cerré, the grantee, or his legal representatives, who conveyed to Amédée Menard, the plaintiff. Menard died during the pendency of the suit, and his heirs at law were made parties to the sult, all of whom were residents of the State of Illinois. A verdict and judgment were rendered against the plaintiffs in the Circuit Court, and the case is brought to this court by the plaintiffs in error.

The case, on each side, as it appears in the transcript, is as follows:

295*] *On the 5th of November, 1790, one Pascal Leon Cerré presented his petition to Don Carlos Dehault Delassus, Lieutenant-Governor and Commander-in-Chief of Upper Louisiana, for seven thousand and fifty-six arpents of land, to be taken in two different places, as follows: The half of said quantity, or three thousand five hundred and twenty-eight arpents, to be taken at the place commonly known by the name of the Great Source of the River Maramee; the other half on the head waters of the Gasconade, and those of the Maramee, known by the name of La Bourbeuse.

On the 8th day of November, 1799, the Lieutenant-Governor, Charles Dehault Delassus, in pursuance of said petition, gave a concession for the quantity of land asked for by the petitioner, reciting that he was well convinced of the facts set forth and stated by the petitioner, and stated further in the grant, that, as it was situated in a desert where there was no settlement, and at a considerable distance from the town of St. Louis, he was not compelled to have it surveyed immediately, "but as soon as some one settles on said place," in which case he was required to have it surveyed without delay.

The said Pascal Leon Cerré, the grantee, produced a letter from Manuel Gayoso de Lemos, Governor-General at New Orleans, to Monsieur Gabriel Cerré, the father of the petitioner, dated New Orleans, 28th April, 1798, in which he acknowledged the many services which the said Gabriel Cerré had rendered the government, and his claim to the generosity of the same; and that the said Lieutenant-Governor, seeing the letter of the Governor-General Gayoso, inquired of said Gabriel Cerré in what manner he might reward him; and that said Cerré replied, that he was then advanced in years, and had a sufficiency of lands, and recommended his son, who was the head of a family, said Pascal Leon Cerré, who had then received no grant for any land, to the bounty of the government.

The concession was registered, by order of the Lieutenant-Governor, in the Book of Concession, and presented to the first Board of Commissioners for confirmation, by the grantee, September 15th, 1806; who reported against its confirmation, September 28th, 1810; and the claim was again presented for confirmation, 5th October, 1832, supported by documentary and oral testimony, and was unanimously recommended for confirmation by the Board of Commissioners, October 31st, 1833, and was confirmed by the Act of Congress of the 4th of July, 1836, to the said Pascal L. Cerré, or his legal representatives.

The land as confirmed was surveyed under the authority of *the United States, by [*296 Deputy-Surveyor Joseph C. Brown, from the 18th to the 20th of June, 1838, under instructions from the surveyor of the public lands in the States of Illinois and Missouri, dated the 6th of June, 1838.

On the 26th of February, 1844, by deed of that date, Pascal L. Cerré conveyed said lands, as granted, located, and surveyed, to Amédée Menard, under whom the present plaintiffs claim as heirs at law.

By the Act of Congress of the 4th of July, 1836, the above decision of the Board of Commissioners, under the acts of 1832 and 1833, was affirmed, and thereby the title under said grant was confirmed.

The defendant admitted that he was, before and at the time of the commencement of this suit, in possession of the whole of section one, township thirty-seven north, range six west, except the west half of the southwest quarter of said section, containing eighty acres, which were the same premises on which "the Big Spring," at the source of the Maramee, is located.

The heirs at law of Amédée Menard, deceased, were admitted, from a statement made by Judge Pope, to be the present plaintiffs.

The plaintiffs gave in evidence a letter from the Secretary of the Treasury of the United States to the commissioner of the general land office, dated 10th June, 1818, in which he was directed and instructed to furnish the receiver and register of the land office of St. Louis, Missouri, with a descriptive list of the land claims which had been presented and registered under the different acts of Congress for confirming the rights of individuals to lands that had not been confirmed, situated within said land district, with instructions to withhold from sale all such lands, until otherwise directed.

The land confirmed to Pascal L. Cerré, and now sued for, was then within the district of St. Louis. The letter of the Secretary of the Treasury was the official copy, transmitted by the commissioner of the general land office to the register at St. Louis, and was produced by the said register, in whose possession the same was.

The plaintiffs gave in evidence, also, a list of claims which had been made out by Frederick Bates, former recorder of land titles at St. Louis, and which had been presented for confirmation, but not finally acted on by Congress; which list was also produced by the register of the land office at St. Louis, and taken from the files in his office, and on said list was this claim, since confirmed to Pascal L. Cerré.

Accompanying said list was a certificate made out by Frederick *Bates, former [*297 recorder of land titles at St. Louis, under date of 10th of July, 1818, in which he states, "The foregoing is a list of claims regularly entered in this office," and which were supposed to be situated and intended to be located within the County of St. Louis, and which was no doubt made out, in pursuance of the instructions and directions from the commissioner of the gener-

al land office, under the direction of the Secretary of the Treasury, reserving said lands from sale.

The plaintiffs also gave in evidence a proclamation of the President of the United States, dated June, 1823, and published in the summer and autumn of 1823, for the sale of public lands, on the third Monday of November in that year, at St. Louis, which were situate in the township and range in which the lands sued for in this action are located, and in which the lands sued for, and contained in the list made out by the recorder of land titles, as above stated, are reserved from sale.

The property in dispute was admitted by the defendant to be worth more than two thousand dollars.

The plaintiffs also proved, by the testimony of Augustus H. Evans, that this claim was located at "the Big Spring" on the Maramee. And, by the testimony of Henry A. Massey, that, between the years 1826 and 1828, Samuel Massey, in speaking of the works at "the Big Spring" on the Maramee, said there was an old claim on the land, which he understood had not been allowed, and authorized Major Biddle at that time to try and buy up that old claim.

The plaintiffs also established, by the testimony of Joseph C. Brown, the United States deputy-surveyor, that he made the survey of this claim, at "the Big Spring," "as the source of the claim."

There was offered in evidence, on the part of the plaintiffs, Plat No. 2 from the register's office, and a copy of the original diagram, as certified by F. R. Conway, surveyor of the public lands in the States of Illinois and Missouri, dated Surveyor's Office, St. Louis, 11th April, 1846; which were objected to on the part of the defendant, and the objection sustained by the court; to which decision of the court plaintiffs' counsel excepted.

The above facts, and also a certified survey, under the Act of 1836, constitute the title of the plaintiffs in error.

The evidence on the part of the plaintiffs was here closed.

The defendant, as it appears from the transcript, gave in evidence seven patents from the President of the United States, all issued on the 20th of December, 1826, to Samuel Massey and Thomas James, five for eighty acres of land each, and one for eighty-two and ninety-six one 298*] hundredths acres, and one *other for eighty-one and twelve one hundredths acres of land; and all of said patents covering a part of the same land included in the survey of Pascal L. Cerré, under the confirmation made to him at the great source of the Maramee.

The evidence on both sides being closed, the counsel for the defendant then prayed the court to direct the jury—

1. That the plaintiffs in this case cannot recover against the defendant for any land embraced within the patents given in evidence by the defendant.

2. That the plaintiffs cannot recover in this case against the defendant, on account of any land within the plaintiffs' survey, without proof that the defendant, at the commencement of this suit, was in possession thereof; and the fact that the defendant had cut wood upon such land is not sufficient to authorize a recovery for the land upon which the wood was cut, if these were merely temporary trespasses and occupation of the land.

These instructions the court gave to the jury; whereupon the counsel for the plaintiffs excepted, and upon this exception the case came up to this court.

It was argued by Mr. Lawrence and Mr. Badger for the plaintiffs in error, and Mr. Ewing for the defendant.

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

That the decision made by the Supreme Court of the United States in the case of Stoddard's Heirs v. Harry W. Chambers, 2 Howard, 284, which is the same in principle as the case now before the court, must govern and settle this case.

That the claim of Pascal L. Cerré was duly filed with the recorder of land titles, September 15th, 1806; and was amongst the first presented to the Board of Commissioners, in accordance with and pursuant to the acts of Congress of 2d March, 1805, and of 21st April, 1806.

The grant was made by Don Carlos Dehault Delassus, who was clothed with ample power for that purpose, as decided in Chouteau's Heirs v. The United States, 9 Peters, 137, and seems to have been prompted by the Governor-General Gayoso himself, from the interest which he took, and the obligations of the government to the father of the grantee for his many valuable services.

The grant called for a special location, but was not required to be surveyed, because of its being remote from the settlements, in the very terms of the concession, and was protected by treaty. It is true, the Act of Congress of 2d March, 1805, ch. 86, required all grantees from the Spanish government to file plats, orders of *survey, etc. But there was no survey [*299 made prior to the confirmation, for, besides not being required by the terms of the grant, in this particular case there was no public officer to do it.

The claim is confirmed, according to the concession, and why it was rejected by the first Board of Commissioners, 28th September, 1810, it is difficult to conceive. The claim had been regularly continued before the commissioners, from the time it was first presented, 15th September, 1806, till it was rejected, 28th September, 1810.

Congress still continued to pass laws to protect the claims which had been thus presented for confirmation. Accordingly, the Act of the 15th of February, 1811, provides, "that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the District of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana." 2 Stat. at Large, 621.

The same provisions were extended and continued in force (see 2 Stat. at Large, 665, and Act of 17th February, 1818, 3 Stat. at Large, 407); and these claims were again protected by the several acts of Congress of 1826 and 1828, until this claim was finally unanimously recommended for confirmation by the Board of Com-

missioners acting under the Act of Congress of July 9th, 1832 (4 Stat. at Large, 565), providing for the final adjustment of private land claims in Missouri, and, in pursuance of that recommendation, confirmed by the Act of July 4th, 1836.

The plaintiffs, therefore, most respectfully contend that the instructions asked for on behalf of the defendant, and given by the Circuit Court of the United States on the trial of this cause, were clearly erroneous. That the patents to Massey and James issued on the 20th December, 1826, could confer no title; for they issued for land reserved from sale, or location, and were therefore void. Wilcox v. Jackson, 13 Peters.

And to bring a case within the second section of the Act of 1836, so as to avoid a confirmation, the opposing location must be shown to have been "under a law of the United States." Stoddard et al. v. Chambers, 2 Howard, 317. The sale made, and the issuing these patents to Massey and James, were not made "under a law of the United States." They were not only not authorized by law, but were expressly forbidden, and therefore no rights were acquired under these patents.

300*] *The counsel for the plaintiffs in error submit, with great respect to the court, that this case is precisely in principle the same as the case of Stoddard's Heirs v. Chambers, and that the decision made in that case by this court will govern in this. That in the one case the owner of land in New Madrid, injured by earthquakes, made a relinquishment of such land to the United States, and, under an act of Congress, received a New Madrid certificate, under which a location was made, and a patent issued in the name of Eustache Peltier, on land covered by a Spanish grant made to Mordecai Bell; and in the other, Massey and James entered in the land office certain lands, and obtained from the government of the United States patents therefor, which lands were covered by a concession previously made to Pascal L. Cerré by the Spanish government; the lands in both cases being expressly reserved from sale.

And in conclusion they state, that—

1. That plaintiffs in error claim under a confirmation of a grant, protected by treaty, and by the Act of Congress.

2. That the decision of the Circuit Court of the United States is erroneous, and ought to be reversed, as being against a title guaranteed by treaty, and protected by legislative enactment. Treaty of 1803, 8 Stat. at Large, 202.

Mr. Ewing, for defendant in error:

The claim of the plaintiffs to the land in controversy was submitted under the acts of Congress of July 9th, 1832, and March 2d, 1833, to the recorder and commissioners, and was recommended for confirmation; and it was confirmed by the Act of July 4th, 1836, with this saving:

"Sec. 2. And be it further enacted, That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the rights acquired by such location or purchase; but the individual or individuals whose claims are hereby confirmed, shall be permitted to locate so much thereof as interferes with such location or purchase on any unappropriated land of the United States," etc.

A part of the land claimed under this concession had been previously surveyed and sold by the United States, and patented to the defendant and Thomas James.

The court instructed the jury that the plaintiff could not recover for any land embraced in the said patents.

1st. The first question is as to the legality of this instruction. *The Act of 1836 is [*301 the grant under which the plaintiffs claim title. It may be right or wrong, just or unjust, but the plaintiffs must take it as it is, and it must be construed altogether, which being done, it amounts to this: The United States confirm to the heirs of Amédée Menard all the lands contained in their concession, except so much thereof as has been surveyed and sold, and for that give to them an equal quantity of land elsewhere, to be selected by themselves.

This is the conveyance under which alone the plaintiffs can claim title. They may accept of it or not, as they please, but they cannot make it anything that it is not.

Out of the statute, if they choose to go out of it for a title, they have nothing on which ejectment can be sustained—they have no title.

It matters not how strong or how weak may be their right to claim a grant of the very land from the United States. They have got no such grant, and without it they can maintain no action. They are left to their humble petition and remonstrance.

2d. The question arising under the second assignment of error is, whether the action of ejectment can be maintained against a defendant who was not in possession when the suit was brought, and who is not shown to have claimed title, upon evidence that he had at some former period committed trespass upon the land.

It would be difficult to maintain the affirmative of the proposition. Ejectment is a possessory action. Its object is to recover the possession of the property claimed; and, according to the practice in England, the declaration must be served on the defendant, or some one representing him, upon the premises, unless he had left them immediately before to evade service.

It would be confusing the forms of action to allow a recovery in ejectment for a mere trespass, committed at a former period, and unaccompanied with possession, and would involve the absurdity of permitting an individual to maintain an action of ejectment for land of which he was himself in possession at the commencement of his suit.

Mr. Justice Catron delivered the opinion of the court:

On the 5th of November, 1799, Pascal L. Cerré petitioned the Lieutenant-Governor of Upper Louisiana for a concession of land, in two parcels, in full property, one half of which or thirty-five hundred and twenty-eight arpents, to be taken at a place known by the name of the Great Source of the River Maramee, at about three hundred miles from its mouth; the *other half, or thirty-five hundred and [*301

twenty-eight arpents, at some distance from the first, at the upper part of the head waters of the Gasconade, and of those of the fork of the Maramee, known by the name of La Bourbeuse, or Muddy. To gratify this petition, the Lieutenant-Governor made the following concession:

St. Louis of Illinois, November 8, 1799.

"Whereas the petitioner is one of the most ancient inhabitants of this country, whose known conduct and personal qualities are recommendable, and being convinced of the truth of what he exposes in his petition, I do grant the petitioner the land which he solicits; and as it is situated in a desert where there is no settlement, and at a considerable distance from this town, he is not compelled to have it surveyed immediately, but as soon as some one settles on said place, in which case he must have it surveyed without delay; and Don Antonio Soulard, Surveyor-General of this Upper Louisiana, will take cognizance of this title for his own intelligence and government in the part which concerns him, so as to enable the interested, after the survey is executed, to solicit the title in due form from the Intendant-General of these provinces of Louisiana.

"Carlos Dehault Delassus."

"Registered by order of the Lieutenant-Governor, pages 15 and 16 of Book No. I. Titles of Concessions—Soulard."

This claim was laid before the first board in the following form:

"September 15, 1806. Pascal L. Cerré, claiming a tract of a league square, to be surveyed in two parts or halves, the one on the Big Spring of the River Maramee, so as to include said spring, and the other at the fall of the forks of the Gasconade and those of the Maramee, called the Muddy, produces a concession from Charles Dehault Delassus, dated 8th November, 1779."

That board (September 28, 1810) were of opinion, that the claim ought not to be confirmed; and so reported to Congress. And thus the claim stood until October 31, 1833, when it was presented to the second board, created by the Act of 1832; and this board was of opinion, and reported to Congress, "that the claim ought to be confirmed to Pascal L. Cerré, or his legal representatives, according to the concession." And by the Act of July 4, 1836, Congress confirmed the claim according to the report, and consequently according to the unsurveyed concession.

303*] *The township, including "the Big Spring of the River Maramee," was offered for sale on the third Monday of November, 1823, pursuant to the proclamation of the President. Whether Massey and James purchased at the public sale in 1823, or entered afterwards, does not appear from the record; but in 1826 and 1827 they obtained their different patents for the land in dispute, from the United States; and these titles, the court below charged the jury, were superior to Cerré's confirmed claim. And here the question arises, whether Cerré's concession, on being confirmed by Congress in 1836, related back to its date of 1799, and overreached the United States title made to Massey and James. If it does so relate to the extent of the survey made under the confirmation in 1838, and approved in 1840, then the controversy is at end; and as on this assumption the suit was brought, it becomes necessary to examine the question of relation of title. The argument is, that the concession was made by an officer who had power to grant; and having done so, the land granted was "property," and protected by the third article of the Treaty of 1803, which declares that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty and property; and that the laws of nations, equally with the stipulations of the treaty, secured the title of such grantees.

That the Lieutenant-Governor of Upper Louisiana had the authority, as a subdelegate, under the Intendant-General of the provinces of Upper and Lower Louisiana and Florida, to make concessions, is undeniable; he could and did deal with the public domain of the province—made concessions, directed the lands to be surveyed, and caused grantees to be put into possession. This, however, does not settle the question. It does not depend upon the existence of power, or want of power, in the Lieutenant-Governor, but on the force and effect of the right his concession conferred. Did it give such a vested title to the soil, as that the Spanish government could not legally disavow it? Or could the Intendant-General, representing the royal authority, lawfully refuse to confirm the concession, and order the grantee to be turned out of possession? If it be true, that the title ended with the concession, survey and occupancy of the land granted, then it follows that the title was completed and perfected under the Spanish laws, by these acts; nor was a confirmation from any higher power than the Lieutenant-Governor at all necessary; the grantee having all the title that the king could give. The assumption that such was the Lieutenant-Governor's power, and the force and effect of the title, sets out with the assertion, that neither the regulations *of Morales, nor any [*304 previous regulations of the Spanish governors, were ever in force in Upper Louisiana, and that the act of the Lieutenant-Governor was conclusive as to law and fact when making grants; that he could grant to anyone, for any quantity, and for any reason, or without reasons, and on any condition, or without conditions; and that no authority existed to supervise his acts; and we are referred to various expressions and conjectures on this subject. In the cases of Soulard and Smith T., against The United State, 4 Peters, this court, after holding the cases under advisement for a year, professed itself unable, for want of information, to give any opinion in the matter; and for this reason, the cases were not then decided. This occurred in 1830. In 1835 and 1836, in the cases of Clarke, Delassus, and two of Chouteau's Heirs, found in 8 and 9 Peters, regulations for the government of subdelegates are admitted to have existed, but not to such an extent as to control the Lieutenant-Governors in regard to persons, quantity or reason, when making concessions, and orders of survey; and such has been the doctrine of this court since that time, so far as concessions made in Upper Louisiana have been adjudged. These cases address themselves to a single consideration; that is to say, whether the Lieutenant-Governor's powers were so limited that the concessions then before the court were

void for want of power; but they do not settle the question, that the grant was a perfect title. It is said by the court in the case of Chouteau's Heirs, 9 Peters, 154: "It is remarkable, that if we may trust the best information we have on the subject, neither the Governor nor Intendant-General has ever refused to perfect an incomplete title granted by a deputy-governor or subdelegate." In point of fact, this is certainly true. No such refusals could take place. From the parts of Upper Louisiana, where grants were made, to New Orleans, where the Intendant-General and Governor-in-Chief resided and kept their offices, the distances were so great, and the trackless wilderness between so infested with hostile Indian tribes, that few could apply, had they possessed the means to pay for perfecting their titles. And, in the next place, the principal standard of value was skins in the upper province; specie was hardly known there. And then, again, land was of no material value to such a population, who resided in villages, and cultivated patches within a common fence, where each inhabitant had his portion assigned by a syndic. But two instances are known to exist in Upper Louisiana, where the Intendant was applied to for a complete title, and made the same; one case was that of Moses Austin for a league square at Mine à Breton, a 305*] report on *which is found in 2 American State Papers, 678, and the other perfected title was made to Mr. Reigh, in the neighborhood of St. Louis.

The fact, therefore, that the intendants-general and governors did not refuse to make perfect titles, is no evidence that they had not the power to deal absolutely with concessions made by subdelegates, and to give titles or refuse them, as the Congress of the United States has done. Like Congress, they exercised the sovereign power. The concession before us addresses itself to the Intendant-General and refers the grantee to him, "to solicit the title in due form," as do, uniformly, all the concessions and orders of survey made by lieutenant governors, after the Indendant was restored to power. By the eighty-first article of the royal ordinance providing for intendants of New Spain, 2 White's Recop. 69, 71, such intendants were made the peculiar judges of causes and questions arising in their respective districts, relating to the sale, distribution, and grant of royal lands; and, a dispute having arisen in 1797, between Morales, Intendant ad interim, and Don G. de Lemos, Governor of Louisiana respecting the exclusive right claimed by the former to control such grants (see Ibid. 469. et seq.), the royal order of 22d October, 1798, was issued, reaffirming this eighty-first article, and declaring the powers of the Intendant to be plenary, and in conclusion of all other authority, to divide and grant all kinds of lands belonging to the crown. Ibid. 245, 477. Acting under and by virtue of these two royal orders the Intendant, Morales, on the 17th of July, 1799, published his regulations, addressed to the lieutenant-governors, subdelegates, and to the people of the provinces of Lower and Upper Louisiana, and West Florida, so that those who wished to obtain lands might know in what manner to ask for them, and on what conditions they could be granted *and sold;* "And especially," in his own language, "that those who are in possession

without the necessary titles may know the steps they ought to take to come to an adjustment; that the commandants and subdelegates of the intendancy may be informed of what they ought to observe." He then states, that a great number of those who have asked for land think themselves the legal owners of it; those who have obtained the first decree, by which a surveyor is ordered to measure and put them in possession; others, after a survey has been made, have neglected to ask for "a title to the property"; and as like abuses, continuing for a longer time, will augment the confusion and disorder which will necessarily result, "we declare, that no one of those who have obtained said decrees, notwithstanding in virtue of *them the survey has taken place, and [*306 that they have been put in possession, can be regarded as owners of the land, until their real titles are delivered completed, with all the formalities before recited." The foregoing is an extract from the eighteenth article of the regulations of July, 1799, which regulations had the force of written law up to the time when a change of government took place. The formalities for completing a real title are prescribed by the three articles preceding the eighteenth; the surveyor was bound to forward to the Intendant a survey, and also a copy of the survey, or rather figurative plot, and a certificate called a proces verbal, signed by the commandant, or a syndic and two neighbors, together with the surveyor, declaring that the survey was made in their presence, and corresponded with the facts stated in the proces verbal, and on the concession, this figurative plot, and the proces verbal, the complete title was founded; a copy of the plot and proces verbal being attached; and which evidence of title was recorded in several departments. Such, in substance, was the real title completed. The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant-governors and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or some one for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat, together with the proces verbal. But this did not make the party owner; without the further act of the king's deputy—the Intendant-General—the title still continued in the crown.

As assumed in argument (and truly), by the third article of the treaty by which Louisiana was acquired, and by the laws of nations, the inhabitants of the ceded territory were entitled to be maintained and protected in the free enjoyment of their property. But in what property? To such an interest in it, if land, as they had when the country changed owners; and that interest being of a character requiring royal sanction before the Spanish government would recognize it as devesting the public title, our government, as the successor of Spain to the public lands, gave the same construction

and effect to concessions and orders of survey; holding, that the title of the king's domain passed by treaty to the United States, notwithstanding the existence of such concessions. 307*] Yet, to the full extent of any equity *in the claimants, the government adopted means to satisfy the claims; and, as the sovereign power could not be sued as legal owner, boards of commissioners were created, with liberal powers, to investigate every description of claims, and report on them to Congress, for the sanction of sovereign authority; and by this means many claims were confirmed, the legal title added, and incipient concessions completed into perfect and conclusive titles against the government. Then, again, Congress provided that special courts should be organized, in which the government might be sued, in a prescribed form, and decrees be made for or against claimants; but no suit could be maintained in an ordinary action of ejectment, or for title of any kind, on a concession and an order of survey, for want of legal title to sustain it. Such claimants "were not regarded as owners of land, until the real title was delivered completed," in the language of the Spanish regulation No. 18. Had the courts of justice been allowed to hold otherwise, and to interfere in the matter, and to decree titles to claimants in equity, or to enforce their claims at law, and oust the United States indirectly by suing persons found on the land, little or no occasion would have existed for boards, or special courts, to adjudge respecting the validity of claims; as the ordinary tribunals could have settled all controversies under State laws declaring such claims cognizable in the State courts. It was therefore manifest, that claims resting on the first incipient steps must depend for their sanction and completion upon the sovereign power; and to this course claimants had no just cause to object, as their condition was the same under the Spanish government. No standing, therefore, in an ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the legal title in the claimant. Such, undoubtedly, is the doctrine assumed by our legislation. To go no further, the Act of May 26th, 1824, allowing claimants a right to present their claims in a court of justice, pronounces on their true character. It declares, that the claim presented for adjudication must be such an one as might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated, had the sovereignty of the country not been transferred to the United States; and, by the sixth section, when a decree is had favorable to the claim, a survey of the land shall be ordered, and a patent shall issue therefor; and by section eleventh, "if the decree shall be in the claimant's favor, and the land has been sold by the United States, or otherwise disposed of, the interested party shall be allowed to enter an equal quantity of land 308*] elsewhere." So, again, the Act *of July 9th, 1832, creating the last board, directs the commissioners to inquire into and examine all unconfirmed claims previously filed, founded on any incomplete grant, concession, warrant, or order of survey, issued by the authority of France or Spain, and to class the same so as to show, first, what claims, in their opinion, would in fact have been confirmed according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities under them "at New Orleans," if the government under which said claims originated had continued in Missouri; and, second, what claims, in their opinion, are destitute of merit under such laws, usages and customs. And by section third it is declared, that from and after the final report of the commissioners, the lands of the second class shall be subject to sale, the same as other public lands; and that those of the first class shall continue to be reserved from sale, as heretofore. From the first act, passed in 1805, up to the present time, Congress has never allowed to these claims any standing other than that of mere orders of survey and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, and which must act, before the courts of justice could interfere and protect the claim. And so this court has uniformly held. The title of Cerré having no standing in court before it was confirmed, it must of necessity take date from the confirmation, and cannot relate back so as to overreach the patents made in 1826 and 1827.

The next ground relied on to reverse the decision of the Circuit Court is, that Cerré's claim was reserved from entry and grant by the Act of March 3d, 1811, providing for the sale of public lands and the final adjustment of land claims. The fifth section declares that back lands to front grants on the Mississippi River, etc., are reserved from sale; and by section sixth it is provided, that, until after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time, and according to law, presented to the register of the land office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Orleans. The eighth section declares, that the Surveyor-General shall cause such lands in the Louisiana territory as the President shall direct to be surveyed, like other public lands; offices are established for their disposal, and it is directed that they shall be sold by order of the President. But from this power to sell are excepted section number sixteen, salt springs, and lead mines, with such lands adjoining thereto as the President shall direct; and *then comes [*309 the exception relied on for the protection of Cerré's claim, to wit: "That, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time, and according to law, presented to the recorder of land titles in the District of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." See Land Laws, 194.

That this provision is an exception to the general powers conferred on the officers to sell, is not an open question; having been so adjudged by this court in the case of Stoddard's Heirs v. Chambers, reported in 2 Howard; and, again at the present term, in the case of Bissell v. Penrose, post, p. 317. Nor is it an open

question, that the Act of February 17, 1818, sec. 3, re-enacts and continues in force the exception as respects such lands. This was also decided by the above cases; and that such was the opinion of Congress is manifest from the third section of the Act of July 9, 1832, under which the last board acted; for it declares, that lands of the first class shall be reserved from sale "as heretofore."

All these acts of Congress, with their exceptions, address themselves especially to the Department of Public Lands, as by them that department must be guided. In reserving lands from sale, it was necessary to know where they were situated, and how far they interfered with the public surveys. Either the President, or some other officer, must have had the power to designate the lands as those adjoining to salt springs and lead mines; or it must have appeared in some public office appertaining to the Land Department what the boundaries of reserved lands were; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers when making sales. This was a conclusion that has from necessity been acted on at the land offices; and as Cerré's claim was not surveyed before the confirmation took place, no boundaries of his tract could be recognized when the public surveys were made and the lands sold. He claimed no "tract of land." The laws refer to specific tracts that are claimed; it is not material whether the boundaries are proper, and according to the concession, or the claim be just or otherwise, so that the tract claimed be certain. This was also decided in the cases just cited. Certainly, a mere floating claim, founded on a concession that was ordered to be located by survey, and where no survey or location had been made, was not protected by the Act of 1811. An actual survey is not indispensable; but boundaries must appear, in some form, 310*] from the notice of claim and *the accompanying evidences filed with the recorder. If, from these, the tract could not be laid down on the township surveys, then the land could not be reserved from sale; although, by the concession, and by the notice, a particular spot (as the Big Spring of the Maramee) was referred to in general terms as the place where the land should lie.

But there is another ground of defense that would have been conclusive, even had Cerré's claim been surveyed and the survey filed with the recorder in 1806, accompanying the notice of claim. By the second section of the Confirming Act of July 4th, 1836, it is provided, that, "if it shall be found that any tract confirmed by this act, or any part thereof, had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the rights acquired by such location or purchase; and the party whose claim is confirmed by this act shall be authorized to enter a quantity of land equal to the interference elsewhere."

Having seen that the United States might confirm the claim of Cerré, or might refuse to do so; and that it took date as a title recognized in the judicial tribunals from the confirming act, it follows that the claim might be confirmed in such part, and on such conditions, as Congress saw proper to prescribe; and having refused to confirm it for lands lying within its boundaries which had been previously sold, and the patents to Massey and James being of this description, they are the only legal title to the land; and, therefore, the charge of the Circuit Court was proper.

The survey of Cerré's tract, founded on the confirmation, was given in evidence, and recognized as part of his title by the Circuit Court; which circumstance we deem it proper not to pass without notice. By the Act of April 26th, 1816, it was provided that a surveyor should be appointed of the public lands for the territories of Illinois and Missouri, whose duty it should be to cause so much of the lands in said territories as the President should direct, to be surveyed and divided as were the public lands lying northwest of the River Ohio; and the act declares that "it shall also be the duty of the surveyor to cause to be surveyed the lands in said territories, the claims to which have been, or hereafter may be, confirmed by any act of Congress, which have not already been surveyed according to law; and he shall transmit to the registers of the land offices in said territories, general and particular plats of all the lands surveyed or to be surveyed, and shall also forward copies of said plats to the commissioner of the general land office; and all the plats of surveys, and all other papers and documents pertaining, *or which did [*311 pertain, to the office of Surveyor-General under the Spanish government within the limits of the territory of Missouri, etc., shall be delivered to the surveyor appointed under this act." "And any plat of survey, duly certified by said surveyor, shall be admitted as evidence in any of the courts of the United States, or the territories thereof." Under this authority, Cerré's claim was surveyed, as will better appear by the following certificate preceding the description of the lines:

"Plat and description of the survey of a tract of 3,528 French arpents, equal to 3,001 and twenty-five hundredths English acres of land, situated in township thirty-eight north, range five west; and townships thirty-seven and thirty-eight north of the base line, range six west of the fifth principal meridian, in the State of Missouri; executed from the 18th to the 20th of June, 1838, by Joseph C. Brown, deputy-surveyor, under instructions from the surveyor of the public lands in the States of Illinois and Missouri, dated the 6th of June, 1838; it being the one half of 7,056 arpents, or a league square, granted in two tracts of equal quantity, on the 8th of November, 1799, to Pascal L. Cerré, by Zenon Trudeau, Lieutenant-Governor of the Spanish province of Upper Louisiana; this tract 'to be taken at the place commonly known by the name of the Great Source of the River Maramee, at about three hundred miles from its mouth, so as to include the said sources'; and confirmed to Pascal L. Cerré by the Act of Congress of the United States approved on the 4th of July, 1836, entitled, 'An Act confirming claims to land in the State of Missouri, and for other purposes,' according to the decision No. 2 of the report of the Board of Commissioners appointed by the Act of Congress, approved on the 9th of July, 1832, entitled, 'An Act for the final adjustment of private land

claims in Missouri,' and the Act of Congress approved the 2d of March, 1833, supplemental thereto."

The Surveyor-General approved the survey, June 26, 1840. In having the land laid off, and in approving the survey, he acted under the authority of Congress, expressly conferred by the Act of 1816. Joseph C. Brown testified that he made this survey, being the same offered in evidence above; that the survey was made at the time stated on its face, and was made by the witness at the place known and called "the Big Spring of the Maramee"; that the said spring was on section one, as marked and designated on the plat before him. The Big Spring was a very large body of water, breaking out of a high bluff, and made a stream from the spring itself of about one hundred feet wide, and a foot in depth; that witness made the survey by direction, and under the authority given 312*] to him by *the Surveyor-General of the United States at St. Louis. Witness further stated, that the survey was made according to Mr. Cerré's directions, and in obedience to the instructions given to him by the Surveyor-General; Mr. Cerré made no particular reconnoissance of the ground, although personally present, but took the land as it came; and it was made by the surveyor at the particular place indicated, the Big Spring, as the source of his claim. Witness stated further, that the instructions from the Surveyor-General were printed instructions, of which a copy is set out. Among numerous and detailed instructions referred to by the witness, there are the following:

"Information given to you by a claimant or his agent relating to the situation of a claim will govern your operations, provided you believe, from all the circumstances which come to your knowledge, that such information is correct; and provided also that it does not contradict the papers with which you may be furnished. The position of any point or place called for in a concession, and also of the settlement or improvement in virtue of which a settlement claim is confirmed, must be stated in your field notes. The survey of claims which are confirmed unconditionally, according to a former survey, will conform thereto, regardless of any excess or deficiency in quantity, provided the old lines and corners can be found and properly identified; in which event, the old corners will be run to, and the true courses and lengths of the several lines, according to operations will be correctly stated in your field notes; and if the old lines and corners cannot all be found, you will conform to the old survey, as near as practicable, by running the courses and distances called for, or to the intersection of the proper lines, as may be required, making the necessary allowance for the difference in the variation of the needle.

"2. The resurveys of claims which are confirmed according to an old survey, but are restricted in quantity, will be surveyed as above directed for those not restricted, except that, if there is any excess or deficiency, it will be thrown off or taken in a line parallel to that old line of the survey, which the claimant may direct; or if he fails or declines to give directions, throw off the excess or take in the deficient quantity on the side which you think will best promote his interest; being careful to note all the particulars relating thereto in your field book, and give the position of the old lines and corners which may be abandoned because of the excess or deficiency in quantity.

"3. Claims which are confirmed according to the concession, *and have been legally [*313 surveyed in conformity therewith, except as to exactness in quantity, will be resurveyed as the class of cases last above mentioned.

"4. If the survey heretofore executed of a claim which is confirmed according to a concession, whether the concession is, or is not, special as to locality, but is special as to the direction of the lines, the proportional length of the different sides, or the figure of the survey to be made in virtue thereof, does not conform to these requirements of the concession, the said survey will be altogether disregarded, except so far as it may be useful, in cases where the concession is not special as to locality, in identifying the situation of the intended concession to be confirmed, unless the survey was executed and approved by the proper Spanish officer prior to the transfer of the country to the United States; in which event, the survey will be considered as evidence of the changed intention of the authority making the concession, and will be taken as a part and parcel thereof.

"5. Claims which are confirmed according to special concessions, and which have not been surveyed, you will survey in strict accordance with the terms of the concessions; always bearing in mind, that where there are no special requirements in the concession, it was the general practice of the government with which the claims originated to run them either in squares, or in right-angled parallelograms of one, five, ten, or some intermediate or greater number of arpents, by forty or eighty, according to the size of the tract, or double as long as wide, unless some other survey or grant intervened and rendered a departure from this rule unavoidable; in which case, the rule was only so far departed from as was necessary to get rid of the interference with prior surveys."

Cerré's claim was of the last class. The land was directed to be surveyed according to his directions; the surveyor having regard to the last (and fifth) instruction, with the exception, that the special spot called for in the concession was required to be laid down and noted in some part of the survey. When it was made, and the field notes returned to the Surveyor-General's office, and the description and plat made out in form and approved by the Surveyor-General, it was conclusive evidence, as against the United States, that the land granted by the confirmation of Congress was the same described and bounded by the survey; unless an appeal was taken by either party, or an opposing claimant, to the commissioner of the general land office. This consideration depends on the fact that the claimant and the United States were parties to the *selection of the land; for, as they [*314 agreed to the survey, they are mutually bound and respectively estopped by it. But private claimants of lands within its boundaries, who were no parties to the survey, are not estopped, and may controvert its conclusiveness, so far as their claims interfere with the lands thus

selected by the party, and which were laid off to him by the United States. We are not called upon to say, nor do we wish to be understood as intimating, to what restrospective date the confirmation by Congress of land thus surveyed relates, so as to overreach a claim by purchase from the United States, further than the case before us requires, which is, that lands purchased before the Act of July 4th, 1836, was passed, are protected against the confirmation made by that act.

For the reasons stated, we order the judgment of the Circuit Court to be affirmed.

For a more perfect understanding of the manner in which a complete title under the Spanish government was executed, the form of such a title, translated from the Spanish, is hereto annexed.

Don Joan Ventura Morales, Principal Comptroller of the Armies, Indendant ad interim of the Royal Finances of the Provinces of Louisiana and West Florida, Superintendent, Subdelegate, Judge of the Admiralty, of the Royal Lands and Domain, etc.:

Whereas (D. M. D.) an officer of the militia, residing in this city, has appeared before this tribunal, petitioning the grant and title of one hundred and twenty-six arpents of land, with that front to the Bayou de los Lobos and the depth of forty, bounded by Don F. S. and vacant lands on the Bay St. Louis, provided they be of the royal domains, to establish there a plantation and cow pens, stating that he has taken the proper steps and showing that he has made the necessary provisions for establishments of that kind; and having presented the plat of the royal surveyor (Don. C. T.), indicative and figurative of the said one hundred and twenty-six arpents in front by forty in depth situated in the above mentioned place; and having submitted the whole to the fiscal of the royal finances, and he having made no objection to the demand of the said D. M. D., but, on the contrary, having given an opinion in his favor, by an act, with the advice of his assessor, dated the 26th instant, I have conceded the said grant, and I do order that the title be made. Accordingly, using the power given to this intendancy, in the name of the king our lord (whom God protect!) I do grant 315*] to the above said D. M. D. *the above mentioned tract of land, containing one hundred and twenty-six arpents in front and forty in depth, situated at the place called the Bay St. Louis, fronting to the Bayou de los Lobos, and bounded by the lands of Don F. S. and vacant lands, in conformity to the points and distances marked on the plat and its certificate, in which is recited the measure appearing in the docket of said matter for record; out of good-will, and without any pecuniary consideration in favor of the royal financier, I give him the whole and direct ownership to the said granted land, for him and his successors in said lands, with power to him, the said grantee, to dispose of the same at his will; with power to take possession of the same, and claim it from this intendancy if there is any obstacle; and in said land forthwith I place and put him without any damage to the rights of third persons who may have a better right to it; with the qualification and condition that he (the said D. *M. D.)* to whom we do this favor, and his successors, shall, as regards such tract of land, fulfill the obligations imposed upon him by the regulations and instructions made and published by this intendancy on the 17th of July, 1799, to wit, the third, fourth, sixth, seventh, and ninth of said instructions, conformably to the location, place, quality, and circumstances of the said granted land; whereof we advise him, that he may know it and not pretend to be ignorant of it, under the penalties contemplated in said instructions, with which he shall acquaint himself. In virtue of which I have ordered these presents to be drawn under my hand, and sealed with the seal of my arms, and countersigned by the undersigned notary of the royal finances; who, as well as the principal Comptroller's office, will register it.

Given at New Orleans, the 29th of May, 1802.

[L. S.] (Signed) Juan Ventura Morales.

By order of the Intendant.

(Signed) Carlos Ximenes.

Registered the foregoing title from page 41 to 43 of the book assigned for that purpose. New Orleans, 29th May, 1802.

(Signed) Ximenes.

In the principal Comptroller's office the foregoing title has been registered in the book assigned for that purpose, at folio 10. New Orleans, 9th of June, 1802.

(Signed) Armides.

I, Don Carlos Trudeau, Surveyor Royal and Particular of the Province of Louisiana, etc., do certify, that in favor of, and in presence of *D. M. D., and with the assistance of [*316 the syndic, Don Philip Sancier, and the adjoining neighbor, has been verified, bounded, and limited, a tract of land of one hundred and twenty-six arpents in front to the Bayou de los Lobos, with the ordinary depth of forty arpents, measured with the perche of the city of Paris, of eighteen feet long, measure of the said city; which tract of land is situated at the place called the Bay of St. Louis, on the southern bank of the Bayou de los Lobos; joining on the north part of the bank of said bayou; on the south, land granted to Don F. S.; and on the other sides, by vacant lands of the domain of his majesty, by parallel lines running southeast by south. On each limit has been planted a stake made of pine, driven into the ground to a depth of two feet; the first implanted upon the bank of the bayou, and the other at the foot of the high land; at the extremity of the ordinary forty arpents, I have planted no boundary, the soil being covered with water and impracticable, as it appears on the plan on the other side, which exhibits the extent and direction of the limits, etc. This survey has been made pursuant to a decree of his Lordship the Intendant-General, dated the 15th of the month of March last past. In testimony whereof, I have delivered these presents, with the foregoing figurative plan, the 15th of the month of April, 1802. Signed, I the present surveyor, and registered in the Book C, No. 3, fol. 62, at No. 1514, of the operations of survey.

I do certify that the present copy conforms to the original. Given to the interested party to enable him to proceed so as to obtain the corresponding title of grant in due form.

(Signed) Carlos Trudeau,
Surveyor Royal.

Order.

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

317*] *LEWIS BISSELL, Plaintiff in Error,

v.

MARY B. PENROSE, Defendant.

Spanish concessions—reservations—private survey—assignee—confirmation in name of original owner inures to—New Madrid certificate, location under, cannot prevail against Spanish concession subsequently confirmed, upon due notice given.

In the case of Stoddard v. Chambers, 2 Howard, 284, this court decided by implication, and now decides expressly, that a general and unlocated concession, granted by the Spanish Governor prior to the transfer of Louisiana, a private survey of which made after the transfer was recognized by the commissioners appointed under the Act of 1805, before whom the claim was filed, was so designated and located as to be reserved from sale by virtue of the Act of 1811, and consequently no New Madrid certificate could be located upon it.

The Act of 1804, forbidding private surveys upon the public lands, was impliedly repealed by the Act of 1805, which required claimants to file a plat. The Act of 1806 authorized the commissioners to direct such surveys as they might deem necessary, which gave them, thereby, the power to adopt any prior and private surveys which they might deem just and proper, for the purpose of designation and location.

The effect of such private surveys was not to sever the land from the public domain, but merely to indicate the tract which Congress was to act upon at a subsequent period, in case it thought proper to confirm the claim.

The Act of 1836 confirmed the claims of assignees who had prosecuted them as claimants, and did not intend to vest the title in the assignor, the original holder. This court has so decided in former cases.

The confirmation by the Act of 1836 is equally effectual in favor of the claimant, whether the commissioners recommended that the claim should be confirmed generally, or confirmed "according to the survey." The only difference is, that in the latter case the survey on file is probably conclusive upon the government, and errors cannot be corrected, whilst in the former case they may be.

The second section of the Act of 1836 makes no provision for a re-location of an unlocated claim confirmed on the report of the commissioners, and further legislation will be necessary for such cases.

The cases of Mackay v. Dillon, 4 Howard, 421, Les Bois v. Bramell, 4 Howard, 449, and Jourdan v. Barrett, 4 Howard, 169, examined and explained.

The mere circumstance that another plat, containing different land, was upon the same sheet of paper which contained the genuine plat, and which was filed in the recorder's office, was not sufficient to invalidate the claim; because the name of the claimant was written upon the face of the one describing the tract claimed, and that was the only one before the commissioners.

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

It was one of those land cases which arose from a conflict of title between an old Spanish concession, confirmed under the various acts of Congress upon the subject, and a title derived under a New Madrid grant. All these acts of Congress bearing upon both titles are set forth in the case of Stoddard v. Chambers, reported in 2 Howard, 284, and the substance of them need not be repeated here. The following is a list of them:

References to Acts of Congress.

Date.	Land Laws, Sen. Ed. 1838. Vol. 1, page	U. S. Stat. at Large. Vol. 2, page	Story's Ed. L. U. S. Vol. 2, page
March 26th, 1804.	112	287	933
March 2d, 1805.	122	324	933
February 28th, 1806.	122	351	933
April 21st, 1806	1183	391	1059
March 3d, 1807.	1185	440	1059
March 3d, 1811.	189	620	1193
June 18th, 1812.	216	748	1257
March 3d, 1813.	230	812	1306
August 2d, 1813.	233	86	1384
April 12th, 1814.	242	121	1410
February 17th, 1815.	255	211	1500
April 29th, 1816.	280	323	1604
February 17th, 1818.	293	406	1659
April 9th, 1818.	299	417	
April 26th, 1822.	344	608	1841
May 26th, 1824.	365	633	1936
May 22d, 1826.	419		
March 2d, 1827.	423	219	2048
May 24th, 1828.	425	296	2135
March 2d, 1831.	488	482	2250
July 9th, 1832.	505	565	2305
March 2d, 1833.	513	601	2359
July 4th, 1836.	557	729	2815

*It was an action of ejectment [*318 brought in the Circuit Court by Mary B. Penrose, the defendant in error, who claimed under the Spanish concession, against Bissell, who claimed under the New Madrid certificate which was located upon the land in controversy in March, 1818. We will first state the title of the plaintiff below, and then that of the defendant.

The petition and concession were as follows, viz.:

"The sons of Vasquez, claiming 800 arpents each.

"To Don Carlos Dehault Delassus, Lieutenant-Governor of Upper Louisiana.

"Sir,—Benito, Antoine, Hypolite, Joseph and Pierre Vasquez, all of them sons of Don Benito Vasquez, captain of militia of this town, breveted by His Catholic Majesty, full of confidence in the generosity and benevolence of the government under which they are born, hope that you will be pleased to take into consideration the unfortunate situation in which

they find themselves by the want of means of their family, which has been living for some time in distressing circumstances, and unable to give them the necessary education; therefore, wishing to procure to themselves, in the course of time, an independent existence, they think of forming an establishment which may one day insure their welfare. They flatter themselves, Sir, that the services of their father will assure to them your protection, and the goodness of your heart will lead you to grant their demand; consequently, they supplicate you to grant to each of them eight hundred arpents of land, in superficie, making altogether the quantity of four thousand arpents, which they wish to take in one or several places of the vacant lands of the king's domain. Favor which your petitioners presume to hope from your justice.

"St. Louis, February 16th, 1800.

"Benito Vasquez,
"Antoine Vasquez,
"Hypolite Vasquez,
"Joseph Vasquez,
"Pierre Vasquez.

"St. Louis of Illinois, Feb. 17th, 1800.

"After seeing the precedent statement, and the laudible motives which animate the petitioners, and considering that their family is one of the most ancient in this country, and worthy of all the benevolence of government, as much for their personal merit as on account of the services [of the] father of the petitioners, I do grant to said petitioners, for them and their heirs, the land which they solicit, if it [is] not 319*] prejudicial to *anybody; and the surveyor, Don Antonio Soulard, shall put the interested party in possession of the quantity of land asked for, in one or two vacant places of the royal domain, after which he shall draw a plat, which he shall deliver to the interested parties, with his certificate, to serve them in obtaining the concession and title in form from the Intendant-General, to whom alone corresponds, by royal order, the distributing and granting all classes of lands of the royal domain. Carlos Dehault Delassus.

"A true translation. Julius De Mun.

"St. Louis, October 27, 1832."

On the 11th of February, 1806, Benito Vasquez, the eldest son, assigned his 800 arpents to Rudolph Tillier.

On the 27th of February, 1806, a survey and plat of the land was made by James Mackay, locating it about two miles northwest of St. Louis, as appeared by the following certificate:

"I do certify, that the above plat represents 800 arpents of land, French measure, situated in the district of St. Louis, Louisiana Territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant.

"Given under my hand at St. Louis, this 27th day of February, in the year of our Lord 1806.

"James Mackay.

"Received for record, St. Louis, February 27, 1806. Antoine Soulard,

"Surveyor-General Territory Louisiana."

On the 25th of August, 1806, Tillier filed his claim before the first Board of Commissioners. There were two plats filed, covering different tracts of land, both of which plats were upon the same sheet of paper; but upon the face of one of them was written the name of the claimant at full length. This one included the land in controversy, and was the only one considered by the commissioners.

On the 22d of September, 1810, the board decided that this claim "ought not to be confirmed."

On the 3d of October, 1832, this claim was brought before another Board of Commissioners, which, on the 2d of November, 1833, passed the following order:

"Saturday, November 2d, 1833.

"The board met pursuant to adjournment. Present, Lewis F. Linn, A. G. Harrison, F. R. Conway, Commissioners.

*"The sons of Vasquez, each claiming [*320 800 arpents of land under a concession from Charles Dehault Delassus. (See page 17.) The board remark, that they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners.

"The board are unanimously of opinion, that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession.

"The board adjourned until to-morrow, at 9 o'clock A. M. L. F. Linn,

"F. R. Conway,

"A. G. Harrison."

This claim was confirmed by the Act of Congress of 4th July, 1836, and again surveyed by the United States surveyor on the 29th of March, 1842, according to the original survey of Mackay, filed with the claim in 1806. The claim was assigned by Tillier to C. B. Penrose, who conveyed it to Mary B. (the plaintiff below) and Anna H. W. Penrose, on the 20th of February, 1823.

The title of Bissell, the defendant below, was as follows:

The defendant produced and read in evidence—

1. A certificate issued by the recorder of land titles, No. 164, dated 4th November, 1816, whereby it is certified, that, in conformity to the provisions of an act of Congress of 17th of February, 1815, John Brooks, or his legal representatives, is entitled to locate 709 arpents on any of the public lands of the territory of Missouri, the sale of which is authorized by law.

2. The location and survey thereof, No. 2541, made in March, 1818, which includes the land in controversy.

3. A patent certificate, No. 308, issued by the recorder of land titles, 17th November, 1822, whereby it is certified, that, in pursuance of an act of Congress passed the 17th of February, 1815, a location certificate, No. 164, issued from the office of the recorder, in favor of John Brooks, or his legal representatives, for 709 arpents of land, that a location had been made by the plat of survey, No. 2541, and that the said John Brooks, or his legal representatives, is entitled to a patent for the said tract, containing, according to the location, 603 14-100 acres, in township 45 north, range 7 east.

It was admitted that the title of John Brooks was vested in the defendant below, by mesne conveyances, on the 14th of February, 1834; and it was proved that one Brady, under whom

the defendant below acquired title, had his 321*] mansion-house *adjacent to the land in controversy, and occupied a part thereof before the year 1824, and that the same has been ever since occupied; that the defendant Bissell extended his improvements over the whole fifty-five acres as early as 1829 or 1830.

The defendant then asked the following instructions, which the court refused to give, and each of them; to which refusal the defendant by his counsel excepted; which instructions are in the words and figures following:

Instructions Refused.

1. That the land sued for in this action was not reserved from sale by the Act of Congress of 3d March, 1811, in consequence of the filing of the claim of Rudolph Tillier, with the concession to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, and other documents, with the recorder of land titles, as given in evidence in this case.

2. That the confirmation by the Board of Commissioners to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, given in evidence in this case, ratified by act of Congress of 4th July, 1836, did not vest any title in the land sued for in this action in the plaintiff.

3. That the plaintiff has shown no title on which she can recover of the defendant the land sued for in this action, or any part thereof.

4. That the plaintiff, if entitled to recover in this action, can recover only the undivided tenth of so much of the land sued for as the defendant was in possession of at the commencement of this suit.

5. If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks, or his legal representatives.

6. That the confirmation of the claim of Benito Vasquez and others, given in evidence by the plaintiff, being according to the concession, is in itself a rejection of the survey made by Mackay, which has been given in evidence; and under that confirmation there is no authority for a survey upon the land located under the certificate in favor of John Brooks, or his legal representatives.

322*] *7. That the survey given in evidence by plaintiff, of 800 arpents, made by Mackay in 1806, being a mere private survey made of a part of the public domain, in violation of an act of Congress prohibiting such surveys at that time under severe penalties, is not in law any part of the claim filed before the recorder of land titles, and cannot come in aid thereof, so as to work a reservation from sale, under the Act of Congress of 3d March, 1811, of said 800 arpents.

The plaintiff then asked the following instruction, which the court gave; to the giving which the defendant, by his counsel, excepted. Which instruction is as follows:

Instruction given.

That the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially resurveyed in conformity to the Act of Congress of the 4th of July, 1836, and which resurvey is numbered 3061, and was approved by Jos. C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made; and, therefore, the location under said claim is invalid as against the title of said Vasquez, or of those claiming through him to the extent that the two claims cover the same land, and that the land included by both the surveys aforesaid is the land confirmed to Benito Vasquez, or his legal representatives, by the Act of Congress of the 4th of July, 1836, and that the confirmation operated as a grant to said Vasquez, or his legal representatives; such being the legal effect of the acts of Congress, records, and title deeds given in evidence.

And the defendant prays the court to sign and seal this his bill of exceptions, which is done accordingly. J. Catron. [L. S.]

Upon this exception the case came up to this court.

It was very elaborately argued by Mr. Benton and Mr. Gamble for the plaintiff in error, with whom was Mr. Geyer, and by Mr. Good and Mr. Ewing for the defendant. It is impossible to do more than state the points raised by the counsel respectively.

Those on behalf of the plaintiff in error were the following:

I. The report of the late Board of Commissioners, ratified by the Act of the 4th of July, 1836, is not a confirmation according to either of the plats of survey filed by Rudolph Tillier, under whom the defendant in error claims, nor of any survey, but *operates as a grant [*323 according to the concession of 4,000 arpents of land, to be located in one or two places of the public domain.

1. The confirmatory act confirms nothing but the concession, the only document mentioned or referred to in the decision, and therefore it cannot be assumed that any survey, or plat of survey, whatever, was adopted. Mackay v. Dillon, 4 Howard, 448. It is a public grant, and passes nothing that is not described in terms, or by specific reference to something out of it. Blake v. Doherty, 5 Wheat. 359; Dyer, 350 b, 362 a; Cro. Car. 169; 10 Co. 65, 112 b; Charles River Bridge v. Warren Bridge, 11 Peters, 420.

2. The concession is a floating warrant of survey, conferring no title to any specific land, and a confirmation in terms, according to that concession, does not give it a special location or boundaries. Forbes's case, 15 Peters, 184; Buyck's case, Ibid. 215; O'Hara's case, Ibid. 275; Delespine's case, Ibid. 319; Miranda's case, 16 Peters, 159, 160; United States v. King, 3 Howard, 773; Mackay v. Dillon, 4 Howard, 448.

3. If anything can be resorted to, other than the decision and the concession to which it refers, for the purpose of determining the legal

effect of the grant, it must appear by the transcript laid before Congress, and that cannot be contradicted, altered, or varied by oral evidence. 1 Phil. Ev. 218, 423; 3 Starkie's Ev. 995–997.

4. The particular survey mentioned in the instruction given at the trial, if in fact executed, was prohibited by law, and is a mere nullity (United States v. Hanson, 16 Peters, 196), and was never recognized by the recorder and commissioners as the foundation of the claim, or as evidence of its location and boundaries.

5. The claim, considered by the recorder and commissioners under the act of 1832, was made by the original grantees, on the concession alone, and the decision by special reference to that claim and concession excludes all other claimants and documents. Co. Lit. 210 a, 183 b.

6. No plat of survey was transmitted with the transcript, or in any form presented to Congress. The confirmatory act, therefore, can have reference only to the face of the concession, regardless of any survey whatever. Mackay v. Dillon, 4 Howard, 448; McDonogh v. Millaudon, 3 Howard, 693.

II. Whatever land is granted or confirmed, by the report and act of Congress, is granted or confirmed to the five sons of Vasquez, named in the decision of the commissioners, or their legal representatives, and not to any one of them, and his representatives, in exclusion of all the others.

324*] *1. The concession does not contemplate or authorize a severance of the interest of the grantees, by survey or otherwise, by the act of one of them or his representatives.

2. No survey for any one of the grantees has ever been recognized by the government.

3. Every claim under the concession in severalty was rejected by the first Board of Commissioners, and none such was presented to, taken up, or recognized in any form, under the Act of 1832.

4. The decision, as entered in the transcript, and confirmed by Congress, is in terms in favor of all the original grantees, by name, according to the concession, and no one of them can be excluded from the benefit of the grant, or preferred in the location.

III. The defendant in error is not the legal representative of Benito Vasquez, Jr., or of any of the grantees named in the decision of the commissioners, and acquired no title to the land sued for, by the confirmation.

1. The instrument of writing purporting to be a transfer from Tillier to C. B. Penrose, under which alone she claims, not being a deed, is inoperative as a conveyance of a freehold estate. Moss v. Anderson, 7 Mo. 337; McCabe v. Hunter's Heirs, Ibid. 355.

2. That instrument is, in terms, a mere assignment of the interest of Tillier in the concession and plats of survey, and does not purport to convey lands. No interest in lands passes by a mere assignment of evidences of title. 2 Ham. 221; Fitzhugh v. Croghan, 2 J. J. Marsh. 429.

3. Taken as an operative conveyance of land, the transfer does not pass an estate of inheritance. Martin v. Long, 3 Mo. 391.

4. The transfer, if otherwise unexceptionable, at most conveys only such right, title, and interest as the grantee had at the time; the title, if any, afterwards acquired by the confirmation, does not inure to his grantee. McCracken v. Wright, 14 Johns. 193; Jackson v. Hubble, 1 Cowen, 613; Jackson v. Winslow, 9 Cowen, 13; Jackson v. Peck, 4 Wend. 300; Missouri Stat. Rev. Code, 1825, p. 217; Landis et al. v. Perkins, 12 Mo.

IV. The instruction given at the trial, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially resurveyed by survey No. 3061, was reserved from location and sale at the time the location under the New Madrid claim was made," is erroneous, because—

*1. The survey referred to was not [*325 only private and unauthorized, but prohibited by positive law, and is of no effect whatever, as fixing the locality and boundaries of the concession, or as the foundation of a claim. Garcia v. Lee, 12 Peters, 511; Smith's case, 10 Peters, 327; Wherry's case, Ibid. 338; Jourdan et al. v. Barrett, 4 Howard, 169; Mackay v. Dillon, Ibid. 448.

2. The plat of a private or forbidden survey is not authorized or required to be filed with the recorder of land titles; and being, in this case, both made and filed contrary to law, is of no effect for any purpose. Kerns v. Swope, 2 Watts, 75; Heister v. Fortner, 2 Binney, 40; Dewitt v. Moulton, 5 Shepl. 418; Blood v. Blood, 23 Pick. 80; Summer v. Rhodes, 14 Conn. 135; Mummey v. Johnston, 3 A. K. Marsh. 220.

3. The concession containing no special location, and the survey being an absolute nullity, no particular tract of land was brought within the proviso of the tenth section of the Act of March, 1811.

4. There were two plats of survey filed at the same time, differing from each other, and, nothing appearing on the record to distinguish which of them designates the land claimed, the court was not authorized to elect between them. Mackay v. Dillon, 4 Howard, 448.

5. The official survey, No. 3061, has no effect on the question of reservation.

6. What particular land was embraced by the plats originally filed depended upon facts to be proved aliunde, and upon which the identity was to be found by the jury, and not by the court or by the act of the surveyor.

7. The reservation of the land included in the survey for Tillier, in 1806, if any there was, ceased before the location, under which the plaintiff in error claims, was made.

V. If it shall be held that the location was made on land within the proviso of the tenth section of the Act of 3d March, 1811, and while it was in force, "the legal effect of the acts of Congress, records, and title papers given in evidence," is not to render the location invalid as against the confirmation by the Act of 1836.

1. The location, survey, and patent certificates being in other respects regular, vested in John Brooks, or his legal representatives, a title valid against the United States, which was defeasible only by a confirmation of the conflicting claim during the continuance of the reservation. Barry v. Gamble, 3 Howard, 32; Stoddard v. Chambers, 2 Howard, 317; Polk's

Lessee v. Wendell, 5 Wheat. 293; Bagnell v. 326*] Brodrick, 13 Peters, 436; *Strother v. Lucas, 6 Peters, 763; 12 Ib. 410; Grignon's Lessee v. Astor, 2 Howard, 319; Chouteau v. Eckhart, Ibid. 376; Carroll v. Safford, 3 Howard, 460; Levi v. Thompson, 4 Howard, 17.

2. The reservation, if any, ceased at least as early as the 26th of May, 1829, and thereby the title under the location became indefeasible, and could not be affected by legislation afterwards. City of New Orleans v. D'Armas, 9 Peters, 224; Fletcher v. Peck, 6 Cranch, 87; Wilkinson v. Leland, 2 Peters, 657.

3. The Act of the 9th July, 1832, has no effect whatever on the land of the title under the location. Having no retrospective operation upon any vested interest, it cannot defeat a title indefeasible when it was passed.

4. Neither the claim of Tillier, nor of any other person, to the particular land described in either of the surveys, was presented, considered or reported upon, under the Act of 1832, and consequently there was no reservation of that land created, revived, or continued by that act.

5. The confirmation by the Act of 1836 does not relate to any antecedent period, so as to overreach a title before valid against the United States. Jackson v. Bard, 4 Johns. 230; Heath v. Ross, 12 Ib. 140; Strother v. Lucas, 12 Peters, 410; Chouteau v. Eckhart, 2 Howard, 376; Les Bois v. Bramell, 4 Ib. 449.

6. There was no confirmation of the claim of Tillier, or of any other person, for the land described in either of the plats filed in 1806.

7. The confirmation to the five sons of Vasquez, "according to the concession," has no effect whatever upon the land previously located, or the title under the location.

8. The survey No. 3061 is not in conformity with the confirmation, and, to the extent of its interference with the previous location, is void.

VI. The second section of the Act of Congress of the 4th July, 1836, confirms the title under the location, survey, and patent certificate, as against any confirmation, notwithstanding any previous reservation of the land from sale.

1. It does not enlarge, but restrains and limits, the operation of the first section, by a condition annexed to the confirmation.

2. Its object is to affirm locations and sales, which, on account of some infirmity, needed, or were supposed to require, legislative aid, not those which, being valid and regular, needed no affirmance. Jackson v. Clark, 1 Peters, 635.

3. The defects and irregularities intended to 327*] be cured are *common to both locations and sales, and which, if not cured, it was supposed might give priority to the confirmations.

4. The confirmations are in conflict with the titles under locations or sales, only when the lands located or sold are reserved from sale by reason of the filing of the claim confirmed, in due time and according to law.

5. No titles under locations or sales are protected, if none are protected but those made on lands not reserved, which is to render the second section of the Act of 4th July, 1836, superfluous and insignificant; for such titles need no legislative aid, as against a confirmation. 8 Co. 274c; Fletcher v. Peck, 6 Cranch, 87; City of New Orleans v. D'Armas, 9 Peters, 224.

The counsel for the defendant in error considered the case of Stoddard v. Chambers, 2 Howard, 284, as ruling all the points involved in the present case. Nevertheless, as it had been brought up and argued as new matter not included within the decision of the court in that case, they would consider it as such, and therefore presented the following points:

The plaintiff in error derives his title by regular transmission under a New Madrid certificate, which was located in March, 1818, on the land in controversy. A "patent certificate" was issued to him on the 17th of November, 1822, but no patent. He has had possession since 1829. His rights, if any he be adjudged to have, were conferred by the Act of 17th of February, 1815, known as the New Madrid Act. In virtue of this act he was authorized to locate his certificate on any of the public lands of the territory of Missouri, the sale of which was, at the time of such location, authorized by law.

1st. In support of the claim as shown by the defendant in error, we shall rely on the Treaty of 1803, in virtue of which the Missouri Territory was acquired; the Act of Congress of 2d of March, 1805; the Act of the 15th of February, 1811, ch. 81, sec. 10; the Act of the 3d of March, 1811, sec. 10; and also the Act of the 17th of February, 1818; all of which, we shall contend, recognized the validity of the plaintiff's claim, and operated as a reservation thereof from any disposition or sale by the United States prior to the passage of the Act of the 26th of May, 1824. We shall cite the opinion of this court in 4 Peters, 512, repeated in 10 Peters, 330, and the case of Strother v. Lucas, 12 Peters, 436, to show the nature of the plaintiff's claim, and his right to a recognition and a confirmation of that claim by the United States. We shall rely upon the authority of these cases to show that the claim was, at least, an equitable right, which, under the Spanish government, must have been *per- [*328 fected; the United States are bound by every consideration which could operate upon the government of Spain, to perfect this right.

2d. We shall contend that there has been no forfeiture of this claim, by virtue of the Act of the 26th of April, 1804, or that of 1807, or by any act subsequent thereto, and having reference to the same subject; that these acts never were in fact intended to operate as a penalty or forfeiture, but were merely precautionary and provisional. We shall further contend that the position of the plaintiff is not more unfavorable than that of the pre-emptioner, who, although a trespasser upon the public domain, has yet been recognized by the State authorities and by the United States as having a claim in virtue of his pre-emption, which could not be defeated by a New Madrid certificate and location, or even by a patent issued thereon. Rector v. Welch, 1 Mo. 238; Opinion of Attorney-General, Wirt, in a letter to the Secretary of the Treasury, dated 27th January, 1821; and the Act of 2d March, 1831, in reference to, and embodying the opinion of the Attorney-General on this subject.

3d. That the effect of the Act of the 26th of

May, 1824, and the Act in revival thereof, passed 24th May, 1828, was not to devest the title of the plaintiff so as to exclude it from the operation of the Revival Act of the 9th of July, 1832, and that that act must be regarded as a waiver of all penalties and forfeitures, if any such were ever designed by the United States to attach to claims like the one in question. There were hundreds of thousands of acres of land claimed by no higher title than that of a concession and mere order of survey; and yet there is no case of forfeiture on record. Soulard Letter, State Papers, Miscellaneous, Vol. I. p. 405.

4th. That this case differs from Smith's case, reported in 10 Peters, 327; also from that of Mackay, as reported in Barry v. Gamble, 3 Howard, 32; and still further from that of Les Bois v. Bramell, 4 Howard, 456.

The claim of the plaintiff could not be defeated by any act of legislation, without a disregard of the Treaty of 1803, and a direct denial of the equitable obligation imposed by the acts of Congress already cited, and which obligation has been repeatedly recognized by the agents of the United States, who, having assumed the trust existing between the government of Spain and the party under whom the plaintiff claims, could not defeat that trust by conditions imposed by them subsequent to the transfer of said trust. Analogies from the law of England will be cited to sustain this view, as also the opinion of this court in the case of Percheman, 7 Peters, 90.

329*] *5th. That the Act of the 9th of July, 1832, embraced this claim; its existence was thereby recognized, and the right to a confirmation of it clearly implied; that the confirmation by the Board of Commissioners, on the 2d day of November, 1833, and which was approved and made conclusive by the Act of the 4th of July, 1836, completes the title of the defendant in error; and that no one claiming the land in question from the United States, by virtue of any sale or grant made by them subsequent to the location and survey by Tillier in 1806, can hold said lands as against the legal representatives of the Spanish grantee. Opinion of the court in the case of Stoddard v. Chambers, 2 Howard, 284, and the authorities therein cited.

The title of the plaintiff in error cannot, we think, be shown to be entitled to the serious consideration of this court—

1st. Because the certificate and location in virtue of which he claims conferred no right: the location was on lands, the sale of which was not at the time authorized by law; and it was therefore absolutely void. Opinions of Attorney-General, Wirt, October 10, 1825; Opinions, etc., Vol. II. p. 25, reference to letters of Secretary Crawford, June 10th, 1818; of Mr. Wirt, October 22, 1828; and of Mr. Butler, Attorney-General, August 8th, 1838; Stoddard v. Chambers, and the authorities therein cited, 2 Howard, 284.

2d. The location, having been on lands the sale of which was not authorized by law, was not only void, but could not be revived except by special act of legislation, the same as in the case of a location of a new Madrid certificate upon lands claimed by a pre-emptioner. Letter of Mr. Wirt, Attorney-General, to Secretary Crawford, June 19th, 1820; also, letter from same to same, under date of the 22d June, on the same subject; the Act of April 26, 1822; and also Act of 2d March, 1831.

There was no act of Congress subsequent to the 26th of May, 1829, and before the 9th of July, 1832, giving the plaintiff in error the right to re-locate his certificate; and if there had been, we should not be willing to admit that a location thus made upon the land in question, although protected by a patent, could prevail against the Spanish grant; but there being no such location or patent, we contend that the New Madrid locator, notwithstanding the land in question should be regarded as public land during the interval mentioned, is in no better condition in regard to said land than he was prior to said interval. His location was void in its inception; nothing less than a special act of Congress could revive and make it available. To contend, as we understand the plaintiff in error will, that, *although the [*330 New Madrid certificate was originally located on land at the time not authorized to be sold, yet it became public land in the interval between the 26th of May, 1829, and the 9th of July, 1832, and was therefore subject to his claim, as it were, by relation back to 1818, when his claim was first located, is, we think, an assumption not less unreasonable than it would be to contend that location under a New Madrid certificate on mineral lands or school lands specially reserved from sale at the time, but subsequently authorized to be sold, would be held good, and entitle the party to a patent, even as against the United States. It cannot be supposed that this court would countenance such a doctrine as this; and yet it is not, as we think, less worthy of their serious consideration than the position assumed in this doctrine of relation so earnestly insisted on by the plaintiff in error.

It will, we presume, be contended, that the confirmation, "according to the concession," shall be construed to mean a confirmation, not of 800 arpents to Benito Vasquez, or his legal representatives, but a confirmation of 4,000 in common to all the brothers. The proceedings from 1806 to 1833, by the Board of Commissioners, and which are in evidence, show conclusively that such was not and could not have been the design of the board who confirmed the claim; but the testimony of Conway, one of the board who confirmed said claim, frees this question from all doubt. His testimony explains what otherwise might admit of dispute. It shows that there was but one plat before the board; they took proof as to that plat; they were satisfied therewith. Its not being referred to in the tabular statement made out by the clerk of the board is likewise satisfactorily explained by the testimony of Conway, one of the commissioners by whom this claim was confirmed. To show the manner of proceeding in this and like cases, we refer to the cases of Gabriel Cerré, 5 American State Papers, 821; St. Gemme Beauvais; Ibid. 744; Raphael St. Gemme and others, Ibid. 745; Thomas Maddin, Ibid. 747; Joseph Morin, Ibid. 819; James Williams, Ibid. 820; Charles Fremon Delaurier and Louis Labeaume, Ibid. 822; James Richardson. Ibid. 823; Pierre Detor, Ibid. 824; Louis Bissonet, Ibid. 828; Thomas Caulke, Ibid. 831, Auguste Chateau, Ibid. 834.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court for the District of Missouri. The case below was an action of ejectment by the plaintiff (the defendant here), to recover against the defendant a moiety of a tract of land in the township of St. Louis, and in which she obtained a verdict and judgment.

331*] *The title of the plaintiff was derived from a confirmed Spanish concession, under the Act of June 30, 1836; of the defendant, from a location of a New Madrid certificate, under the Act of February 17, 1815. Both rest upon acts of Congress; and the question is which has the elder or better title.

We shall, therefore, lay out of view, in proceeding to the examination of the case, a class of cases referred to on the argument, founded on these Spanish claims, which were prosecuted under the Act of May 26, 1824, and which underwent very elaborate discussions, both at the bar and by the court. United States v. Arredondo et al. 6 Peters, 691; Soulard et al. v. United States. 4 Ib. 511; Smith v. The Same, 10 Ib. 326; United States v. Clarke, 8 Ib. 436.

That act empowered the District Court, upon which original jurisdiction was conferred, to hear and determine these claims according to the stipulations of the Treaty of 1803, the law of nations, and the laws and ordinances of the Spanish government, and in conformity with the principles of justice.

The inquiry there was not into the legal title, but into the equitable right under the treaty, with a view to a confirmation of these imperfect grants, if entitled to confirmation according to Spanish law, so that the grantee might be clothed with the legal estate.

The inquiry was difficult and embarrassing, on account of the scanty and imperfect materials within the reach of the courts from which to collect Spanish laws and ordinances, as they consisted of royal orders, orders of the local governors, and also of the usages and customs of the provinces, which were not readily accessible to the profession or the courts in this country.

The case before us depends upon the construction of our own acts of Congress, disembarrassed from any inquiries into the origin of these grants, or into the rights and principles upon which they were founded, or which made it the duty of the government under the treaty to acknowledge them. Inquiries of this kind were closed on the confirmation of the grant by the Act of 1836. The title then became complete. It became an American, not a Spanish title.

One of the principal questions arising under these acts of Congress, and, indeed, in our judgment, every material question presented here, was either directly or by necessary implication involved in the decision of the case of Stoddard v. Chambers, heretofore decided by this court and reported in 2 Howard, 284.

The plaintiff there claimed under a Spanish concession, confirmed by the Act of 1836; the 332*] defendant, under a location by *virtue of a New Madrid certificate, in pursuance of the Act of 1815. The defendant and those under whom he claimed had been in possession since 1819. The Spanish concession was, like the one before us, general and unlocated, except by a private survey in January, 1806.

The court decided that the plaintiff, deriving title under the confirmed claim, held the better title, on the ground, that in 1816, when the New Madrid certificate was located upon the premises in question, the tract was reserved from sale or private entry by virtue of the tenth section of the Act of 1811, and being thus reserved, the location was void; and, further, that it was not within the protection of the second section of the Act of 1836, confirming Spanish grants, as the locations there referred to were locations made in pursuance of some law of the United States; that, in the case before the court, it was made against law.

In the case before us, the Spanish concession was made to the five sons of Benito Vasquez, for eight hundred arpents each, to be laid off in one or two places of the vacant domain. The grant was made February 16, 1800.

The eldest son (Benito) conveyed his interest in the concession to Rodolph Tillier, 11th February, 1806. The latter located it, by procuring a private survey, the 27th of the same month.

The time when the claim was filed in the recorder's office at St. Louis, under the Act of 1805, does not appear; but it must have been before the 25th of August, 1806, as we find the evidence of the claim presented to the Board of Commissioners on that day, including the grant, the survey, and other proof going to establish it.

The tenth section of the Act of 1811 (2 Stat. at Large, 665) provided that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in Louisiana, and filed in his office, for the purpose of being investigated by the commissioners, etc.

The argument against the application of the clause to the claim before us is, that the concession to Vasquez, being general and unlocated, giving a right to the eight hundred arpents, in no particular part or parcel of land in the public domain, but in any and every part, and the private survey designating and locating the tract being a nullity, and to be disregarded, the premises in question were not, and could not have been, reserved from sale by the filing of this vagrant claim; and hence were open to location under the New Madrid certificate in 1816, at the date of the entry.

*Now, the Spanish concession to [*333 Mordecai Bell, in Stoddard v. Chambers, under which the plaintiff derived title, was of a similar character: the private survey, therefore, must have been regarded as having designated and located the tract, so far as to give effect and operation to the reservation of it from sale.

It is only upon this ground that the case can be upheld. Otherwise, the location of the New Madrid certificate was made in pursuance of law, and the defendant under it held the better title. The tract was not covered by any claim, within the contemplation of the Act of 1811. To give effect to it, the claim must designate the particular tract.

But if this question were an open one, and to be decided the first time by the court, we should feel ourselves obliged to re-affirm the

same conclusion which we have supposed necessarily involved in the case already mentioned.

The Act of 1805, sec. 4 (2 Stat. at Large, 326), provided, that a plat of the tracts claimed should accompany the written notice of the claim directed to be filed in the office of the recorder.

The Act of 20th February, 1806 (2 Stat. at Large, 352), repealed this clause, and extended the powers of the Surveyor-General over the public lands in Louisiana, making it his duty to appoint deputy-surveyors, etc., and the commissioners were authorized to direct such surveys of the claims presented as they might deem necessary for the purpose of their decision—the survey to be at the expense of the claimant.

The act also declared, that every such survey, as well as every other survey, by whatever authority theretofore made, should be held and considered a private survey only; and that all the tracts of land, the titles to which might be ultimately confirmed by Congress, should, prior to the issuing of the patents, be resurveyed, if judged necessary, under the authority of the Surveyor-General, at the expense of the parties. Sec. 3.

The Act of March 26, 1804 (2 Stat. at Large, 283), forbade settlements on the public lands within the territory of Louisiana; and also surveys, or any and every attempt to survey, or designate boundaries, by marking trees or otherwise, declaring, at the same time, the act an offense punishable by fine or imprisonment. Sec. 14.

The Act of 1805, as we have seen, required the claimant to accompany the claim filed with a plat of the tract.

It is apparent, therefore, unless this act operated as a modification, by implication, of the restriction in the Act of 1804 in respect to surveys, the benefits under it would be limited to the 334*] single class *of claimants, who had happened to procure surveys of their tracts by a Spanish officer prior to the cession under the treaty. Whether it had this effect, or not, is at this day a matter of no particular importance; it is certain, that such was the practical construction given to the act at the time; as we find that numerous surveys of the tracts claimed were made after the passage of the Act of 1805, and before that of 1806 dispensing with the plat. This construction was also recognized by the government, and the surveys directed to be regarded by the commissioners in their proceedings, as affording a sufficient designation of the tract claimed under the concession.

In the instructions of the Secretary of the Treasury to the board, under date of March 25, 1806, one month after the passage of the act, he observed (speaking of the authority conferred on the board to order surveys), that, as the authority was discretionary, it was presumed they would exercise it only in cases where it would be actually necessary, as it was not intended to vex the claimants with repeated surveys; and that, where they were satisfied that those surveys which had been executed before the receipt of his communication were sufficient to enable them to form a correct decision, they need not order new ones; and the observation, be said, would apply, whether the previous surveys had been executed under the authority of Soulard, or by any other person whatever. Part 2, Public Land Laws, p. 672.

Nothing can be more direct and express than these instructions; and the records of the proceedings of the several boards of commissioners under the Act of 1805, and the acts succeeding it down to that of July 9, 1832, show that they uniformly acted upon them. These private surveys constituted a part of the evidence of the claim upon which their decision was founded.

They were necessary to give description and locality to two important classes of these Spanish concessions: 1. A grant or order of survey for a given number of arpents, conferring upon the grantee the right to locate it upon any part of the royal domain, at his election; 2. A grant designating some natural object only, such as the head or sources of a river, as the place where the tract should be located. These two classes constitute no inconsiderable portion of the claims filed in the offices of the register and recorder, and afterwards presented before the commissioners. Among the incomplete grants, they probably constituted at least one half of the number. Of the first fifty in the report of the 27th of November, 1833, twenty-eight *are of this description; it [*335 is fair to presume the same proportion exists throughout.

The effect claimed, upon the above view, for these private surveys, was denied on the argument, on the authority of the cases decided under the Act of 1824, to which we have already referred; but the distinction will be apparent on an examination of those cases, and a slight attention to the difference in the two modes of proceeding upon these claims.

Under that act, it was held by the court, that, in order to enable the claimant to recover, the land must have been severed from the general domain of the king of Spain prior to the cession of the territory by a grant which gives, either in its terms or by a reference to some description, locality to the tract; or if the grant was vague, and gave only an authority to locate, the location must have been made by the official surveyor; that a private survey could have no such effect as to sever the tract from the public domain under either the Spanish or American government; and that no government ever admitted such effect to be given to private surveys of its warrants, or orders of survey.

In the proceedings before the Board of Commissioners, the object of the private survey is not a severance of the tract from the public domain; nor is this the effect of it; that is done by the confirmation of the grant by the act of Congress, and not before. The object is the selection of the tract by the claimant that he is entitled to locate by virtue of his general grant, by means whereof he is enabled to present his claim in full to the board for their decision. A general grant or order of survey is not simply a vagrant right to the given number of arpents in some part of the public domain; but carries along with it the right, and without which it is valueless, to have it located with metes and bounds, that it may be occupied and enjoyed. In the absence of this description and location the claimant would be disabled from present-

ing his full claim under the Spanish concession for adjudication by the board. The Act of 1806 providing for private surveys, and the instructions of the Secretary founded thereon, removed every embarrassment of the kind, and were, doubtless, so intended at the time.

The acts of 1832 and of 1836 confirm the above view. The former organized a new Board of Commissioners, and made it their duty to examine all unconfirmed claims to land theretofore filed in the office of the recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey; and also, that, in examining them, they should take into consideration as well the testimony 336*] taken before the former *boards upon the claims, as such other testimony as might be admissible under the rules adopted for taking testimony before the previous commissioners.

It should be recollected, that the reports of the previous commissioners upon these unconfirmed claims were before Congress at the time of the passage of this act; and that those reports contained the substance of the evidence in support of each claim, including these private surveys; and with this knowledge, it will be seen, they have made it the duty of the board to take that testimony into their consideration in passing upon them.

Congress have thus virtually recognized these private surveys as competent and proper evidence of the particular tract of land claimed under the grant or concession, carrying out thereby the construction previously given to the Act of 1806 and the instructions of the Secretary.

The board are directed to examine all the unconfirmed claims remaining in the office of the recorder, founded upon these incomplete grants, and orders of survey; and to examine them upon the evidence already furnished by the claimants, and in the possession of the government; and to show that the examinations were conducted in conformity with these directions, we need only turn to the reports of the board, at different times, to the commissioner of the land office, and which were also laid before Congress. It will there be seen that these private surveys are invariably used as a part of the evidence, in each case, where one has been made, for the purpose of giving description and locality to the claim.

The concession before us is embraced in the report of the 27th of November, 1833, as No. 19. It contains the original grant, the private survey of February 27, 1806, together with the evidence of several witnesses produced by Tillier, the assignee and claimant; and among others a witness was called to prove the handwriting of the Governor to the concession, and of Mackay to the plat of the survey.

We have said that the Act of 1836 also confirms this view of the case.

The second section of that act provides, that if it shall be found that any tract confirmed, or part thereof, had been previously located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation shall confer no title to such lands in opposition to rights acquired by such location and purchase; but the individual whose claim is confirmed shall be permitted to locate so much thereof as interferes with such location or *purchase on any [*337 unappropriated land of the government within the State.

It will be perceived that the right to re-locate by the Spanish claimant is confined to the case of an interfering location or purchase of the whole or a part of the tract of land confirmed, omitting altogether to make provision for the case of a confirmation of an unlocated concession or order of survey. If the argument, therefore, is well founded, that these surveys are a nullity, and incapable of giving description and locality to the claim, Congress have not yet provided for one half of them under the Act of 1836; and further legislation will be necessary to carry into effect their clear intention, as declared in the Act of 1832. We cannot think they are chargeable with any such omission or oversight, or that a proper interpretation of their acts leads to such a conclusion; but the contrary.

Our conclusion, therefore, is that the private survey by Mackay in 1806, of the 800 arpents granted to Benito Vasquez by the Spanish Governor, February 17, 1800, of which Tillier was the assignee, and which was filed in the recorder's office under the Act of 1805, designated and located the grant so as to give effect and operation to the Act of 1811, reserving the premises from sale, which reservation was continued down by subsequent acts to 1829.

It has been argued, that the Act of 1836 confirms only the Spanish concession in the abstract, without regard to the plat of survey or claimant, if an assignee of the grant. The act provides, that the decisions in favor of land claimants made by the recorder and the commissioners, under the Act of 1832 and the supplemental Act of 1833, as entered in the transcript of decisions transmitted by the commissioners to the commissioner of the land office, and by him laid before Congress, be, and the same are hereby confirmed.

Now, the transcript of these decisions embraced, as required by the Act of 1832, the date and quantity of each claim, and the evidence upon which each depended, together with the authority under which it was granted. The claimant was the party who had filed the claim in the office of the recorder, and had prosecuted it before the Board of Commissioners. His name, of course, appeared—Rudolph Tillier—in the case before us. He represented the interest of one of the sons of Benito Vasquez, in quantity eight hundred arpents. There were four other sons, each of whom was entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, together with the conveyance from the original grantee, and, under these circumstances, it is insisted *that, upon [*338 the true construction of the act, the confirmation was in favor of the son, and not of the assignee.

It is certainly difficult to perceive what right or claim the son had, either before the commissioners or Congress, to be confirmed. Having parted with all his interest, he had neither land, nor claim, nor was he a claimant; as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the Act of 1805. By that act, every person

claiming lands, etc., by virtue of any incomplete grant, etc., shall deliver to the recorder a notice, etc., of the nature and extent of his claim; and, also, the grant, order of survey, deed, conveyance, or other written evidence of his claim, to be recorded: providing at the same time, in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat; all other conveyances and deeds to be deposited with the recorder; thereby making a distinction between the two cases, as it respects the derivative title; and, in both, clearly contemplating that the assignee might be a claimant.

This is the view taken of the question in the case of Strother v. Lucas, on each occasion when it was before this court. 6 Peters, 772; 12 Ib. 458. It was there held that the confirmation was to be deemed to be in favor of the person claiming it. The construction has entered into the usage and practice of the land office, as may be seen by the instructions from that office and the opinion of the Attorney-General on the subject. 2 Land Laws, 747, 752, and 1043.

As it respects the branch of the argument, that the confirmation was irrespective of the location of the tract by the private survey of Mackay, we refer to the view we have already taken of that question, without any further remark.

It has also been argued, that Tillier put on file in the recorder's office, at the time of giving notice of his claim, two plats of the tract of land claimed, each embracing different parcels; and that the uncertainty as it respects the parcel claimed under the concession takes the case out of the reservation from sale under the Act of 1811.

The case shows that there were two plats protracted upon the same sheet of paper on the files of the office, covering different parcels; and that the name of the claimant was written at full length on the face of one of them; that but one was before the commissioners, and that corresponding to the one on file with his name upon it; that this one includes the premises in question; the other does not.

When this second plat was protracted upon 339*] the same sheet *of paper, or how it came on the files of the office, or whether Tillier was in any way connected with it, are matters unexplained at the trial, and left altogether to conjecture. The connection is but an inference from the fact, that it has been found on the same piece of paper on which his was protracted; but, as his was marked, and identified with his name, and that, too, in connection with his claim to the tract, also on file, we do not perceive that anyone could be misled who might resort to the office for the purpose of ascertaining the land thus intended to be appropriated; and as it respects the proceedings before the commissioners, also on the files of the office, none of the objections taken existed in point of fact.

It has been supposed that this case is distinguishable from the case of Stoddard v. Chambers, on the ground that there the concession was confirmed, in terms, according to the survey. If the view we have taken of these private surveys be correct, the difference at once disappears. But with reference more particularly to the objection, it is to be observed, that in the report of the commissioners under date of 27th November, 1833, which included one hundred and forty-two claims, of which the present case is one, the form of their decision as expressed, in respect to these imperfect grants, is uniformly in the words here used.

In the report of the board in 1835, in which the confirmation of the claim in Stoddard v. Chambers is included, a change of persons having taken place in the commission, a different and more particular form of expression was adopted. They, usually, confirmed according to the survey, or according to the possession, or a given number of arpents, as the case might be.

In cases where the report recommends the confirmation of the claim according to the survey, the effect of the confirmation under the Act of 1836 is, probably, to conclude the government; so that an error in the private survey cannot be corrected on a resurvey of the tract. When recommended in the general form of the present case, any such error may be corrected, agreeably to the intention of Congress in declaring, as they did, in the Act of 1806, that these surveys should be regarded only as private surveys. This is the distinction made at the land office, founded upon the opinion of the Attorney-General; and is, we think, the only one between the two cases.

It was also suggested, on the argument, that the cases of Mackay v. Dillon and Les Bois v. Bramell, 4 How. 421, 449, contained principles in support of the defense in this case. We have examined them attentively, and find nothing decided there in conflict with the views expressed in this case.

*In the former, the question was be- [*340 tween a confirmed Spanish grant and the commons of the city of St. Louis, under which the defendant held; and which had been, also, confirmed by the Act of 1812. There had been a private survey of the commons by Mackay in 1806, and in which he had at the same time marked the boundaries of his own lot. His claim was confirmed under the Act of 1836; the claim to the commons, as we have seen, in 1812; the latter, therefore, holding the elder title. But the confirmation of the commons was very special, the act declaring that all the rights, titles, and claims to town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages, including St. Louis, which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages, etc.; and making it the duty of the principal deputy-surveyor, as soon as may be, to survey and mark, where the same had not already been done according to law, the out boundary lines of the several towns and villages, so as to include the out lots, common field lots, and commons thereto respectively belonging.

The Act of 1831 (4 Stat. at Large, 435) has no bearing upon the question of boundary.

The question of boundary being left at large by the very special terms of the act of confirmation, a great deal of evidence was given on the trial for the purpose of ascertaining the limits

of these lots, out lots, common field lots, and commons in and adjoining the town. But the court, in submitting the case to the jury, instructed them, virtually, that the boundary and extent of the commons were to be determined by the private survey of Mackay in 1806; an error that was obvious, whether we regard the terms of the act of confirmation, or the nature and effect of the survey; and for which the new trial was granted.

There is nothing in the other case bearing upon the question except that the second instruction given and approved favors the views expressed in the case before us.

The case of Jourdan v. Barrett, 4 Howard, 169, was also referred to as bearing upon the question. The case involved the right to back lands on the Mississippi River between front proprietors; and an attempt was made by the defendant to conclude the right by the effect of a private survey, which was properly denied by the court. The case has no application to the present one. No such effect is claimed for the survey, and all that is contended for in 341*] respect to it is derived from acts of *Congress, and applies only to the class of cases in question. The effect depends upon the construction of these acts.

Upon the whole, after the most careful consideration that we have been able to bestow upon the case, the conclusions at which we have arrived are—

1. That the private survey by Mackay, on the 27th of February, 1806, of the 800 arpents granted to Benito Vasquez, of whom Tillier was the assignee, and which was filed in the recorder's office with his claim, under the Act of the 2d March, 1805, designated and located the grant, so as to give effect and operation to the Act of 1811, reserving the premises in question from sale.

2. That the title was confirmed to Tillier, the assignee, as claimant, under the Act of 1836.

3. That the location of the New Madrid certificate in 1816, under which the defendant holds, was inoperative and void, as has already been decided in the case of Stoddard v. Chambers, heretofore referred to.

It follows, therefore, that the plaintiff, deriving title under Tillier, the confirmee, has an elder and better title, as was decided by the court below.

For these reasons, we are of opinion that the judgment of the court should be affirmed.

Mr. Justice McLean dissented:

In my judgment, this case is not within the decision of the case of Stoddard v. Chambers. In that case, the claim was confirmed "to the said Mordecai Bell or his legal representatives, according to the survey." But in this case the claim was confirmed "according to the concession." Now, until a concession is located, it can give no claim to any specific tract of land, and consequently cannot come within the reservation of any of the acts of Congress. And the main question in the case was, whether there was such a survey or designation of this concession as to bring it within the above acts.

The first Board of Commissioners, who acted on this claim in 1806 and 1810, rejected it. As appears from their record, the concession only was before the board when they finally acted upon the subject. But a new and more favorable board was constituted in 1832, and it appears from their record, that, on the 9th of October, in that year, "the sons of Vasquez, Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, claiming 800 arpents each under a concession dated 17th of February, 1800, was presented. Also a plat of survey dated 7th February, 1806, of 800 arpents." "Pascal Cerré, being duly sworn, *saith, that the sig- [*342 nature to the concession is in the handwriting of Delassus; that the signatures to the survey are in the handwritings of Mackay and Antoine Soulard."

On the 2d of November, 1833, the board again met, and their record states that "the sons of Vasquez, each claiming 800 arpents of land under a concession from Charles Delhault Delassus;" and that "they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners." And they "are unanimously of opinion that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession."

On the 11th of February, 1806, Benito conveyed to Rudolph Tillier his "right, title, and interest, claim and pretension and demand in and to a certain tract of land not yet located or surveyed." And Tillier says: "I do hereby assign, transfer, sell, and set over, unto Clement B. Penrose, all my right, title, interest, property, claim, and demand of, in, and to a certain concession purchased of Benito Vasquez and assigned to me on the 11th of February, 1806, and plat of survey made for me, and dated 27th February, 1806, for value received." This assignment bears no date, but it was acknowledged the 31st of October, 1818.

Frederic R. Conway, a witness for plaintiff, testified that he was one of the late Board of Commissioners that confirmed this claim; that the said original survey of Mackay, given in evidence by plaintiff, was the plat that Tillier claimed by, as he understood it; and that no other survey was exhibited to the commissioners, so far as he remembered, connected with this claim; that the survey was not noted in the tabular statement contained in the proceedings of said board, which omission, he thought, was by the mistake of the clerk.

The following certificates of surveys were given in evidence, one by the plaintiff and the other by the defendant: "I do certify that the above plat represents 800 arpents of land, French measure, situated in the district of St. Louis, Louisiana Territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant. Given under my hand at St. Louis, the 27th day of February, 1806. Signed, James Mackay. Received for record, St. Louis, the 27th of February, 1806. Signed, Antoine Soulard, Surveyor-General of Louisiana."

The other certificate is in the same words. These plats and certificates were recorded by the recorder of land titles on the *same [*343 page. It was proved that one of these surveys covered the land in controversy, and that the

other did not. The name of Tillier was written on one of the plats, but by whom, at what time, and under what circumstances, does not appear. From the loose manner in which the recorder's office and the papers connected with it seem to have been kept, and the ready access to them by all parties, it would be a dangerous principle of evidence, to consider the simple indorsement of a name on a plat as identifying the owner of the land. And especially where the surveyor nowhere states for whom the survey was made.

The court instructed the jury, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially resurveyed in conformity to the Act of Congress of the 4th of July, 1836, and which resurvey is numbered 3061, and was approved by Joseph C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made, and therefore the location under said claim is invalid, as against the title of said Vasquez," etc.

Among the instructions prayed for by the defendant, which the court refused to give, was the following: 5. "If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and, as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in the defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks or his legal representatives."

The deposition of Conway, one of the commissioners who confirmed this concession, was introduced to supply a defect in the record. He states that the original survey of Mackay, which Tillier claimed by, was before the commissioners, and no other plat, so far as he can remember. Now, if this evidence was admissible, it was for the consideration of the jury. It was intended to correct the record, and show that the survey was acted upon by the commissioners, although no entry was made of it by the clerk in the tabular statement. It may well be doubted whether parol evidence was admissible for this purpose, especially after the lapse of some fourteen years. In a matter 344*] *involving title to real estate, parol evidence cannot be heard to correct the record, which the commissioners were required to keep, of their proceedings.

As the evidence was heard, and does not appear to have been overruled or withdrawn from the jury, it was their province to act upon it. But by the instruction given, there was nothing left for the jury to decide. They were instructed that the claim of the plaintiff was reserved from the location and sale when the New Madrid location was made, and consequently the latter was void. This ruled the whole case.

If the statement of Conway were not admissible, there was no evidence to show that any survey was before the commissioners at the time they confirmed the concession. And it is certain that no entry was made upon their record to show a sanction of any survey. It does appear that a survey of the concession was before the commissioners who rejected the claim in 1806. And it also appears that on the 9th of October, 1832, "a plat of survey dated 7th February, 1806, of 800 arpents, was before the new commissioners. But on the 2d of November, 1833, when the concession was confirmed, no survey appears to have been before them, and they refer to none.

If the two surveys made by Mackay of 800 arpents each, "for the proprietor," were admitted to have been made at the instance of Tillier, it leaves the location of the concession uncertain. Both surveys were executed on the same day, and were recorded on the same page. Under Tillier's right, he could survey only 800 arpents; and if he surveyed two tracts each of that quantity it was a fraud upon the public. Under the acts of Congress no tract of land was reserved as a Spanish claim, which was not surveyed or so specifically designated as to show with reasonable certainty its boundaries. There is nothing on the record or in the parol proof to show which of the plats, if either, was made at the instance of Tillier. Both surveys were made "for the proprietor," and as they bear the same date, it may be presumed they were made for the same person. But whether this be so or not, they present a state of uncertainty which is fatal to the Spanish claim. The mere name of Tillier, on one of the plats, without explanation, is no proof of its identity. An entry on the record to identify the survey would have been sufficient. In the absence of such evidence, the survey made or approved by Joseph C. Brown in 1842 does not supply the defect. He must have acted arbitrarily, or from circumstances which existed at the time he acted. There was nothing to guide him as to the true survey at the time the New Madrid location was made. And that was the period of *time to which the facts must apply, [*345 and the reservation of the Spanish claim be shown to have been made. The two surveys then existed and were on the record, and if neither was specially designated as Tillier's claim, there was no location of it within the reservation act. He could not claim both surveys, and as there was nothing on record to guide the New Madrid claimant in his location, he cannot be chargeable with notice.

Under these circumstances, I think the court erred in its instruction to the jury, that the Spanish claim was reserved from sale, and that the New Madrid location was void. I think, for this error, the judgment should be reversed.

Order.

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

ADAM L. MILLS, Plaintiff in Error,
v.
SIMEON STODDARD, a Citizen of Indiana; Curtis Stoddard and Daniel Stoddard, Citizens of Ohio; Joseph Bunnell and Lucy Bunnell, his Wife, Citizens of New York; Jonas Foster and Lavinia Foster, his Wife, Citizens of Ohio; Lucy Hoxie, a Citizen of New York, Daniel Morgan and Arva Morgan, his Wife, Citizens of New York, Defendants in Error.

Spanish concessions—original petition construed—private survey—New Madrid certificate—location of—time.

The decision of this court in the case of Stoddard et al. v. Chambers, 2 Howard, 285, re-examined and confirmed.

The original petition to the Spanish Governor of Louisiana, upon which the concession was made, stated that he "came over to this side of the M. R. S. with the consent of your predecessors." These letters stand for Majeste Rive Sud, and refer to the Mississippi River.

The survey of the concession in 1806 fixed its locality. It is true that the survey was a private one, but it was adopted by the commissioners, who had authority to direct such surveys as they deemed necessary.

The holder of a New Madrid certificate had a right to locate it only on public lands the sale of which was authorized by law. But lands claimed under a Spanish concession, where the claim had been filed according to the acts of Congress, were reserved from sale when the entry under the New Madrid certificate was made, viz., in 1816. Consequently, the entry was void.

The patent for the land covered by the New Madrid certificate was not issued until after Congress had renewed this reservation, viz., in 1832. Therefore, neither the entry nor patent can give a good title.

Had the patent been issued before Congress passed the Act of 1832, the result would have been different.

346*] *THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Missouri.

It was an ejectment brought in the Circuit Court by the defendants in error, as heirs of Amos Stoddard, to recover 350 arpents of land, which is thus described in the declaration:

"Being the same tract originally granted by the Spanish government, in the province of Upper Louisiana, to Mordecai Bell, by concession bearing date 29th January, 1800, and being the same tract located and surveyed by the proper officer on or about the first day of January, 1806, and which concession and survey have been duly confirmed by the Congress of the United States to the said Mordecai Bell, or to his legal representatives, according to the said survey, and which tract is the same contained in the survey No. 3026, made by the authority of the United States, under and by virtue of the confirmation aforesaid, and is bounded on the east by the forty-arpent field lot, on the south by a tract called the Mill tract, and on the north and west by lands described as public lands on the survey made as aforesaid on the 1st of January, 1806."

The title of the heirs of Stoddard was particularly set forth in the report of the case of Stoddard v. Chambers, 2 Howard, 284, and it need not be repeated. Mills claimed under the same title as Chambers, both deriving their titles from two New Madrid certificates issued to Peltier and Coontz. It was admitted that, at the commencement of the suit, the defendant, Mills, was in possession of a portion of the tract comprehended in the survey of Mackay, made in January, 1806, for Amos Stoddard, being forty acres conveyed to said defendant on the 14th of March, 1836, by Hamilton R. Gamble and wife.

It was also admitted, that the property sued for was worth more than ten thousand dollars; that the plaintiffs claimed in this action four undivided fifths of the land described in the declaration; that the other undivided fifth had been conveyed to Hamilton R. Gamble in fee; and that the whole of the land sued for was embraced in the patent to Peltier.

Some testimony was given on the part of the defendant, with a view of impeaching the title of the plaintiffs, which was not produced in the trial of the cause of Stoddard v. Chambers, and which evidence it is proper to insert here.

Pascal L. Cerré, a witness for defendant, testified that he came to St. Louis very young from Canada, in the year 1777, returned to Canada, and came back to St. Louis in 1779, and remained there till 1781; that he then went to Canada, and staid there till 1787, when he came to St. Louis, where he remained till 1791, when he again visited Canada and staid there till 1794, when he came to St. [*347 Louis, where he has remained ever since; that he was well acquainted with Mordecai Bell and his family, his father, mother, brothers, etc., and knew him when he first came to the Spanish country; that said Mordecai Bell resided at Wild Horse Creek, a few miles south of the post of St. Andre, where James Mackay was commandant in Spanish times; it was about two or two and a half miles south of that post where Mordecai Bell lived, and was about forty miles west-southwest of St. Louis; that Mordecai Bell never resided at any time nearer St. Louis than that place, nor did any other of the Bells; that Mordecai Bell lived at that place several years, and then went away; that said Bell was principally employed in hunting, drinking, and playing cards; he led a vagabond sort of a life; that he, Cerré, lived all the time at St. Louis, while Mordecai Bell was at Wild Horse Creek; that he, witness, knew the land occupied by Stokes; and that there was no improvement or cultivation there under Spanish government, nor, until Stokes cultivated it, was there any cultivation; said witness examined said original petition of Mordecai Bell, given in evidence by plaintiffs, and stated that he knew the handwriting of James Mackay well, and that it was, with the signature, except the mark, all in Mackay's handwriting; that he did not know why Stoddard's Mound was so called, but supposes it was because he purchased the land on which it was, and did not know when it was first so called, whether at Stoddard's death; he thinks it was before his death.

The defendant then offered in evidence the deposition of Mordecai Bell, which was objected to by the plaintiff's counsel; 1st, because of irrelevancy; 2d, if not irrelevant, that it went to impeach a title conveyed by the witness; which objection was overruled, and the deposition read, which is as follows:

"Deposition of Mordecai Bell, produced, sworn, and examined at the house of said Bell, at Moreau township, in the County of Morgan, and State of Missouri, before me, John Chism, Judge of the County Court for the County of Morgan aforesaid, in a certain cause now pending in the Circuit Court of the United States for the District of Missouri, between Simeon Stoddard, Curtis Stoddard, Daniel Stoddard, Anthony Stoddard, William Stoddard, Joseph Bunnell, and Lucy Bunnell, Jonas Foster and Lavinia Foster, Lucy Hoxie, Daniel Morgan, and Arva Morgan, plaintiffs, and Adam L. Mills, defendant, on the part of the defendant.

"Mordecai Bell, of lawful age, being pro- [*348] duced, sworn, and examined on the part of the defendant, deposeth and saith, that he resides in Moreau township, in the County of Morgan and State of Missouri; that he was first married on the 8th day of March, in the year 1802, and that parts of the three winters preceding his marriage, he was hunting in the upper parts of this State; that neither in the year 1800, nor any year after, did he petition the Spanish Governor Delassus for any grant of land. That a few years after he was married, Santiago Mackay repeatedly asked deponent to petition the Spanish Governor for a grant of land; that some two or three years after deponent was married, Mackay told him that he, deponent, had a head right, and that he, Mackay wished to change a tract of land for his head right, which he, deponent, did; that he never petitioned the Spanish Governor for any grant of land in or in the neighborhood of the town of St. Louis, nor was there any granted him to the best of his knowledge; that he resided in the counties of St. Louis and Franklin till the year 1819

his
Mordecai M Bell."
mark.

Adolphe Renard, for defendant, testified that he is a Frenchman, and the French language is his mother tongue; that he has been in the recorder of land titles' office since April, 1837, and more or less in habit of handling papers there, making copies and translations, and that the translation of the said original petition of Mordecai Bell—which translation is given in evidence by defendant—is a correct and faithful translation; that the letters "M. R. S." in said petition he considers as put for "Majeste Rive Sud;" that he, witness, knows nothing of the Spanish laws; that Julius De Mun was a good translator, and understood both French and English. He further stated that he never saw a concession where a commandant of a post recommended a grant of land lying close to St. Louis, the residence of the Lieutenant-Governor.

William Milborne, for defendant, testified that he had been in the surveyor's office from 1816 to 1841, a part of the time as clerk, and the latter part of the time as surveyor-general. He examined the said petition of Mordecai Bell, as translated by Renard, and the concession, and stated that he, as surveyor, should survey said concession on the south bank of the Missouri River, if not otherwise directed; that the post of St. Andre was in what is called Bonhomme *Bottom, some* thirty miles from St. Louis; that *St. Andre* was close on the river, and its site has been partially or wholly washed away by the river.

"The plaintiffs, by way of rebutting [*349 testimony, gave in evidence the following letter of the Secretary of the Treasury of the United States, produced by Thomas Watson, register of the land office at St. Louis, from the files of his office, dated 10th June, 1818:

"'Treasury Department, 10th June, 1818.

"'Sir:—You are requested to instruct the recorder of land titles in the Missouri territory to furnish to the receiver and register of the land district of St. Louis a descriptive list of the land claims which have been presented and registered under the different acts of Congress for confirming the rights of individuals to lands which have not been confirmed, and that are situate within the said land district, with as little delay as practicable; also, a list of the same kind to the receiver and register of the district of Howard County, of all the land claims within said district which in like manner have not been confirmed. For this service he will be entitled to a reasonable compensation. 'You are also requested [to] direct the register and receiver of those districts, respectively, to withhold from sale all such lands, until otherwise directed.' It may be proper, however, to advise those officers that this act is not to be considered as in any manner countenancing the idea that such claims are considered equitable, or that their being withheld from sale at this time ought to excite an expectation that they will ultimately receive the sanction of Congress. They are withheld from sale because the land claims have been, during the latter end of the late session of Congress, referred to the Secretary of the Treasury, with directions to report to the next session. The receiver and register should be instructed to make the subject of these observations known, for the purpose of preventing speculation on those land claims.

"I have the honor to be your most obedient servant.

(Signed) "Wm. H. Crawford.

"Josiah Meigs, Esq., C. G. L. O."

The plaintiffs likewise read in evidence the proclamation of the President of the United States, dated June, 1823, and published in the summer and fall of 1823, for the sale of the public lands, on the third Monday of November in that year, at St. Louis, which were situate in the township and range in which the land sued for in this action is situate.

The evidence being finished, the counsel for the defendant prayed the court to give the jury the following instructions:

1. That the survey in 1806, made by Mackay, which has been given in evidence, was made without authority of law, *and is not [*350 evidence of the proper location of the order of survey made by the Lieutenant-Governor.

2. That if the jury find, from the evidence, that the order of survey made by the Lieutenant-Governor in favor of Mordecai Bell would not embrace any part of the land in dispute, if surveyed according to its terms, then the land in dispute was never reserved from sale, and the patent to Eustache Peltier, or his legal representatives, passed the title to the land described in such patent.

3. The reservation by the Act of Congress of 1811, in favor of those claiming under Mordecai Bell, if any such reservation existed, was of the land granted to said Bell, and not of the land surveyed by Mackay.

4. If the jury find, from the evidence, that the land sued for in this action is not a part of the tract of land conveyed by Mordecai Bell to James Mackay, in the deed of said Bell given in evidence, they will find for the defendant.

5. Unless the jury find, from the evidence, that Mordecai Bell, or some person claiming under him, filed with the recorder of land titles a notice in writing stating the nature and extent of his claim, and that such notice embraced the land now in dispute, and was filed with the recorder on the first day of July, 1808, or prior thereto, then the land in dispute was not reserved from sale, and the patent to Eustache Peltier, or his legal representatives, conveyed the title to the land described in such patent.

6. That the instructions of the Secretary of the Treasury, read in evidence in this case, and the list of the recorder of land titles of the unconfirmed lands, do not affect any reservation of said land in dispute from sale against the title under the Peltier claim, as distinct from the reservation, if any there be, by Act of Congress of March, 1811.

7. That there can be no recovery in this action, unless for land which was granted to Mordecai Bell.

8. If the jury find, from the evidence, that the New Madrid certificate, so called, in favor of Peltier, was located, embracing the land in controversy in this suit, and that in the year eighteen hundred and twenty-seven a patent certificate was issued by the recorder of land titles on such location, they will find for the defendant.

9. That no title to the land in question passed by the deed given in evidence of Mordecai Bell to James Mackay.

Which instructions, except the sixth, the court refused to give, and each of them; to which refusal the defendant, by his counsel, excepted. The court then, of its own motion, gave the following instruction:

351*] *The court rejected the instructions presented on the part of the defendant, numbered from one to nine, except the sixth, which was given, and instructed the jury, that the land included in the survey given in evidence, made for Amos Stoddard, on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and therefore both the location and patent are invalid, as against the title of Amos Stoddard, or those claiming through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the Act of Congress of July 4th, 1836; and that the confirmation operated as a grant to said Stoddard, or, if he was dead, to his heirs, such being the legal effect of the acts of Congress, records, and title deeds given in evidence; nor does the evidence of the witnesses introduced in any wise impair the effect of the acts of Congress and title papers.

To the giving of which last mentioned instruction the defendant, by his counsel, excepted. The defendant then asked the following instructions:

10. That there is no evidence before the jury that Mordecai Bell, or any person claiming under him, filed with the recorder of land titles such notice of claim according to law as was required in order that the land in question should be considered as reserved from sale.

11. That the plaintiffs are not entitled to recover in this action for any land embraced within the patent to Eustache Peltier, or his legal representatives, which has been given in evidence.

12. That there is no sufficient evidence that notice of the claim of Stoddard, under Mordecai Bell, was filed with the recorder of land titles on or before the 1st day of July, 1808, according to law.

13. If the jury find, from the evidence, that two of the plaintiffs, Anthony Stoddard and William Stoddard, conveyed their interest in the land in question to Henry G. Cotton since this action was brought, then the plaintiffs in this action are not entitled to recover anything but damages down to the time of such conveyance, and the plaintiffs cannot recover damages for any time prior to the 4th day of July, 1836; and the jury are instructed to find specially the fact of such conveyance by said Anthony and William Stoddard, and its date.

Which the court refused to give, to which refusal the defendant, by his counsel, excepted. The defendant then asked the following instruction, which the court gave, viz.:

*14. That the plaintiffs cannot recover [*352 damages for possession of the premises for any time prior to the 4th of July, 1836.

And the said defendant prays the court to sign and seal this his bill of exceptions, which is done accordingly. J. Catron, [Seal.]
R. W. Wells. [Seal.]

Under these instructions the jury found the following verdict:

"We, the jury in the above entitled cause, find the defendant guilty of the trespass and ejectment alleged in the declaration in the above entitled cause, as to four fifths, less one sixth and one twelfth, of the following described piece of land, parcel of the land in said declaration described, to wit: A certain tract or parcel of land, situate, lying, and being in the County of St. Louis, and bounded as follows, beginning at the southeast corner of the location, under a New Madrid certificate issued to Eustache Peltier, or his legal representatives, where the said corner is fixed upon the line of a tract, formerly the Mill tract of Auguste Chouteau, deceased; thence, with the southern line of said location, as the same runs westwardly, seven chains; thence, north fourteen degrees forty-five minutes east, to the Methodist burying-ground; thence, with the south line of the Methodist and Catholic burying-grounds, nine chains and sixty links, to the line of the common field lots; and thence, with the line of the common field lots (having in it an angle), to the place of beginning: being forty acres of land, and is bounded on the south by the land formerly of Auguste Chouteau, called the mill tract; west by the land of John F. Darby; north by the Methodist and Cath-

olic graveyards; east by the common field lots of St. Louis. And we further find, that the damages suffered by said plaintiffs, by reason of said trespass and ejectment, to have been twelve hundred dollars. And we further find, that the monthly value of said four fifths, less one sixth and one twelfth, of said described premises, is thirty-one dollars and twenty-five cents."

Upon the above bill of exceptions, the case came up to this court.

It was argued by Mr. Benton and Mr. Gamble for the plaintiff in error, and Mr. Ewing for the defendants in error.

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

1. That the Circuit Court erred in instructing the jury that the confirmation "to Mordecai Bell, or his legal *representatives," operated as a grant to Amos Stoddard, or, if he was dead, to his heirs. *352

The confirmation is in the alternative—to Bell, or his legal representatives. Stoddard claimed as purchaser under Bell; the instruction, that the confirmation is a grant to Stoddard, involves the decision by the court of all the questions of law and fact arising upon the conveyances under which Stoddard claimed. Wear and Hickman v. Bryant, 5 Mo. 164.

2. Bell had no pretense of claim to the land in controversy at the period when the United States took possession of Louisiana, nor had Mackay or Stoddard any such claim prior to the survey in 1806.

3. The survey made by Mackay in 1806 did not, either by itself or in connection with the concession, give any title to the land in controversy, because—

1st. It was made, not only without authority of law, but contrary to express act of Congress. Act of 26th March, 1804, 2 Stat. at Large, 287; Smith's case, 10 Peters, 326; Wherry's case, Ibid. 338; Jourdan v. Barrett, 4 Howard, 169; Mackay v. Dillon, Ibid. 448.

2d. It was a nullity, because a manifest departure from the concession. 8 Peters, 468; 9 Peters, 171; 15 Peters, 173.

4. The title now set up by the heirs of Stoddard, under a confirmation by the Act of 4th July, 1836, cannot, by relation, overreach the patent to Peltier, issued in July, 1832. Les Bois v. Bramell, 4 Howard, 449; Chouteau v. Eckhart, 2 Howard, 344; Mackay v. Dillon, 7 Mo. 12.

Unless the claimants under the confirmation can show that the Peltier patent is void, they have no shadow of right to maintain this action of ejectment. They attempt to avoid the patent by showing that the land was reserved from sale; and, consequently, from appropriation by a New Madrid claim, at the time when Peltier's location was made, and at the time when the patent issued. They insist, that by the proviso to the tenth section of the Act of 3d March, 1811, the land in controversy was reserved from sale, because their claim to it had been filed, "in due time and according to law," with the recorder of land titles; that this reservation was continued by the Act of 17th February, 1818; and although it is admitted that, by the acts of 26th May, 1824, and 24th May, 1828, the reservation was terminated on *the 26th of May*, 1829, they insist that it was revived by the Act of the 9th July, 1832, just seven days prior to the date of the Peltier patent.

It is necessary here to quote the words of the proviso in the Act of 1811, upon which so much stress is laid. They are as *follows: [*354 "That until after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

In this case the following points are made in relation to the alleged reservation:

1. That the proviso in question leaves to the officers, who are to act for the government in selling the public lands, the ascertainment of the facts, 1. That a particular tract has been claimed. 2. That the claim has been filed in due time. 3. That it has been filed according to law.

2. In this case it is insisted that there was no such notice of the nature and extent of the claim filed by the claimant, as was required by the acts of Congress. Acts of 2d March, 1805; 28th February, 1806; 3d March, 1807; Strother v. Lucas, 6 Peters, 763.

3. That the question whether the law was pursued by the claimant is not determined by the fact that the commissioners acted upon the claim, inasmuch as they acted upon claims illegally filed. Bird v. Montgomery, 6 Mo. 510.

4. The proviso reserved no land under a floating concession; it sanctioned no survey made in violation of any previous act of Congress; and the recording of a survey, illegally made, could have no effect whatever under this proviso.

The acts of Congress requiring the exhibition and recording of Spanish claims are analogous to registry acts. Strother v. Lucas, 12 Peters, 510. Recording a document, not required by law to be recorded, gives it no additional legal effect. 5 Shepl. 418; 23 Pick. 80; 3 A. K. Marsh. 220.

5. Where a claim to a tract of land had been filed and recorded according to law, the proviso only suspended the sale until the decision of Congress upon the report to be made by the commissioners; and this decision was made before the location of Peltier's warrant. See Acts of 13th June, 1812; 12th April, 1814; and 29th April, 1816.

6. The Act of 17th February, 1818, did not revive any reservation that had terminated.

If it could be held that there was a reservation of this land from sale, and that such reservation continued to the time of Peltier's location, still it is insisted, that, as between the confirmation to Bell and the location and patent of Peltier, the location and patent are not void.

*The reservation is admitted to have [*355 terminated on the 26th of May, 1829, and then Peltier's title was indisputably good.

1. The acts of the officers of the government appropriating the land had been performed. Bagnell v. Broderick, 13 Peters, 460; Barry v. Gamble, 3 Howard, 32.

2. The location of Peltier, thus appropriating

the land, was not, as against the government, a mere nullity, but at the utmost was only defeasible by the confirmation of a conflicting claim during the continuance of the reservation. Stoddard v. Chambers, 2 Howard, 284; Carroll v. Stafford, 3 Howard, 460.

3. When the adverse claim under Mordecai Bell was, by the Act of 26th May, 1824, entirely barred, and the land declared public land, so far as that claim was concerned, the title under the Peltier location became unquestionable, and no subsequent grantee of the land could dispute its validity. Hoofnagle v. Anderson, 7 Wheat. 212; Stringer v. Young, 3 Peters, 320; City of New Orleans v. D'Armas, 9 Peters, 224.

The patent issued to Peltier is dated on the 16th of July, 1832, and it was under the laws of the United States the completion of the title. Unless this document is a nullity, the claimants under Bell cannot maintain their action.

It is insisted by them that the Act of the 9th of July, 1832, revived the reservation which had terminated in 1829, and that, therefore, a patent could not legally be issued after the passage of that act for the land covered by their claim.

To this I reply, that the Act of 9th July, 1832, did not make a reservation from its date, but from the time of the final report of the commissioners, which was long after the patent issued.

Lastly, it is claimed by the plaintiff in error that the effect of the second section of the Act of 4th July, 1836, is to protect his title against the confirmation under the first section; and it is insisted—

1. That this section is designed to protect locations and sales that would be subject to exception, and be liable to be defeated by the confirmations under the first section, but for the protection given by the second section. Jackson v. Clark, 1 Peters, 635.

2. That a location or sale, made in conformity to the acts of Congress, would have passed the title beyond controversy, as against a confirmation under this act, without the aid of the second section. Chouteau v. Eckhart, 2 Howard, 376; Les Bois v. Bramell, 4 Howard, 449.

3. That the very defect supposed to exist in the locations and sales intended to be protected was, that the land was reserved from sale when the locations and sales were made.

356*] *Mr. Ewing, for defendants in error:

This is in effect the case of Stoddard v. Chambers, reported in 2 Howard, 284. The suit below was against another defendant residing on the same tract, and the evidence is substantially the same as in the reported case, to which, and to the authorities there cited, and the points of law decided by the court, I beg leave to refer.

It was held in that case that the location "under any law," saved in the second section of the Act of confirmation of July 4th, 1836, must be a location in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs. p. 317. And that the location of the New Madrid warrant, being made on lands reserved from sale, was not authorized, but forbidden, by law. The saving was therefore held not to protect the claimant under the warrant. Against this decision I understand it will be urged—

1st. That the court, to give the saving effect, and thus conform to the intent of the Legislature, must apply it to this class of cases, there being no others, as it is said, to which it can apply.

This is a mistake in point of fact. From May 26th, 1829, to July 9th, 1832, there was no reservation of these lands from sale or location; and during part of this time the law allowed the location of New Madrid warrants. The saving would very properly apply to a location made during that time, which, without it, would not prevail against the confirmation, by law, of the elder title.

2d. That the opinion of the bar in Missouri was general in favor of the validity of New Madrid locations upon these reserved lands, and that in faith of such opinions many titles were acquired, which ought not to be disturbed.

This, also, is not correct in point of fact. Some of the ablest members of the bar, whose opinions I have seen, held these locations invalid. Indeed, there was a degree of boldness in the attempt to seize upon these lands by virtue of the New Madrid warrants, and a contempt of legal prohibition, which cannot fail to command our admiration. These New Madrid warrants were a charity; the law forbade their location on lands before they should be surveyed and offered for sale; and it again forbade their location on the lands claimed under Spanish concessions, until those claims should be finally adjusted. This location, with the rest that are in like jeopardy, was made against this double prohibition. See the letters of Mr. Wirt, *Attorney-General, to Mr. [*357 Crawford, of May 11, and June 19, 1820, Gilpin's Collection of Opinions, pp. 263 and 273.

So far as the government itself was concerned, the wrong was submitted to, and a law was enacted, April 26, 1823, ch. 40, sanctioning locations which had been made before survey. But no law ever did the injustice to sanction these illegal locations on the property claimed under the concessions. Our legislators were not at first familiar with the laws and policy of Spain, or her mode of making these grants; they were, therefore, long held open for consideration, and the laws sternly forbade the creation, under their authority, of other titles, which might put it out of the power of the government to do what at last might be found to be an act of justice, and a performance of treaty stipulation. This prohibition was distinctly understood, while these New Madrid titles were in fieri. See the opinion of Mr. Wirt, Attorney-General, October 10, 1825, Opinions, etc. Vol. II. p. 25, refers to letters of Mr. Crawford, June 10, 1818; Mr. Wirt, October 22, 1828; Mr. Butler, Attorney-General, August 8, 1838, Opinions, etc. Vol. II. p. 1045.

The opinion that titles thus acquired were valid was, as far as I have been able to ascertain, confined to those who were engaged in their acquisition and their counsel, and to such additional public opinion as interested parties were able to create.

But let the opinion be as extensive as it might, it can avail nothing in this court; it was contrary to plain law and right, and this is the place to correct it.

3d. It is said that an adherence to the decision in the case of Stoddard v. Mills will disturb many titles; that much property is held under these New Madrid locations, made upon Spanish concessions, which have been since confirmed, while they were thus reserved from location.

I know not how the fact is, as few such cases have come under my notice; but if it be so, it is entitled to no weight with this court. Whether there had been much or little property thus illegally taken, it ought all to be restored to its lawful owners. It was taken by those who knew, at the time, that their acts were illegal, and that they were attempting to seize what the law had reserved for others. They played for a stake, putting up a warrant worth but a trifle against a tract of land of great value. They have lost, and should be compelled to stand the hazard of the die.

4th. It is said, also, that the confirmation of these titles by the Act of July 4, 1836, was a mere gift, and ought not to be considered favorably.

I contend, on the contrary, that it was an act 358*] of justice done *in execution of a treaty stipulation. Such is the ground on which it is put by the Act of July 9th, 1832, and by the commissioners who examined these claims and recommended them for confirmation. Those who have become familiar with these concessions, and with the early value of such property, the state of the country, and the policy of Spain as to her colonies, are satisfied that form was necessarily and habitually dispensed with; and that, if the United States had not acquired the sovereignty, the class of titles that were sanctioned by the law of confirmation would have become, or been made, valid by the existing government. It was thought with reason, that, independently of treaty stipulation, the inhabitants ought not to suffer in their property by the transfer of the sovereignty to the United States.

On the other hand, the New Madrid warrants were a mere charity.

The particular objections to be urged in this case, and which did not arise out of the evidence, in the case of Stoddard v. Chambers, I understand, are:

1st. That certain depositions offered by plaintiffs below were improperly admitted.

The court, on the 4th day of April, 1844, established the following rule, which is still in force:

"Ordered, that all exceptions to depositions, other than exceptions to the competency or relevancy of the evidence therein contained, shall be in writing, and filed, and notice thereof given a reasonable time before trial, and shall be taken up and disposed of before the jury are sworn in the cause, or the trial commenced; and no exceptions to depositions, other than to the competency or relevancy of the evidence therein contained, shall be allowed on the trial of the cause."

Depositions offered by the plaintiffs below, to prove heirship, were objected to for informality in the taking, but admitted by the court under the above rule. The depositions were filed in court in May Term, 1840. They were not objected to on the former trial of the cause, nor until the 31st day of March, 1846, a few days before the cause was again called for trial, when the objections were noted, and notice given to the plaintiffs' counsel. The court held that this notice was not given a "reasonable time before trial," taking into view all the circumstances of the case.

The correctness of this decision seems to me self-evident. It was not "reasonable" to suffer those depositions to remain four years on file without objection, and then take exception to them for form merely, at such time as would compel a continuance *of the cause, [*359 to the great inconvenience of counsel and with expense to the parties, especially as nothing was to be gained by it except this inconvenience and expense.

2d. That the conveyance by two of the plaintiffs of their interest in the land, after action brought, bars the recovery in ejectment as to all, and that the court erred in not so instructing the jury.

If this were an action of trespass in legal effect, as it is in form, the conveyance by the two plaintiffs would not disturb the case in the slightest degree. The sale of the land is not a release of the action; and if it were, the release must have been specially pleaded, puis darrein continuance, or it could not have been given in evidence.

But this action, wronged and mutilated as it is, is still ejectment, and the court will deal with it according to its substance, without regard to the form which it is constrained to assume.

In this action the courts have long done on the trial, and on motion, what, in other real actions, used to be done by summons and severance; that is to say, they have freed the case of parties who ceased to have an interest in its prosecution. This was done here by nonsuiting the plaintiffs who had sold their interest, and striking their names out of the declaration, and taking a verdict in behalf of the other plaintiffs for their remaining interest.

This practice is in strict analogy to that in the action of ejectment, where the nominal plaintiff counts on several demises from tenants in common; and the court on the trial, or even on motion in arrest of judgment, allow the demises of some of the lessors, who have shown no title on the trial, to be stricken from the declaration. Van Ness v. Bank of United States, 13 Peters, 17.

The court having directed that the names of two of the plaintiffs be stricken out of the declaration, it is not necessary to erase the record. Lessee of Walden v. Craig's Heirs, 14 Peters, 147. The direction stands for the act.

At common law, the summons and severance was resorted to in all real actions, where one of the parties plaintiff was for any reason unable or unwilling to proceed in the case.

"It lies in waste because the land is to be recovered." 20 Vin. Abr. 51. "It lies in right of ward of land." "In right of ward of body and land." "In detinue of charters, for peradventure he (the plaintiff) is to recover a warrantee by it." "So, generally, in actions real or mixed." 20 Vin. ubi supra. "It lies also

in quare impedit, and a writ of error upon it." Pipe v. Dominam Reginam, Cro. Eliz. 325.

360*] *In modern practice, the summons and severance is seldom used, but in cases where it has heretofore applied, the court proceeded on motion. In the case at bar it would have been very idle to summon and sever, when the parties were all present by their counsel, and ready to sever by nonsuit.

But, be the mode adopted to get clear of the parties who had sold their interest right or wrong, it was for them only, and not for defendants below, to complain of it. The defendants were not injured by any irregularity, if there was any. It would be a reproach upon the law to say that there was no way in which this could be done; and no one, I think, can devise a better than that which was adopted by the court below. Chouteau v. United States, 9 Peters, 144, 153; Hunter v. Hemphill, 6 Mo. 119; United States v. Percheman, 7 Peters, 90, 91.

To the objection, that the location was a departure from the concession, I answer—

1st. That it is immaterial if it were so; for, the location having been made, the survey filed with the claim became a part of it. Altogether, it was a claim; and whether good or bad, it was not for a stranger, but for the United States, to determine. This land, then, was claimed; and being so, was reserved from sale by the Act of 1811. Finally, the Board of Commissioners, and Congress acting on their report, determined that the land ought to be held according to the survey.

2d. But the location was in pursuance of the concession. The translation of De Mun conveys the true meaning of the petition; that of Renard does not, though it may translate each French word literally into an equivalent English word. Their disagreement is in the translation and explanation of the clause in which Bell represents, "que avec l'agrement de votre predecesseur il se transporter sur cette rive, où il a choisi une morceau de terre," etc.

De Mun, a contemporary, resident at the time in Louisiana, translates and explains the passage thus: "That, with the consent of your predecessor, he came over to this side (of the Mississippi), where he selected a piece of land," etc.

Renard translates it, "That he, with the consent of your predecessor, has come over to this shore, where he has selected a tract of land," etc.; and by the context, as expounded by counsel, makes it the "shore" of the Missouri, and not of the Mississippi, to which he has come with this assent.

That it was the Mississippi, and not the Missouri, which he crossed with the assent of the Lieutenant-Governor, is certain. The Mississippi bounded the Spanish territory on the east, but the Missouri was entirely within it; he might cross the Missouri at pleasure, without 361*] such assent—not the Mississippi. *Again, why say, "il se transporter sur cette rive où il a choisi," etc., "rive sud du Misouri?" Why "cette rive" and "rive sud," with the addition of Missouri in the same sentence, if both meant the same thing, or if Missouri were understood in the first branch of the sentence? But it is very clear from the text itself that they meant different things. De Mun's knowledge of the boundary of Louisiana, and the laws touching immigration, enabled him to explain that difference. "Cette rive" means this side of the Mississippi. It may be north or south of the Missouri, for his majesty had domains on both sides of that river; but "R. S. due Missouri," (rive sud), defines the side north or south of that river, on which he prays for a concession. But neither "cette rive" nor "rive sud" means short, in its most restricted sense—the water's edge, or the river bank. Its whole sense, text, and context show, that it was to this side of the Mississippi which he had come, not confining himself to the water's edge; and it was on the south side of the Missouri, in an equally large sense, as contradistinguished from the north, that he asked permission to locate the warrant which he prays for.

Indeed, the very fact that initials are used (M. R. S.), shows that the expression occurred frequently, and De Mun, a contemporary, gives its conventional meaning.

Mr. Justice McLean delivered the opinion of the court:

The plaintiffs brought an action of ejectment in the Circuit Court, to recover three hundred and fifty arpents of land in the neighborhood of St. Louis, which they claim under a concession made by the Spanish government, in 1800, to Mordecai Bell. Bell conveyed his right to James Mackay on the 20th of May, 1804, and on the 20th of September, 1805, Mackay conveyed the same to Amos Stoddard, the ancestor of the plaintiffs. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as Surveyor-General, the 20th of January, 1806.

On the 29th of June, 1808, the above papers were filed with the recorder of land titles for the district of St. Louis. The claim was duly presented to the board of Commissioners, under the acts of Congress, and rejected on the 10th of October, 1811; but afterwards, on the 8th of June, 1835, a new board decided that three hundred and fifty arpents of land "ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey on record." On the 4th of July, 1836, an Act of Congress was passed, confirming the decision of the commissioners. The land was surveyed as confirmed. The *defendant admitted that [*362 he was in possession of forty acres of the land claimed at the commencement of the suit.

The title of the defendant was founded on an entry made by Peltier of one hundred and sixty acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued on the 16th of July, 1832. Possession has been held of the forty acres claimed by the defendant and by those under whom he claims, since 1819. This title was conveyed to the defendant.

The township in which this land is situated was surveyed by the United States in 1817, 1818, 1819, and was examined in 1822. In 1823, the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

This title, with but little variation of facts, was asserted by the plaintiffs, and duly considered by this court, in the case of Stoddard's Heirs v. Chambers, 2 How. 284. And the court

held the title to be valid against that which is now set up by the defendant. In the case of Barry v. Gamble, 3 How. 53, that decision was sanctioned. But the counsel for the defendant, having brought the same title before us in this case, have requested a re-examination of the points ruled in the case of Chambers. We will briefly refer to the points now made, and to the new facts proved, on which this application is founded.

The court instructed the jury, "that the land included in the survey given in evidence, made for Amos Stoddard on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and, therefore, both the location and patent are invalid, as against the title of Amos Stoddard, or those claiming through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the Act of Congress of July 4th, 1836," etc.

It is objected, that the concession granted to Mordecai Bell should have been located at St. Andre, and not in the vicinity of St. Louis. In his petition to the Lieutenant-Governor of Upper Louisiana, he states, "with the consent of your predecessor, he came over to this side [of the Mississippi], where he has selected a piece of land in his majesty's domain, on the south side of the Missouri. This being considered, he supplicates you to have the goodness to grant him, at the same place, for the support of his family, three hundred and fifty arpents of 363*] *land in superficie." This bears date 21st January, 1800; and on the 29th of the same month the Lieutenant-Governor responds: "In consequence of the information of the commandant of St. Andre, Don Santiago Mackay, I do grant to the petitioner the tract of land of three hundred and fifty arpents in superficie," etc., "in the place indicated."

St. Andre, the place of Bell's residence, is situated on the south side of the Missouri River, about thirty miles from St. Louis. Pascal L. Cerré, a witness, states that Bell resided in the neighborhood of St. Andre several years, and was engaged in hunting, drinking, and playing cards, and led a sort of vagabond life; that his petition, except the mark of the signature of Bell, was in the handwriting of Mackay. And Bell, being sworn as a witness, says he never applied for a concession, nor was there, to his knowledge, any grant made to him. That Mackay told him he had a head right which he, Mackay, wished to obtain, and which the witness exchanged with him for a tract of land near St. Andre.

Instead of the word "(Mississippi)," included in brackets in the petition of Bell, it seems the letters M. R. S. were used, which one of the witnesses considers "as put for Majeste Rive Sud;" and Milburn, a surveyor, says that he should have surveyed the concession on the south bank of the Missouri River, if not otherwise directed. In opposition to this view, the words of the petitioner are relied on, "that with the consent of your predecessor he came over to this side of the M. R. S.," which could only have meant the Mississippi River, that river being the eastern limit of Louisiana, which extended far north of the Missouri. That to cross the Missouri River, the "leave of his predecessor" could not have been asked, as it was unnecessary.

Whatever doubts this evidence may have created, as to the location of Bell's concession, had it been laid before the commissioners who acted upon the claim, it is now too late to affect the title under it. In regard to the statement of Bell, his conveyance of the land in controversy to Mackay shows, at least, the inaccuracy of his memory. But the survey of the concession in 1806, as now claimed, which survey was recorded and expressly confirmed by the commissioners on the 8th of June, 1835, is a sufficient answer to the above objection. The survey was a private one, and consequently was of no authority except to designate the locality and extent of the claim, until sanctioned by the commissioners. By the Act of the 21st April, 1806, they were authorized to direct such surveys as they may think necessary for the purpose of deciding on claims presented for their decision; and under this power they had a *right to adopt private surveys of [*364 claims, if accurately executed. This was in pursuance of the instructions of the Secretary of the Treasury.

The great question in the case is, whether the land in controversy was subject to be appropriated by a New Madrid warrant on the 20th of October, 1826, when Peltier made his location.

Under various acts of Congress up to the 26th of May, 1829, Spanish or French titles which had been duly filed by the recorder of land titles were reserved from sale. Those acts are referred to in the case of Stoddard v. Chambers. At that period, all claims which had not received the sanction of the government were barred. On the 9th of July, 1832, an act was passed "for the final adjustment of land titles in Missouri," which provided that the recorder of land titles, with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, founded upon any French or Spanish grant, etc., issued prior to the 10th of March, 1804." And they were required to class the claims so as to "state in the first class what claims, in their opinion, should in fact have been confirmed, according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them; and second, what claims, in their opinion, are destitute of merit, law, or equity." And after the report, the lands in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made against them; but the second class was declared to be subject to sale as other public lands.

This act reserved from sale, necessarily, all claims which had been duly filed, until the final report of the commissioners; and those which were embraced in the first class, until Congress should reject them. In the case of Stoddard v. Chambers, the court say, in reference to Peltier's location: "It was made on land not liable to be thus appropriated, but which was expressly reserved; and this was the case when the patent was issued. Had the en-

try been made, or the patent been issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the Act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell, until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid warrant."

The defendants' counsel suppose that if the location of the New Madrid claim was void, 365*] the patent, though issued within *the time above stated, could have conveyed no title. The New Madrid location was void because it interfered with the Spanish title. When that title was barred by the lapse of time, the government, by issuing of a patent, would have sanctioned the New Madrid claim, and no one could have contested it, as between the government and the claimant no controversy could exist. By the patent, he only acquired what his certificate entitled him to. And the right, thus made complete, could not have been affected by any subsequent act of Congress. The government might have withheld the patent, on the ground that the New Madrid certificate had been improperly located; but that not being done, the patent gave an indisputable title.

It is insisted that the New Madrid location, if made on lands reserved from sale by reason of the Spanish claim, became valid, so soon as the bar was complete against that claim. But this consequence would not seem to follow. If, during the bar, no act was done by the government to confirm the New Madrid claim, nor by the claimant to perfect his title, a removal of the bar would not prejudice any newly acquired right. And this only could prevent the renewal of the reservation by Congress. By such a renewal, a preference was given to the Spanish claim, which was an exercise of legislative discretion. Congress might have excepted from this reservation lands covered by New Madrid locations; but this not having been done, the Spanish claim was revived, and placed on the same footing as before the bar.

It is insisted, that, as Bell's concession was surveyed without authority, it was no notice to Peltier, though recorded. The Act of 1806, as before remarked, authorized the commissioners to direct such surveys as they may think necessary to be executed, for the purpose of deciding on claims presented for their decision; but where a private survey had been made, they had the power to adopt it, as was done in this case. And such survey, being placed upon record by the recorder, seems to have been a reasonable notice, within the acts of Congress.

But it is contended that the proviso in the Act of 1836, which confirmed the Spanish and French claims reported by the commissioners, embraces Peltier's New Madrid location. The words of the proviso are, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title on such lands, in opposition to the rights acquired by such location or purchase."

366*] *In the case of Stoddard v. Chambers, this court held, that "a location under the law of the United States" must be "in conformity with it." But this, it is insisted, is not the true construction of the proviso. That, "under the law" does not mean "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

The word "under" has a great variety of meanings. But the sense in which it was used in the proviso is, "subject to the law." We are under the laws of the United States—that is, we are subject to those laws. We live under a certain jurisdiction—that is, we are subject to it. The proviso declares, that the act shall not confer a title, "in opposition to the rights acquired under the laws of the United States." This would seem to be conclusive, as no right can be acquired under a law which is not in pursuance of it. If the New Madrid location was made in violation of the law, it is not perceived how any right could be acquired under it.

The judgment of the Circuit Court is affirmed.

Order.

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

EDMUND B. CALDWELL, surviving partner of James Lynd, Jr., & Company, Plaintiff in Error,

v.

THE UNITED STATES.

Collection of duties—forfeiture—invoice for less than value—election by U. S. to take goods and not the value—instructions calculated to mislead jury erroneous.

In this case, the court below instructed the jury, that, if the goods were fraudulently entered, it was no matter in whose possession they were then seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser.

This instruction was right in respect to the sixty-eighth section of the Act of 1799 (1 Stat. at Large, 677), as the penalty is the forfeiture of the goods without an alternative of their value, but wrong as the instruction applies to the sixty-sixth section of the same act—as the forfeiture under it is either the goods or their value.

Under the sixty-eighth section, the forfeiture is the statutory transfer of right to the goods at the time the offense is committed. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the right to them relates backwards to the time the offense was committed, so as to avoid all intermediate sales of them between the commission of the offense and condemnation.

But under the sixty-sixth section of the act, in which the forfeiture is the goods or their value, the United States have no title in the goods, until a election has been *made either to recover [*367 the goods or their value. Therefore, under that section, any rights in the goods acquired bona fide by third persons in the meantime are protected.

The claimants prayed the court to instruct the jury, that the United States were not entitled to recover under the first and second counts of the information founded on the fifteenth section, unless the goods were unladen and delivered without permits. The jury was told, in reply, "If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenues." Whether or not the permits were obtained by fraud or improper means was a point in the cause for the jury to decide, and what the court said upon the prayer, was virtually saying to the jury, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying if they thought that there was evidence enough to prove the fact against them.

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

The case was this:

In August, 1839, the attorney of the United States filed an information in the District Court of the United States for the Eastern District of Pennsylvania, against thirty-five remnants of pieces of cloths and cassimere, that had been seized at the store of James Lynd, Jr., & Co.

The information contained thirteen counts.

1. Charged, That the goods were brought from a foreign port into some port or place in the United States, to the attorney of the United States yet unknown, and were unladen and delivered from the vessel in which they had been brought, without any permit or special license from the collector or naval officer, or any other competent officer of the customs. Act of 1799, sec. 50, 1 Stat. at Large, 665.

2. Charged, That the goods were brought into the port of New York, and there unladen and delivered without a permit. Act of 1799, sec. 50, Ibid.

3. That the said goods were found concealed in a certain store in the occupation of William Blackburne & Co., at the port of Philadelphia, the duties on said goods not having been paid or secured to be paid. Act of 1799, sec. 68, 1 Stat. at Large, 677.

4. That the said goods were, on their importation, entered at the office of the collector of New York; and that on each and every of the entries, an invoice of the goods included in the entry was produced and left with the collector. That the said goods were not invoiced according to the actual cost thereof at the place of exportation, but were invoiced at a less sum than the actual cost, with design to evade the duties thereupon, or some part thereof. Act of 1799, sec. 66, 1 Stat. at Large, 677.

368*] *5. That entries of the said goods, at the time of their importation, were made at the office of the collector of New York; and that on each of the entries an invoice of the goods, etc., was produced and left with the said collector. That all and each of the said invoices so produced, and all and each of the several packages, in each and every of the said invoices in which the said goods were imported, were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830, 4 Stat. at Large, 410.

6. That entries of the said goods, at the time *of their importation*, were made at the office of the collector of New York; that on each of the entries an invoice of the goods was produced and left with the collector; that all and each of the said invoices were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830, sec. 4, 4 Stat. at Large, 410.

7. That all and each of the several packages contained in each and every of the entries, and each and every of the invoices so produced, were made up with intent, by a false valuation, to evade and defraud the revenue. Act of 1830, sec. 4, 4 Stat. at Large, 410.

8. Charges that the invoices were made up by a false extension, to evade and defraud the revenue of the United States. Act of 1830, 4 Stat. at Large, 410.

9. That the goods, etc., being composed wholly or in part of wool or cotton, were entered, at the times of their importation, at the office of the Collector of New York; that invoices were produced and left with the collector; that all and each of the packages in each and every of the invoices, and each and every of the entries, were made up with intent to evade and defraud the revenue of the United States. Act of 1832, 4 Stat. at Large, 593.

10. As amended, the same with the 4th.

11. As amended, the same with the 6th.

12. As amended, the same with the 7th.

13. As amended, the same with the 9th.

To this information the claimants put in three pleas:

1st. Traversing the several causes of forfeiture alleged.

2d. The second plea, which was to all the counts save the two first, alleged that claimants, prior to goods being seized, had bona fide purchased the goods for full value, without any notice or knowledge of their being liable to seizure or forfeiture, under or by an act of Congress, entitled "An Act to regulate the collection of duties on imports and tonnage," from persons having the ostensible ownership of them, and that at the *time [*369 of seizure the goods were in no way whatever concealed, within the meaning of any act of Congress.

3d. The third plea alleged that the goods, prior to their seizure, had been duly entered, passed through the custom-house, etc., the duties imposed paid, and the goods thereupon delivered to the importers; that afterwards the several packages, of which these goods formed part, were broken up and divided; that subsequently these goods were at sundry times purchased bona fide, and for full value, from persons having the ostensible ownership of same, and without notice or knowledge that they were liable to seizure or forfeiture under any act of Congress for any cause; that no part of the goods had been imported or entered by the claimants; that at the time of seizure they were not in original packages, nor concealed, but openly exposed for sale on the shelves of claimants' store.

To the first of these, the United States joined issue.

To the second and third demurred generally, and claimants joined in demurrer.

These two pleas denying every cause of forfeiture except the single one of the goods having been falsely invoiced, it is believed that

all the material questions afterwards arising on the trial of the cause are raised by these demurrers; but for greater caution, the same points were again raised on the trial, in the shape of exceptions to the judge's charge and otherwise.

On the trial it appeared that James Lynd, Jr., & Co. kept a wholesale and retail dry goods store in Philadelphia, and were in the habit of purchasing goods from W. Blackburne & Co. and John Taylor, Jr.; that at the time of the seizure, the officer inquired for and took from them, at their store, all the goods which had been purchased from Blackburne & Co., or from John Taylor, Jr.; and that the goods seized were at the time distributed among other goods in single pieces and parts of pieces, on the shelves of claimants' store, for sale, without any appearance of concealment whatever. Evidence was, under objections, offered to show that part of the goods seized corresponded in numbers with pieces forming parts of various invoices that had been in 1838 and 1839 fraudulently entered by Blackburne and Taylor, at prices below their value in England, whence they had been exported.

There was no evidence of any other cause of forfeiture whatever.

For the purpose of fixing the fraud, evidence was likewise given, under similar objections, of other fraudulent invoices made about the same time by Blackburne and Taylor, and likewise of conversations with Blackburne some 370*] days before the *seizure, about other invoices and other goods, and the concealment of said other goods from the officers.

There was no attempt to show that the claimants had any part in this concealment, nor in the making of the false entries; but, on the contrary, it appeared that the goods had been fairly and bona fide purchased and settled for before the seizure.

The claimants contended, that where goods are imported, entered at the custom-house, duties imposed and paid according to such entry, and a permit and license thereupon granted, under which the goods are delivered to the importer, the original packages subsequently broken, and part of them sold to a bona fide purchaser without notice, and before the United States had made any election, the goods so sold are not liable to seizure in the hands of such bona fide holder, though they may have been fraudulently entered by being invoiced below their actual cost, etc.

The attorney of the United States contended, on the contrary, that, from the moment the fraudulent entry was made, the goods became forfeited, and the title of the United States accrued so as to defeat the right of a subsequent bona fide purchaser without notice, and that when the goods are delivered under a permit obtained under such fraudulent entry, it is as though no permit had been given, and the goods had been delivered without permit.

The counsel for the claimants asked the court to instruct the jury—

First. That there cannot be a forfeiture of the goods under the fourth section of the Act of 1830, nor under the fourteenth section of the Act of 1832, unless the information alleges, and the United States have proved, all the special circumstances of the examination and detection of the fraud, under the authority of the collector, in the manner pointed out in said acts of Congress.

On which the court instructed the jury: This is correct; but there may be a forfeiture under the Act of 1799.

Second. That the probable cause mentioned in the seventy-first section of the Act of Congress of 1799, chapter 22, refers to the right of seizure under said act; and the right of seizure depends on the fact, whether, at the time of their being seized, the goods were concealed within the meaning of the sixty-eighth section of said act.

On which the court instructed the jury: This is not law as applied to this case. The probable cause applies to all cases of seizure for any fraud under any of the revenue laws, and any section of any such law. Whether there was probable *cause for the prosecution [*371 does not depend upon whether there was originally ground for the seizure or not, but upon the proof at the trial in support of the prosecution.

Third. That the term "concealed," in said sixty-eighth section, applies only to articles intended to be secreted and withdrawn from public view, on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive; which the court answered affirmatively.

Fourth. That if the goods were not so concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, is sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries.

On which the court instructed the jury: This is not the law. The burden of proof is not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

Fifth. That if the goods seized had been fairly and bona fide purchased by the claimants, without any knowledge by them of their being liable to seizure on the part of the United States, and were, at the time of the seizure, openly exposed by them for sale in their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said Act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto.

On which the court instructed the jury: This is not the law. If the goods were fraudulently entered, it is no matter in whose possession they were when seized; the forfeiture took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

Sixth. That even though the goods in ques-

tion had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof; and that any rights in said goods acquired bona fide by third 372*] *persons in the mean time are protected against the right of forfeiture under this section.

On which the court instructed the jury: This is not the law. The title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

Seventh. That the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen, and delivered without permits.

On which the court charged: If the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue.

Eighth. That the burden of proof in this case, under the seventy-first section of the Act of 1799, is upon the United States.

On which the court charged: This is not so; the burden of proof is on the claimants.

The counsel for claimants also asked the court to charge—

Ninth. That the claimants are not bound to prove the innocence of intent of the importers in making the invoices.

Tenth. The claimants are not bound to prove the actual cost or value of the goods at the place of exportation.

Eleventh. The claimants are not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were appraised at the custom-house.

Twelfth. That the permits and the delivery of these goods from the custom-house, is a bar in all cases against any forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

Thirteenth. If the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto.

But the court refused so to charge the jury, and further charged—

That the United States have shown probable cause for this prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house. That the granting permits, and delivery of these goods from the custom-house, is not a legal bar against forfeiture in all cases, except where the claimants are par- 373*] ties or *privies to the fraud in obtaining them, or had knowledge of the same. And, as to the thirteenth point, that if the goods were fraudulently entered, no title passed to *the claimants*.

And thereupon the counsel for the said claimants did then and there except to the aforesaid charge and opinion of the court.

Under these instructions of the court, the jury found a verdict for the United States under the Act of 1799, ch. 22, sec. 50 and 66, as to all the goods contained in the libel, except two pieces of cloths, as to which they found for the claimants. The judgment of the District Court followed the finding of the jury.

Upon the exceptions above stated, the case went up to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court, and a writ of error brought the case up to this court.

It was argued by Mr. Fallon for the plaintiff in error, and by Mr. Johnson (Attorney-General) for the United States.

Mr. Fallon, for the plaintiff in error, made the following points:

1. That the court below erred in not giving judgment in their favor on the demurrers.

2. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods were not, within the meaning of the sixty-eighth section of the act of 1799, concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in the possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, are sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries; and in charging, on the contrary, that this is not the law; the burden of proof is not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

3. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods seized had been fairly and bona fide purchased by the claimants, without any knowledge by them of their being liable to seizure on the part of the United States, and were, at the time of the seizure, openly *exposed by them for sale in [*374 their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said Act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto; and in charging, on the contrary, that this is not the law, and that if the goods were fraudulently entered, it was no matter in whose possession they were when seized; the forfeiture took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

4. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that even though the goods in question had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the Unit-

ed States had no title in the goods until they made their election either to recover the goods themselves or the value thereof; and that any rights in said goods acquired bona fide by third persons in the mean time are protected against the right of forfeiture under this section; and in charging, on the contrary, that this is not the law, and that the title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

5. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen and delivered without permits; and in charging, on the contrary, that if the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity, and that the United States were entitled to recover, if the goods were imported with a view to defraud the revenue.

6. That the learned judge erred in not instructing the jury as requested by claimants' counsel, that the burden of proof in this case, under the seventy-first section of the Act of 1799, is upon the United States; and in charging, on the contrary, that the burden of proof was on the claimants.

7. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the claimants were not bound to prove the innocence of intent of the importers in making the invoices; that the claimants were not bound to prove the actual cost or value of the goods at the place of exportation; that the claimants were not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were 375*] appraised at *the custom-house; that the permits, and the delivery of the goods at the custom-house is a bar in all cases against forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had a knowledge of the same, and that if the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto.

8. That the learned judge erred in charging the jury, that the United States have shown probable cause for this prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house.

9. That the learned judge erred in charging the jury, that the granting permits and delivery of these goods from the custom-house is not a legal bar against forfeiture in all cases, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

10. That the learned judge erred in charging the jury, that, as to the thirteenth point, if the goods were fraudulently entered, no title passed to the claimants.

11. The plaintiff in error further submits, that the case of Wood v. United States, 16 Peters, 342, in no way rules the present case; that the claimant in that case was the same person who had made the false entry, he having entered them on his own oath as goods of which he was the actual owner. See page 346. It is therefore submitted, that the language of the court there applies only to a case where the party making the false entry is himself the claimant, and not to a case like the present, where the goods are claimed by a bona fide purchaser without notice. See 16 Peters, 361–365.

12. That the learned judge erred in admitting in evidence the acts and declarations of John Taylor, Jr., and Wm. Blackburne & Co., tending to show fraud in the entry or concealment of other goods than those in the invoices of which the goods in question formed part.

In support of these points Mr. Fallon made the following observations:

It is contended that at common law, forfeitures have no relation back to time of the offense (except in cases of suicide, etc.) See 4 Black. Com. 421; Co. Litt. 390 b, 391 a; also authorities collected by Mr. Justice Story, in United States v. 1960 Bags of Coffee, 8 Cranch, 405, 408, 411, 412; and by *Judge [*376 Winchester, in United States v. Grundy, 3 Cranch, 356, 363, in note. And though it may be admitted that Congress may so provide, that the title shall, by reason of the forfeiture, relate so as to vest from the time of the offense committed, such is not the provision of the law under consideration.

The sixty-sixth section of the Act of 1799 (1 Stat. at Large, 677), on which alone this case can be sustained, provides, that, in case of a false invoice of goods, with design to evade the duties thereon, "such goods, or the value thereof, to be recovered of the person making entry, shall be forfeited," showing that it was intended that government should make an election to take either goods or value from the person making entry. They certainly could not take both, and their right to either being precisely equal, neither becomes vested in them till election made. See opinion of the court, construing the fourth section of the Act of 1792 (1 Stat. at Large. 289), containing words precisely alike, "the ship or its value, to be recovered of the person making the oath shall be forfeited." This right of election, it was held by the court, negatived the argument that Congress intended that the title should vest from time of offense committed, and protected a bona fide purchaser, who bought before election made. In this respect, this case is distinguished from the cases of United States v. 1960 Bags of Coffee, 8 Cranch, 396, where, in the absence of words giving a right of election, from the fifth section of the Act of 1809 (2 Stat. at Large, 520), the title was held to vest from time of offense committed. See p. 398, Ibid. To the same effect is Gelston v. Hoyt, 3 Wheat. 311. In confirmation of these views, the court is referred to the 68th section of the Act of 1799 (1 Stat. at Large, 678), which imposes heavy penalties on parties to pretended sales; a precaution hardly necessary, if it were not that a bona fide sale without notice would defeat the recovery by the United States.

It is submitted, that the language of the court in Wood v. United States, 16 Peters, 365,

where it is held that the forfeiture accrues upon making the false invoice, in no way conflicts with the present argument. In that case the claimant was the very party who had made the false entry (see p. 342; and indeed had been tried for perjury, see 14 Peters), and the argument made by him was, that, the moment the goods passed the custom-house, the goods were safe; the action of the officers of the government in passing the goods was, it was argued, equivalent to a judgment mantling the successful fraud, and that case refused only to the bungling deceiver the protection of res adjudicata. It was in reference to such a case that 377*] the language *in question was used; but it is submitted that, even then, the opinion of the court is perfectly reconcilable with the present argument. All that the court decided was that the "forfeiture," that is, the penalty or right to recover, accrued at once on commission of the offense; but whether that forfeiture should be of "the goods, or of the value thereof," must depend upon the exercise of their right of election, and until that right be exercised, intervening rights are protected.

Also, it is submitted that the fiftieth section of the Act of 1799 (1 Stat. at Large, 655) was meant to provide against cases of smuggling in goods at places other than ports of entry, or without passing the custom-house, etc. Such was not this case. There was no evidence, or pretense whatever, of fraud in obtaining the permits. The fraud was in making the false entries or invoices, and frauds of that character are specially provided for by the subsequent sections of the act. It is therefore contended, that, under the evidence, and so far as respects this case, the learned judge erred in charging that if the permits were obtained by fraud, they are of no effect.

A contrary construction of the act from what is now contended for induced the court erroneously, as is submitted, to permit evidence to be given of frauds on the revenue, committed by the original importers in other importations and in other ways, thus treating the claimant as a praticeps criminum. It may be admitted that, in cases of conspiracy, fraud, etc., the quo animo may be shown by evidence of similar frauds committed by the same parties about the same time. But this rule has never been extended further. To oblige an innocent purchaser to defend his vendor, or perhaps his more remote vendor, from every imputation of fraud that may be brought against him, though unconnected with the goods bought by him, and of which he could have had no knowledge, would be to impose a hardship so intolerable as to be revolting to every sense of justice; and yet perhaps it is the necessary consequence of the construction now complained of.

On the part of the United States, Mr. Johnson (Attorney-General) made the following points:

1. That probable cause was shown for the prosecution, so as to throw the onus probandi of innocence on the claimant. Wood v. United States, 16 Pet. 342; Taylor v. Blackburne, 3 How. 197; Buckley v. United States, 4 How. 251; Clifton v. United States, Ibid. 242.

2. That the acts and declarations of John Taylor, Jr., and William Blackburne & Co., 378*] showing fraud in the entries, *invoices, and concealment of other goods than the goods in question, were evidence as tending to show fraud in the entries, invoices, and concealment of the latter goods. Same authorities above cited.

3. That the goods not being invoiced, at the time of their entry, at the actual cost at the place of exportation, but below the said cost, and with the design to evade the duties thereon, the same were at once forfeited to the United States, not only as against the fraudulent importer, but as against a purchaser without notice from such importer. Same authorities as are cited under the first point, and United States v. 1960 Bags of Coffee, 8 Cranch, 398; Roberts v. Witherhead, 5 Mod. 193; 12 Mod. 92; 1 Salk. 223; Lockyer v. Offley, 1 Term Rep. 252; Wilkins v. Despard, 5 Term Rep. 112.

4. That the United States were entitled to recovery under the first and second counts of the information, although the goods were unladen, and delivered with permits, if these permits were obtained by fraud and improper means; and that they were entitled to recover if the goods were imported with a view to defraud the revenue. Bottomley v. United States, 1 Story, 146.

5. That the instructions asked below, by the claimant, as to the construction of the fourth section of the Act of 1830, and the fourteenth of that of 1832, and the proof which the United States should offer to bring the present case within these sections, were erroneous; but if not, the judge below was right in saying, that, independent of these acts, the United States were entitled to recover under the Act of 1799. The same authorities as are cited under the first point.

6. That, admitting that a purchaser for value and without notice could not be affected by a forfeiture under the sixty-sixth section of the Act of 1799, yet the judgment below being on the first, second, and fourth courts, is correct, because the first plea of the claimant does not profess to answer the first and second counts; and the second plea, which is to all the counts, is no answer to the first and second counts, and being bad in part, is bad altogether. 7 Cranch, 339; 16 Peters, 357; 4 Howard, 250; 1 Chitty's Plead. 546; Biggs v. Cox, 7 Dowl. & Ryl. 410.

Mr. Justice Wayne delivered the opinion of the court:

We shall direct the reversal of the judgment of the Circuit Court in this case, on account of three erroneous instructions which were given to the jury. The prayers upon which those instructions were given are the fifth, sixth, and seventh.

*They involve the question, as to the [*379 time when the right of forfeiture attaches upon the entry of goods invoiced at less than their value at the place of exportation, under a statute which declares in such a case, that either the goods, or the value of them, shall be forfeited.

The instructions were given by the learned judge in the court below, upon the supposition that they were required by the decision which this court made in Wood's case, 16 Peters. 342, particularly upon account of a sentence in the opinion at the three hundred and sixty-fifth page of the volume.

It was supposed to be a repetition in that case of what had been adjudged by the court in the cases of The United States v. 1960 Bags of Coffee, and in The Brigantine Mars, 8 Cranch, 398, 417. Or that those cases did not permit instructions to be given to the jury as they were asked by the counsel for the claimants, and did permit the court to give the following: That the title of the United States vested in the goods entered upon an undervalued invoice, at the time the fraud was committed, and the law authorized the United States to seize the goods wherever they might be found.

Neither of the cases mentioned authorizes such a conclusion. There is a sentence in Wood's case, from which it may be made, unless it is carefully considered in connection with the last of the paragraph and with the first part of the next. That sentence is, "But under the sixty-sixth section no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it was ascertained."

The sixty-sixth section of the act to regulate the collection of duties upon imports and tonnage (1 Statutes at Large, 677) is, "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares and merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited."

It cannot be correctly said, when the declaration of forfeiture is disjunctively one or the other, of either the goods or their value, that the forfeiture upon the fraudulent entry necessarily and compulsively comprehends the first, to the exclusion of the value of the goods, which is also said may be a forfeiture—that is, that the goods are forfeited with a right in the government to assert a forfeiture of the value 380*] too, where the penalty *for the fraud committed can only be one of them, and not both; or that when this court said in Wood's case, speaking of the sixth-sixth section, that "forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," it was not intended to embrace either or both penalties, between which the United States might make its election for the punishment of the fraud.

That such is the meaning of the sentence already cited from Wood's case is shown by the court's recognition, in the next, of the alternative forfeiture of the value of the goods, to be recovered of the person making the false entry; and, also, by the use it makes of it, to show that the sixty-sixth section had not been repealed, because no such provision exists in the Acts of 1830 or 1832, and no subsequent act covers all the cases provided for by it. The point of discussion in that part of the opinion was, whether the sixty-sixth section of the Act of 1799, ch. 22, had been repealed, or whether it was in full force. The court, arguing against the repeal, used the alternative forfeiture in it of the value of the goods, and the want of the same in other acts, to show that it was still in full force; in that way satisfactorily establishing that the words, "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," apply to the entry; not to make the goods a vested forfeiture in the United States, but to show that the right in the United States to either forfeiture is co-existent with the commission of the fraud.

But if the explanation given of that part of Wood's case shall not be as satisfactory to others as it is to ourselves, though we think it will be so to all persons, we then say, that the point there in discussion, concerning the sixty-sixth section, is altogether different from that which we are here considering under the same section; and that any declaration concerning it used argumentatively, only to show a difference between it and other statutes in a point of pleading, as is the fact in that part of the opinion, cannot be an applicable authority, much less controlling, when the inquiry under the same statute is its meaning in respect to the attachment of penalties in it for its violation.

In Wood's case, the point in discussion is, that the United States are not entitled to recover under the third count in that information, because the sixty-sixth section of the Act of Congress, passed the 2d of March, 1799, entitled "An Act to regulate the collection of duties on imports," etc., was not in force when the goods mentioned in the count were imported.

The point we are now considering, arising under the same *section, is, Are goods [*381 entered upon an invoice not according to the value thereof at the place of exportation, with design to evade the duties thereon or any part thereof, eo instanti upon the false entry a forfeiture to the United States, so as to avoid an intermediate sale of them to a bona fide purchaser, or one altogether ignorant of the fraud, and in no way connected with the perpetrator of it, except in buying the goods from him for a fair price? The claimants in this case contended, in the trial in the Circuit Court, that neither under the sixty-sixth nor the sixty-eighth section were the goods, eo instanti upon the commission of the fraud, forfeited to the United States, "if the goods seized had been fairly and bona fide purchased by them, without any knowledge by them of their being liable to seizure, and were, at the time of the seizure, openly exposed by them for sale in their stores, though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto." And, "that though the goods in question had been invoiced at less than actual cost of them at the place of exportation, with design to evade the duties thereon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof. And that any rights in said goods acquired bona fide, by third persons in the mean time, are protected against the right of forfeiture under the sixty-sixth section.

The claimants asked that such instructions should be given by the court to the jury. The court refused, but did instruct the jury, "that

if the goods were fraudulently entered, it is no matter in whose possession they were when seized, or whether the United States had made an election between the penalties; and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser." This instruction is partly right and partly wrong; right in respect to the sixty-eighth section, as the penalty is the forfeiture of the goods without an alternative of their value; wrong as the instruction applies to the sixty-sixth section, the forfeiture under it being either the goods or their value.

In the first, the forfeiture is, the statutory transfer of right to the goods at the time the offense is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backwards to the time the offense was com-
382*] mitted, *so as to avoid all intermediate sales of them between the commission of the offense and condemnation.

So this court said in the case of United States v. 1960 Bags of Coffee, 8 Cranch, 398. It was said again, in the case of The United States v. Brigantine Mars, 8 Cranch, 417. Declared again four years afterwards, in Gelston v. Hoyt, 3 Wheat. 311, in these words: "The forfeiture must be deemed to attach at the moment the offense is committed," so as to avoid all sales afterwards.

The differences in time when the transfer of right in forfeited goods takes place, under such provisions for forfeiture as are found in the sixth-sixth and sixty-eighth sections of the Act of 1799, were fully considered and ruled by this court in United States v. Grundy and Thornburg, 3 Cranch, 337. It was afterwards noticed and assented to by the Attorney-General of the United States, in his argument in the case of the 1960 Bags of Coffee, 8 Cranch, 398; and has always been considered, from the time it was made, as the proper interpretation of a statute providing for a forfeiture for an offense, either of goods or their value. No case can be found in our own or the English courts in conflict with it.

We must therefore say, that the instructions given upon the fifth and sixth prayers of the claimants were erroneous.

Our conclusion, also, is, that there was error in the instruction given by the court upon the seventh prayer of the claimants. The prayer is, "that the United States are not entitled to recover, under the first and second counts of the information, unless the goods were unladen and delivered without permits." The difference between the first and second counts is, that the allegation in the first is, that the goods were brought into some port or place in the United States unknown, unladen and delivered; and in the second, that they were brought into the port of New York, and unladen and delivered there; and in both, without any permit or special license from the collector, or any other competent officer of the customs.

The response of the court to the prayer is: "If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue."

The direct and proper response to that prayer ought to have been, that, as the first and second counts were framed upon the fiftieth section of the Act of 1799, by which a fine is imposed upon persons unlading and delivering goods without a permit, if the jury should find that the goods in question had been *so [*383 unladen by the claimants, then they were liable to the penalty provided in that section; or if the goods were unladen by them with a permit, the jury could not find a verdict against the claimants upon the first and second counts.

The prayer does not involve, either in terms or inferentially from them, the legal effect or sufficiency of a permit obtained by improper means, or fraud upon the unlading of goods under it; or that the permit, under which the goods in question may have been landed had been fraudulently obtained, and the goods landed under it by the claimants. When, then, the jury were told that a permit obtained by fraud or improper means was of no effect and a nullity, it was virtually saying to them that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying, if they thought that there was evidence enough to prove the fact against them. And the court, by adding, that "the United States are entitled to recover, if the goods were imported with the view to defraud the revenue," stated a proposition out of the case; for there was no such count in the information or any statute of the United States, for the punishment of frauds in the importation of goods, upon which a count could have been framed in the words of the instruction. The instruction was calculated to mislead the jury into a conclusion that the suit was against the claimants for a meditated fraud in the importation of the goods in question, which had rendered them liable to be forfeited.

It is not necessary to notice the other prayers asked, refused, and given in this case. It was argued before this court only upon the three already stated, the answers to which we have said are erroneous.

We shall, therefore, remand the cause, with an order for the reversal of the judgment, and for a venire de novo, that further proceedings may be had thereon in conformity with this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to enter a disaffirmance of the judgment of the District *Court, and to remand this [*384

cause to the said District Court, with directions to that court to award a venire facias de novo, and for further proceedings to be had therein in conformity to the opinion of this court.

EDMUND T. H. GIBSON, Plaintiff in Error,

v.

BRADFORD B. STEVENS, Defendant.

Commission merchant advancing money to owner on warehouse certificate and order to deliver to himself, has legal title to, and possession of property.

Where personal property is, from its character or situation at the time of the sale incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee.

Where articles of commerce were purchased in the State of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.

Therefore, an attachment subsequently issued, at the instance, of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained.

This court will judicially recognise this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood.

The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession.

A guarantee by the first sellers that the arrosses should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold.

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

It was an action of replevin brought by Gibson, a citizen of New York, against Stevens, the sheriff of Allen County, Indiana, who had in his custody sundry articles of property, which he had taken by virtue of a writ of foreign attachment, issued under the State laws of Indiana.

The facts of the case were agreed upon by the counsel in the Circuit Court as follows:

Be it remembered, that at the May Term of said court, A. D. 1844, the above cause was submitted to the decision of the court, without the intervention of a jury, upon the following agreed facts, to wit:

The parties mutually agree that the following are the facts in this case: That McQueen & McKay, citizens of the city of Detroit, State of Michigan, about the 20th of March, 1844, *by false pretenses, fraudulently procured [*385 the branch of the State Bank of Indiana, at Indianapolis, to loan to them the sum of about eleven thousand dollars. The money thus loaned consisted of notes of the Indianapolis branch of said State Bank of Indiana, payable to bearer, and transferable by delivery. With part of the money thus obtained, McQueen & McKay purchased of Hanna, Hamilton & Co. three hundred and fifty barrels of mess pork, for the sum of $2,908,50, and at the same time paid to the said Hanna, Hamilton & Co. the said purchase money; and thereupon the said Hanna, Hamilton & Co. executed and delivered to the said McQueen & McKay the memorandum of said purchase, receipt, and guarantee thereto appended; which are herewith filed and marked A, and made a part of this agreement, and are in the words and figures following, to wit:

NOTE.—Delivery of ponderous and bulky goods, what sufficient to transfer the title.

Where goods are ponderous or bulky, or cannot conveniently be delivered manually, or are not in the personal custody of the vendor, an actual delivery is unnecessary. The delivery of the evidence of ownership, as of a bill of sale, bill of lading of goods in transitu, key of the warehouse containing the goods, receipt, ticket, sale note, dock warrant, certificate, bill of parcels, or other usual type or evidence of title to goods in the situation of those sold, will be a sufficient constructive delivery to pass the title. Lucas v. Dorrien, 7 Taunt. 288; Spear v. Travers, 4 Camp. 251; Chaplin v. Rogers, 1 East, 192; Searle v. Keeves, 2 Esp. 598; Rice v. Austin, 17 Mass. 204; Harman v. Anderson, 2 Camp. 243; Wilkes v. Ferris, 5 Johns. 335; Zwinger v. Samuda, 7 Taunt. 261; Atkinson v. Maling, 2 Term. Rep. 462; Hodgson v. LeBret, 1 Camp. 233; Hurry v. Mangles, 1 Camp. 452; Manton v. Moore, 7 Term Rep. 67; Hollingsworth v. Napier, 3 Cow. 182; Pleasants v. Pendleton, 6 Rand. 473; Bentall v. Burn, 3 Barn. & Cr. 423; Story on Sales, sec. 311, 312, 390, 392; Ryall v. Rolle, 1 Atk. 171; Barney v. Brown, 2 Vt. 374; Jewett v. Warren, 12 Mass. 300; Hinde v. Whitehouse, 7 East, 558.

So, affixing particular marks to the goods sold or cutting the spills of wine casks, will be sufficient to pass the title. Anderson v. Scott, 1 Camp. 235, n.; Stoveld v. Hughes, 14 East, 308; Tansley v. Warner, 2 Bing. N. C. 151, 155; 2 Scott, 263.

Delivery of part will pass title to the whole, where nothing beside remains for the vendor to do. Hammond v. Anderson, 1 New R. 69; Bunney v. Poynts, 4 Barn. & Ad. 568; Bloxam v. Sanders, 4 Barn. & Cr. 941; Mills v. Hunt, 20 Wend. 431; Waddington v. Oliver, 2 New R. 61; Champion v. Short, 1 Camp. 53; Bell, Law of Sale, 83; Walker v. Dixon, 2 Stark. 281; Miles v. Gordon, 3 Cromp. & M. 504; Holderness v. Shackles, 8 Barn. & C. 612; Payne v. Shadbolt, 1 Camp. 297; Johnson v. Dickinson, 78 N. Y. 42.

It is only necessary, in case of ponderous or bulky goods, that they be put under the absolute power of the vendee or vendee's authority as owner be formally acknowledged, or that some act should be done importing a surrender of them on one side, and an acceptance of them on the other. Bates v. Conklin, 10 Wend. 389; Shindler v. Houston, 1 N. Y. 261; Stanton v. Small, 3 Sandf. 230; Oliphant v. Baker, 5 Den. 379; Crofoot v. Bennett, 2 N. Y. 258.

In case of flour in a storehouse or vessel, the transfer of accepted delivery orders is sufficient to pass the title, where it is the usage to transfer in that way. Ibid; Dexter v. Norton, 55 Barb. 272.

Delivery of the permit by which iron in a bonded warehouse may be obtained, or of a guarantied warehouse receipt, is sufficient delivery to pass the title. Dunham v. Mann, 4 Seld. 508; Dunham v. Petty, 1 Daly, 12; Whitlock v. Hay, 58 N. Y. 484.

The vendor's entering into possession of land on which the ponderous articles sold are, is sufficient delivery. DeRidder v. McKnight, 18 Johns. 294.

"Fort Wayne, April 4th, 1844.
"Messrs. McQueen & McKay,
"Bought of Hanna, Hamilton & Co.
"350 barrels mess pork, to be delivered on board of canal boats soon after the opening of canal navigation, at $8.31 ..... $2,908.50
"Received payment in full,
"Hanna, Hamilton & Co.
"We guarantee the inspection of the above pork at Toledo, and the delivery on board of canal boats at this place, soon after the opening of canal navigation.
"Hanna, Hamilton & Co.
"Fort Wayne, April 4, 1844."

The said barrels of pork were, at time of said sale to McQueen & McKay, lying in the warehouse of said Hanna, Hamilton & Co., in the town of Fort Wayne, in the State of Indiana, about twenty feet from the Wabash and Erie Canal, marked and branded "Mess Pork," together with a large number of other barrels of pork, marked and branded "Prime Pork," and "Clear Pork."

Said three hundred and fifty barrels being all the mess pork in said warehouse at that time, or at any other time since, and all the barrels marked "Mess Pork," but were not seen by McQueen & McKay. Said barrels of prime, clear, and mess pork laid in said warehouse promiscuously, and so remained up to, and at, the time of the assignment of said writing marked A; but after the assignment, and before the levying the attachment hereinafter mentioned, said Hanna, Hamilton & Co. had shipped 386*] *off all of the said barrels of pork marked and branded "Prime Pork" and "Clear Pork."

Said McQueen & McKay, at the same time, purchased of D. & J. A. F. Nichols, of Fort Wayne, Indiana, two hundred barrels of superfine flour, for the sum of $712.50, and at the same time paid the said D. & J. A. F. Nichols the said purchase money; and thereupon said D. & J. A. F. Nichols executed and delivered to said McQueen & McKay a memorandum of said purchase, receipt, and guarantee, in the words and figures following, to wit:

"Fort Wayne, April 4th, 1844.
"Messrs. McQueen & McKay,
"Bought of D. & J. A. F. Nichols.
"Two hundred barrels of superfine flour, at $3.56¼, ... $712.50
"Received, Fort Wayne, April 4th, 1844, payment in full. D. & J. A. F. Nichols.
"Received the above flour in store, at Fort Wayne, April 4th, 1844, which we agree to deliver on board of canal boats here, soon after the opening of the navigation, subject to the order of McQueen and McKay.
"D. & J. A. F. Nichols.
"We guarantee the inspection of the above flour in New York as superfine flour.
"D. & J. A. F. Nichols."

Which are herewith filed and marked B, and are part of this agreement. Said barrels of flour were, at the time of said sale, lying in the warehouse of said D. & J. A. F. Nichols, in the town of Fort Wayne, Indiana, on the bank of the Wabash and Erie Canal, and there remained until they were seized and taken under the attachment hereinafter mentioned. Said purchases were both made in the town of Fort Wayne, in the County of Allen, in the said State of Indiana, on the 4th day of April, 1844.

On the 17th day of April, 1844, said McQueen & McKay presented the said memorandums of purchase, receipts, and guarantees thereto appended, as above set forth, and marked A and B, to the said Gibson, in the city of New York, and requested of said Gibson an advancement upon the flour and pork therein mentioned; whereupon the said Gibson did advance to the said McQueen & McKay, on the faith of said flour and pork, and the evidences of title thereto, the sum of $2,787.50, and took from said McQueen & McKay an assignment of said *memorandums of pur- [*387 chase, receipts, and guarantees, respectively, indorsed on the back of each in the words and figures following, to wit:

"Deliver the within two hundred barrels of flour to E. T. H. Gibson, or order.
"McQueen & McKay."
"New York, April 17th, 1844.
"Deliver the within 350 barrels of pork to E. T. H. Gibson, or order.
"McQueen & McKay."

Which are also part of this agreement.

Said McQueen & McKay, at the same time, delivered to said Gibson the original memorandums of purchase, receipts, and guarantees above set forth, and marked A and B; in whose possession they now remain.

At the same time McQueen & McKay wrote, signed and delivered to said Gibson, the letter which is herewith filed, marked C, and made a part of this agreement; and is in the words and figures following, to wit:

"New York, 17th April, 1844.
"Messrs. Ludlow & Babcock, Toledo:
"Gentlemen,—We have this day received an advance from E. T. H. Gibson, Esq., on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to the shipment, to wit:

365 bbls. mess pork, } from warehouse of Walk-
225 do. prime do. } er, Roger & Co.
11 do. mess do. from warehouse of Bembridge & Mix.
300 bbls. mess pork, from warehouse of Hamilton & Williams.
350 bbls. mess pork, from warehouse of Hanna, Hamilton & Co.
200 bbls. flour from warehouse of D. & J. A. F. Nichols.

"Respectfully, Gentlemen, your obedient servants. McQueen & McKay."

On the 18th day of April, 1844, Gibson inclosed the letter above referred to in another letter written by himself, directed to Mott & Co., at Toledo, Ohio, and mailed the same on the said 18th day of April, 1844, in the postoffice in the city of New York; which said letter, with the inclosure, said Mott & Co. received by due course of mail, and handed said inclosed letter, as requested by said Gibson, to Ludlow & Babcock, at Toledo, Ohio.

Said Gibson also, on the said 18th day of April, 1844, *mailed, in the postoffice [*388 in the city of New York, a letter written by himself, and directed to said Ludlow & Bab-

cock, at Toledo, Ohio, which said Ludlow & Babcock received by due course of mail; which letter is herewith filed, marked D, and made a part of this agreement; and is in the words and figures following, to wit:

"New York, April 17, 1844.

"Messrs. Ludlow & Babcock, Toledo, Ohio:

"Gentlemen,—I have this day made McQueen & McKay, of Detroit, an advance on twelve hundred and fifty-one barrels of pork, and two hundred barrels of flour, which is stored at different points on the line of the Wabash Canal, and which they state is to be shipped to your care, and held by you at Toledo, until you receive instructions from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo, at the lowest possible rates of freight, and send me a bill of lading of the same. There is one lot of three hundred barrels of pork in Hamilton & Williams's warehouse, on which there is due from McQueen & McKay, on its arrival at your place, $550.00. This amount you may draw on me for, so soon as I receive bill of lading of the pork. Let me hear from you by return mail respecting it.

"I remain truly and respectfully yours,

"E. T. H. Gibson."

At the time of the assignment of said memorandums of purchases, receipts, and guarantees, said Gibson was a commission merchant in said city of New York, in the State of New York, and it was usual and customary for commission merchants, residing and doing business in the city of New York, to make advances on Western produce, upon the assignment of the proper evidences of title thereto.

On the 23d of April, 1844, said Gibson, having on that day learned that McQueen & McKay had suffered some of their bills to be protested for nonpayment, despatched one William Hoyt to the town of Fort Wayne, aforesaid, to see to the shipping of said pork and flour; and the said Hoyt arrived at said town of Fort Wayne on the 29th day of April, 1844, for that purpose, having in his possession the said writings marked A and B.

At the time of the assignment of said writings marked A and B, the said Wabash and Erie Canal was navigable at and from the said town of Fort Wayne to the said town of Toledo.

On the 27th day of April, 1844, a writ of 389*] attachment issued *from the Allen Circuit Court, in the State of Indiana, in due form of law, at the instance and in the name of the State Bank of Indiana, against the goods and chattels, lands and tenements, of the said McQueen and McKay (William McQueen and James McKay); which said writ of attachment and all the proceedings in and about the issuing of the same, are admitted to have been regular; and the production of the same, and of the record thereof, is hereby waived.

This said writ was directed to the defendant in this suit, who then was and still is sheriff of said County of Allen, and came to his possession as such sheriff on the said 27th day of April, 1844; on which said 27th day of April, 1844, the sheriff aforesaid, by virtue of said writ of attachment, levied upon, seized, and took into his possession the said pork and flour described in said writings, marked A and B, the return day of which said writ has not yet elapsed. And it is also agreed, that the proceedings of the said sheriff in executing the writ of attachment were, in all respects, regular. (It is not, however, admitted by the plaintiff, that the property levied on was, at the time levied on, or at any time since, the property of the said McQueen & McKay, or that McQueen & McKay had an attachable interest therein.) And that the defendant shall have the full benefit of all the proceedings in the said attachment, in the same manner as though the record thereof was produced before this court. And it is further agreed, that the said sheriff kept and retained the possession of the said flour and pork; so levied on by said writ of attachment, until the same was replevied out of his possession, by virtue of the writ of replevin in this case. The said writ of attachment was issued and sued out for the purpose of coercing the payment of the said money, obtained by the said McQueen and McKay, as above stated.

It is further admitted by the parties, that the said pork and flour are of the value mentioned in the affidavit of William Hoyt, now on file in this court, on which said writ of replevin was issued.

The said Ludlow & Babcock were, on the 17th day of April, 1844, the forwarding merchants of the said McQueen & McKay, at Toledo, Ohio, one hundred and four miles from Fort Wayne; and that Mott & Co. were, on the same day, the forwarding merchants of said Gibson, at same place, Toledo.

It was understood between the said Gibson and the said McQueen and McKay, at the time of said assignment of said writings marked A and B, that the said Gibson should sell the said pork and flour, and after retaining his said advancement and his legal commission, and interest and outlays, pay the *remainder of the[*390 proceeds of said pork and flour to said McQueen & McKay, according to the usage and custom of commission merchants. The pork and flour mentioned in said writings, marked A and B, and that levied upon by virtue of said attachment, and that replevied by virtue of said writ of replevin, in this cause issued, and purchased by McQueen & McKay with the money obtained from said bank, as aforesaid, are the same pork and flour, and not other or different. The said levy, seizure or detention of said pork and flour happened at and within the County of Allen, in the State of Indiana; a legal demand was made before the commencement of this suit, and after the said levy, upon the defendant, by said Hoyt, as the agent of said Gibson, for the said pork and flour, and the said defendant refused to surrender the same. The said Gibson was, at the time of the commencement of this suit, and still is, a citizen of the State of New York, and the defendant a citizen of the State of Indiana.

The said advancement, so made by said Gibson, corresponds with the usual advancing rates of commission merchants in the said city of New York, at the time of said advancement.

The said writ of attachment was levied on the said property at the instance of the said branch of said State Bank of Indiana; and it was known to the State Bank of Indiana at the time of, and

before the levy of said writ of attachment, that the said loan had been procured from her said branch at Indianapolis fraudulently, by said McQueen & McKay, and that the said McQueen & McKay had invested the said money, so obtained, in the purchase of said pork and flour, and that said attachment is still pending; and that the original bills on which said money was obtained fell due after the levy under said attachment; and that none of said bills, on which said money was obtained, or any part thereof, have ever been paid, but were at maturity protested for nonpayment.

It is also admitted, if the court should consider the circumstances legitimate or material, which the defendant denies, that in 1843 the said McQueen & McKay, and said Gibson, had a similar transaction in New York, in which the said McQueen & McKay acted with integrity, but with which the bank or the other parties had no connection.

Upon this case stated, the Circuit Court gave judgment for the defendant in replevin. The counsel for the plaintiff took an exception, and brought the case up to this court.

It was argued by Mr. Romeyn and Mr. Wood for the plaintiff in error, and by Mr. Bright (in a printed argument) for the defendant in error.

391*] *Points for the Plaintiff.

I. The attachment was prematurely brought. Because—

1. The loan of its bills by the bank to McQueen & McKay was an express agreement for credit; which agreement, if procured by fraud, was not void, but voidable, by the bank at its option. Chitty on Cont. 678; Story on Sales, secs. 420, 447, and cases cited; Galloway v. Holmes, 1 Doug. Mich. 336; Rowley v. Bigelow, 12 Pick. 307.

2. There being an express contract for a loan on time, if the bank elected to consider it fraudulent and to sue immediately, the action should have been in tort. Story on Sales, secs. 432, 434, 442, 446, and cases cited there; Jones v. Hoar, 5 Pick. 285; Willett v. Willett, 3 Watts, 277; Cary v. Curtis, 3 Howard, 247, 248.

3. The remedy by foreign attachment in Indiana is confined to cases of debts due on contract and show by affidavit; and the institution of such a suit was in affirmance of the contract of loan; and, inasmuch as the stipulated term of credit had not expired, the action was prematurely brought. Code of Indiana of 1843, pp. 762, 763, 772, 773; Lindon v. Hooper, Cowp. 418; Ferguson v. Carrington, 3 Carr. & Payne, 457, at Nisi Prius; same case in Bench, 9 Barn. & Cress. 59. This case is cited as law by Starkie, 2 Ev. 55; 1 Chitty on Pl. 157; 1 Com. on Cont. 221; Dutton v. Solomonson, 3 Bos. & Pull. 585; 15 Mass. 80, note a; Galloway v. Holmes, 1 Doug. Mich. 334.

In the present case, the question is not whether the bank had a right to disaffirm; but whether, by bringing this action, she did not in fact affirm the express contract.

The authorities cited show the general doctrine of the common law to be, that promises in law exist only in the absence of promises in fact; that where there is an express contract, suing in assumpsit is an affirmance of it; that in those cases in which it has been held that assumpsit would lie immediately on discovery of the fraud, there was a debt due, in præsenti, either by an express precedent contract, or by the absence of any agreement for credit; or the contract was incapable of confirmation and absolutely void, through illegality, or as being contrary to public policy.

It is further contended, that the attachment of the pork and flour, as the property of McQueen & McKay, was an affirmance of the contract with them. Campbell v. Fleming, 1 Adolph. & Ell. 40; Selway v. Fogg, 5 Mees. & Wels. 86; Thompson v. Morris, 2 Murphy, 248; Dingley v. Robinson, 5 Greenl. 127; Hanna v. Mills, 21 Wend. 90; Ibid. 175.

A party cannot claim in repugnant rights, and is concluded *by the form of his [*392 action. Smith v. Hodson, 4 Term Rep. 217.

4. The retention of the bills of exchange, given by McQueen & McKay, as well as the form of the action, was an affirmance of the contract of loan. Tobey v. Barber, 5 Johns. 72; Dayton v. Trull, 23 Wend. 346; Thomas v. Todd, 6 Hill, 341; Masson v. Bovet, 1 Denio, 74; Story on Sales, sec. 427.

II. The bank, under her attachment, had no right, as against Gibson, to claim the pork and flour as the specific proceeds of her bills, on the ground of the alleged fraud of McQueen & McKay in procuring them. Because—

1. She attached it as the property of McQueen & McKay, and for the benefit of their general creditors. If trover had been brought, the alleged fraud would have been disputed.

2. Having voluntarily parted with the possession and ostensible ownership of her bills, she cannot claim them or their avails from a bona fide purchaser. Parker v. Patrick, 5 Term Rep. 175; Mowrey v. Walsh, 8 Cowen, 238; Root v. French, 13 Wend. 572; Hoffman v. Noble, 6 Metcalf, 68; Story on Sales, sec. 200, and cases cited there.

III. The flour in the custody of Hanna, Hamilton & Co., and the pork in the hands of D. & J. A. F. Nichols, were the legal property of McQueen & McKay, at the time of the transfer thereof by them to Gibson, the plaintiff, and said McQueen & McKay held, at the time of the attachment, the beneficial interest only in the residue of the proceeds of sale thereof, to be made by Gibson, when the property reached him, after satisfying his advance thereon, with commissioners and all other charges.

IV. McQueen & McKay acquired a vested legal title in said pork and flour, by their purchases. The bills of sale being their muniments of title, also a constructive possession thereof, the property remaining in the custody of the respective vendors, as their bailees. Because—

1. The sale was a perfect vested sale, and not an executory agreement to sell at a future period. Martindale v. Smith, 1 Adolph. & Ell. N. S. 389; 41 Cond. Com. Law, 595.

2. The bills of sale purport to pass a present vested interest, and they were delivered to McQueen & McKay. The payment of the purchase money bound the bargain, and passed at once the legal title to them. Barrett v. Goddard, 3 Mason, 110.

3. Whenever there is a present vested sale, valid in law, and the property sold is left with

the vendor, he holds it in custody as bailee for the purchaser. Elmore v. Stone, 1 Taunton, 157; Bailey v. Ogdens, 3 Johns. 416; Dixon v. Yates, 5 Barn. & Adolph. 314.

393*] *4. The pork and flour were sufficiently identified and distinguishable from all other property, there being no other pork in the warehouse, and the flour being marked. Barret v. Goddard, 3 Mason, 107; Pleasants v. Pendelton, 6 Rand. 473; Swanwick v. Sothern, 9 Adolph. & Ell. 895.

5. This construction is confirmed by the condition of the property at the time, and the general, well established usage of trade in regard to it; which usage is to leave such produce in the warehouse till the opening of navigation, the warehouseman being in the mean time the bailee of the owner; and for the owner to get an advance thereon from the Eastern merchant, and to transfer the same to secure the advance; he to sell the same on commission.

6. The delivery on board of canal boats provided for, was a delivery as bailee for the purpose of transmission. The guarantee of inspection at Toledo was a warranty of quality, to be tested after sale, and it was not preliminary to the sale.

V. McQueen & McKay passed the entire legal title in said produce to the plaintiff, together with the beneficial interest, to the extent of his advance thereon, and gave him the constructive possession. Because—

1. The condition of said produce was such as not to admit of actual delivery at the time, and it was in accordance with the course of business and the usage of trade to leave it with the warehouseman in the West.

2. The delivery order, according to the weight of authority, was sufficient of itself to pass the title to Gibson, on making the advance, before its presentment and acceptance.

3. But if not, the delivery to Gibson of the muniments of title, viz., the bills of sale, was sufficient for that purpose, especially when accompanied with a delivery order. Hollingsworth v. Napier, 3 Caines, 182; Wilkes v. Ferris, 5 Johns. 338; Bailey v. Johnson, 9 Cowen, 115; Lucas v. Dorrien, 7 Taunt. 279; Greaves v. Hepke, 2 Barn. & Ald. 131; Pleasants v. Pendleton, 6 Rand. 473; Ricker v. Cross, 5 N. H. 571; Ingraham v. Wheeler, 6 Conn. 277; Atkinson v. Maling, 2 Term Rep. 465; Brown v. Heathcote, 1 Atk. 162; Gardner v. Howland, 2 Pick. 599; Story on Sales, sec. 311; 2 Kent. 500.

4. It was sufficient for the plaintiff to give notice of his purchases in a reasonable time to the respective bailees of the property, so as to exempt himself from the imputation of laches; which notice was given in this case. Putnam v. Dutch, 8 Mass. 290; Meeker v. Wilson, 1 Gall. 419; 5 N. H. 571; 6 Conn. 277.

5. The effect of the whole was to give the 394*] plaintiff the legal *title in the produce, and not a mere lien thereon, or a mere pledge of the property; and this is the effect whether the transfer be governed by the law of New York (which is properly applicable to it), or by the law of Indiana. Story on Conflict of Laws, secs. 316 to 325; Black v. Zacharie, 3 Howard, 512.

VI. If Gibson be considered as not having the entire legal title, but as a pledgee to the amount of his advances, he is pro tanto to be considered and protected as a purchaser. Story on Bailments sec 297; Story on Agency, sec. 361; Lickbarrow v. Mason, 2 Term Rep. 63; Root v. French, 13 Wend. 572; Holbrook v. Wight, 24 Wend. 169; Hoffman v. Noble, 6 Metc. 69; Story on Agency, sec. 111.

VII. The legal title of the plaintiff in said produce is not superseded or devested by the levy of the attachment on the property. Because—

1. The bank was not a bona fide purchaser. The attachment amounted only to an assignment in invitum by operation of law, and for the benefit of the creditors at large, as well as for the attaching creditor. Indiana Code, 1843, pp. 762–775; Lempriere v. Pasley, 2 Term Rep. 485; 1 Atk. 160; Nathan v. Giles, 5 Taunton, 558; United States v. Vaughan, 3 Bin. 394; Ingraham v. Wheeler, 6 Conn. 277; Ricker v. Cross, 5 N. H. 571; Portland Bank v. Stacey, 4 Mass. 663; Putnam v. Dutch, 8 Mass. 287; Badlam v. Tucker, 1 Pick. 389; Gardner v. Howland, 2 Pick. 604; Arnold v. Brown, 24 Pick. 95; note to Lanfear v. Sumner, 17 Mass. 114.

2. If the bank had been a bona fide purchaser of said produce of McQueen & McKay, instead of being attaching creditors, such purchase would not devest the plaintiff of his title, which is a legal title, with a constructive possession, fairly acquired and unaccompained with any laches in notifying the bailee thereof, or in reducing the same to actual possession, according to the course of trade; such a legal title, being prior in time, is prior in right. See cases cited under last proposition; also Caldwell v. Ball, 1 Term Rep. 205; Tuxworth v. Moore, 9 Pick. 348; Joy v. Sears, 9 Pick. 4; Turner v. Coolidge, 2 Metc. 351; 3 Mason, 114; Meeker v. Wilson, 1 Gall. 422; Phillemore v. Barry, 1 Camp. 563.

The cases do not turn on the question of notice to an attaching creditor, but whether there has been such a delay in taking actual possession as to furnish evidence of fraud.

3. If the attachment had the character of a purchase, it would not be bona fide and without notice, within the reason of the rule, because McQueen & McKay were out of possession, actual or constructive, which put the purchaser upon inquiry, *and amounted to con- [*395 structive notice of the prior legal transfer to the plaintiff. Lucas v. Dorrien, 7 Taunt. 278; 1 Gall. 422.

4. The bank, therefore, under the circumstances, took only the interest of McQueen & McKay then existing, and subject to all equitable, as well as legal, interests then outstanding against it.

VIII. The only interest of McQueen & McKay was the equitable beneficial interest in the residue of the proceeds of the produce when sold by the plaintiff on the consignment to him, after satisfying thereout his advances and charges on sales, which alone was attachable, and which did not warrant the officer in taking the property. Story on Bailments, sec. 353, and cases cited; Badlam v. Tucker, 1 Pick. 399; Indiana Code, sec. 383. p. 744, and sec. 39, p. 770; Evans v. Darlington, 5 Blackf. 320.

IX. The rights of the plaintiff are not weakened by his having purchased the property out of the State of Indiana, to be sent and sold in New York, according to the course of trade. Blake v. Williams, 6 Pick. 307-314; Black v. Zacharie, 3 Howard, 514.

X. If there had been any danger that the plaintiff would have absconded with the property, to the injury of the equitable lien of the bank and other creditors, acquired by the attachment (which is not shown or pretended), their remedy would then have been in equity only.

XI. The warehouse receipt accompanying the transfer to Gibson was equivalent, under the usage of trade, to a bill of landing, and its transfer devested all outstanding title unknown to Gibson, whether legal or equitable. Because,

1. Such instruments are assignable. Indiana Code, p. 576; Laws of New York of 1830, p. 203, sec. 5; 2 Rev. Stat. p. 60.

2. The case states that it was usual and customary to make advances on the assignment of proper evidences of title. Noble v. Kennoway, 1 Doug. 512; Zwinger v. Samuda, 7 Taunt. 265; Lucas v. Dorrien, Ibid. 288; Barton v. Baddington, 1 Car. & Payne, 207; Keyser v. Suse, Gow, 58.

The argument filed on behalf of the defendant in error was an elaborate support of the following points:

1. If Gibson's claim be in the nature of a lien, he cannot recover, unless he, or his agent for the purpose expressly authorized, had the actual possession of the pork and flour before the attachment was levied. Under the circumstances of this case, a constructive possession cannot be conferred, for the following reasons: 1. Because the bills of parcels, etc., in this 396*] cause, do *not amount to warehouse receipts; for instance, the memorandum of Hanna, Hamilton & Co. is a mere receipted bill of parcels, and a guarantee of the inspection of the pork at Toledo; it does not even acknowledge the pork to be in store. Should the pork and flour not pass inspection, McQueen & McKay would not be bound to accept them. The bills of parcels, with their indorsements, etc., amount to nothing more than mere orders to deliver the pork and flour to Gibson; and until the Nicholses, and Hanna, Hamilton & Co., were presented with such orders, and they had accepted the same, and assented to hold the pork and flour for Gibson, as his agents, his lien could not attach; and the attachment having been sued out, and levied on the pork and flour in question before they received orders in favor of Gibson, the attaching lien of the State Bank must prevail. 2. Although the memoranda may be considered as warehouse receipts, yet, there being no legislative enactment or usage in New York making the transfer and delivery thereof to confer a constructive possession of the pork and flour, their transfer and delivery to Gibson cannot have that effect. 3. Although, by the laws of New York, these memoranda might confer a constructive possession on Gibson, yet, as the pork and flour were, at the time of the delivery of those memoranda to Gibson, at Fort Wayne, in Indiana, the transaction must be governed by *the laws of* Indiana. In Indiana we have no law, or usage, giving such force to warehouse receipts.

2. Although Gibson should be regarded as an absolute purchaser, yet, as the attachment was levied upon the pork and flour before he or any agent of his had actual possession of them, Gibson cannot recover. A fortiori if Gibson's claim be only a lien.

3. If the pork and flour be regarded as a security to Gibson, for the repayment of the advance, nevertheless, as neither Gibson nor any agent of his had the actual possession of the pork and flour before they were attached, nor had the instruments by which his lien on the pork and flour was created been recorded in Allen County, Indiana (the place where the pork and flour were), within ten days, according to the Rev. Stat. of Indiana, 1843, p. 590, sec. 10, such assignment to Gibson is void as to the State Bank.

4. Whether Gibson's right be regarded as a lien on, or a purchase of the pork and flour, still, as neither Gibson nor any agent of his had the actual possession thereof, before the attachment was levied, Gibson cannot recover.

5. If Gibson be regarded a "deemed pro tanto purchaser," McQueen & McKay must be regarded as owners of the residue. This condition *of things necessarily makes [*397 Gibson and McQueen & McKay tenants in common of the pork and flour. If this be true (which we regard as unquestionable, if Gibson be a "pro tanto purchaser"), the interest of McQueen & McKay in the pork and flour is attachable, and the officer attaching can, by virtue of the attachment, take the whole of the pork and flour, even out of the actual possession of Gibson, and deliver it over to the purchaser, and Gibson cannot replevy them from the officer or the purchaser under the attachment.

6. If Gibson's right be only a lien, although such lien may have attached on the pork and flour before the attachment of the State Bank was levied thereon, nevertheless the interest of McQueen & McKay therein is attachable.

Mr. Chief Justice Taney delivered the opinion of the court:

This case is one of much interest, and has been very fully argued. There is, however, but a single question in it, and that is, whether the property in dispute was transferred to the plaintiff in error, and vested in him, by the indorsement and delivery of the warehouse documents in the manner stated in the record.

The fact that McQueen & McKay by fraudulent means obtained the money from the bank, with which they purchased the pork and flour, is not material in the decision of this question. The bank in these proceedings does not claim the property as its own, upon the ground that it was purchased with money fraudulently obtained from it. If it had intended to assert its title as owner, it should have proceeded by some appropriate action to recover the property itself, or the value of it in damages. But the bank presents itself in the character of a creditor, seeking to collect its debt by an attachment against the property of its debtor. And the claims of both parties, plaintiff and defendant, rest upon the admission that the pork and flour were the property of McQueen

& McKay, and had been left by them in the custody of the warehousemen as their bailees.

We are not, therefore, called upon to decide whether the owner of the money fraudulently obtained from him can follow the proceeds in the hands of a bona fide purchaser without notice, and in the usual course of trade. As this question is not in the case, we forbear to examine it, although it was discussed in the argument at the bar. We must not, however, be understood as intimating that, if this point had arisen, the judgment of the court would have been different from that which we are about to give.

398*] *The case as it comes before us in substance is this: The pork and flour were purchased by McQueen & McKay, at Fort Wayne, in the State of Indiana, on the 4th of April, 1844. The articles were in the warehouses of the respective vendors at the time of sale, and the purchasers took from each of them a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats soon after the opening of canal navigation. There was also a written guarantee from the respective vendors, that the articles sold should pass inspection. By the order of McQueen & McKay they were to be sent by canal boats to Ludlow & Babcock, their agents at Toledo, in the State of Ohio, to be held by them until they received orders from McQueen & McKay.

The documents executed by the warehousemen, hereinbefore mentioned, transferred the property and the possession of the pork and flour to McQueen & McKay, and the vendors from that time held it for them, and as their bailees.

Being thus in possession, McQueen & McKay afterwards, on the 17th of April, in the city of New York, in consideration of the advance of money mentioned in the statement of the case, delivered to Gibson, the plaintiff in error, the evidences of title which they had received from the vendors, indorsing thereon an order upon them to deliver the property to Gibson. They at the same time delivered to Gibson a letter to Ludlow & Babcock, their agents at Toledo, stating that they had received an advance from Gibson upon this property, and directing them to deliver it to him, and to comply with his orders.

Gibson was a commission merchant residing in New York, and it is admitted that this transaction with McQueen & McKay was in the usual course of his business. On the 27th of April, ten days after this transfer, the property was seized by the defendant in error, as sheriff, under an attachment issued on the same day at the suit of the bank, to obtain satisfaction for the debt due to it from McQueen & McKay. At the time of the attachment, the pork and flour still remained in the warehouses at Fort Wayne, and neither the warehousemen nor the attaching creditor had notice of the transfer to Gibson. The agent despatched by him arrived two days afterwards, and claimed the property. The sheriff refused to deliver it up, and this action of replevin was thereupon brought to recover it.

In examining the question between these parties, it is proper to say, that, if the fact had not been admitted that the dealing between McQueen & McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. Apart from the fraud imputed to McQueen *& McKay, of which Gibson had no [*399 knowledge, the statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader.

The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff, the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents, in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justices in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this court in the case of Conard v. The Atlantic Insurance Company, in 1 Pet. 445, where this symbolical delivery was fully considered and sustained. The same principle was decided in the case of Brown v. Heathcote, 1 Atk. 160; Greaves v. Hepke, 2 Barn. & Ald. 131; Atkinson v. Maling, 2 Term Rep. 465; Wilkes and Fontaine v. Ferris, 5 Johns. 335; Pleasants v. Pendleton, 6 Rand. 473; Ingraham v. Wheeler, 6 Wend. 277; Ricker v. Cross (5 N. H. 571), Gardner v. Howland, 2 Pick. 599; *2 Kent's Com. [*400 499; Story on Sales, sec. 311. The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were

incapable of actual delivery; consequently, the delivery of the evidences of title, with the order to the bailees indorsed on them, passed the title and possession to the plaintiff.

It is true there is no formal assignment indorsed on the warehouse document. But the technical rules of common law conveyances and transfers of property have never been applied to mercantile contracts made in the usual course and forms of business. The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. A contrary rule would most commonly defeat the object which both parties design to accomplish, and believed they had accomplished, by the instruments they executed.

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor, who makes advances for his principal upon goods in his possession. But even in that case the property cannot be withdrawn from his hands until his advances are repaid. But in the case before us, the title of Gibson is not a mere lien. The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an equitable interest in the surplus, if any remained after satisfying the claims of Gibson. The case of Conard v. The Atlantic Insurance Company, before referred to was the case of a loan of money upon a respondentia bond upon a cargo at sea, secured by an assignment on the bill of lading, and in that case the court said: "It is true that, in discussions in a court of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and sometimes more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law." 1 Pet. 441.

401*] *The guarantee that the articles should pass inspection does not affect the character of the transaction, nor convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken by the purchaser in every sale of personal property when he does not choose to take the risk upon himself.

It appears that the attachment was laid before the warehousemen received notice of the transfer to Gibson. Undoubtedly it was his duty to use reasonable diligence in giving notice both to them and the agent at Toledo. And negligence in this respect on his part would be regarded as evidence of fraud, and might moreover put in jeopardy his right of property, if it passed into the hands of a bona fide purchaser without notice, and in the usual course of trade. But in this case there has been no unreasonable delay. The notice was promptly given, and the receipt of it by the bailees was not necessary to complete his title. As between him and the creditors of McQueen & McKay, the property and possession vested in him at the time of the transfer and delivery of the documents. The cases before referred to establish this principle.

Neither is the equitable interest of McQueen & McKay in the surplus (if any remain) material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana. But that liability will not authorize the attaching creditor to take the property out of the hands of the legal owner, before his claims upon it are discharged. The equity of redemption upon a mortgage of real property is liable to attachment. But it will scarcely be contended, that the attaching creditor, or a purchaser under the attachment, or the officer levying it, could maintain an ejectment against a mortgagee in possession, or in any other way interfere with his possession, when holding it as security for money due him. The same rule applies to a mortgagee of personal property holding the legal title and possession to secure his advances.

Upon the whole, therefore, we think there is error in the judgment of the Circuit Court, and that it must be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, *for further pro- [*402 ceedings to be had therein in conformity to the opinion of this court.

JOHN WEST, Appellant,
v.
JOSEPH SMITH, and Ellen, his Wife.

Bill against executor to obtain legacy—parties—orphans' court in D. C.—decision, when final—in Virginia, executor justified in not pleading statute of limitations—rent for land held by legatee adversely to testator, not set-off against his legacy.

Where a bill was filed in the Circuit Court of the United States for the County of Alexandria, by a legatee, against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia, who resided in Virginia, a party defendant.

The Orphans' Court had power to allow a commission to the executor for paying over a specific legacy, and a right to extend this commission to ten per cent.

Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed.

Where the executor paid legacies to persons who had occupied property which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner, by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy.

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

It was a bill filed in the Circuit Court by Ellen Smith, then Ellen Mandeville, one of the legatees of Joseph Mandeville, deceased, whose will was before this court for construction at January Term, 1844. The case is reported in 2 Howard, 560. It will be seen by reference to that case, that John West became a party to the proceedings, upon the ground of being the residuary legatee, and, as the court then held, residuary devisee also.

Ellen Mandeville, who intermarried with Joseph Smith pending the suit, was a legatee under that will for $3,000. One of the clauses of the will was this: "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them."

Mandeville, the testator, died in July, 1837.

In May, 1839, Ellen Mandeville filed her bill in the Circuit Court (to which suit her husband, Smith, afterwards became a party), charging the making and publication of the will, the bequest to herself and others of certain legacies, which in default of personal assets were chargeable upon the real estate, the death of the testator, and the deficiency of personal as-
403*] sets; *and praying a sale of lands for the satisfaction of her legacy. To this bill, all the other pecuniary legatees, the residuary devisee, West, and the executor of Mandeville, were made defendants.

It is not necessary to trace the progress of the suit through its successive stages. It was at last referred to a master in chancery, who reported sundry matters of account, to some of which exceptions were taken by the defendant, West. The court, however, overruled these exceptions, and proceeded to decree a sale of so much of the real estate as might be necessary to pay the legacies. From this decree West appealed, and the case now came before this court upon the exceptions to the master's report. Only four of these exceptions were insisted on in the argument, viz., the second, third, seventh, and eighth.

They were as follows: The first exception is inserted for the purpose of explaining the second.

1. For that said commissioner has improperly allowed William C. Gardner, deceased, a credit in his account as executor of Joseph Mandeville, deceased, the sum of eight hundred and forty-two dollars and ninety cents, as having been paid to Sarah A. Hill, "a specific legacy of slaves, furniture, etc., as appraised," which said property was properly subject, at the time of its delivery to the said legatee, Sarah A. Hill, to the payment of the debt of Joseph Mandeville, deceased.

2. For that the said commissioner has improperly allowed the said William C. Gardner, deceased, as a credit in his said executorial account on the estate of Joseph Mandeville, deceased, the sum of eighty-four dollars and twenty-nine cents, as a commission on the said $842.90, mentioned in the first foregoing exception, which said sum was not so due to said Gardner.

3. For that the said commissioner has improperly allowed the said Gardner, as a credit in his said executorial account, the sum of three hundred and sixteen dollars and thirty-seven cents, and a further credit in said account of nine hundred and twenty dollars and twenty-six cents ($920.26), as having been paid by said Gardner on account of a judgment in favor of Samuel Bartle, against said Gardner, as executor of Joseph Mandeville, deceased, the items or most of them forming the account of said Bartle against said Mandeville's estate, on which said judgment is predicated, being unsustained by legal proof, and barred by the statute of limitations.

7. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with the several sums of two hundred and twenty-five dollars and four hundred and fifty dollars interest thereon, after allowing a credit of one hundred *and fifty dollars, [*404 as a legacy due to Mary Mandeville, under the will of Joseph Mandeville, deceased; the said legacy being subject to a further credit of two hundred and twenty-five dollars, for the use and occupation of a portion of the real estate of Joseph Mandeville, deceased.

8. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with seven hundred and thirty-five dollars, the interest due thereon, as a legacy, to Julia Mandeville, under the will of Joseph Mandeville, deceased, when the same should have been credited with the sum of two hundred and twenty-five dollars for the use and occupation of a portion of the real estate of Joseph Mandeville, deceased.

The cause was argued by Mr. Jones for the appellant, and Mr. Neale and Mr. Davis for the appellees.

Mr. Jones submitted a preliminary objection of a defect of parties, because of the nonjoinder as a defendant of James Mandeville, a nephew of the testator, and a specific devisee of ten thousand acres of land upon the head waters of Guyandotte River, in Virginia.

He then proceeded to argue, in support of the second exception, that no commission was allowable on the specific legacy, in addition to the general commissions incident to the administration of the assets.

Of the third, that the executor suffered judgment at the suit of Bartle, in consequence of his improper and illegal concessions, and of evident negligence, amounting to a devastavit.

Of the seventh and eighth, we maintain, 1st. That the evidence clearly entitled the exceptant to the set-offs claimed in these exceptions. 2d. That the pretense set up, of long possession under a parol gift, was wholly unsupported by evidence—indeed disproved—and was moreover barred by estoppel, the parties claiming both under and against the will.

And further maintained, that the court erred in proceeding to the final decree, whilst the

claims of the two creditors and the two legatees named in these exceptions remained sub judice.

Last, that the court had no jurisdiction to decree satisfaction of the creditors out of the real estate.

Mr. Neale, for defendants in error:

2d. Exception. If this exception is made as a legal and valid objection, it is thought that such is not the law; on the contrary, the allowance is fully authorized by law. No doubt the commissioner was guided by the allowance made the executor of Mandeville by the Orphans' Court of Alexandria County, in which 405*] *the accounts were settled; and that court had full power and authority, under the testamentary system of Maryland, to make the allowance, it being a matter within the admitted discretion of the court; and being in its discretion, not even an appeal, much less this exception, is sustainable. 2 Laws of Maryland, 482; Dorsey's Testamentary Law of Maryland, 17; 1 Peters, 565; 5 Ib. 224.

The exception, if sustained, might, by a future proceeding on the part of the appellant against the executor's legal representative, tend to defeat, at least in part, the commission allowed Mandeville's executor by the Orphans' Court aforesaid, and which could only have been done, in the first instance, by an appeal, alleging and proving fraud in its procurement. It would, therefore, seem to be an attempt to do that indirectly which could not have been done directly and lawfully.

3d. Exception. This exception is clearly untenable for the following reasons: that is to say, because the judgments of every court of competent jurisdiction, if fairly obtained, are conclusive upon the parties, until reversed by writ of error or supersedeas; nor can a court of equity look into them, unless fraud, mistake, accident, or surprise in their procurement be alleged and proved; in such a case, it is admitted that chancery has jurisdiction. But no such allegations are to be found in the record of this cause, and for want thereof, this honorable court, sitting as an appellate chancery court, will not, it is imagined, disturb the allowance. The appellant was made a party defendant on the 8th of June, 1842, and although Commissioner Eaches made his report on the 31st of May, 1839, the appellant never filed exceptions thereto until the 3d of October, 1846, long after the death of Mandeville's executor; and having so long failed to do so, it is submitted whether the court will now entertain the same. 2 Robinson's Practice, 214, 383; 3 Howard, 691; and the same remarks apply to Commissioner Green's report.

[Mr. Neale then went into an argument that the statute of limitations did not apply.]

7th and 8th Exceptions. The claim set up by the appellant for use and occupation is strictly legal, and as a general principle can only be enforced in a court of law. Such claim must be founded on the privity of contract, either express or implied, and neither the one nor the other can arise without the previous relation of landlord and tenant. 1 Howard, 153.

No such relation is pretended in this case; none such ever existed; the parties, on the con- 406*] trary, are now contending before *the court below, in a suit at law, about their legal rights to the lot of land in question, and to the rent of which lot the appellant in this chancery suit claims to be entitled. It would therefore appear to be a fit subject for an action at law, and not a bill in equity, for the right of property in this case is a question which involves matters of fact as well as of law, and should be adjudicated in a court of law, where the appellant has adequate remedy; and having such remedy, a court of equity is not the proper forum. 1 Laws U. S. old edition, p. 59, sec. 16.

The evidence in the record is, that the Misses Mandeville entered on the premises in dispute, under a gift from their uncle, the late Mr. Mandeville, and that they held, used, and occupied it for more than twenty years prior to their said uncle's death, and that, too, with his personal knowledge and consent, and that they still hold, use, and occupy it as their own property. If, then, the Misses Mandeville entered on the premises under color or claim of title, and held possession adversely to their uncle for so long a period, with his knowledge, and without any attempt on his part to eject them, it gives them good right and title under Virginia law, and is a complete bar to a possessory action, although it might not be against a writ of right, founded on the seisin of the appellant's devisor or testator, for in Virginia it has been decided that a devisee, like an heir, may maintain a writ of right.

Mr. Davis, for the defendant in error, contended that the exceptions were properly overruled:

As to the first exception, because—

1. The realty as well as personalty being liable, under the will and law, to both debts and legacies, it is immaterial to the residuary devisee and legatee to which object the personalty is applied. Tayloe v. Thomson, 5 Pet. 367; 5 Geo. II. ch. 7, 1732; Silk v. Prime, 1 Dick. 384; 1 Bro. C. C. 138, note; 2 Stat. at Large, 103, 104, sec. 1-756, sec. 4.

2. Had the executor sold the specific legacy for payment of debts, the legatee would have been substituted to the creditor's rights against the realty; it being liable to the debts by law, and charged with the legacies by will, and only the residue given to West.

By analogy to specialty creditors, 2 Lomax on Executors, 252, 253, sec. 7, 253, 254, secs. 14, 15, 16; Byrd v. Byrd, 2 Brock. 171.

Or where the devise is of the residue of personalty and realty, Hanby v. Roberts, 1 [*407 Ambl. 129; 2 Smith's Ch. Pr. 282; Norris v. Norris, 1 Dick. 253; Headly v. Redhead, Coop. 51.

Or when the lands are charged with debts, Keeling v. Brown, 5 Ves. 359; 2 Smith's Ch. Pr. 282, 283, a; Eland v. Eland, 4 Myl. & Cr. 42; 1 Story's Eq. Jur. secs. 565, 566; Clifton v. Burt, 1 P. Wms. 678, 679, Cox's note; Haslewood v. Pope, 3 P. Wms. 323; 2 Lomax on Executors, 254, sec. 13.

3. The language of the will imports a debt, and this legacy in satisfaction.

As to the second exception, because the commission is an incident to the legacy, and has been allowed by the Orphans' Court, and for the reasons given on the first exception.

As to the third exception, because—

1. The exception does not specify item by

item the part objected to, nor the grounds of objection, and is in the alternative. Harding v. Hardey, 11 Wheat. 103; Wilkes v. Rogers, 6 Johns. 568, 591, 592; Story v. Livingston, 13 Pet. 359, 365, 366; Buller v. Steele, reported in 2 Smith's Ch. Pr. 372.

2. If the exception covers all the items, then, as some are proper, it must be overruled. Green v. Weaver, 1 Simons, 404; 3 Cond. Ch. R. 204, 218, 219.

3. No objection was made before the master for want of, or to the competency of, the proof.

4. The verdict and judgment fix the debt as due at testator's death; and the receipts on the execution show its payment. Garret v. Macon, 2 Brock. 213, 214; Strodes v. Patton, 1 Brock. 230, 231; Powell v. Myers, 1 Dev. & Batt. Eq. 502; Munford v. Overseers of Poor, 2 Rand. 313, 316; Chamberlayne v. Temple, 2 Rand. 384, 396, 397.

5. There is no bill of particulars, nor any part of the record showing the items on which said judgment is founded.

6. The burden of showing the items to be barred rests on the exceptant, the judgment being prima facie evidence of a just debt, and he has produced no proof, either of what the items were, or of what proof was before the jury, or that any of them were barred by limitation.

7. If he rely on the report and account incorporated by the clerk in the record of Bartle v. Mandeville's Executor, it is no part of the record, and so not competent evidence. Cunningham v. Mitchell, 4 Rand. 189, 190, 192; Moore v. Chapman, 3 Hen. & Mun. 260, 267; Lessor of Fisher v. Cockerel, 5 Pet. 248; Lessor of Reed v. Marsh, 13 Pet. 153. It does not appear ever to have been returned and filed in court, nor to have been confirmed or adopted by the court or parties. No judgment was entered on it. It does not appear even to have been read 408*] *before the jury. Nor that it was all or the only evidence before them; and in the absence of proof to the contrary, the verdict and judgment must be presumed right. Thompson v. Tomlie, 2 Pet. 165; Grignon's Lessee v. Astor et al. 2 How. 319, 340; Voorhees v. Bank of United States, 10 Peters, 472, 473; Williams v. United States, 1 How. 290; 1 Saund. 329, notes 3, 4, 330, note 5; 2 Saund. 50, note 3; 1 Saund. 334, note, 9; 2 Lomax on Executors, 428, 429, sec. 33.

8. If the report is to be considered, then it does not appear from it that any item allowed in that report accrued more than five years before testator's death, nor more than five years before the commencement of the suit, and it rests on the exceptant to show that the items were barred. Adams v. Roberts, 2 How. 486, 496.

Testator died 25th July, 1837, narr. filed Aug. rules, 1838. The capias must have been before May, 1838; it may have been before October, 1837, and on or at any time after July 25, 1837, the date of testator's death.

All the items reported as due or as suspended, i. e., for further evidence, appear to have accrued during or after 1834—except $158.19½, the several sums of $26.88, $17.23, $22.37, making $66.48, and $37.62.

The $37.62 is dated 1833; it may have accrued in January, or in December, 1833; in either case, it may have been within five years from the beginning of the suit; if after May, it must have been so.

The items composing $66.48 have nothing to fix their date, except that they are prior to April 30, 1835.

The item of $158.19½ has no date assigned; it is only said to have been found in a book for 1831, 1832, and 1833; if it accrued due after July 25th, 1832, it may have been within five years of writ, and was within five years before testator's death.

Rev. Code (1792), 167, S. LVI. 8. The law requiring the court to strike out the items barred, and dispensing with a plea of limitation, the presumption is that any item which, though apparently barred, has not been stricken out, was sustained by evidence removing the bar. 2 Lomax on Executors, 423, sec. 25; 2 Pet. 165; 2 Howard, 340; Brook v. Shelly, 4 Hen. & Mun. 266.

9. If any items be apparently more than five years before suit, but not before testator's death, the executor may have promised to pay them within the five years, which he had a right to do.

The obligation to plead statute is discretionary, and failure should be shown to be unreasonable.

*10. The dealings between Bartle and [*409 Mandeville were mutual, long continued, and complex, and probably neither party kept or had full proof of all items, so that the only mode of making a fair settlement was by reference to a commissioner, with production of books and papers, and it should be shown that this proceeding was ill-advised, as in case of submission to arbitration. Strodes v. Patton, 1 Brock. 230, 231.

11. It appears, on the contrary, to have been prudent and beneficial, for, 1st. Mandeville gets credit by his own books for $912.01, 17th February, 1834. 2d. For $1,314.06, for none of which is there any proof in the record or report, and which seems to have come entirely from Mandeville's books by consent of plaintiff. 3d. For the claims of S. B. Larmour & Co., Daniel Cawood & Co., against Bartle, included in the above $1,314.06, otherwise than by consent not an offset.

As to the seventh and eighth exceptions:

1. A joint demand cannot be set off against a several demand. 2 Story's Eq. Jur. sec. 1437.

2. Credit for the whole sum is claimed against each legacy.

3. It does not appear that any such sum is due as claimed, no tenancy being proved, and, on the contrary, an adverse occupation being expressly reported.

Mr. Justice Woodbury delivered the opinion of the court:

The original proceeding in this case was a bill in chancery instituted in September, 1839, in the Circuit Court for the District of Columbia, sitting for the County of Alexandria. The object was to recover a legacy of $3,000, bequeathed by Joseph Mandeville, in 1837, to Ellen Mandeville, now the wife of Smith.

William C. Gardner, the executor, took upon himself the execution of the will, and was made

one of the original defendants, with West and several other legatees. West, being residuary legatee, took a leading part in conducting the defense in the Circuit Court, and made the appeal to this court. Various answers were put in by the respective respondents, several depositions filed, and some documentary evidence. From these it appears, that proceedings had for some time been instituted in the Orphans' Court for the County of Alexandria, for the purpose of settling the estate of Joseph Mandeville. Most of the debts had been adjusted, and some of the legacies; and the personal estate being exhausted, permission had been asked to sell and apply a part of the real estate, situated in said County of Alexandria, to pay the residue.

To this application, as well as to some of the 410*] previous proceedings *and decrees in the Orphans' Court, sundry objections had been interposed. But the exceptions made by West to the last report of the commissioner, in the Circuit Court, in May, 1846, disclose all the matter finally relied on in opposition in that court by the respondent. Those exceptions having been there overruled, this appeal was taken.

Before going into the consideration of those exceptions in detail, and the correctness of the decision which was pronounced upon them, it may be well to dispose of a preliminary question raised here, that James Mandeville, of Virginia, a legatee of 10,000 acres of land there situated, ought to be made a party defendant, with those already before the court.

We feel obliged to overrule this objection.

It is not clear that it could be made here after an appeal; though, if proper, the case might perhaps be sent back, and an amendment made there—as new parties can be admitted there as late as the final hearing. Mitford, Pl. 144, 145; Owing's case, 1 Bland. Ch. 292; Clark v. Long, 4 Rand. 451.

At the same time, it is true as to exceptions to a master's report, that none can generally be made in the appellate court which were not taken below. Brockett et al. v. Same, 3 How. 691. The objection here, however, must in any view be overruled, because the Orphans' as well as the Circuit Court, for the County of Alexandria, proceeded, and ought to have proceeded, against parties and property situated within their limits, and not against either situated like James Mandeville and his land in Virginia, and without their jurisdiction. Hallett v. Hallett, 2 Paige, 15; Townsend v. Auger, 3 Conn. 354. Though he held his land under the same will, yet it is admitted that he and his land were both in another State. Another excuse for not joining him is, that property enough existed within the County of Alexandria to discharge the claims of the original plaintiffs without a resort to James Mandeville, or the land devised to him. Russell v. Clarke's Executors, 7 Cranch, 72.

Especially must West and all the property devised to him be first made liable, as he is only a residuary legatee, or, in other words, is entitled only to what is left, after all others are satisfied. And, finally, it was not necessary to make James Mandeville a party to this bill, when neither he nor his land could be affected by a decree made against other persons and other lands, and in a case instituted in another jurisdiction, and in which no service had been made on him. West v. Randall, 2 Mason, C. C. 181; Joy v. Wirtz, 1 Wash. C. C. 517; Elmendorf v. Taylor, 10 Wheat. 152; Wheelan v. Wheelan, 3 Cowen, 538.

*To proceed next to the consideration [*411 of the exceptions made below, it is to be remembered that the first one was waived at the hearing, and need not, therefore, be repeated. The second exception is, that the executor, Gardner, was improperly allowed a commission of $84.29 on a specific legacy of slaves, furniture, etc., made and paid to Sarah A. Hill.

This commission was at the rate of ten per cent.; and though that rate seems high, yet, if the Orphans' Court had authority to make any allowance in such a case, its decision within its authority and jurisdiction must be considered binding. 1 Peters, 566; Thomas v. Fred. City School, 9 Gill & Johns. 115.

On general principles, it would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies, the trouble and risk are as great, if not greater, than in moneyed legacies, and it would be difficult to find elementary principles to justify commissions in one case, and withhold them in the other.

If this point is to be governed by these principles, as it must be, provided the laws of Virginia at that time controlled the matter in the County of Alexandria, then the exception must fail under those principles, and under a practice, well settled there, authorizing in such cases a quantum meruit. Under that, as much as ten per cent. on moneys received and paid out has in several instances been sanctioned, McCall v. Peachy, 3 Munf. 301; and Hutchinson v. Kellam, Ibid. 202.

But if it is to be governed by the laws of Maryland, as is contended by the plaintiffs, a like result will follow, by means of express statutory provisions and decisions in that State.

They contend this, because in February, 1801, Congress established in Washington and Alexandria counties an Orphans' Court for each county, and provided that they "shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the register of wills and judges of the Orphans' Court within the State of Maryland," etc. 2 Statutes at Large, p. 107, sec. 12; Yeaton v. Lynn, 5 Peters, 230.

It is argued that this provision extended to the power and duty of the Orphans' Court in Virginia to allow commissions as large as here, and for specific as well as moneyed legacies, and not to the mere organic structure and jurisdiction of the Orphans' Court, leaving all else in Alexandria County to be governed by the laws of Virginia, and in Washington County by the laws of Maryland.

If this view be correct, which is supposed to be the one *usually acted on in this Dis- [*412 trict, it was provided in Maryland by statute in 1798, ch. 101, that a commission may be allowed, "not under five per cent., nor exceeding ten per cent. on the amount of the inventory." Nichols et al. v. Hodges, 1 Peters, 565; 5 Gill & Johns. 64.

The third exception is, that a judgment was

allowed by the executor to be recovered by one Bartle against the estate of the deceased Mandeville, which "was unsustained by legal proof, and barred by the statute of limitations.

But this judgment was recovered after due notice and hearing. No fraud or collusion is set up or proved between the parties to it, for the purpose of charging the estate. And the chief, if not only, exception to its fairness or validity is, that Gardner, the executor, did not plead the statute of limitations to a part of the claim on account, when he might have done it under the apparent time when the cause of action accrued on that item. But in Virginia, and especially if the court, by not striking out the item, sanction a waiver of the statute, as is inferred to have been done here, the executor seems fully justified in not pleading it. 2 Lomax on Executors, 419; Bishop v. Harrison, 2 Leigh, 532; 1 Robinson's Practice, 112; 1 Rev. Stat. 492. So in England, formerly, the executor was held excused in his discretion from interposing as a defense the statute of limitations. Norton v. Frecker, 1 Atk. 526. But in a recent case, doubt is cast over this in England, in 9 Dowl. & Ryl. 43.

The Virginia law, however, must control here, and conduces to justice, when the court or the executor is satisfied no payment has been made, or that there has been a re-promise by the deceased. Holladay's Ex'rs v. Littlepage, 2 Munf. 316; 4 Hen. & Mun. 266.

At all events, on elementary principles, the judgment thus obtained must stand as binding till duly reversed, and be till then for most purposes presumed correct. Vorhees v. Bank of United States, 10 Peters, 472, 489; 2 Howard, 319; Lupton v. Janney, 13 Peters, 381.

Under the sixth and seventh exceptions, the respondent insists that Mary and Julia Mandeville, legatees of the deceased, ought to have been charged rent for a piece of land which they occupied, and that the amount thereof ought to have been deducted from these legacies.

It is true that this land once belonged to the deceased, but Mary and Julia insist that they have been in the exclusive occupation of it for more than twenty years. They had always since their entry claimed it as their own, and 413*] this land was not, *by name, devised by the deceased to anyone, as if still his property. The legatees insisted, that at first, being relations of J. Mandeville, and the premises contiguous to their house, they were given to them for a garden, and that their possession had ever since been adverse to all the world. Nor was there any contract shown to pay rent by them to him; nor any proof that rent had ever been demanded by him, while living. Without, then, settling here the disputed title to this property, it is sufficient to say, that under these peculiar circumstances such a use and occupation of these premises would not warrant the recovery of rent from them in an action of assumpsit at law. 1 Chit. Pl. 107; Birch v. Wright, 1 D. & E. 387; Smith v. Stewart, 6 Johns. 46. Such an action must rest on a contract express or implied. Lloyd v. Hough, 1 Howard, 159, and cases there cited. And if no implied promise could be raised to recover rent, when the occupation is adverse, and no express one is pretended to exist, the executor could not legally set off this claim against their legacies.

The rights to the land, or to any rent thereon, must be settled by a direct action at law, and not in this collateral manner; and if the legatees do not succeed there, they can be made to pay, in trespass, for mesne profits, what they are not liable for as rent, ex contractu, when holding adversely.

A concluding objection to the proceedings below, subsequent to overruling the written exceptions to the report, is, that the court proceeded to a final decree whilst the claims of two of the creditors and two of the legatees were held under consideration.

But either those claims are independent and not necessary to be decided before a final decision on the rest, or they are so connected that a decision on them was proper at the same time, and then this appeal itself would be premature, and would have to be dismissed. 4 Howard, 524; Perkins v. Fourniquet et al. 6 Howard, 206. This, it is understood, is not moved, nor desired by either party.

Such independent claims, however, may properly be suspended under the circumstances existing here, according to Royal's Administrators v. Johnson et al. 1 Randolph, 421.

The judgment below must therefore be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is *now here ordered, ad- [*414 judged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

JOHN D. MURRILL and The Bank of New Orleans, Appellants,
v.
ALEXANDER NEILL and William T. Somerville.

Construction of deed of trust for benefit of creditors—partnership creditors—individual creditors—order of payment.

A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:

It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors pari passu; and out of further remittances there was to be paid the sum of $12,000 to his wife as a com-

NOTE.—Application of partnership assets to debts. Rights of individual and partnership therein. See note to 8 L. ed. U. S. 941.

pensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall have been ascertained. In case of a surplus, it was to revert to the grantor.

The construction of this deed must be, that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds.

Under the deed, it was the duty of the trustee to divide the first $15,000, amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them proportionally.

The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid.

The American and English cases respecting this rule examined.

THIS was an appeal from the Circuit Court of the United States for the District of Maryland, under the following circumstances:

On the 24th of September, 1839, Luke Tiernan, of the city of Baltimore, and Anne, his wife, made a deed of trust to Charles H. Carroll, of Livingston County, New York, thereby conveying to said Carroll about 5,888 acres of land, part of Tuscarora Tract in said Livingston County, of which Luke Tiernan was seized in fee-simple as his individual property. The property so conveyed is in said deed estimated to be worth about $120,000.

415*] *The deed, among other things, recites that Anne, the wife of Luke, had previously joined in a conveyance of various portions of said tract, the property of said Luke, which before that time had been sold, without receiving for her separate use any consideration therefor.

It also recites, that said Luke was indebted to Anne E. Brien, at the time of her death, in the sum of $4,450, which on her death became due to Luke Tiernan Brien, her only child and heir at law.

It also recites, that said Luke "is indebted to divers other persons, residing in different parts of the United States of America, in a large amount of money in the aggregate, but the names of all the persons to whom he is so indebted, and the amount due to each respectively, the said Luke Tiernan is now unable to specify particularly."

The deed then conveys said land to said Carroll in trust, to sell and convey the same in the manner therein specified, and after paying expenses, including a commission for his services, to remit the net proceeds, of the first moneys arising from the sales, in bank checks or drafts, to Alexander Neill, of Maryland, "until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan, whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied."

After said sum of $15,000, shall have been remitted, then the sum of $12,000 is to be remitted by said Carroll to such person as said Anne Tiernan may designate, which is to be invested for the sole and separate use of said Anne, as a compensation to her for relinquishing her dower in the land by the deed conveyed.

Then the sum of $4,450, with interest from the 1st of January, 1841, is to be remitted by said Carroll in payment of the above mentioned debt due to Luke Tiernan Brien.

"And after the last mentioned sum shall have been remitted as aforesaid, all the residue of the moneys arising from such sales (after deducting the expenses and commissions as aforesaid) shall be remitted by the said Charles H. Carroll from time to time, as the same shall be received, to the said Alexander Neill, in the manner hereinbefore provided for the remission of the said sum of $15,000, and the same shall be applied by the said Alexander Neill to the payment of the debts due from the said Luke Tiernan to all the creditors of the said Luke, whose *demands shall then have been ascer- [*416 tained by the said Alexander Neill; and in case that the sum so to be applied shall be insufficient for the payment of all such demands, then and in this case the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied to that object; and in case the said sum shall be more than equal to the payment of such demands, then and in that case the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs, executors, administrators, or assigns."

The said Carroll, in pursuance of said deed, proceeded to make sale of various parts of the property thereby conveyed, and from time to time, from the 1st of March, 1841, to the 22d of April, 1844, remitted to said Neill, in various amounts, the whole sum of $15,000, provided to be paid in the first place to said Neill out of the net proceeds of sales as above mentioned. This sum increased in the hands of Neill, by interest and premiums on the drafts in which it was remitted, to $16,440.55.

Luke Tiernan was a partner in the commercial firm of Luke Tiernan & Son, of Baltimore, the only other partner therein being his son Charles Tiernan. This firm was dissolved previously to the death of Luke Tiernan, which occurred on the 9th of November, 1839, and after his death it was conducted under the same name by Charles Tiernan.

Luke Tiernan was also a partner in the commercial firms of Luke & Charles Tiernan, and Tiernan, Cuddy & Co., of New Orleans. The partners of the first named firm were Luke and Charles Tiernan, and of the second, Luke Tiernan, Charles Tiernan, Calvin Tate, and James McG. Cuddy.

The firm of Tiernan, Cuddy & Co. failed in December, 1835, for a large sum of money. Charles Tiernan was the liquidating partner thereof, and was engaged from April, 1836, to May, 1842, in collecting the assets of the firm. He collected about $100,000, the whole of which, and a good deal more, he paid in satisfaction of the debts of the firm. Calvin Tate, one of the partners, applied for the benefit of

the bankrupt law of the United States on the 18th of February, 1842, and obtained his discharge under said application. The amount of debt returned by him as due by Tiernan, Cuddy & Co., was $569,069.49, and the amount as due to said firm was $800,743.47.

On the 29th May, 1845, the executors of Luke Tiernan, on an account then passed by them with the Orphans' Court of Baltimore County, had in hand a balance in cash to the amount of $506.91. They conjecture that, with this balance, debts may be collected and other assets 417*] may be realized, including *the entire real and personal property of said Luke, to the amount in all of about $30,000. None of this amount, however, so far as appears, was ever collected, except said sum of $506.91, and the entire estimate is merely conjectural.

The individual debts of Luke Tiernan, as proved and allowed in this case, amount to $31,586.25.

The partnership debts of all the firms in which Luke Tiernan was concerned as a partner, as proved in this case, amounted to $295,025.74.

In October, 1843, John D. Murrill, a citizen of the State of Virginia, and the Bank of New Orleans, filed their bill in equity against Mr. Neill, claiming from him an account of his trust under the deed now described, and a distribution of any fund in his hands among the creditors of Mr. Tiernan. The bill was amended by making William T. Somerville a defendant, as executor, along with Mr. Neill, of Luke Tiernan.

The answer of Neill admits the receipt under the deed of $15,000, increased, by interest from investment, to $16,440.55; and this sum he asks may be distributed among the creditors of Mr. Tiernan who may under the trust have right to it. Testimony was taken to show the insolvency, and the debts and assets, of the partnership in New Orleans, and of Luke Tiernan. The separate estate of the latter in Maryland is shown to have been administered, leaving only $506 in the hands of the executors, and some good debts to be collected, and some unsalable stocks.

The court passed an order for notifying creditors of Luke Tiernan to file their claims, and under it a number of claims have been presented, partnership and individual, against Luke Tiernan. The individual amount to $31,586.25, the partnership to $295,025.74.

The matters being referred to an auditor to report an account upon the claims, he stated two accounts, one applying the fund to payment of only the individual creditors, the other to payment of them and of the partnership creditors pari passu.

Upon exceptions taken, the court determined that the individual creditors were to be preferred, and the funds of the trust should go to their satisfaction before any payments should be made to the partnership creditors.

The trustee was therefore directed to proceed to distribute and pay over the funds accordingly. From this decree, the complainants appealed to this court.

The case was argued by Mr. Mayer and Mr. Johnson (Attorney-General) for the appellants, and by Mr. Brown and Mr. Meredith for the appellees.

*The counsel for the appellants, con- [*418
tending that they were entitled to share ratably with the individual creditors in the funds proceeding from the lands conveyed, submitted these propositions:

1. There is no rule at law, nor in equity, which gives separate creditors a priority of payment over joint creditors, out of separate estates; although the principle is well established that joint, that is (more properly) partnership, creditors are first to be paid out of partnership property. This principle is founded upon the consideration that each partner is interested in the partnership fund, and concerned to see it applied for his exoneration by its paying the common liabilities; and it is pledged accordingly, not only for partnership debts, in favor of partnership creditors, but from each to the other partner for the indemnity of both. The prior right of partnership claims upon the partnership estate arises, therefore, from the nature of that estate, in reference to the rights of the partners; and does not grow out of any limitation of the rights or remedies of the partnership creditors. Such being the nature of the partnership fund, it is regarded, too, as under a prior lien in favor of the partnership creditors. The principle, then, which gives the priority is not restrictive, but is cumulative, in furnishing a security, by this preferred claim to the partnership property, in favor of partnership creditors. The rule contended for by the appellee has reference only to the marshaling of assets, not to the satisfaction, directly or ultimately, of the joint claims. It it a rule only "of convenience."

2. Whatever may be the rule as to the distinctive appropriation of separate and joint estates of debtors, it is believed to be clear from the authorities, that where there is no joint estate, or it is inadequate, or there are no solvent partners, the partnership creditors are admitted to dividends, with separate creditors out of the separate estates.

3. Modern decisions in equity regard partnership claims, and satisfy them, as jointly and severally binding the partners. In this respect, equity follows the law, and would virtually make the property here, under that position, legal assets. The whole idea of separate claims having a priority upon separate estates, arose from the impression that the partnership claims should not be treated in equity as joint and several.

4. Whether the proceeds of sales under Mr. Tiernan's deed be regarded as legal or as equitable assets, the terms of the deed demand a distribution among all creditors, without preference to any class.

5. But those proceeds are to be regarded as legal assets, and *the partnership credit- [*419
ors can no more rightfully be excluded from them than they could have been denied, after judgment against all the partners, the privilege of levying an execution on the lands, if they had not been conveyed. So far as the deed provides for creditors generally, it does but what the law had ordained, in subjecting the lands to all creditor claims. Equity here must follow the law in applying the avails of this property. That is the true equity.

Under the first proposition, the following authorities were relied upon: 5 Cranch, 34; 5

Serg. & Rawle, 78; Eden on Bankruptcy, 169; 3 Ves. Jun. 238; 4 Ib. 838, 437; 6 Ib. 813; 9 Ib. 118, 124, 125; Ex-parte Haydon, 2 Bro. C. C. 5; 14 Ves. 447; 15 Ib. 496; 17 Ib. 210; 5 Johns. Ch. 60, 74; 2 P. Wms. 500; 2 Russ. 191, 194, 196; 1 Harr. & Gill, 96; 8 Peters, 271; 4 Johns. Ch. 525; 3 Madd. 229; Buck's Cases in Bankr. 227; 2 Madd. Ch. Pr. 464; 3 Kent, 43, 64, 65; 8 Law Reporter, 273, Judge Ware's Decision; Story on Partnership, 363; West v. Skip, 1 Ves. Sen. 239.

Under the second, the cases from Vesey and 2 Bro. C. C. 5; 2 Madd. 464; 5 Serg. & Rawle, 78, cited under the first proposition, were relied on.

Under the third proposition, 1 Story's Equity, 626, sec. 676; 1 Mylne & Keen, 582; 1 Meriv. 539, 572; 2 Johns. Ch. 508; 1 P. Wms. 682; 3 Ves. Jun. 238; 4 Ib. 838; 1 Harr. & Gill, 96; 2 Russ. & Mylne, 495; 1 Keen, 219; 1 Gall. 371, 630; 2 Vern. 292; 2 Ves. 100 371.

Under the fourth proposition, Ram on Assets, 317, 8 Law Lib.; 1 Vern. 63, 101; 2 Ib. 61, 763.

Under the fifth, 1 Vern. 63, 410, 411; 2 Vern. 764; 1 Story's Equity, 521, sec. 553; 22 Pick. 450, 454, 455.

The counsel for the appellees contended:

1st. That the language of that clause in the deed of the 24th September, 1839, which directs that the first $15,000 remitted by the trustee shall be paid to "the creditors of the said Luke Tiernan," throws upon the appellants the onus of showing that the creditors of the partnership firms of Tiernan, Cuddy & Co. and L. & C. Tiernan were meant to be included. Thomas v. Beynon, 12 Adolph. & Ellis, 431.

2d. That, for the purpose of determining the meaning attached by the grantor to the language of the provisions of said deed, and to ascertain what he intended by the same, the court, by means of extrinsic evidence, will place itself in his situation, by inquiring into all the collateral facts and circumstances that can be made ancillary to those objects. Wig-
420*] ram's Extrinsic *Evidence, 2 Lib. of Law and Equity, Introductory Observations, sec. 9; the whole of Proposition V., with the notes, and especially secs. 61, 62, 71, 72, 73, 74, 77, 78, 79, 95, 96; the whole of Proposition VII., with the notes, and particularly secs. 150, 151, 152; General Conclusions, secs. 211, 212, 213, 214, 215. Broom's Legal Maxims, 262, 263, 294, 1 Lib. of Law and Equity; Gresley's Evidence in Equity, 203; Cheyney's case, 5 Rep. 68; Altham's case, 8 Rep. 155; Counden v. Clark, Hob. 32; Smith v. Jersey, 2 Brod. & Bing. 473; Doe v. Harvey, 8 Bing. 239; Gord v. Needs, 2 Mees. & Wels. 129; Hiscocks v. Hiscocks, 5 Mees. & Wels. 367, 368; Allen v. Allen, 12 Aldolph. & Ellis, 451; 1 Greenleaf's Ev. secs. 286, 287, 288, 290, 297; Blackwell v. Bull, 1 Keen, 176; Doe v. Morgan, 1 Cromp. & Mees. 235; Shore v. Wilson, 5 Scott, N. R. 1037, 1038; Bradley v. Steam Packet Co. 13 Peters, 89; Barry v. Combe, 1 Peters, 640; Barkley v. Barkley, 3 McCord, 269; Doe v. Roe, Geo. Decis.; Part I. 80.

3d. That the deed per se, without looking beyond it, or out of it, ought to be construed to include only the creditors of Luke Tiernan, on his own individual account. Broom's Legal Maxims, 1 Lib. of Law and Equity, pp. 120, 126, 127, 128, 140, 141, 150, 151; 1 Preston's Shep. Touch, ch. 5; 30 Law Lib. 150 et seq.

4th. If this construction be not correct, they will maintain that the money in question in this case, which consists of the $15,000 first mentioned in the deed, with the increase thereof, should be divided solely among the individual creditors, and that the partnership creditors of said Luke Tiernan, if embraced at all in said deed, are secured by the subsequent part thereof, which provides that the residue of the proceeds of sales shall be divided among all the creditors of said Luke.

5th. And if neither of said constructions shall be sustained by the court, they will further maintain that said Luke Tiernan, if all his debts, both individual and partnership, be taken into consideration, made said deed with reference to the rule common both to courts of equity and bankruptcy, that individual creditors shall first be paid out of individual property, and partnership creditors out of partnership property, and that all the property conveyed by said deed, being the individual property of Luke Tiernan, must be applied in the first instance to the payment of his individual debts.

They relied on the decree of Lewis H. Sandford, Assistant Vice-Chancellor of the First Circuit of the State of New York, made with reference to this deed in the case of Slatter v. Carroll, 2 Sandf. Ch. R. 573, Cary on Part. 220, 5 *Law. Lib.; Ib. 296; Gow on [*421 Part. 386; Story on Part. secs. 363-366, 376; 3 Kent, 64, 65, 4th ed.; Collyer on Part. 337-341; 3 Bland, 356; McCulloh v. Dashiell, 1 Harr. & Gill, 97; Pierce v. Tiernan, 10 Gill & Johns. 253, Tuckers v. Oxley, 5 Cranch, 44, 45; United States v. Hack, 8 Pet. 271; Wilder v. Keeler, 3 Paige, 171; Payne v. Matthews, 6 Paige, 19, 1 Story's Eq. sec. 675; Eden on Bankruptcy, 169 et seq. 34 Law Lib.

Mr. Justice Daniel delivered the opinion of the court:

The original bill in this case having been framed upon a palpable misapprehension of the position of the parties, and of the facts connected with and entering into their rights or their obligations, reference to that bill beyond this remark is deemed unnecessary. The object of the amended bill filed by the complainants on behalf of themselves and others, creditors of the mercantile houses of Luke Tiernan and Charles Tiernan, of Baltimore, and of Tiernan, Cuddy & Co., of New Orleans, is to procure an appropriation to those creditors of the sum of $15,000, remaining in the hands of the defendant Alexander Neill, and derived to him from Charles H. Carroll, the trustee in the deed from Luke Tiernan, filed as an exhibit with the answer of Neill in this cause. This controversy depends, first, upon the construction of those clauses of the deed above mentioned, which direct the payment by the trustee to Alexander Neill, and the application by the latter of the sum so paid, and, second, upon the operation of the rules of law, as

controlling such application in reference to the rights of the separate creditors of Luke Tiernan, and of the joint creditors of the firms of Luke & Charles Tiernan and of Tiernan, Cuddy & Co.

In other words, whether the separate creditors of Luke Tiernan, have a prior right of satisfaction from the subject of the trust constituting the separate private estate of said Tiernan, or have the right to claim against that separate estate pari passu only with the several creditors of the mercantile houses of which Luke Tiernan was a partner. The facts of this case are few and simple, and are scarcely in any respect controverted; the cause turns, as has already been remarked, upon the construction of the deed, and upon the rules of equity as applicable to the position of the grantor, in relation to the different classes of his creditors, at the period of its execution. The language of the deed, as indicative of the intention of the grantor, will in the first place be adverted to. And in considering this language, it may be remarked, that it nowhere speaks of debts due from Luke Tiernan, as a member of the firms of Luke & Charles Tiernan, or of Tiernan, Cuddy & Co., 422*] nor mentions *nor alludes to those firms, nor to any other mercantile firms whatsoever. This deed recites the facts of the relinquishment by Mrs. Tiernan of her dower right in a large amount of property previously sold by her husband, and of her consent to a similar relinquishment in future sales to be made by the trustee, Carroll; it recites also a debt due from the grantor to Mrs. Anne E. Brien, deceased, which was still unpaid, and was due and owing to her son, Luke Tiernan Brien. It then proceeds to declare, "That whereas the said Luke Tiernan is indebted to divers other persons, residing in different parts of the United States, in a large sum of money in the aggregate, but the names of all the persons to whom he is indebted, and the amounts due to each respectively, the said Luke Tiernan is now unable to specify particularly. And whereas the said Luke Tiernan is desirous of conveying the lands hereinafter described, in trust that the same shall be sold, and the proceeds thereof applied in the manner hereinafter particularly specified." The deed then, after directing a sale by the trustee, provides, that he shall remit from time to time, as the same shall be received, "to Alexander Neill, of Maryland, and payable to his order, of the first moneys arising from such sales, until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan, whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of the said demands, in the ratio that each of said demands shall respectively bear to the whole sum $15,000, so to be applied." The deed then provides, out of further remittances arising from sales to be made by the trustee, for the payment of $12,000 to Mrs. Tiernan, in compensation for her right of dower; and next, for the payment of the debt due to the son of Mrs Anne E. Brien, and then declares, that after the last mentioned sum (i. e., the sum due to Mrs. Brien or to her son) shall have been paid, all the moneys arising from such sales (after deducting expenses, etc.) shall be remitted by the trustee to the said Neill, and the same shall be applied by the said Neill to the payment of the debts due from the said Luke Tiernan to all the creditors of the said Luke, whose demands shall then have been ascertained by the said Alexander Neill; "and in case that the sum so to be applied shall be insufficient for the payment of all such demands; then, and in this case, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied to that object; and in case the said sum shall be more than equal to the payment of *such de- [*423 mands, then, and in that case, the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs," etc.

We have already adverted to the circumstance, that the grantor in this deed has nowhere alluded to any mercantile concern with which he was associated; that he was disposing of a subject confessedly his own separate property; that he has not said, that whereas Luke Tiernan & Son, or Tiernan, Cuddy & Co., but that Luke Tiernan, was indebted to Mrs Tiernan and to Mrs. Brien, and to divers other persons residing in different quarters of the country. This would not be the language of a merchant (still less of a practiced and extensive merchant), when intending to designate the firm of which he makes a part. On such occasions he never mentions himself individually, unless he intends expressly to distinguish between himself and his house, and would always be so understood by established mercantile acceptation. And again, if, in the construction of this deed, the name of Luke Tiernan is to be taken as synonymous with Luke Tiernan & Son, and Tiernan, Cuddy & Co., we should be driven to the conclusion that these several firms were indebted to Mrs. Tiernan in consideration of her relinquishment of her dower in her husband's estate, and to Mrs. Brien for the private debt due to her—for all these creditors are grouped in the same category. Their claims originate in the same source—in the obligations of Luke Tiernan. The language of the deed is, that Luke Tiernan is indebted to Mrs Tiernan, and to Mrs. Brien; and the same Luke Tiernan it is who is also indebted to divers other persons residing in different parts of the United States. Such a construction of the deed involves, we think, a violation of the plain meaning of the terms of the instrument, and leads to confusion and absurdity.

It has been insisted for the appellants in this case, that the admission by the grantor of a large amount of claims against him, of the diversity of the residence of his creditors, and of the inability on his part at once to designate those creditors and their demands, should be received as proof that the deed was never intended to be limited to the private creditors of the grantor, who, it is contended, must, as well as the extent of their claims, have been known; but was designed to embrace all his partnership liabilities. We have just stated that such an interpretation of the deed is inconsistent with the meaning of its language. But if we look beyond the deed, to the position of the parties at the time of its execution, is there any

probability arising from that position, which 424*] can justify the conclusions *urged in this respect for the appellants? The grantor in this deed appears to have been at one time the possessor of great wealth; the deed made an exhibit in this case shows that he was the possessor of an unusual extent of property. It is almost certain, too, from the character and situation of the subject of this conveyance, as well as from other circumstances disclosed by the record, that its owner must have been the proprietor of many other constituents of a large estate, both within and without the city and State of his residence. That a man thus situated should necessarily be engaged in a variety of transactions; should employ numerous agents; that many of his transactions, both as to persons and contracts, should be conducted by agents; that his knowledge with respect to persons and undertakings should in their detail be dependent on information to be derived from agents thus employed, are circumstances, in our view, falling within the range of daily experience, and such as not only may explain the language of an instrument intended to embrace the transactions of one so situated, but which in fact render such language proper, in order to bring it within the bounds of experience and truth. The daily habits of one so situated must imply, to some extent, an ignorance of the precise detail of all that may be consequent upon them. We think it natural (nay, with a due regard to truth, inevitable), that one so situated, if called upon on an emergency, should admit his inability to enumerate all that he had done—all that he had authorized to be done through others—and every consequence which might flow from the one or the other. The language of Mr. Tiernan we consider, therefore, as not more comprehensive than was appropriate to embrace his private liabilities. The debts due to his wife and to Mrs. Brien were strictly domestic obligations, necessarily within his knowledge; were regarded as of a peculiarly sacred character; and therefore were provided for, exempt from the contingency of an ultimate insufficiency of funds. But even these claims, however sacred they may have been deemed, were not permitted absolutely to precede a contribution at least to other creditors whose condition might be known; but they have been postponed to these pro tanto. The language of that portion of the deed which, after the payment directed to be made to Mrs. Tiernan and to Luke Tiernan Brien, and after distribution of the first fifteen thousand dollars received from the trustee, directs the application of the subsequent proceeds of the trust subject to all the creditors of the grantor then ascertained, and, in the event of a surplus, the payment of that surplus to the grantor, has been earnestly pressed on our attention. It has been argued upon 425*] *this provision of the deed, either that it is expressive of the intention of Luke Tiernan to let in all his creditors, social as well as individual, or that it is fraudulent, as interposing a hindrance on one or the other class, or on both the classes of his creditors, by an attempt to retain the proceeds of the land, in opposition to their rights. We cannot yield to this argument the ends it was designed to accomplish. *We think* that the terms of this latter provision, so far from enlarging the meaning of the former, so as to let in upon the trust subject the creditors of the firms before mentioned, tend rather to strengthen the limit presented by the former provision when standing alone. For although the distribution of the money to be received by Neill is to be made amongst all the creditors, they are still the creditors of the said Luke Tiernan before spoken of, and the creditors of no other person. This mode of expression, coming from an individual practiced in the habits and language of merchants, we regard as a confirmation of the intention previously expressed, rather than as proof of a departure from that intention. Next, as to any evidence of fraud resulting from the direction to pay over to the grantor in the deed any surplus which might remain after satisfying the separate creditors; we can perceive no proof of fraud, no attempt to hinder or delay the creditors in this direction. Nothing is more probable than that Luke Tiernan might have considered the effects of Luke Tiernan & Son and of Tiernan, Cuddy & Co., represented to be of a large amount, as adequate to meet the joint responsibilities of those firms; or, at any rate, he might have insisted upon his right to refer the partnership creditors to the partnership funds in the first instance, and, until these should be shown to be insufficient, to retain possession of his separate private estate. The argument then appears to be defective in either aspect in which it is applied.

The second principal position assumed for the appellant is this: that, conceding the fifteen thousand dollars in controversy to have been ever so clearly appropriated by Luke Tiernan to his separate creditors, still, under principles of equity, such an appropriation cannot be maintained; but that those principles authorize the partnership creditors of Tiernan & Son, and of Tiernan, Cuddy & Co., to charge that fund pari passu with the separate creditors of said Tiernan.

The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, *with one or two eccentric variations [*426 in the English practice, which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: That partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety.

This rule may be traced back in England, with certainty, to the cases of Ex-parte Crowder in 2 Vernon, 706, in 1715, and of Ex-parte Cook, 2 P. Wms. 500, in 1728, nearly a century and a half since. It was affirmed by Lord Hardwicke in Ex-parte Hunter, in 1 Atkyns, 228, in 1742, and continued unchanged until the year 1785, when a material innovation was made upon it by Lord Thurlow, in the case of Ex-parte Hodgson, 2 Bro. Ch. Rep. 5. By the decision last mentioned, the established practice then of sixty years was so changed, and the distinction between joint and separate creditors so broken up, that the former were permitted to come in, and to receive dividends pari passu with the latter, from the separate estate.

This change led to the practice of filing a bill on behalf of the separate creditors, to restrain the order in bankruptcy whenever there was a joint estate, and by this means the rights of the joint and separate creditors on their respective funds were maintained; a proceeding which could rest on no other foundation than the peculiar equities of these different parties with respect to the funds with which they had been respectively connected. In consequence of the inconvenience of Lord Thurlow's rule, and of the injustice it was thought to involve, Lord Loughborough re-established the practice that had so long previously existed, with the single modification of permitting the joint creditors to prove under a separate commission; but denying to them any right to dividends, until after the separate creditors were satisfied. The reasoning of his Lordship, as going to show that his decision is founded in pure principles of equity, is peculiarly forcible. Speaking of the rule of Lord Thurlow, he says: "The difficulty that has struck me upon 427*] it is, that what I order here sitting in bankruptcy, I shall forbid to-morrow sitting in chancery; for it is quite of course to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain that it is of course upon a bill filed. The object of the commission is to distribute the effects with the least expense. Every order I make to prove a joint debt on a separate estate, must produce a bill in equity. It is not fundamentally a just distribution, nor a convenient distribution. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate." Again his Lordship says: "It is not stated as a case where there are no joint funds. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get all they can from that first. I have no difficulty in ordering them to be permitted to prove, but not to receive a dividend." This doctrine of Lord Loughborough, deduced, as he tells us, not less, from fundamental principles of equity, than from convenience in the administration of bankrupts' estates, appears to have been followed in England ever since. The numerous cases chiefly before Lord Eldon going to sustain this position, would, if quoted, unnecessarily encumber our opinion; they are collected in note 1 to the case of Elton, ex-parte, 3 Vesey, by Sumner, p. 242. It may be proper in this place to mention the two departures permitted by the Court of Chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion. The first is presented in the instance in which the petitioning creditor, though a joint creditor, is permitted to charge the separate effects pari passu with the separate creditors, because, as it is said, his petition, being prior in time, is in the nature of an execution in behalf of himself and the separate creditors. The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends pari passu on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country. The case of Tucker v. Oxley, 5 *Cranch, [*428 34, was a case at law, and the court in that case, whilst they admitted the joint creditors to prove and to receive dividends against the separate estate, explicitly recognized the authority of Ex-parte Elton, and the power and the duty of a court of chancery, upon application thereto, to prevent the diversion of the separate fund. The latter exception above referred to was considered by the Court of Appeals of Maryland, in the case of McCulloh v. Dashiell, 1 Harris & Gill's Reports, 97, and by that court expressly repudiated.

The doctrine upon this question of distribution, as illustrated both in the English and American decisions, will be found to be ably treated in the case of Murray v. Murray, 5 Johnson's Chancery Reports, 72 et seq., and by Archer, Justice, in the case of McCulloh v. Dashiell, in 1 Harris & Gill, pp. 99 to 107; and the authorities, both English and American, are collated in a learned note in the third volume of Kent's Commentaries, beginning on p. 65 of that volume.

The proper conclusion from these authorities we deem to be this, as is stated also by Justice Story in his treatise on Partnership, p. 376, where he says: "It is a general rule, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus, only after satisfying such priorities, can be reached by the other class of creditors."

Upon a full consideration of this cause, we are of the opinion that, upon either ground of objection urged to the decree of the Circuit Court, that decree should be affirmed, and it is hereby accordingly affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on con-

sideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

429*] *DANIEL L. GROVE, Appellant,

v.

JOHN McP. BRIEN, Robert Gilmor, William Fowle, William H. Fowle, and George D. Fowle, trading under the Firm of William Fowle & Sons, Defendants.

Cross Suit.

ROBERT GILMOR, Complainant,

v.

DANIEL L. GROVE, John McP. Brien, William Fowle, William H. Fowle, and George D. Fowle, trading under the Firm of William Fowle & Sons, Defendants.

Consignment of goods to secure debt due from consignor to consignee, when will pass title—assent of consignee, when presumed.

Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the canal boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, such delivery and bill of lading operated as a transfer of the legal title to Gilmor, who was in fact the consignor.

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage.

Therefore, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer; nor had Fowle & Sons any valid lien upon them for previous advances to him. The title to the nails had passed to Gilmor before they came into the possession of Fowle & Sons.

In this case the manufacturer acted bona fide, in the transfer of the goods, for the purpose of securing a pre-existing debt to Gilmor. This being so, there was no necessity for Gilmor's expressing his assent to the transfer, in order to the vesting the title. The manufacturer was a competent witness.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria.

It was a controversy respecting the right to certain kegs of nails, which were in the hands of William Fowle & Sons, in Alexandria.

On the 14th of March, 1843, the following was the position of the several parties who had any concern in the matter:

John McPherson Brien carried on an extensive iron concern upon the waters of Antietam Creek, in Maryland, near the Potomac River, above Harper's Ferry. He was indebted to Robert Gilmor, of Baltimore, to Daniel L. Grove, of Alexandria, and to William Fowle & Sons, of the same place. To the last mentioned house he had been in the habit of sending nails from the foundry, and upon the preceding 21st of February had written the following letter:

"Antietam, February 21, 1843.

"Messrs. Wm. Fowle & Sons:

"Gentlemen,—Your account of sales, etc., has been examined *and found correct, [*430 and charges for your commission, etc., made in my books accordingly.

"The water I learn will be put into the canal in a day or two, when I shall embrace the first opportunity to forward you the nails you have ordered.

"Yours, most respectfully,

"Jno. McP. Brien."

In this state of affairs, Brien made a shipment by one of the canal boats, and took the following receipt:

"Received, March 14, 1843, of John McP. Brien, 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order. George H. Sharpless,

"For Isaac Sharpless."

Upon the same day the following letter was written, which it appeared by the testimony, was not mailed at Mr. Brien's postoffice, but brought down the canal by the boatman, and mailed at Georgetown, on the 20th. It was received by Fowle & Sons on the 21st.

"To Messrs. Wm. Fowle & Sons:

"Gentlemen,—We have this day shipped on board of Capt. Sharpless' boat, and consigned to you, for the use of Robert Gilmor, Esq., Bal-

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NOTE.—How far consignment of goods vests the property in the consignee, and to whom is the carrier responsible for loss or injury.

To produce a change of property from the shipper to the consignee, it is essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other agreed to buy. The Frances, 8 Cranch. 359; 9 Cranch. 183; The Francis, 2 Gall. 391; Wilmhurst v. Bowker, 5 Bing. N. C. 5; 7 Scott, 561; 2 Man. & Gr. 792.

Where goods are sent by vendor to vendee, the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for them. Fragrano v. Long, 4 Barn. & C. 219; Stanton v. Eager, 16 Pick. 467; Dawes v. Peck, 8 Term Rep. 330; Dutton v. Solomon, 3 Bos. & P. 584; Brown v. Hodgson, 2 Camp. 36; Abbott on Shipping, 326.

But if by the terms of dealing between the consignor and consignee, the latter is not to acquire a property in the goods; or if the consignee procured the goods to be consigned to him by fraud, so that no property in them passed to him, the consignor may sue. Freeman v. Birch, 1 Nev. & Man. 420; Stephenson v. Hunt, 4 Bing. 476; Duff v. Budd, 4 Brod. & B. 177.

So, if the goods were sent merely for approval, or the carrier has contracted to be liable to the consignor. Swain v. Shepherd, Moo. & Rob. 224; Moore v. Wilson, 1 Term Rep. 659.

If the consignor purchase the goods merely as agent of the consignee, by delivery of same to the carrier, the property of the consignor is devested, and he cannot bring an action against the carrier. The Mary and Susan, 1 Wheat. 25; Potter v. Lansing, 1 Johns. 215.

And the fact that the bill of lading states the goods to be on account and risk of the consignee is prima facie evidence of the consignee's ownership. Ibid.

But notwithstanding the freight is payable by the consignee, if the goods are at the risk of the consignor during their transportation, the property remains in the consignor till delivery. McIntyre v. Bowne, 1 Johns. 229; Ludlow v. Bowne,

timore, 500 kegs nails, viz., 27 3d., 34 4d., 68 6d., 99 8d., 107 10d., 58 12d., 22 20d., and 17 30d. nails; 22 2d., 7 8d., and 15 10d. brads; 10 8d., and 12 10d. fencing, which we hope will arrive in good order. You will please pay Capt. Sharpless his freight, and oblige yours, respectfully, Jno. McP. Brien,

"Per Jas. S. Primrose.

"March 14, 1843."

Postmarked, "Georgetown, D. C., March 20."

Upon the preceding 23d of January, Grove had filed a bill (the origin of all these legal proceedings) against Brien and Fowle & Sons, stating that Brien was indebted to the complainant in the sum of $1,089.50, and praying that an attachment might issue against his funds and effects in the hands of Fowle & Sons. As soon as the nails arrived, viz., on the 20th of March, the marshal served the attachment and subpœna.

It may be here stated, that Gilmer obtained leave of the court to be made a defendant, and afterwards filed his answer and cross bill.

431*] *It is not necessary to state the progress of the suit through all its details. The parties all answered, and much testimony was taken, including that of Brien, which was objected to by the counsel for Grove. Proper parties were also made in place of some who had died.

Fowle & Sons in their answer set forth their previous dealings with Brien, the letter (above inserted) of the 21st of February, and claimed that Brien was indebted to them on account of prior transactions, for which balance so due they had a lien on the nails.

The answer of Gilmor, and his cross bill, state substantially the same facts, and after referring to the attachment of the nails in controversy by Grove, say, that John McP. Brien was indebted to Robert Gilmor (besides other large indebtedness), in the amount of a draft for $4,405.40, which was drawn by Brien on Gilmor and by him accepted, and at maturity paid by Gilmor, at the request and solely for the use of Brien. That previous to the shipment of the said nails, it was agreed between Brien and Gilmor, that Brien should ship to Gilmor the 500 kegs of nails, on account of, and to be applied in part liquidation of, such pre-existing debt.

It then proceeded to state the shipment, and claimed the nails as his property.

The answer of John McP. Brien to the original and cross bills neither admits nor denies his indebtedness to Grove, as charged in his original bill, but calls for proof. He states his indebtedness to Gilmor, as alleged in the cross bill, and admits that, according to a previous agreement between himself and Gilmor, and in consideration of such pre-existing indebtedness, he shipped the 500 kegs of nails in controversy, on the 14th of March, 1843, to the care of Wm. Fowle & Sons. That by letter dated the 14th of March, 1843, he advised said William Fowle & Sons, that the said nails, a particular description of which is contained in the letter, were forwarded to them, for the use of Robert Gilmor, of Baltimore, and also inclosed them the receipt or bill of lading of the common carrier, to whom the said nails were delivered, which expressed that the same were shipped for the use of Robert Gilmor, and denies all fraud, combination, etc.

Grove answered the cross bill, stating his ignorance generally of the facts, calling for proof, and charging that the consignment for Gilmor's use, if made, was fraudulent, etc., etc.

The result of the evidence in the suit may be stated to establish the debt of Brien to Gilmor, to Grove, and to Fowle & Sons, and the question was which creditor had the preference. The account of the sale of the nails was thus presented by Fowle & Sons.

*It will be perceived that their prior [*432 debt is not brought into the account.

"Sales 500 casks nails, received from the Antietam Iron Works, for account and risk of whom it may concern.

"Account of the sale of the nails by William Fowle & Sons.

1845.			
Nov. 8.	R. Crupper, 100 casks, 10,000 lbs. at $4⅛, 6 months' credit...	$ 412.50	
1846.			
Oct. 27.	James Green, 400 casks, 40,000 lbs. at $3½, 6 months's credit..	1,400.00	
			$1,812.50
	Charges.		
1843.			
Mar. 18.	Paid freight on 500 kegs nails	$ 75.00	
	Interest on $75 till sales are due	17.54	
	Wharfage, $5; drayage $3.75	8.75	
	Storage, at ¾ cents per cask per month	152.25	

1 Johns. 1; De Wolf v. New York Ins. Co. 20 Johns. 214; The Venus, 8 Cranch. 253, 275; The Merrimack, 8 Cranch. 317, 327, 328; The Frances, 9 Cranch, 183; The Mary and Susan, 1 Wheat. 25; The St. Jose Indiano, 1 Wheat. 208, 212; Isley v. Stubbs, 9 Mass. 65; Chandler v. Sprague, 5 Met. 306; see Griffith v. Ingleden, 5 Serg. & R. 429.

The mere shipment of goods does not always vest the property of them in the consignee, though he be the purchaser; as where the bills of lading were made for delivery to the shipper's own order, or to ——, or order or assigns, which give notice to the carrier that they are shipped on some condition. In such case the carrier can only safely deliver to the holder of the bill of lading indorsed by the shipper to whose order they are thereby to be delivered. Brant v. Bowlby, 2 Barn. & Adol. 932; Mitchell v. Ede, 3 Per. & D. 513; 11 Ad. & Ell. 888; Abbott on Shipping, 327–330; see Ogle v. Atkinson, 1 Marsh. 323; 5 Taunt. 759; Cox v. Harden, 4 East, 211; Nichols v. Clint, 3 Price, 547.

Where bills of lading to shipper's order, or to ——, or order, indorsed, or by which goods are made deliverable, to the consignee by name, are transmitted to consignee as security for advances, or to indemnify him from liability on account of the particular consignment which they represent, they are evidence of such appropriation to him of the goods as will vest in him a property absolute or special in them, and render the carrier responsible to him for their loss or injury. Wallie v. Montgomery, 3 East, 585; Hallie v. Smith, 1 Bos. & P. 513; Anderson v. Clarke, 2 Bing. 20; Bryans v. Nix, 4 Mees. & W. 702; Patton v. Thompson, 5 Maule & S. 356; Vertue v. Jewell, 1 Camp. 31; Evans v. Nicholl, 4 Scott, N. C. 43; Kinloch v. Craig, 14 East, 582; Bruce v. Wait, 3 Mees. & W. 15; Abb. on Shipp. 333; Dows v. Cobb, 12 Barb. 310; 10 N. Y. Leg. Obs. 161.

If delivery is ordered to a mere agent of the shipper, he has no property in the goods, and cannot bring action in his own name for non-delivery. Waring v. Cox, 1 Camp. 369; Cox v. Harden, 4 East. 211, but see Morrison v. Gray, 2 Bing. 260; Story on Agency, 349–356.

So, if goods are consigned to A for the use of B,

Brought over		$1,812.50
Labor, receiving, piling, and delivering,	5.00	
Cooperage	4.25	
Fire Insurance, 5.100 per $100 a month and policy $1.....	42.00	
Commission and guarantee, 6 per cent..	108.75	
		413.54
Net proceeds average cash, February 7–10th, 1847		$1,398.96

E. E.

"Wm. Fowle & Sons.

"Alexandria, October 28th, 1846."

On the 31st day of October, 1846, the Circuit Court passed the following decree.

"Final Decree.

"And now here, at this day, to wit, at a court continued and held for the district and county aforesaid, the 31st day of October, 1846, came the parties aforesaid by their solicitors, and these causes being set for hearing, and coming on to be heard this 31st day of October, 1846, upon the original, amended, and cross bills, demurrer, answers, general replication, depositions, exceptions, agreements of counsel, interlocutory decrees and orders, and other papers, and it appearing to the court that all the parties defendant to said original, 433*] amended, and cross *bills had duly answered the same, and the arguments of counsel being heard, the court doth order, adjudge and decree, that the amount of sales by the defendants, William Fowle & Sons, of the nails in controversy, made under an order in these causes of May Term, 1844, not having been excepted to, be, and the same is hereby confirmed. And the court proceeding first to decide upon the original bill filed by the complainant, Daniel L. Grove, doth adjudge, order and decree, that the resident defendants, William Fowle & Sons, had not, at the filing of the said original bill, or at any time since, in their hands any property, effects, or money belonging to the said non-resident defendant, John McP. Brien; and do further adjudge, order and decree, that said original bill be dismissed, and that the said Daniel L. Grove do pay to the defendants thereto their costs in that behalf expended.

"And the court proceeding now to consider and decide upon the cross bill, filed by the said Robert Gilmor in this cause, doth adjudge, order and decree, that the said Robert Gilmor recover of the said John McP. Brien, the sum of four thousand four hundred and five dollars and forty cents, the amount of the draft in the said cross bill mentioned, with interest thereon from the 4th day of March, 1843, till paid; to be credited, however, by the sum of one thousand eight hundred and twelve dollars and fifty cents, as of the 14th day of March, 1843; the said sum of $1,812.50 being the gross amount of the sales of the said five hundred kegs of nails, as shown by the account of sales of the said William Fowle & Sons above mentioned, and the court doth further order and decree, that the said William Fowle & Sons, out of the said one thousand eight hundred and twelve dollars and fifty cents, the proceeds of the sales of said nails in their hands, retain the sum of four hundred and thirteen dollars and fifty-four cents, in discharge and payment of the freight on the shipment of said nails, for storage, insurance, commission on sales, and the other items of charge against the said nails set forth in their said account of sales; and the court doth further adjudge, order and decree, that the said William Fowle & Sons are not entitled to any lien on the said nails, or their proceeds, for the sum of $334.60 claimed by them to be due as a general balance of account on previous transactions between them and the said John McP. Brien. The court doth further adjudge, order and decree, that William Fowle, William H. Fowle, and George D. Fowle, composing the firm of William Fowle & Sons, pay over to the said Robert Gilmor the sum of one thousand three hundred and ninety-eight dollars and ninety-six cents, being the balance of the sales of the *said nails in their hands, after [*434 deducting the said sum of $413.54 in manner aforesaid. And the court further adjudge, order and decree, that the said Robert Gilmor recover of the defendants to said cross bill his cost against them in that behalf expended.

"From which decree the complainant, Grove, in the original bill, and a defendant in the cross bill, prays an appeal to the Supreme Court of the United States, which is granted, upon his giving bond and security in the sum of $2,500, to be approved by the court, or one of the judges thereof."

Upon this appeal, the case came up to this court.

It was argued by Mr. Davis for the appellant, and Mr. Francis L. Smith and Mr. Meredith for the appellee.

The points raised by Mr. Davis, upon which the decision of the court turned, were the following:

If the deposition of Brien be admitted, still, on consideration of the whole evidence, the case of the answer and cross bill is not proved.

B ought to bring the action. Evans v. Martlett, 1 Ld. Raym. 271; Sargent v. Morris, 3 Barn. & Ad. 278.

Where there is an agreement between the consignor and consignee, that the consignee shall make advances on the credit of the goods consigned, and dispose of them on commission, for his re-imbursement, or where he has made advances on them, the consignee acquires a vested interest in the goods, which will entitle him to bring an action against the carrier for the loss, waste, or wrongful conversion thereof. 2 Hill, 147; Adams v. Bissell, 28 Barb. 382; Dows v. Greene, 16 Barb. 72; Dows v. Greene, 32 Barb. 490; Wilson v. Nason, 4 Bosw. 155; Alvin v. Latham, 31 Barb. 294; Milliken v. Dehon, 27 N. Y. 364; Rawles v. Deshler, 3 Keyes, 572; Williams v. Tilt, 36 N. Y. 319; Bates v. Cunningham, 12 Hun, 21; Brown v. Combs, 68 N. Y. 598.

If there be an express contract contained in the bill, a suit founded thereon should generally be brought by the shipper, or by the owner where the shipper acted as his agent. 3 Barn. & Ad. 932; 3 Barn. & Ald. 277; 7 Ad. & Ell. 29; Abb. on Ships. 337; 14 Mees. & W. 403; 2 Bing. 20.

Yet no general rule can be laid down, as the rights of the consignee will depend on the circumstances of each case; and the carrier will be liable to the consignor or consignee, according to the right of property as between them. Dows v. Cobb, 12 Barb. 310; 10 N. Y. Leg. Obs. 161; Dows v. Greene, 16 Barb. 72; Patterson v. Berry, 5 Bosw. 510; 10 Abb. Pr. 82.

The consignee is presumed to be the owner, and if the goods are lost or diverted, in transitu, suit may be brought either in his name, or that of the owner. Fitzhugh v. Wyman, 9 N. Y. 559; Sheets v. Wilgin, 56 Barb. 662.

But this presumption may be rebutted. Swet v. Barney, 23 N. Y. 335.

(a.) The deposition is silent as to the alleged "previous agreement;" nor is any communication with Gilmor prior to the attachment shown.

(b.) The statement of the consideration is defective—as in the cross bill—being merely his drawing on Gilmor, who accepted and paid the draft; "in consideration of which draft and other indebtedness," etc.

5. He then states, 1st, that he shipped 500 kegs of nails to Fowle & Sons, for the use of Gilmor; 2d, that he took the annexed receipt; 3d, that the letter of March 14, 1843, was written by his authority. What that letter contained does not appear. If it be supposed to be the one produced by Fowle & Sons, then—

1. It is not proved, and so cannot be read against any but Fowle & Sons.

2. If it be read against the complainants, it did not reach Fowle & Sons till after the attachment, and was not mailed till the day of the attachment.

It is not shown that the receipt ever left Brien's possession prior to the attachment or prior to his deposition. 9 Leigh, 181.

It is submitted that these facts, if believed, do not amount to a transfer of the title to the nails to Gilmor, prior to the attachment. Tiernan v. Jackson, 5 Pet. 597-599; Williams v. Everett, 14 East, 582; Grant v. Austen, 3 Price, 58; Scott et al. v. Porcher, 3 Meriv. 652, 663, 664; Story on Agency, sec. 377, note 3; The Frances, French's claim, 8 Cranch, 359, 435*] *363; 3 Cond. R. 224; and Dunham and Randolph's claim, 8 Cranch, 354, 358; 3 Cond. R. 222, 223; The Constantia—Henrickson, 6 Rob. Adm. 321; Abbott on Ship. 328, 329, 5th Am. ed. sec. 6; The Venus, 3 Cond. R. 181, note 2; 2 Kent's Com. 532, 533, note a, 3d ed.; 3 B. & A. 321.

The receipt is not a bill of lading; or if it be one, the mere taking it does not change the property, nor the mere indorsement, without delivery of it. Abbott on Ship. 329, 330; Mitchel v. Ede, 3 Perry & D. 513; S. C. 11 Adolph. & Ell. 888; 1 Bos. & Pull. 563; 1 Pet. 386.

But, in fact, the deposition shows that these nails were consigned generally to Fowle & Sons on their order; that the consignment for use of Gilmor is an after-thought, to cover the property from attachment, and a device frequently resorted to by Brien for such purposes; and that Brien's deposition is unworthy of credit.

The counsel for the appellee, after examining the evidence to prove that the nails were shipped by Brien to pay a pre-existing debt to Gilmor, made the following points:

If, then, as we insist the evidence just alluded to proves that the nails were shipped under a special contract between Brien and Gilmor, in consideration of a pre-existing debt, due from the former to the latter, they became the property of Gilmor, on the 14th day of March, 1843, and are not liable to the lien of an attaching creditor, and on this ground the attachment of Grove must fail. Story's Com. on Agency, ed. 1839, sec. 362, and cases cited in note 2; Weymouth v. Boyer, 1 Ves. Jun. 416; Coxe et al. v. Harden et al. 4 East, 211; Burn v. Carvalho, 4 Mylne & Craig, 690; Wood v. Roach, 2 Dall. 180; 1 Yeates, 177.

In view of these positions, we further submit, that immediately upon the receipt of the nails by Sharpless, the common carrier, and his signing the bill of lading, expressing on its face that they were to be delivered to William Fowle & Sons, for the use of Robert Gilmor, of Baltimore, the absolute title to the nails vested in Gilmor, and their delivery to Sharpless, the carrier, operated in law as a delivery to Gilmor. The rule is the same whether the goods be sent from one inland place to another, or beyond sea. Holt on Shipping, 359; Story's Com. on Agency, sec. 301, and cases there cited; 2 Kent's Com. ed. 1847, part 5, p. 490; Smith v. Bowles, 2 Esp. Cases, 578; Atkin v. Barnwick, 1 Stra. 165; Evans v. Martlett, or Martell, 1 Ld. Raym. 271, and also reported in 12 Mod. Rep. 156, and in 3 Salk. 200, which is strongly analogous to the case at bar; Dawes v. Peck, 8 Term Rep. 330; Allen v. Williams, 12 Pick. *297; Buffington et al. v. Curtis et al., [*436 15 Mass. 528, and cases there cited; Ludlowe v. Bowne, 1 Johns. 15; Potter v. Lansing, Ibid. 215; Summeril v. Elder, 1 Bin. 106; Griffith v. Ingledew, 6 Serg. & Rawle, 429; King v. Meredith, 2 Camp. 639; Copeland v. Lewis, 2 Starkie's N. P. 33; Howland v. Harris, 4 Mason, C. C. 502.

The letter of advice from Brien to Wm. Fowle & Sons was a declaration of trust, and an irrevocable appropriation of the nails for the use of Robert Gilmor. Walter et al. v. Ross et al. 2 Wash. C. C. 288; Sharpless v. Welsh et al. 4 Dall. 279; Row v. Dawson, 1 Ves. Sen. 331; Stevenson v. Pemberton, 1 Dall. 4; Corser v. Craig, 1 Wash. C. C. 424; 2 Story's Eq. Jur. 1044, 1045.

The letter of advice to Fowle & Sons, the consignees, connected with the execution of the bill of lading and the delivery to the carrier for the use of Gilmor, amounts to such an assignment and transfer of the property in the nails to Gilmor, or to his use, as to protect them effectually against the claims of any attaching creditor. They amount to an order drawn on the whole fund. Mandeville v. Welch, 5 Wheat. 277-286; Story's Conflict of Laws, p. 324, sec. 396; Bac. Abr. Gwillim's ed. 1846, 381, and cases there cited; 2 Kent's Com. ed. 1847, 548, 549; Lickbarrow v. Mason, 2 Term Rep. 63; Nathan v. Giles, 5 Taunt. 558; Meyer v. Sharpe, Ibid. 79; S. C. 1 March. 233; Wright v. Campbell, 4 Burr. 2051; Cuming v. Brown, 9 East, 506; Newson v. Thornton, 6 East, 16; Gardner v. Howland, 2 Pick. 599; Peters v. Ballistier, 3 Pick. 495; Hodges v. Harris, 6 Pick. 359; Rowley v. Bigelow, 12 Pick. 307; Dawes v. Cope, 4 Bin. 258; Chandler v. Belden, 18 Johns. 157; Bholen et al. v. Cleveland et al. 5 Mason, C. C. 174; Wilmshurst v. Bowker, 7 Man. & Grang. 882; Conard v. Atlantic Ins. Co. 1 Pet. 419; Wakefield v. Martin, 3 Mass. 558; Holt on Shipping, p. 362, sec. 4, p. 365, sec. 8, p. 373, sec. 15, p. 374, sec. 16, p. 377, sec. 19.

Notice of acceptance by Gilmor was not necessary, the goods having been shipped to pay a precedent debt. Anderson v. Van Alen, 12 Johns. 343; Wheeler v. Wheeler, 9 Cowen, 34; Holland v. Dale, 1 Alabama, 263.

The attaching creditor can occupy no better footing than the absent defendant. Wilson v. Davisson, 5 Munf. 178; United States v. Vaughan, 3 Bin. 394.

The rights of parties arising from the shipment of the nails should, we suppose, be governed by the local law of the State of Maryland, where the shipment was made. Story's Conflict of Laws, secs. 397, 398, 399; Black et al. v. Zacharie & Co. 3 How. 483. These cases establish that an assignment of personal 437*] *property, which is valid by the laws of the country where it is made, is binding everywhere. Adopting the course which was pursued in Black v. Zacharie, the appellee Gilmor took the depositions of Messrs. Glem and Brent, two eminent counselors, who gave an opinion that the letter of advice from Brien to Wm. Fowle & Sons, and the carrier's receipt, according to the course of decision of the Court of Appeals of Maryland, vest an absolute right to the nails in controversy in Robert Gilmor. In support of their opinions, they refer to the cases of Powell v. Bradlee, 9 Gill & Johns. 220, and 2 Harr. & McH. 453.

The claim of Wm. Fowle & Sons cannot be sustained, because no account has been filed showing the balance claimed by them, and further, that they have only asked relief by their answer. A cross bill was necessary. Talbot v. McGee, 4 Monroe, 379; Pattison v. Hull, 9 Cowen, 747.

The nails were not shipped, as Wm. Fowle & Sons suppose, to answer their order of the 21st of February, 1843, but for the benefit of Gilmor, in the manner stated.

The nails were appropriated (and the evidence thereof accompanied the property), by Brien to Gilmor, before they came to the possession of Fowle & Sons, and therefore their lien for a general balance does not attach. Ryberg et al. v. Snell, 2 Wash. C. C. 294; Abbott on Shipping, ed. 1829, 389; Walker v. Birch, 6 Term Rep. 262.

Being shipped under a special contract, the nails are not subject to any intervening lien. Story on Agency, sec. 362; and Weymouth v. Boyer, before cited.

The bill of lading for the nails, signed by the carrier, being produced by Gilmor, the legal presumption arises that it was delivered to him; either by the carrier or by the consignees, Wm. Fowle & Sons.

John McP. Brien is a competent witness, he has no interest in the result of the suit, he stands in mutual regard between Grove and Gilmor, and his legal interest is equally balanced. A witness who is liable to both parties is competent for either. Stewart v. Stocker, 1 Watts, 135; Sommer v. Sommer, Ibid. 303; Bailey v. Chapell, 1 Harring. 449; Eldridge v. Wadley, 3 Fairf. 371-373; Blaisdell v. Cowell, 2 Shepl. 370; Sherron v. Humphreys, 2 Green, 217; Prince v. Shephard, 9 Pick. 176; Emerson v. The Prov. Man. Co. 12 Mass. 237; Stump v. Roberts, 1 Cook, 440; Harwood v. Murphy, 4 Halst. 215; Nessly v. Swearingen, Addison's Rep. 144; Evans v. Hettich, 7 Wheat. 453; Kirk v. Hodgson, 2 Johns. Ch. 550; Richardson, 268.

A cross bill was Gilmor's proper, indeed only, 438*] remedy. The *nails were attached and in the hands of a court of equity, and how else could he claim and litigate his right to the property? Story's Eq. Pl. from sec. 319 to sec. 403 inclusive; 1 Smith's Ch. Pr. 449, 460, 461, *462, 463.*

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of this District, in which a bill was filed by the complainant for the purpose of enforcing the collection of a debt due from John McP. Brien, a non-resident, out of goods belonging to him within the district, in the hands of William Fowle & Sons, the consignees. It was defended by Fowle & Sons, on the ground that they had a lien upon the goods. They also set up, that the property was claimed by R. Gilmor, a merchant in Baltimore. The bill was afterwards amended, making Gilmor a defendant, who answered, setting up his title to the property; and also filed a cross bill against the complainant, Fowle & Sons, and Brien, setting forth the same title, and praying that the proceeds, the property in the mean time having been sold, might be paid over to him. The defendants put in several answers to the bill; but, upon the view we have taken of the case, it is unnecessary to refer to them particularly.

The facts disclosed which it is material to notice are, that Brien, being indebted to Gilmor, on the 14th of March, 1843, shipped to Fowle & Sons 500 kegs of nails, the property in question, for the purpose of securing such indebtedness, and took from the master of the boat the following receipt or bill of lading: "Received, March 14, 1843, of John McP. Brien, 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order." And on the same day sent a letter directed to the consignees, advising them that the goods were consigned for the use of Gilmor; and which was received about the time of the arrival of the goods.

Upon these facts, the court below dismissed the original bill of complainant, with costs, and decreed the proceeds of the property to Gilmor, deducting freight and charges.

The case is here on an appeal by the complainant in the original bill.

We are of opinion that the decree of the court below was right, and should be affirmed.

The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor, for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment, therefore, was not only in *fact, but in judgment [*439 of law, for and on his account. Gilmor was the consignor.

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage. 3 Salk. 290; 1 Ld. Raym. 271; 3 Barn. & Alu. 382; 1 Binn. 109; Abbott on Ship. 216 and note; Long on Sales, 293, Boston ed.

If the person to whom the goods are ordered to be delivered, is only an agent of the shipper, he has no property in them, and cannot maintain an action against the master for not delivering them (Abbott, 216; 1 Camp. 369), nor for damage for negligence of the carrier (3 Barn. & Ald. 382). And if the goods are shipped at the risk of the consignor, though the freight is payable by the consignee, the prop-

erty remains in the former. Abbott, 216; 1 Johns. 229.

These cases, and others that might be referred to, show that the five hundred kegs of nails in the hands of Fowle & Sons were not subject to the attachment of the complainant for the liabilities of Brien, their debtor, as the title to the property had already passed to the defendant, Gilmor; and, also, that Fowle & Sons had no valid lien upon them as consignees for previous advances to Brien by the delivery to the master; as they were only agents to receive the goods on commission for sale, and were advised by the bill of lading and correspondence, that they were shipped for and on account of Gilmor. Though the goods were delivered by Brien to the master for consignment, they were delivered as the property of Gilmor, and, under circumstances, as we have seen, that had the effect to invest him with the title. His right, therefore, was prior in point of time to any lien that might have been acquired, either by the complainant or Fowle & Sons, in consequence of Brien's indebtedness, upon the strictest principles of law; and as to the equities, it was but a race of diligence among the several creditors of a falling debtor to see which should get the first security for their debts.

An objection was made on the argument, that there was no evidence that Gilmor had assented to the transfer of the property to him as security for his demand against Brien, until after the levy of the complainant's attachment.

The original bill was amended, making him a defendant, and in his answer he sets up that the transfer was made in pursuance of a previous agreement between him and Brien, in part liquidation of his indebtedness.

440*] *We are inclined to think this part of the answer is responsive to the bill, and there is no evidence in the case contradicting it in this respect. Though the bill is brief and meagre in the statement of the case which it presents, and has not incorporated in it the amendment making Gilmor a defendant; yet, from the nature of the charge against him, and ground for making him a party, it would seem necessarily to call upon him to set forth his claim to the property in dispute.

But it is unnecessary to place the answer to the objection on this ground. In the absence of all evidence to the contrary, in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it.

This principle was recognized and applied by this court in the case of Tompkins v. Wheeler, 16 Peters, 106, and had been before in Brooks v. Marbury, 11 Wheat. 96. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him.

It was also objected, that Brien was an incompetent witness for Gilmor, on the ground of interest; but it is apparent that he had no interest in the suit, for in any event the property would be applied to the discharge of debts against him, and whether in favor of one or the other was, in point of interest, a matter of indifference to him.

In any view, therefore, that can be properly taken of the case, we are of opinion the decree of the court below was right, and should be affirmed.

Order.

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

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*THOMAS C. SHELDON and Eleanor [*441
Sheldon, his Wife, Appellants,

v.

WILLIAM E. SILL, Appellee.

Assignee of bond and mortgage bringing suit in Circuit Court must show his assignor was competent to sue there.

Courts created by statute can have no jurisdiction but such as the statute confers.

Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different States, but the act of Congress restrains the circuit courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution.

A debt secured by bond and mortgage is a chose in action.

Therefore, where the mortgagor and mortgagee resided in the same State, and the mortgagee assigned the mortgage to the citizen of another State, this assignee could not file his bill for foreclosure in the Circuit Court of the United States.

THIS was an appeal from the Circuit Court of the United States for the District of Michigan, sitting in equity.

The appellee was the complainant in the court below. The bill was filed to procure satisfaction of a bond, executed by the appellant, Thomas C. Sheldon, and secured by a mortgage on lands in Michigan, executed by him and Eleanor, his wife, the other appellant. The bond and mortgage were dated on the 1st of November, 1838, and were given by the appellants, then, and ever since, citizens of the State of Michigan, to Eurotas P. Hastings, President of the Bank of Michigan, in trust for the President, Directors and Company of the Bank of Michigan.

NOTE.—Jurisdiction, colorable conveyances to enable suit to be brought when the mode of transfer is no objection. Coupons. Residence of assignor. See note to 7 L. ed. U. S. 287.

Jurisdiction of Circuit Court depending on parties and residence. See note to 1 L. ed. U. S. 640; 36 L. ed. U. S. 579.

General answer waives objections to residence. See note to 3 L. ed. U. S. 36.

The said Hastings was then and ever since has been a citizen of the State of Michigan, and the Bank of Michigan was a body corporate in the same State.

On the 3d day of January, A. D. 1839, Hastings, president of said bank, under the authority and direction of the Board of Directors, "sold, assigned, and transferred, by deed duly executed under the seal of the bank, and under his own seal, the said bond and mortgage, and the moneys secured thereby, and the estate thereby created," to said Sill, the complainant below, who was then and still is a citizen of New York.

These are all the facts which it is necessary to state, for the purpose of raising the question of jurisdiction.

The Circuit Court decided in favor of the complainant below, and decreed a sale of the mortgaged premises, etc.

From this decree the defendants appealed to this court.

The case was argued by Mr. Romeyn for the appellants, and Mr. Ashmun (in a printed argument) for the appellee.

Only so much of the arguments will be given as bear upon the point of jurisdiction.

442*] *Mr. Romeyn, for the appellants:

The Circuit Court had no jurisdiction.

The complainant below claimed as assignee from a mortgagee, who was a citizen of the same State with the defendants, the mortgagors.

A bond and mortgage, under the laws of the State of Michigan, and in every court of equity, and by the adjudications of this court, on a bill filed to sell mortgaged property, foreclose the equity of redemption, and collect the debt secured by the mortgage, constitute a chose in action, within the intent and meaning of the eleventh section of the Judiciary Act of 1789.

Before stating the points under this, we beg leave to refer to the case of Dundas et al. v. Bowler, 3 McLean, 205. The opinion in that case was repeated by the court as its opinion in this. It asserts that the eleventh section of the Judiciary Act of 1789 "is in conflict with the Constitution"; that the right of a citizen of one State to sue the citizen of another State in the federal courts, in all cases, is given directly by the Constitution; that Congress may not restrict it; that the converse is "a new and most dangerous principle, and cannot be maintained."

Points under this Proposition.

I. The eleventh section of the Judiciary Act of 1789, inhibiting a suit by an assignee of a chose in action, in cases where the assignor could not have sued, if no assignment had been made, is constitutional; because, the disposal of the judicial power, except in a few special cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the Constitution might warrant. So, again, it has been decided, that Congress have not delegated the exercise of judicial power to the circuit courts, but in certain specific cases. Both the Constitution and an *act of Congress* must concur in conferring power upon the circuit courts. A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law. The eleventh section of the Judiciary Act of 1789, giving jurisdiction to the circuit courts, has not covered the whole ground of the Constitution, and those courts cannot, for instance, issue a mandamus, but in those cases in which it may be necessary to the exercise of their jurisdiction; for—

*1st. This is the settled, practical [*443 construction, which, irrespective of express adjudications on this topic, concludes the question.

2d. The point itself has been repeatedly and fully discussed and directly settled, on solemn deliberation, and not "without inquiry as to the validity of the act."

We propose to cite some authorities on these propositions, in the above order; and then to notice the authorities cited in the opinion below.

First. Cases as to practical construction and its effect.

[The counsel then cited a number of cases under this head.]

Second. Cases to show that this principle has been deliberately settled.

The general principle for which we contend is the necessity of legislation to define and vest jurisdiction in the Circuit Court. The opposing principle is, the right and duty of the courts to exercise jurisdiction to the extent of the constitutional limit, by virtue of its provisions and without the authority of Congress. We refer to United States Bank v. Deveaux, 5 Cranch, 61; Osborne v. Bank of United States, 9 Wheaton, 738, 1 Wash. 235; 7 Cranch, 32; Ibid. 504; 3 Wheat. 336; 12 Pet. 616; also 623, 642; 14 Pet. 75; 2 Howard, 243.

In Turner v. Bank of America, 4 Dall. 8, the very question arose, and was decided. Cary v. Curtis, 3 Howard, 245; 1 Kent's Commentaries, 513.

[The counsel then reviewed the authorities cited to support the opinion in Dundas v. Bowler, and contended that they did not sustain it.]

II. The statute in question should be construed according to the ordinary and usual acceptation of the terms used in it. Because—

1st. It is constitutional.

2d. If unconstitutional, it should be entirely rejected.

If sustained at all, it should be subjected to the ordinary rules of interpretation.

III. The phrase, "other choses in action," includes the bond and mortgage in this suit. Because—

1st. The statute was not intended to be confined to negotiable instruments, as is intimated in Dundas v. Bowler, 3 McLean, 209. For,

First. If an instrument not negotiable be assigned, the assignee can sue in equity in his own name, and therefore the reason given in Dundas v. Bowler is not sound.

Second. The exception, in the Judiciary Act, of foreign bills of exchange, will leave nothing of consequence for this language to cover, if it be confined to negotiable instruments.

444*] *Third. This comprehensive meaning of the clause is a matter of express decision —decisions which have remained for forty years unquestioned. In Sere v. Pitot, 6 Cranch, 332, Chief Justice Marshall decides that promissory notes were not alone in the contemplation of Congress, and that the "intention was to except from the jurisdiction those who could sue by virtue of equitable assignments, as well as those who could do so by virtue of legal assignments." "The term 'other chose in action,' is broad enough to include either case."

2d. The object of the statute was to preserve to the State judicatures the interpretation and enforcement of contracts made between their own citizens; and the general nature of a bond and mortgage, and the fact that they affect the realty of the State, render it particularly proper that they should not be considered out of the statute.

3d. There is greater reason for inhibiting the collection of mortgage debts in the United States courts, by an assignee, than of negotiable instruments, because, in case of the latter, a transfer for the purpose of jurisdiction would defeat the action; while in the case of the former, if the assignment of a mortgage be viewed as the transfer of a title, the consideration cannot be made the subject of inquiry. Briggs v. French, 2 Sumner, 252; Smith v. Kernochen, 7 Howard, 216.

4th. The statute includes every such right as is ordinarily termed a chose in action; by which is meant, not a right which may be sued for, but one which can be realized only by suit; not a claim to property in specie, which may, if opportunity offer, be exercised by caption or entry, but a right to a debt or damages, or money which can be recovered only by action. 1 Chitty's R. 99.

A deed of land is not a chose in action. A writer on the jus mariti, after informing his readers that the husband might dispose of his wife's choses in action, will hardly need to add that this did not include her "deeds for real estate."

5th. The transferee of a bond and mortgage is usually termed an assignee, and therefore is within the act.

We ask an application of the old and familiar rule, that, when words of a fixed legal import are used in a statute, such meaning will be accorded to them in its construction. Chief Justice Marshall applied it to the interpretation of this statute in 6 Cranch, 332, when, referring to the reason why the court, in 4 Cranch, held that an alien administrator might sue when the intestate could not, he said, "The representatives of a deceased person are not usually designated by the term 'assignee.'" So Justice Story at the circuit and this court, on several occasions, in 445*] *determining that the bearer of a promissory note could sue when the payee could not, said that the plaintiffs title did not rest upon what was generally and commonly known as an assignment, and that the words of the statute were employed in the ordinary popular professional sense.

6th. Even at law, the mortgage is considered but as a chose in action, and the mortgagor is the real owner.

[The counsel then cited a number of cases to show how a mortgage, even at law, is regarded by the English courts, by American courts generally, and by the federal courts.]

Douglas, 610; 1 Powell on Mortgages, 109, 110; 4 Kent, 159, 160; 2 Vernon, 401; 2 Jac. & Walk. 194, note; 4 Conn. 235, 424; 6 Conn. 158 to 164; 18 Johns. 114; 4 Kent's Com. 161, note a; 21 Wend. 483; 2 Gallison, 154; 5 Peters, 483; 1 Paine, 534; 9 Wheat. 489.

7th. Whatever be the doctrine at law, in equity a mortgage is styled and treated, in all its relations and for all purposes, as a chose in action. 2 Jac. & Walk. 185; 1 Hopkins, 594; Story's Equity, secs. 1013, 1015, 1016.

8th. If it be conceded that the complainant might have brought ejectment on the mortgage, it would not effect the character of the action. For,

First. This action can be fully sustained by an informal transfer, or even a simple delivery of the mortgage, without writing; while an ejectment would require a formal, regular transfer, with the solemnity of other deeds of realty, in order to pass the legal estate.

Second. That both proceedings grow out of the same transaction proves nothing; because there may be two remedies for one debt, in one of which the federal court has jurisdiction, and not in the other.

The indorsee of a note may sue on a direct promise to him by the maker, when he could not sue as indorsee. 5 Howard, 278.

The assignment of the mortgage, without an assignment of the debt, is a nullity (2 Cowen, 23), while an assignment of the debt carries with it the interest in the land. 2 Gall. 155. In this case, an assignee of the bond alone could not sue on it in this court. This proves that an assignment of the debt will not confer jurisdiction.

If we grant that he could sue in ejectment at law as assignee of the mortgage, the question would still remain, how should he be viewed when suing in equity for his money, and not for the land, and on both the bond and mortgage?

Finally, we ask particular attention to the effect upon the *rights of the mortgagee [*446 produced by the statute of Michigan, forbidding him to bring ejectment before foreclosure and sale. How emphatically does it reduce his claim to a chose in action. He has no longer a title, upon which he can even take possession; but, according to the only substantial right ever intended to be secured, a claim for money, and the right to an appropriation of the land by suit to make it. And it is no answer to this, that this law, taking away a remedy, does not bind the federal court. It is equally high evidence of the doctrines of our State, in relation to the nature of the right of a mortgagee.

The argument of the counsel for the appellee upon the question of jurisdiction was as follows:

With regard to the first point, the objection is based upon the act of Congress, which provides that the Circuit Court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of a foreign bill of exchange.

The Constitution of the United States (sec.

2 of article 3) says the judicial power shall extend to controversies between citizens of different States, and, in section one of the same article, it says that this judicial power shall be vested in one Supreme Court, and such inferior courts as Congress shall from time to time establish.

Now, we would remark, first, that the case before the Circuit Court was a controversy between citizens of different States, and to such a controversy the judicial power of the courts of the United States extends by the Constitution, and by the same Constitution that power is vested, except where the Supreme Court has original jurisdiction by the Constitution, in the inferior courts created by Congress. This judicial power, therefore, to take cognizance of this case, is, by the Constitution, vested in the Circuit Court, and the plaintiff claims the constitutional right to have his controversy with Mr. Sheldon, living in Michigan, decided by that court. Congress has said, by the provision above referred to, that there are certain controversies between citizens of different States which the United States courts shall not take cognizance of; yet the judicial power of the court extends to them by the Constitution, and citizens of the different States have the right to have that power exercised in their controversies. Where does Congress get the power or authority to deprive the courts of the United States of the judicial power with which the 447*] Constitution has invested them? *Congress may create the courts, but they are clothed with their powers by the Constitution, and we submit that the provision of the act of Congress materially conflicts with the provisions of the Constitution and is void. It has been settled, that an act of Congress, enlarging the jurisdiction of the Supreme Court beyond the terms of the Constitution, is void. Marbury v. Madison, 1 Cranch, 137. Can it any more take away a constitutional power than it can confer an unconstitutional one? We submit that it cannot. The jurisdiction of this class of controversies is in the Circuit Court. The Constitution makes no such distinction as the act of Congress does, and we respectfully submit, that it is of the utmost importance to citizens of the different States that the whole judicial power granted by the Constitution to the courts of the United States should be exercised. We are aware that in some cases it has been assumed that this act of Congress is valid; but we submit that there has been no decision of this court to that effect, and even if there had, being erroneous, the court would reverse it.

But a mortgage is not a promissory note or chose in action, within the meaning of the provisions of the act of Congress. A mortgage is a conveyance of the fee-simple of real estate, liable to be defeated subsequently by payment of money, to secure the payment of which it was made. It is in no sense a chose in action, which is a thing in action, a right of action, a thing recoverable in action, a debt, a demand, a promissory note, a right to recover damages. A chose in action was originally a right of action not assignable at law. It was a cause of suit for a debt due or a wrong. The bond with the mortgage may be a chose in action; but the estate conveyed by the mortgage is not. It is a realty. It is real estate conveyed, and at law the estate is absolute, forfeited, perfect. In equity it may be redeemed; but the estate is nevertheless absolute, and redemption is a matter of favor or equity rather than a legal right. How does this partake of a chose in action? Now, what is a foreclosure bill? It is not a suit upon a bond, but a proceeding in law against property, to cut off the equitable right to redeem within a certain period, and to procure a sale of the real estate. It is not a personal action—seeks no decree against the person—but simply asks that certain property conveyed to the plaintiff may be sold, and further right to redeem foreclosed. An ejectment lies upon a mortgage, especially after forfeiture; the mortgagee may convey the estate and ejectment lies in favor of his grantee. Will it be said that his grantee, though living in another State, could not maintain an ejectment in this court to recover the property? Cannot his grantee equally appeal to this court to [*448 foreclose the equity to redeem? This point has been directly passed upon in the Circuit Court for the District of Ohio, in the case of Dundas et al. v. Bowler et al., reported in the first volume of Western Law Journal, and the decision of the court is sustained by the soundest reasoning. 3 McLean, 205.

Mr. Justice Grier delivered the opinion of the court:

The only question which it will be necessary to notice in this case is, whether the Circuit Court had jurisdiction.

Sill, the complainant below, a citizen of New York, filed his bill in the Circuit Court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the President of the Bank of Michigan.

Sheldon in his answer, among other things, pleaded that "the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same State, and the complainant being assignee of them, the Circuit Court had no jurisdiction."

The eleventh section of the Judiciary Act, which defines the jurisdiction of the circuit courts, restrains them from taking "cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

The third article of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies "controversies between citizens of different States."

It has been alleged, that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

It must be admitted, that if the Constitution had ordained and established the inferior courts,

and distributed to them their respective powers, they could not be restricted or devested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must de-449*] fine their respective jurisdictions. *The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.

In the case of Turner v. Bank of North America, 4 Dall. 10, it was contended, as in this case, that, as it was a controversy between citizens of different States, the Constitution gave the plaintiff a right to sue in the Circuit Court, notwithstanding he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said: "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in McIntire v. Wood, 7 Cranch, 506; Kendall v. United States, 12 Peters, 616; Cary v. Curtis, 3 Howard, 245.

The only remaining inquiry is, whether the complainant in this case is the assignee of a "chose in action," within the meaning of the statute. The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.

It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as hav-450*] ing but a chattel *interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the purpose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor.

In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or lien on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance.

The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the "assignee of a chose in action," within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.

The judgment of the Circuit Court must therefore be reversed, for want of jurisdiction.

Order.

This cause came on to heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that this cause be, and the same is hereby reversed, for the want of jurisdiction in that court; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of complaint for the want of jurisdiction.

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*JACOB LE ROY, Plaintiff in Error, [*451

v.

WILLIAM BEARD.

Power to agent to sell lands—extent of authority—covenant of seisin broken without eviction—power ambiguous, construction of by agent binds principal—assumpsit in one State on undertaking in another, seal not affixed.

By the laws of Wisconsin, where the contract in question was made, a scroll or any device by way of seal has the same effect as an actual seal. But in New York it is otherwise, and an action brought

NOTE.—Attorney, authority of. See note to 8 L. ed. U. S. 60.

Lex loci rei sitæ governs titles to lands by deed or devise. See notes to 5 L. ed. U. S. 335, 6 L. ed. U. S. 367, 583.

In New York upon such an instrument must be an action appropriate to unsealed instruments.

Therefore, where a deed was executed with a scroll in Wisconsin, which contained a covenant of seisin, and an action was brought in New York for a breach of this, it was properly an action of assumpsit, and not covenant.

It was not necessary in the declaration to allege an eviction, because the covenant was broken as soon as made.

Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, etc., as sufficiently in all respects as we ourselves could do personally in the premises," these expressions, aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, must be construed as giving to the agent the power to enter into a covenant of seisin.

Some of the general rules stated for the construction of powers.

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

The facts of the case were these:

On the 31st of August, 1836, Jacob Le Roy and Charlotte D. Le Roy, citizens of the State of New York, executed the following power of attorney:

"Know all men by these presents, that we, Jacob Le Roy and Charlotte D. Le Roy, his wife, of the town of Le Roy, in the County of Genesee, and State of New York, have constituted and appointed, and by these presents do constitute and appoint, Elisha Starr, of the same place, our true and lawful attorney, for the purposes following, to wit: In the name of the said Jacob Le Roy, and for his use and benefit, to expend and invest certain moneys for that purpose herewith placed by him in the hands of the said Starr, in the purchase of lands and real estate in some of the Western States and territories of the United States, at the discretion of the said Starr, and to take the certificates, titles, deeds, or other evidences of such purchases, to and in the name of the said Jacob Le Roy; and also, for and in the names of the said Jacob Le Roy and Charlotte D. Le Roy, to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr with the money herewith furnished him, or any other lands or real estate heretofore purchased in the said States or territories, by the said Starr or Suffrencis Dewy, for the *said Jacob Le [*453 Roy, and now owned by him, or any lands which may have been bought with the avails of the lands so purchased as aforesaid, or for which the same may have been exchanged, to such person or persons, for such consideration, and on such terms, in all respects, as the said Starr shall deem most advantageous; and for us, and in our names, to execute to the purchaser or purchasers thereof, the assignments, contracts, or deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, and interest, dower and right of dower, as sufficiently, in all respects, as we ourselves could do personally in the premises; and generally, as the agent and attorney of the said Jacob Le Roy, to purchase lands or real estate with the money now furnished him, and to sell, resell, and exchange the same, or any lands heretofore purchased by him for the said Jacob Le Roy, or any lands or real estate that he may acquire in consideration of the sale or exchange of the same, to such persons, and on such terms, in all respects, as he may deem most eligible; and to do all acts legally necessary for the perfect transfer to such persons of the title of the same; we hereby ratifying and confirming whatsoever our said attorney shall do in the premises, by virtue of these presents, until the 1st day of July next, 1837; from and after which day, these presents, and the powers conferred thereby, shall cease, and be null and void.

Covenant of seisin, when broken, and when not. Measure of damages for breach of same.

The covenant of seisin is broken, if the covenantor has not the possession, the right of possession, and the right of legal title. Bradshaw's case, 9 Co. 60; Wotton v. Hele, 3 Saund. 181 c, note; Pollard v. Dwight, 4 Cranch, 421, 430; Duvall v. Craig, 2 Wheat. 62; McCarty v. Leggett, 3 Hill. 134; 2 Hilliyard on Real Property, 372, 382, 2d ed.

Where grantor holds under a deed, which is not void, but only voidable, as the deed of a non compos not under guardianship; or, where he has exclusive possesion, claiming a fee, adversely to the owner; or, where he claims under a deed from one having no right to convey, and enters under color, though not by virtue of such deed, and acquires a seisin by disseisin of the prior owner, the covenant of seisin is not broken. Wait v. Maxwell, 5 Pick. 217; Marston v. Hobbs, 2 Mass. 433; Bearce v. Jackson, 4 Man. 408; Smith v. Strong, 14 Pick. 132; Baxter v. Bradbury, 7 Shepl. 260; Spring v. Chase, 9 Shepl. 905.

In New Hampshire, a mere right of entry in the grantor has been held to sustain the covenant of seisin. Willard v. Turtchell, 1 N. H. 177.

Where land is definitely described, it is no breach of the covenant that grantor owns less number of acres than that estimated in deed. Mann v. Pearson, 2 Johns. 37.

But it is a breach of the covenant of seisin, if covenantor is not seized of the entire fee, but only of an undivided portion. Sedwick v. Hollenback, 7 Johns. 376.

There is a distinction between the covenant of seisin and that of a "perfect, absolute and indefeasible estate of inheritance in fee-simple." A tenancy by the curtesy, the tenant being in possession, is a breach of the latter covenant, but not of the former. Smith v. Strong, 14 Pick. 132; Garfield v. Williams, 2 Vt. 327; Lockwood v. Sturdevant, 6 Conn. 373.

A seisin by wrong, or of an estate less than a fee, is a breach of the covenant of seisin. This covenant is not the same with that of "a good right to convey." The latter is a covenant for title, and requires "the very estate in quantity and quality" which is agreed for. Richardson v. Dorr, 5 Vt. 19; 2 Id. 337.

In Connecticut, the covenant of seisin is held to require a lawful seisin. Mitchell v. Warner, 5 Conn. 497.

The covenant of seisin has reference to the time of conveyance. No subsequently acquired title is a fulfillment of it. If broken at all, it is so the instant it is made. Abbott v. Allen, 14 Johns. 248; McCarty v. Leggett, 3 Hill, 134; 2 Hilliard, Real Property, 374, 2d ed.; Gilbert v. Bulkley, 5 Conn. 262; Morris v. Phelps, 5 Johns. 49; 2 Saund. 171; 3 T. R. 186; 4 East, 507.

Where the covenant is of seisin in fee-simple, and the covenantor has only a copyhold in fee, the covenant is broken, and the measure of damages is the difference in value of a fee-simple and a copyhold. So where husband and wife convey, and the latter is an infant and dies, it is a sufficient breach of the covenant of a right to convey, to allege this fact, and that her right has descended to a minor heir, and that the estate is devested from the plaintiff. Gray v. Riscoe, Noy. 142; Nash v. Ashton, Jones, T. 195.

The covenant of seisin is not broken by any outstanding equity, or equitable lien, as, for instance, a mortgage or judgment, or the expectant right of

"Sealed with our seals, and dated this 31st day of August, 1836.

"Jacob Le Roy, [L. S.]
"Charlotte D. Le Roy. [L. S.]

"In presence of—"

This power was regularly acknowledged.

On the 7th of November, 1836, Starr executed the deed which was the subject of the present controversy, viz.:

"This indenture, made this 7th day of November, in the year of our Lord 1836, between Jacob Le Roy and Charlotte D. Le Roy, wife of said Jacob, both of Le Roy, Genesee County, State of New York, by Elisha Starr, now of Milwaukee, in the Territory of Wisconsin, their lawful attorney, parties of the first part; and William Beard, of Newtown, Fairfield County, and State of Connecticut, party of the second part, witnesseth: that the said party of the first part, for and in consideration of one thousand eight hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm, 453*] unto the said party of the *second part, and to his heirs and assigns, forever, one certain piece or parcel of land, situated in the town of Milwaukee, and territory of Wisconsin, viz.: One equal undivided acre of land, in fifty-seven and sixty hundredths acres, said fifty-seven and sixty hundredths acres being in township lot number three of the southeast fractional quarter of section number thirty-two in said township seven, north of range twenty-two east, it being part of the same tract of land conveyed to us by Levi C. Turner, of Cooperstown, Otsego County, State of New York, as per his deed, bearing date the 28th day of April, 1836; together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, to their sole and only proper use, benefit, and behoof, forever. And the said parties of the first part, by their attorney, as aforesaid, for their heirs, executors, and administrators, do covenant, grant, bargain, and agree, to and with the said party of the second part, and his heirs and assigns, that, at the time of the ensealing and delivering these presents, we are well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee-simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid. And that the same are free and clear of all incumbrances, of what kind and nature soever. And that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will forever warrant and defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

"Jacob Le Roy, [L. S.]
"By Elisha Starr, his Attorney.
"Charlotte D. Le Roy, [L. S.]
"By Elisha Starr, her Attorney.

"Sealed and delivered in presence of
"Hans Crocker,
"David V. B. Baldwin."

*This deed was regularly acknowledged and recorded in Wisconsin. [*454

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a wife to dower her husband being living. Backus' Adm'r, etc. v. McCoy, 3 Ohio, 218; Wheeler v. Hatch, 3 Fairf. 389; Fitzhugh v. Croghan, 2 J. J. Marsh. 430; Sedgwick v. Hollenback, 7 Johns. 376, 380; 16 Johns. 254; Rawle, Covenants for Title, 63, 64; Tuite v. Miller, 10 Ohio, 383.

It is no breach of the covenants of seisin and a right to convey, that a highway passes over the land. The owner of the land has the fee, or right to the soil, subject to the public use. Cooke v. Green, 11 Price, 736; 1 Rolle's Abr. 392, B.; 2 Inst. 705; Lade v. Shepherd, Str. 1004; Grose v. West, 7 Taunt. 39; Goodtitle v. Alker, 1 Burr. 133, 143; Cortelyou v. Van Brunt, 2 Johns. 357; Jackson v. Hathaway, 15 Johns. 447; Makepeace v. Worden, 1 N. H. 16; Peck v. Smith, 1 Conn. 103; Witter v. Harvey, 1 McCord, 67; 3 Md. L. 83; Com. v. Peters, 2 Mass. 127; Paley v. Chandler, 6 Mass. 454; Fairfield v. Williams, 4 Mass. 427; Stackpole v. Healey, 16 Mass. 33; Robbins v. Borman, 1 Pick. 122; McDonald v. Lindall, 3 Rawle, 495; Whitbeck v. Cook, 15 Johns. 483; Mayor, etc. v. Steamboat, etc. Charlt. 342; Nicholson v. Stockett, 1 Walk. 67; Matter of John and Cherry Streets, 19 Wend. 659; Doe v. Pearsy, 7 B. & C. 304; Dygert v. Schenck, 23 Wend. 446; Trustees, etc. v. Auburn, etc. 3 Hill, 567; Union, etc. v. Robinson, 5 Whar. 18; Wooster v. Butler, 13 Conn. 309; Rowe v. Granite, etc. 21 Pick. 344; Bosley v. Susquehanna, 3 Bland, 67; Leavitt v. Towle, 8 N. H. 96; 2 Hill, Real Property, 37; Rawle on Covenants for Title, 63; Lewis v. Jones, 1 Burr, 336.

If a fence, or a building, on the premises, which is part of the realty, does not belong to the covenantor, the covenant of seisin is broken, as to that. Mott v. Palmer, 1 N. Y. 564; West v. Stewart, 7 Burr. 122; Rawle, Cov. for Title, 64.

A want of title, according to the covenant of seisin, breaks it and gives an immediate right to action. McCarty v. Leggett, 3 Hill, 134; Bingham v. Weiderway, 1 N. Y. 509; Fitch v. Baldwin, 17 Johns. 171; Rawle, Cov. for Title, 57.

Measure of damages on breach of covenant of seisin.

Upon the covenant of seisin the measure of damages is the consideration paid with interest. 2 Hilliard on Real Property, 385, 2d ed.; Horsford v. Wright, Kirby, 3; Castle v. Peirce, 2 Root, 294; Mitchell v. Hazen, 4 Conn. 495; Nelson v. Matthews, 2 Hen. & M. 177; Mills v. Bell, 3 Call. (Va.) 322; Stout v. Jackson, 2 Rand. 132; Thuelkeld v. Fitzhugh, 2 Leigh, 451.

The measure of damages on the breach of the covenant of seisin is the value of the lands at the time of the sale, and the best estimate, and the only one generally taken, of this, is found in the consideration money paid, and to counterbalance the claim for mesne profits it is deemed proper to allow interest upon this amount whenever they could properly be recovered by the paramount owner. 4 Kent, 475; Rawle on Covenants for Title, 71, 73.

It was the land and its price at the time of the sale which the parties had in view, and to that subject the operation of the contract ought to be confined. Decisions to this effect may be found in nearly every State in the Union in which the covenant for seisin is employed. Some of them are: Marston v. Hobbs, 2 Mass. 433; Caswell v. Wendell, 4 Mass. 108; Smith v. Strong, 14 Pick. 128; Stubbs v. Page, 2 Greenl. 376; Leland v. Stone, 10

There were three persons, viz., Nichols, Baldwin, and Beard, engaged in making purchases from Starr, each upon his own account, and the following letters were read upon the trial. They are inserted because the opinion of the court lays some stress upon the actions of the parties.

"Newtown, August 28, 1838.

"Jacob Le Roy, Esq.:

"Dear Sir—I take the liberty of forwarding to you the following information, by advices lately received from my attorney at Milwaukee. I learn that the title of the property I purchased of you in Milwaukee, in November, 1836, has failed, in consequence of the Indian title not being extinguished when the property was floated. I further learn that the receiver or land officer has been directed to refund the purchase money to the original purchaser, and that the subject has been before the Solicitor of the Treasury, and he has directed that the property belongs to the government, and that an appeal was taken from his decision to the Secretary of the Treasury, who confirmed the decision.

"If so, you are doubtless aware that, upon your covenants of warranty, you are liable to refund to me the purchase money, which I shall expect you to do, together with the interest on the same. If a deed of release or quitclaim will be of any service to you, you can have one when the money is refunded.

"I shall be happy to hear from you on the receipt of this, and any proposition you may have to make regarding the premises will be duly considered.

"Your obedient servant,

(Signed) "Theophilus Nichols."

"Le Roy, 2d September, 1838.

"Dear Sir—I received last evening yours of the 28th, and the contents surprised me not a little, that I, who held large possessions in Milwaukee, and in constant communication with that place, should receive the first intelligence of so great a misfortune from you. I received a letter three days ago from that place, but not a word is said about any trouble, and I have therefore come to the conclusion your agent has been hoaxed; the whole statement carries on the face of it an absurdity. Admitting that anything had occurred as you state, have not the United States received the same amount *there from their land as they have else- [*455 where? Do you imagine that Congress would allow innocent persons to suffer in a case of that kind? I have written to Milwaukee by this day's mail to ascertain if there is any difficulty, and in the interim would beg you to keep easy in mind, for you may rest assured that your title will never be disturbed.

"Respectfully, yours truly,

(Signed) "Jacob Le Roy."

"New York, 12th June, 1839.

"Theophilus Nichols, Esq.:

"Sir—Your letter of the 1st instant was returned to me this day from Le Roy. In reply I state, that the title to the lands purchased from me is derived from the United States, and I know of no mode by which a sale can be rescinded by any officer of the government after it has been once consummated. If any error has been committed, of which I have no information upon which reliance ought to be placed in transactions of business, the government will no doubt correct it. Besides, as my grantor is liable to me if there is any defect of title, I can make no voluntary settlement without increasing the difficulties. There were many purchasers at the public sales of the lands of which those I sold are a part, who have sold out, and it cannot be possible, if there is any substantial legal defect in the sale, that the question will not soon receive the adjudication of some sufficient legal tribunal, when I shall always be willing to fulfill any legal claims which I may be under to you or your friends.

"With respect, yours, etc.,

"Jacob Le Roy."

Mass. 459; Mitchell v. Hazen, 4 Conn. 495; Sterling v. Peet, 14 Conn. 234; Whiting v. Nissly, 1 Harr. Pa. 655; Tapley v. Lebeaum's Ex'rs, 1 Mo. 550; Martin v. Long, 3 Mo. 391; Wilson v. Forbes, 2 Dev. 30; Logan v. Moulder, 1 Pike, 323; Bachus v. McCoy, 3 Ohio, 211; Clark v. Barr, 14 Ohio, 121; Cummins v. Kennedy, 3 Litt. 118; Cox's Heirs v. Strode's Heirs, 2 Bibb, 277; Nichols v. Walter, 8 Mass. 243; King v. Kerr, 5 Ohio, 156.

So where the covenant of seisin is broken as to part of the land, the measure of damages is such proportion of the purchase money as the value of the land of which the grantor is not seized bears to the value of the whole land. Cornell v. Jackson, 3 Cush. 506; Morris v. Phelps, 5 Johns. 49, and see Guthrie v. Pugsley, 12 Johns. 126; Wager v. Schuyler, 1 Wend. 553.

Where the breach arises solely from a prior mortgage, the damages will be determined by the amount due on the mortgage. Gilbert v. Bulkley, 5 Conn. 262.

But such damages cannot be recovered till grantor has discharged the mortgage. Comings v. Little, 24 Pick. 266.

Where grantor, with covenant of seisin in fee, has only a life estate, the value of the life estate is to be credited on the damages. Lockwood v. Sturtevant, 6 Conn. 373.

Where grantor was not seized at the time of conveyance, but afterwards became so, and grantee thereby acquired title by estoppel, under the covenants of warranty, he cannot retain the land and still recover back the consideration, upon the covenant of seisin. Baxter v. Bradbury, 7 Shepl. 260.

*The money paid to extinguish adverse title, is, in such case, the measure of damages, but not exceeding the consideration money. Leffingwell v. Elliott, 10 Pick. 204; 8 Id. 455; 11 N. H. 74; Spring v. Chase, 22 Me. 509.

Defendant in action on covenant of seisin may show that nothing was in fact paid for the particular land in question, or that it was included by mistake, or where the land was in two portions, with separate price for each, that the title failed to only one portion. So, it may be proved that the consideration was greater or less than that stated in the deed. Barnes v. Learned, 5 N. H. 265; Guthrie v. Pugsley, 12 Johns. 126; Morse v. Shattuck, 4 N. H. 229; Fla v. Curd, 2 N. H. 175; Harlow v. Thomas, 15 Pick. 66; Leland v. Stone, 10 Mass. 459; Belden v. Seymour, 8 Conn. 304; Greenvault v. Davis, 4 Hill, 643; Bingham v Weiderwax, 1 N. Y. 514; Moore v. McKee, 5 Sm. & M. 438; Rawle, Cov. for Tit. 78.

Defendant may claim allowance for profits of land received by plaintiff. Whiting v. Dewey, 15 Pick. 428; Caulkins v. Harris, 9 Johns. 324.

Only nominal damages recoverable, where grantee keeps possession long enough to give him good title by lapse of time, or where defendant has gained good title after action commenced which enures to plaintiff, by estoppel. Garfield v. Williams, 2 Vt. 327; Caulkins v. Harris, 9 Johns. 324; Baxter v. Bradbury, Law Rep. Oct. 1841, 231; see McCarty v. Leggett, 3 Hill, N. Y. 134; Cornell v. Jackson, 3 Cush. 510; Wilson v. Forbes, 2 Dev. 30; Cowan v. Silliman, 4 Dev. 47.

In New York, only six years' interest on consideration money recoverable, and purchaser only liable for six years' mesne profits. Caulkins v. Harris, 9 Johns. 324; Bennet v Jenkins, 13 Johns. 50.

"New York, 5th February, 1841.

"Dear Sir—Yours, addressed to me at Le Roy, came to hand in due course, being returned to this place. In reply to your remarks I have only to say, that so soon as the highest tribunals of our country shall decide that my title to the land sold you is defective, I shall be ready to settle with you on just principles; but until then I must decline all negotiations. You say that the title is bad. Perhaps you are not aware that an act passed the Senate of the United States at its last session, unanimously confirming the sale, and was only lost in the House for want of time. I am in great hopes that relief will be obtained this session; but at any rate a long time cannot now elapse before justice will be done us; for a more righteous claim there cannot be. My situation is the same [*456] as yours. Until such decision is made, I cannot make claim from those from whom I purchased.

"With great respect, yours truly,

"Jacob Le Roy.

"William Beard, Esq., Newtown."

On the 24th of June, 1841, Beard, a citizen of the State of Connecticut, brought his action in the Circuit Court of New York against Le Roy. It was an action of assumpsit, containing the ordinary money counts, and also two special counts, stating the purchase and sale, the covenant of seisin, and an averment that the grantor was not so seized, whereby he became liable to repay the $1,800.

The defendant pleaded the general issue to the money counts, and a special plea that he had a good title to the premises described in the declaration. To this plea there was a general replication.

In April, 1846, the case came up for trial.

The counsel for the plaintiff offered in evidence the power of attorney, the deposition of Starr, the oral evidence of Nichols, the letters above recited, and some other evidence not material to be mentioned.

The counsel for the plaintiff then offered to read in evidence the deed or instrument of conveyance executed by the defendant, by Elisha Starr, his attorney, to the plaintiff, with a scroll and the word "Seal" written therein, opposite the name of the defendant, as subscribed in execution thereof, without any wafer, wax, or other tenacious substance being affixed thereto; referred to in, and proved by, the same depositions. The counsel for the defendant objected to the reading of the covenants contained in said deed so offered, on the ground that the power of attorney from the defendant to Starr did not authorize Starr to enter into such covenants on behalf of the defendant.

The court overruled the objection, and the defendant's counsel excepted.

The counsel for the plaintiff then offered numerous papers from the general land office, to show that the title of Le Roy was not good in the premises conveyed.

The counsel for the defendant then offered to read in evidence, on his part, from a book purporting to be a printed copy of the laws enacted by the Legislature of the territory of Wisconsin, "an act of the said Legislature in relation to seals."

The counsel for the plaintiff objected to the evidence so offered, on the ground that the same was not authenticated in such [*457] manner as to entitle the same to be read in evidence; and the court overruled the objection; and to the decision thereupon, the counsel for the plaintiff excepted.

The counsel for the defendant then read in evidence from said printed book as follows:

"Sec. 5. That any instrument, to which the person making the same shall affix any device by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

The counsel for the defendant then prayed the court to instruct the jury, among other things, that no action can be sustained against the defendant in this suit, because the power of attorney executed by the defendant to Elisha Starr did not authorize Elisha Starr to warrant the title of the defendant to any lands which might be sold by him under said power of attorney.

The counsel for the plaintiff then prayed the court to give its instruction to the jury upon the construction of the power of attorney executed by the defendant to Elisha Starr, so given in evidence at this stage of the cause, as, in the event of such construction being against the existence of such authority in said attorney under said power, the said plaintiff had further evidence to give of the representations of the said agent to the said plaintiff at the time of, and made as a part of, the transaction.

The court reserved for the present their opinion upon the question, for the purpose of hearing the further evidence of the plaintiff, so as to enable him to bring out the whole case, and perhaps thereby save another trial.

The counsel for the plaintiff then offered to prove that, at the time of negotiating the sale of, and of selling, the land described in said deed to the plaintiff, the said Elisha Starr fraudulently represented to the plaintiff that he, the said Elisha Starr, was authorized by the defendant to warrant the defendant's title to the premises therein described, and withheld from the plaintiff any view of the power of attorney in question; and that the plaintiff refused to make the purchase, or take any conveyance of such lands, without such warranty on the part of the defendant.

The counsel for the defendant objected to the evidence so offered as incompetent and inadmissible, and the court sustained the objection, and excluded the testimony; and the counsel for the plaintiff excepted to the decision.

The counsel for the plaintiff next offered to prove, that, at the time of the negotiation of the said sale between Starr and the [*458] plaintiff, and as a part of the transaction, the said Elisha Starr, as the agent of the defendant, also fraudulently represented to the plaintiff that the defendant had a good and valid title to the land described in the said deed, and that the plaintiff was deceived thereby.

The counsel for the defendant objected to the evidence so offered, and the court overruled the objection and to the decision thereon the counsel for the defendant excepted.

The counsel for the plaintiff recalled Theophilus Nichols, who further testified, that he was present at the negotiations and bargain between the plaintiff and Elisha Starr, as the

agent of the defendant, as to the sale of the acre of land described in said deed; that Mr. Starr stated that the title to the land was good, and there could not be a question about it, because the defendant had the government title; that it had been sold by the government about a year previous to that time. That Linus Thompson and others had floated off George Walker, who had first settled on it, and claimed a pre-emption right, but who had got no patent; that the defendant's title was direct from the government, and there was no question about it. Mr. Starr proposed to give to the plaintiff a quit-claim deed, and said it was just as well, as the title came from the government. The plaintiff said he would not accept it; that he would not take the land unless he had covenants of warranty; and Mr. Starr then gave the plaintiff the deed read in evidence in this case. No title papers were produced by Starr, or exhibited to the plaintiff. It was stated in the body of the deed executed by Starr, from whom the defendant had purchased, but he did not exhibit to the plaintiff any papers of any kind. Plaintiff, and Mr. Baldwin, and witness, all stayed together at the public house kept by Starr. They all went to Milwaukee together for the same purpose; stayed together, purchased together, and left together. The plaintiff did not make any examination of the title that witness knows of. Witness purchased an acre of the defendant of the same title, at the same time, and under the same representations; and witness did not make any examination of title, but relied upon the representations of Mr. Starr. They all left Milwaukee on the 10th of November, 1836, three days after they made the purchase.

The counsel for the plaintiff then recalled David V. B. Baldwin, who further testified, that he had heard the testimony just given by Mr. Nichols, and concurred with him as to the representations made by Mr. Starr, and the acts done by the parties in making such purchase; that he was present and acting with the others in the transaction; that no examination of the 459*] title *was made by him, nor by either of the others, to his knowledge.

The counsel for the plaintiff next read in evidence, from the same volume of the statutes of Wisconsin above referred to, an act of the Legislature of the territory of Wisconsin, entitled "An Act in relation to fraudulent conveyances of lands and the conveyance thereof," the sixth section of said title, in the words and figures following, to wit:

"Sec. 6. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

The proofs in the cause were here closed.

The counsel for the defendant prayed the court to instruct the jury—

First. That the plaintiff had not proved the failure of the defendant's title to the lands in question, because he had not shown that the defendant had not acquired a title from the French settlers, or other source than the government of the United States.

Second. That if it be shown that the defendant claimed title under the government of the United States, the plaintiff has not shown that the title of the defendant to said lands has been legally declared to be invalid. That the certificate of the register of the land office at Green Bay gave a title to the lands, and the only power vested in the officers of the government at Washington was to see that two patents were not issued for the same land.

Third. That by the acts of Congress granting rights of pre-emption to actual settlers, Linus Thompson had a right to float upon the land in question; and that the decision of the Secretary of the Treasury annulling the certificate of the register was contrary to law, and void. That under the Chicago treaty the lands in question were public lands at the date of the passage of the said act.

Fourth. That the deed of defendant in evidence in this cause is a sealed instrument by the law of the territory of Wisconsin, and is to be treated and regarded as a sealed instrument in the State of New York, because of its character at the place where it was made; and that the present action being assumpsit, such cannot be maintained upon said deed.

*Fifth. That no action will lie upon [*460 this deed upon a failure of the title to the lands therein described, without express covenants of warranty; there being no valid warranty against the defendant, the plaintiff is not entitled to recover.

Sixth. That the plaintiff is not entitled to recover in this form of action, if a fraud be proved in the cause, but should have brought an action on the case for deceit.

The counsel for the plaintiff then prayed the said court to instruct the jury, that the action of assumpsit is properly brought in this court upon the promises of the defendant contained in said deed, if any promises are made therein which are binding or obligatory upon the defendant.

The court so instructed the jury, and to such instruction the counsel for the defendant excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the deed in question being without seal, by the laws of the State of New York, and a deed to convey lands in the territory of Wisconsin not being required by the laws of that territory to have any seal, or any device by way of seal, affixed thereto, it is competent for the plaintiff to prove a ratification of the defendant, by parol, of the act of Starr as his attorney, in warranting such title.

The court refused so to instruct the jury, and thereupon instructed the jury, that, by the laws of the territory of Wisconsin, the said deed is an instrument under seal, that it is a covenant by the laws of that territory, and this court must so regard it, and give it the same effect here that it would have in the territory of Wisconsin; that being a covenant by the laws of that territory, there can be no ratification or confirmation of the act of the agent, Starr, by the defendant, which will be binding upon the defendant, unless made by an instrument executed by him under seal.

The counsel for the plaintiff then prayed the said court to submit to the jury, upon the facts in evidence, the question, whether the defendant, with full knowledge that his agent, Elisha Starr, had assumed in his name to warrant, and had warranted, the title to the land in question to the plaintiff, had ratified the act of the said agent in making such warranty.

The court refused to submit the said question of ratification to the jury upon the evidence in the case, and to such refusal of the said court the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the agent of the defendant having undertaken to convey a title to the plaintiff, and the defendant having given 461*] *the agent authority so to do, if the jury believe the defendant had no title to the premises described in said deed, at the time of the execution and delivery thereof, then the consideration for which the plaintiff paid his money to the defendant has failed, and the plaintiff is entitled to recover.

The court refused so to instruct the jury, and to such refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that if the defendant's agent made a representation to the plaintiff, as to the title of the defendant to the land described in said deed, which was untrue, and which was material to, and was relied upon by, the plaintiff, so that the plaintiff was actually deceived as to the subject he was acquiring by his bargain, the plaintiff is entitled to recover, whether there was moral fraud or not on the part of the agent in making such representations.

The court refused so to instruct the jury, and to the said refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then requested the said court to submit to the jury, upon the evidence in the case, the question, whether Elisha Starr, by fraudulent representations, induced the plaintiff to believe that the defendant had title to the land described in said deed when the defendant had no such title, and upon such belief became the purchaser thereof.

The court refused to submit such question to the jury, on the ground that the evidence so introduced on the part of the said plaintiff did not go far enough to raise the question of fraud on the part of the agent of the defendant, and decided that the plaintiff must give evidence of knowledge on the part of the agent, at the time of making such representations, that the representations so made were untrue.

To which refusal and decision the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to submit the question to the jury, upon the evidence in the case, whether the agent of the defendant, at the time of making the representations so made by him to the plaintiff, had not knowledge that the representations so made by him were untrue.

The court refused to submit the said question to the jury, on the ground that no evidence had been given, on the part of the plaintiff, to authorize the submission thereof.

To which refusal of the said court the counsel for the plaintiff then and there excepted.

The court instructed the jury in respect to the question reserved in the course of the trial, that the power of attorney, *upon a true [*462 construction of its terms and conditions, conferred upon the agent authority to give a deed of the land with covenant of warranty, to which the counsel for the defendant then and there excepted.

The jury thereupon, under the charge of the court, rendered a verdict for the plaintiff, of $2,862.25 damages, and six cents costs.

Upon these several exceptions, the case came up to this court.

It was argued by Mr. Blunt and Mr. Webster for the plaintiff in error, and Mr. Seeley and Mr. Baldwin for the defendant in error.

The counsel for the plaintiff in error made the following points:

1st. That the action of assumpsit does not lie in this case. If the deed were binding on the plaintiff in error, the action should have been on the covenants. Chitty, Pl. 131, 134, 111, 112, 116; 3 Johns. 509; 4 Cranch, 239; Story on Conflict of Laws, 475; 2 Caines, 362; 5 Johns. 239; 4 Cowen, 508, 530; 7 Cranch, 115; 3 Wheat. 212; 2 Co. Litt. 365 a.

2d. The judge erred in instructing the jury, that the power of attorney did authorize Elisha Starr to execute a deed with special covenants. Frost v. Raymond, 2 Caines' Cas. 188; Nixon v. Hyserott, 5 Johns. 58; 12 Ib. 436; 13 Ib. 359; Gibson v. Colt, 7 Johns. 390; 2 Johns. Ch. Cas. 519.

3d. The judge admitted evidence to prove failure of title objected to by the defendant below, which was incompetent.

4th. The judge assumed that, upon the evidence, the defendant below had no title.

5th. The counts in the declaration are bad. 5 Johns. 120; 7 Ib. 259, 376; 13 Ib. 236.

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

I. Upon the facts in evidence, it is clear that the title failed.

II. The form of action, being in assumpsit, was right; an action of covenant could not have been sustained in the State of New York.

The first count is special, founded on the instrument of conveyance. The second is also special, but more general, and the third contains the common money counts.

The instrument of conveyance executed by Le Roy's agent, has the form and language of a deed with covenants, but has no seal, a scroll being used in place of a seal.

*The form of the remedy depends on [*462 the lex fori.

In Warren v. Lynch, 5 Johns. 329, 1810, the Supreme Court held, that "a scrawl with the pen, of L. S., at the end of the name, was not a seal. A seal is an impression on wax or wafer, or some other tenacious substance capable of being impressed." It was admitted in that case, that the note declared on, having been executed in Virginia, with such scrawl, and the initials L. S. at the end of the maker's name, had, by the laws of Virginia, "all the efficacy of an instrument sealed with a wafer or wax." Kent, Ch. J., delivering the opinion of the court, says: "By the laws of that State, it was a sealed instrument or deed." "A scrawl

with a pen is not a seal;" and it was accordingly held that in the State of New York, assumpsit was the proper form of action. The same rule has prevailed, without any exception, to the present time. Van Santwood et al. v. Sandford, 12 Johns. 198; 4 Cowen, 508; 2 Hill, 228; 3 Ib. 493; 1 Denio, 376; 4 Kent's Com. 451.

The rule that the form of action, or remedy, depends on the lex fori, is everywhere recognized as universal. In United States Bank v. Donally, 8 Peters, 362, the court says: "The form of the remedy depends on the lex fori, and though an action of covenant will lie on an unsealed instrument in one State, it will not in another state, where covenant can be brought only on a contract under seal." See, also, Story's Conflict of Laws, 470, 475; De la Vega v. Vianna, 1 Barn. & Adol. 284; Trimbey v. Vignier, 1 Bing. N. C. 151, per Tindal, Ch. J.; 10 Barn. & Cress. 903.

III. The power of attorney from Le Roy gave sufficient authority to Starr, as his agent, to covenant for the title of the premises.

[The counsel then entered into an analysis of the power, and examined each paragraph of it.]

4 Rep. 81; 10 Wend. 250; 1 J. J. Marsh. 292; 1 Brod. & Bing. 319; 2 Sugden on Vendors, 110, Amer. ed. 104; 2 Johns. 595; Co. Litt. sec. 733, note; 1 Ch. Gen. Pr. 312, 313; 2 Penn. 304; 4 Cruise's Dig. 357.

IV. Le Roy cannot disavow in part the contract of his agent, and at the same time retain the money paid by Beard upon the faith of that contract.

V. Assuming that the covenants were not authorized, independently of the preceding views, Beard was deceived by the false representations of Le Roy's agent, and is entitled to recover back the purchase money in the present action.

VI. The stipulations contained in the instrument of conveyance have been ratified by Le Roy.

464*] *VII. If the attorney mistook his powers to covenant for the title, but undertook to covenant and conveyed no title, Beard is entitled to recover on the count for money had and received, on the ground of a total failure of consideration. He did not get that for which he stipulated and paid his money.

Mr. Justice Woodbury delivered the opinion of the court:

This was an action of assumpsit for money had and received; and also counting specially, that, on the 17th of November, 1836, the original defendant, Le Roy, in consideration of $1,800 then paid to him by the original plaintiff, Beard, caused to be made to the latter, at Milwaukee, Wisconsin, a conveyance, signed by Le Roy and his wife, Charlotte. This conveyance was of a certain lot of land situated in Milwaukee, and contained covenants that they were seized in fee of the lot, and had good right to convey the same. Whereas it was averred, that, in truth, they were not so seized, nor authorized to convey the premises, and that thereby Le Roy became liable to repay the $1,800.

Under several instructions given by the Circuit Court for the Southern District of New York, where the suit was instituted, the jury found a verdict for the original plaintiff, on which judgment was rendered in his favor, and which the defendant now seeks to reverse by writ of error. Among those instructions, which were excepted to by the defendant, and are at this time to be considered, was, first, that "the action of assumpsit is properly brought in this court, upon the promises of the defendant contained in the deed, if any promises are made therein which are binding or obligatory on the defendant."

The conveyance in this case was made in the State of Wisconsin, and a scrawl or ink seal was affixed to it, rather than a seal of wax or wafer. By the law of that State, it is provided, that "any instrument, to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

But in the State of New York it has been repeatedly held (as in Warren v. Lynch, 5 Johns. 329) that, by its laws, such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practiced on an unsealed instrument in the State where the suit is instituted, and the latter must therefore be assumpsit. 12 Johns. 198; 2 Hill, 544, 228; 3 Hill, 493; 1 Denio, 376; 5 Johns. 329; Andrews et al. v. Herriot, 4 Cowen, 508, overruling Meredith v. Hinsdale, 4 Kent, 451; 8 Peters, 362; Story's Conflict of *Laws, 47; 2 Caines, 362. [*465 A like doctrine prevails in some other States. 3 Gill & Johns. 234; Douglas et al. v. Oldham, 6 N. H. 150.

It becomes our duty, then, to consider the instruction given here, in an action brought in the Circuit Court in New York, as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the State of New York, and one of the counts was special on the promise contained in the covenant. We hold this, too, without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the lex loci contractus, must govern. Robinson v. Campbell, 3 Wheat. 212.

It is further objected here, that an eviction by elder and better title should have been averred in the declaration before a recovery can be had for a breach of warranty.

But such averment is necessary only when the breach is of a covenant for quite enjoyment, etc. 14 Johns. 48. Because, in a breach of the covenant of seisin, it is broken at the time of the conveyance if at all, and no eviction need be alleged. 4 Cranch, 421; 4 Kent's Com. 474, note.

Here it virtually appears that the original defendant was not seized. Little attempt is made to show that he was; and the title, so far as disclosed in the evidence, could not have been in him or his grantors.

It is likewise contended, that, if a covenant legally existed in this case, and was broken, assumpsit lies to recover back the money. That form of action seems at times justified on general principles, beside the rule that in New York the remedy must be assumpsit on an instrument like this. 9 Mees. & Wels. 54; 4

Man. & Grang. 68; 5 Adolph. & Ell. 433; 6 East, 241. To this the chief objection urged is, that neither assumpsit nor covenant will lie, in case no covenant whatever was made or broken. 3 Bos. & Pull. 170; 2 Johns. Ch. 515; 4 Kent, 474; 3 Ves. 235.

But as the facts here do not require a decision on this last point, none is given.

The next instruction to which the original defendant objected, and which is the chief and most difficult one that can properly be considered by us, under the present bill of exceptions, is, that the power of attorney by Le Roy and his wife to Starr, their agent, was broad enough to confer upon him "authority to give a deed of the land with covenant of warranty."

This power of attorney is given in extenso in the statement of the case. It appears from its 466*] contents, that Le Roy, after *authorizing Starr to invest certain moneys in lands and real estate in some of the Western States and territories of the United States, at the discretion of the said Starr, empowered him "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." Again, he was authorized to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right, title," etc., "as sufficiently in all respects as we ourselves could do personally in the premises," "and generally, as the agent and attorney of the said Jacob Le Roy," to sell "on such terms in all respects as he may deem most eligible."

It would be difficult to select language stronger than this to justify the making of covenants without specifying them eo nomine. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument (4 Moore, 448), aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question.

That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, first, from its leaving the terms of the sale to be in all respects as Starr shall deem most advantageous. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. Rogers v. Kneeland, 10 Wendell, 219. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchaser.

To strengthen this view, the agent was also enabled to execute conveyances to transfer the title "as sufficiently in all respects as we ourselves could do personally in the premises." And it is manifest, that inserting certain covenants which would run with the land might transfer the title in some events more perfectly than it would pass without them; and that, if present "personally," he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that any thing so censurable as this was contemplated.

*Again, his authority to sell, "on [*467 such terms in all respects as he may deem most eligible," might well be meant to extend to a term on condition to make covenants of seisin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price.

Now, all these expressions, united in the same instrument, would prima facie, in common acceptation, seem designed to convey full powers to make covenants like these. And although a grant of powers is sometimes to be construed strictly (Com. Dig. Poiar, B. 1 and c. 6; 1 Bl. R. 283), yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid. Nind v. Marshall, 1 Brod. & Bing. 319; 10 Wendell, 219, 252. This he must refund when the title fails, or be accessory to what seems fraudulent. 1 J. J. Marsh. 292. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself. Solly v. Forbes, 4 Moore, 448. Le Roy resided in New York, and Starr was to act as his attorney in buying and selling lands in the "Western States and territories," and this very sale was as remote as Milwaukee, in Wisconsin. For aught which appears, Le Roy, Beard, and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying.

The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of The Lessee of Clarke v. Courtney, 5 Peters, 349, Justice Story says: "This is the common course of conveyances;" and that in them "covenants of title are usually inserted." See, also, 6 Hill, 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine, that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal.

It is true, that some of these cases relate to personal estate, and some perhaps should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage; and consequently may not be decisive by analogy to the present case. 3 D. & E. 757; Helyear *v. Hawke, 5 Esp. Cas. 72, note; [*468 Pickering v. Bush, 15 East, 45; 2 Camp. N. P. 555; 6 Hill, 338; 4 D. & E. 177.

So of some cases which relate to the quality, and not the title, of the property. Andrews v. Kneeland, 6 Cowen, 354; The Monte Allegre, 9 Wheat. 648; 6 Hill, 338.

But where a power to sell or convey is given in writing, and not aided, as here, by language conferring a wide discretion; it still must be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent. 10 Wendell, 218; Howard v. Baillie, 2 H. Bl. 618; Story on Agency, p. 58; Dawson v. Lawly, 5 Esp. Cas. 65; Ekins v. Maclish, Ambler, 186; Salk, 283; Jeffrey v. Bigelow, 13 Wendell, 527; 6 Cowen, 359. Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill, 338; 2 Pick. 345; Bell on Com. L. 410; 2 Kent's Com. 618; Vanada v. Hopkins, 1 J. J. Marsh. 287; Sanford v. Handy, 23 Wendell, 268. We have already shown, that, under all the circumstances, a covenant of warranty here was not only usual, but appropriate and reasonable.

Again, "all powers conferred must be construed with a view to the design and object of them." 1 J. J. Marsh. 287. Here that design was manifestly in the discretion of the agent, to sell as he might deem most advantageous. Again, if a construction be in some doubt, not only may usage be resorted to for explanation (Story on Agency, p. 73; 5 D. & E. 564), but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong; as understood by the principal, the latter is still bound by the conduct of the agent. Lomax v. Cartwright 3 Wash. C. C. 151; 2 Ib. 133; 4 Ib. 551; 6 Cowen, 358, in Andrews v. Kneeland. Because the person who deals with the agent is required like him to look to the instrument to see the extent of the power (7 Barn. & Cress. 278; 1 Peters, 290); and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms. 2 Barn. & Ald. 143, in Barin v. Corrie; 1 Peters, 290; Courcier v. Ritter, 4 Wash. C. C. 551; 23 Wendell, 268.

In the next place, the acts of the parties themselves tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts, it is competent to consider in order to remove doubt. 17 Pick. 222; 1 Metcalf, 378; Paley on Agency, 198; Mechanics' Bank of Alexandria v. Bank 469*] *of Columbia, 5 Wheat. 326; and Bac. Abr. Covenant, F.; 5 D. & E. 564; 1 Greenleaf on Ev. sec. 293.

The agent's acts on this subject are strong. He construed the instrument as if empowering him to make the warranty, and made it accordingly. He was to gain nothing for himself, by such a course, if wrong, and does not appear to have done it collusively with anybody. 2 Bro. Ch. 638.

The principal, too, when asked for redress, and when corresponding on the subject, does not appear to have set up as a defense, that he did not intend, by this instrument, to authorize a conveyance with warranty. On the contrary, for some time he conducted himself towards both the agent and the plaintiff, as if he had meant covenants should be made. 14 Johns. 238; All Saints Church v. Lovett, 1 Hall, 191.

Finally, the decided cases on this question, though in some respects contradictory, present conclusions as favorable to this construction, as do the peculiar language used in the power and the weight of analogy. See 23 Wend. 260, 267, 268; Nelson v. Cowring, 6 Hill, 336; Vanada v. Hopkin's Ad. 1 J. J. Marsh. 293; 13 Wendell, 521, Semble.

Some earlier cases were contra. Nixon v. Hyserott, 5 Johns. 58; Van Eps v. Schenectady, 12 Johns. 436; and Ketchum v. Everston, 13 Johns. 365; 7 Johns. 390.

But in these the power was merely to give a deed of a certain piece of property, and could be construed as it was, without directly impugning our views here. Whereas, in the present case, the power was manifestly broader in terms and design. Wilson v. Troup, 2 Cowen, 195; 6 Cowen, 357.

The earlier cases in New York, bearing on this subject, are also considered by its own courts as overruled by the later ones. Bronson, J., in 6 Hill, 336.

It may be proper to add, that the general conclusions to which we have arrived are more satisfactory to us, if not more right, because they accord with what appears to be the justice of the case, which is, that the plaintiff should not keep money which would probably not have been obtained except by these very covenants, and which it must be inequitable, therefore, to retain and at the same time avoid the covenants.

The judgment below is affirmed.

Mr. Justice McLean dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District *of New York, and was argued by coun-[*470 sel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs, and damages at the rate of six per centum per annum.

GEORGE D. PRENTICE and George W. Weissinger, Copartners doing Business under the Style and Firm of Prentice & Weissinger, Plaintiffs in Error,

v.

PLATOFF ZANE'S ADMINISTRATOR.

A venire de novo must be awarded when special verdict finds only evidence of facts—agreements that judges may draw inferences of fact—presumption of finding to support judgment.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court

will not render a judgment, but remand the cause to the court below for a venire facias de novo.

Therefore, where a suit was brought by an indorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, this court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case.

But the parties below agreed to submit the cause to the court, both on the facts and the law. This court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below.

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

In 1836 Platoff Zane, a citizen of Virginia, being in Pennsylvania, executed the following promissory note:

"$5,437.50. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven 50-100 dollars, without defalcation, for value received. Platoff Zane."

On some day afterwards (the record did not show when), this note was indorsed in blank by Johnson, the payee, and delivered to John Stivers, who handed it over to Prentice & Weissinger, without putting his own name upon it.

On the 8th of May, 1840, Prentice & Weissinger filed a bill before the Honorable George M. Bibb, Judge of the Louisville Chancery Court in Kentucky, against the above named John Stivers and one John Thomas. The bill stated, that the complainants and Thomas were sureties for Stivers as principal in a debt which Stivers owed to the Bank of Louisville, that the complainants had paid the debt, and now required Thomas to contribute one half.

471*] *On the 16th of June, 1840, Thomas answered, and also filed a cross bill. He alleged that Stivers had placed in the hands of Prentice & Weissinger a large amount of securities, and required an exhibition thereof. Weissinger answered the cross bill, and gave in a list of these securities, amongst which was Zane's note; to which was attached the remark, that they had received notice that the note would be defended on the ground of no consideration. The answer also offered to transfer all the securities to Thomas for eighty per cent, of their amount, averring a belief of their insufficiency to pay the debt.

Here these proceedings in chancery stopped.

On the 7th of November, 1845, Prentice & Weissinger, citizens of Louisville, Kentucky, brought an action of debt against Zane, in the District Court of the United States for the Western District of Virginia, upon the above mentioned promissory note.

The defendant pleaded nil debet, and the case went to a jury, who found a special verdict. Before reciting this, it may be mentioned that the deposition of Jacob Anthony, therein referred to, proved that the note in question was passed by Stivers to Prentice & Weissinger, to indemnify them for money paid by them, as his indorsers, in bank.

The jury say, that they find that the note in these words—"$5,437.50. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven 50-100 dollars, without defalcation, for value received. Platoff Zane"—was made by the defendant, and delivered to the payee, at the date thereof, at Philadelphia, in the State of Pennsylvania, and that said note was indorsed by the payee, and delivered by him so indorsed, to one John Stivers, at the city of Louisville, in the State of Kentucky, before the maturity thereof; that there has not been any evidence submitted to us that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated; but should the court be of opinion that, from the facts and evidence herein found, the jury ought to presume that said indorsement to said Stivers was made for a valuable consideration, then we find that the same was made for full value received by the payee from said Stivers therefor; otherwise we find that the same was made without any consideration or value therefor. And we further find, that said Stivers afterwards, but before the said note became payable, delivered the same (indorsed in blank by the payee as aforesaid, but not indorsed by the said Stivers) to the plaintiffs, at the city of Louisville aforesaid, for the purposes and upon the *consid- [*472 eration shown in the deposition of Jacob Anthony, and the record of a bill, answer, and cross bill and answers; which deposition and record are in the words and figures following, to wit. (The deposition and record were then set forth in extenso, and the special verdict proceeded thus):

We further find, that the consideration of said note was fraudulent on the part of the payee, and such that the payee could not recover against the maker upon said note.

But we further find, that the plaintiffs had no notice of the fraudulent consideration of said note at or before the time the same was delivered to them as aforesaid.

And we find that the defendant, since the institution of this suit, has duly served the plaintiffs with a notice in the following words, to wit:

"An action of debt, in the District Court of the United States for the Western District of Virginia, between

"Prentice & Weissinger, Plaintiffs,
and
Platoff Zane, Defendant.

"The defendant in this suit will offer evidence to show, and will insist at the trial, that the note described in the declaration was obtained from him, said defendant, by the payee thereof, by means of misrepresentation and fraud, and without any value having been received therefor by said defendant, and will require the plaintiffs to prove at the trial the consideration, if any, paid by them, or the previous holder or holders thereof, for the same, and the time and manner in which they became possessed of said note.

"Very respectfully, etc.,
"Platoff Zane,
"By Jacob & Lamb, his Attorneys.

"To Messrs. Prentice & Weissinger."

"Due service of above admitted.

"M. C. Good, Attorney for Plaintiffs."

We further find the statute of Pennsylvania in force within that State at the time of the execution of said note, and the indorsement thereof and delivery of the same to the plaintiffs as aforesaid, in these words:

"Act of 27th February, 1797.—4 Dallas, 102; 3 Smith, 278.

"An Act to devise a particular Form of Promissory Notes not liable to any Plea of Defalcation or Set-off.

"6. Sec. 1. All notes in writing, commonly called promissory notes, bearing date in the city or County of Philadelphia, whereby 473*] *any person or persons, bodies politic or corporate, or copartnership in trade, shall promise to pay, or cause to be paid, to any other person or persons, bodies politic or corporate, or copartnership in trade, and to the order of the payee for value in account, or for value received, and in the body of which the words 'without defalcation,' or 'without set-off' shall be inserted, shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof; and the indorsees shall be entitled to recover against the drawer and indorsers such sums as, on the face of the said notes, or by indorsements thereon, shall appear to be due: Provided always, that in every action brought by the holder of any such note, whether against the drawer or indorsers, the defendant may set off and defalk so far as the plaintiffs shall be justly indebted to him in account by bonds, specially or otherwise."

See 8 Serg. & Rawle, 481, and posted notes.

"A copy from a copy filed in my office.

"Teste: Alexander T. Laidley, Clerk."

And if the law be for the plaintiffs, then we find for them the sum of $5,437.50, the debt in the declaration mentioned, with interest thereon at the rate of six per cent. per annum from the 1st day of December, 1841, till paid. But if the law be for the defendant, then we find for the defendant. T. W. Harrison.

And because the court will consider what judgment should be rendered upon the verdict aforesaid, time is taken until to-morrow.

Memorandum. Upon the trial of this cause, the parties, by their attorneys, filed a written agreement in the words following, to wit: "And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the State of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom, if the same were submitted to them upon the trial of this cause; and that 474*] *this agreement is to be made part of the record in this suit.

"M. C. Good, Attorney for Plaintiffs.

"Jacob & Lamb, Attorneys for Defendant."

Which agreement is ordered to be made a part of the record in this suit.

On the 9th of September, 1846, the District Court pronounced the following judgment, viz: "The matters of law arising upon the special verdict in the cause being argued at a former term of this court, and the court having maturely considered thereof, it seems that the law is for the defendant."

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

It was argued by Mr. Badger and Mr. Bibb for the plaintiffs, and Mr. Ewing for the defendant.

The points raised by Mr. Bibb, for the plaintiffs in error, were the following:

The legal right of the plaintiffs to have judgment for the sum expressed in the note stands, 1st, upon the effect of the Act of 1797, as declared in the title, body, soul, and spirit of the act itself; 2d, upon principles well established by adjudged cases, which confirm and fortify their right.

I. The true meaning and effect of that act, to be collected from the expressions of the act itself, stand in the foreground.

It may be useful, and will be according to the usages of the sages of the law in expounding statutes, to look into the old law, the inconveniences and grievances arising under it, thereby the better to understand the remedy intended by the new law, so that the mischiefs may be suppressed, and the remedy advanced.

The Legislature of Pennsylvania, on the 28th May, 1715, passed "An Act for the assigning of bonds, specialties, and promissory notes." 1 State Laws, p. 77. The inconveniences growing out of the provisions of that act, in the remedies allowed to assignees, will be sufficiently understood, for all the present purposes, by looking into the decisions of the courts in these cases, viz.: Wheeler, Assignee, v. Hughes, in 1776, 1 Dallas, 23; M'Cullough, Assignee, v. Houston, in 1789, 1 Dallas, 441; Stille v. Lynch, in 1792, 2 Dallas, 194.

By these decisions it appears that the statute of 3 and 4 Anne, chap. 9, respecting assignments, was not considered as in force, ex proprio vigore, in Pennsylvania; and that the Act of Pennsylvania of 1715 differed materially from the statute of Anne, especially in omitting to allow promissory notes to be negotiated and assigned in like manner as bills of exchange.

*The assignee took the assignment [*475 of a bond, specially, or promissory note, under the Act of 1715, at his peril, and stood in the place of the payee, "so as to let in every defalcation which the obligor had against the payee at the time of the assignment, or notice of the assignment." "The only intent of the act being to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment" (1 Dall. 28), "subject to all equitable considerations to which the same was subject in the hands of the original payee." 1 Dallas, 444.

In Stille v. Lynch, 2 Dallas, 194, the maker of a promissory note was permitted, in an action by the indorsee, to set up in defense, that the note was without any consideration. This trial was had at the September Term of that court, in the year 1792.

On the 30th of March, 1793, the Legislature of Pennsylvania passed an act (3 Dallas's State

Laws, p. 329), by which promissory notes discounted at the Bank of Pennsylvania were placed upon the footing of foreign bills of exchange, except as to damages. Whereby such discounted notes became discharged, in the hands of the indorsee, from any plea of defalcation or set-off on account of the transactions between the original parties. But similar notes, not discounted at bank, were in the hands of indorsees, under the Act of 1715, subject to all equities existing between the original parties "at the time of the assignment, or notice of the assignment."

Such peculiar rights, privileges, and immunities, enjoyed by the President, Directors and Company of the Bank of Pennsylvania, having their office of discount and deposit in the city of Philadelphia, but not accorded to others dealing in like promissory notes, and doing business in the vicinage of the bank and within the sphere of its influence, were inconveniences and grievances. Such differences and privileged anomalies, growing out of the positive acts of legislation by the State of Pennsylvania, called for some remedy.

Such were the old laws and their effects, when the Act of 1797 was passed, "to devise a particular form of promissory notes, not subject to any plea of defalcation or set-off. This act, in its title and body, manifests the intent of the Legislature to enable the community to make for themselves promissory notes, which should be thereafter creditable, merchantable, negotiable, indorsable, and circulated according to the general principles and usages of the mercantile law, not subject, in the hands of indorsees, bona fide and for value, to any defalcation or set-off, not warranted by the established principles of the law merchant.

476*] *The form devised contains, to the full, the terms to impart the characteristics and qualities of negotiable mercantile paper, expressed simply and aptly, in words well known to the law merchant, and intelligible to a common understanding. The notes are to bear date in the city or County of Philadelphia, to promise to pay money, to express the sum to be payable "to order" to express "for value received," and to be payable "without defalcation." Such notes, the act declares, "shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof."

That no ambiguity might exist as to what was meant by "defalcation," that not a loop might remain whereon to hang a doubt to be solved by construction, the act has superadded, "And the indorsees shall be entitled to recover against the drawer and indorsers such sum as on the face of the said notes, or by indorsements thereon, shall appear to be due."

The explanation proceeds, "Provided, always, that in every action by the holder of any such note, whether against the drawer or indorsers, the defendant may set-off and defalk, so far as the plaintiffs shall be indebted justly to him in account by bonds, specialty, or otherwise."

The proviso subjects every holder for his own acts, and no further. The first position and body to which the proviso is appended discharges the indorsee from any difficulty arising out of matters inter alios acta, not disclosed by the instrument itself—not made known to the indorsee before he made a fair acquest of the note for value.

II. Upon the authority of adjudged cases, the right of the plaintiffs is confirmed and fortified against the defense set up.

[The counsel then referred to the following English authorities: 2 Burr. 276; Bla. Com. book 2, chap. 30, p. 470; 4 Term Rep. 148. Pennsylvania authorities: 4 Dallas, 370; 5 Binney, 469; 1 Serg. & Rawle, 180; 9 Serg. & Rawle, 193. And a number of English cases, to show that the "general mercantile law" was in harmony with these decisions.]

In Lickbarrow v. Mason, 2 Term Rep. 71, Justice Ashurst stated the law to be, "As between the drawer and payee, the consideration may be gone into; yet it cannot be between drawer and an indorsee; and the reason is, it would be enabling either of the original parties to assist in a fraud."

This same distinction between a defense impeaching the consideration, in actions between the original parties, in which case it is admissible, and actions by indorsees, and in which case such defense cannot be admitted, was adjudged in these cases: Snelling v. Briggs, and Collett v. Griffith, Bull. N. P. *274; [*477 Puget De Bras v. Forbes & Gregory, 1 Esp. N. P. Cases, 119; United States v. Bank of the Metropolis, 15 Peters, 393; Swift v. Tyson, 16 Peters, 15, 22.

In the case of Swift v. Tyson, the defendant attempted to defend against the indorsee by showing that the consideration held out to the maker was, on the part of the payee, totally false and fraudulent. But the Supreme Court of the United States decided, that "a bona fide holder of a negotiable instrument for valuable consideration, without any notice of the facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before it becomes payable, holds the title unaffected by those facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning now to be brought forward in its support.

"As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration without notice; for the law will presume that, in the absence of all rebutting proofs; and therefore it is incumbent on the defendant to establish his defense by proofs, to overcome the prima facie title of the plaintiffs."

In the case of The United States v. Bank of the Metropolis, the Supreme Court of the United States said: "The rule is, that a want of consideration between drawer and acceptor is no defense against the right of a third party who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawee, if that be not known by the third party before he gives value for it." 15 Peters, 393.

The special verdict finds that Stivers (who received the bill from the payee indorsed in

blank) did not indorse it, but delivered it to the plaintiffs. The want of Stivers' indorsement is no objection to the title of the plaintiffs. They had a right to fill up the blank indorsement by an assignment to themselves, as they did. A number of cases cited, 11 Peters, 81, etc.

The parties, by agreement of record, waive all objections to the verdict for "finding in part evidence, and not fact," and agree that the court "may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, which a jury ought to draw therefrom."

Upon the deposition of Anthony, and the bill, 478*] answer, cross *bill, and answers, between Prentice & Weissinger, as original complainants, and John Thomas, to compel him to contribute for the debt for which the parties were bound as co-securities for Stivers as principal, and paid by Prentice & Weissinger; and the cross bill by Thomas v. Prentice & Weissinger, to account for the notes by them received of Stivers, and the answer of Prentice & Weissinger to the cross bill; it appears that Prentice & Weissinger had paid as indorsers and securities for Stivers upwards of twelve thousand dollars, and that this note and others were delivered over to Prentice & Weissinger in consideration of the moneys so previously paid by them for Stivers, and as indemnities; from which, however, they are not likely to be saved from loss by all the securities which Stivers gave them.

It is clear from the transcript of the record of the suit in chancery, and the deposition of Anthony, as found by the special verdict, that the note upon P. Zane was delivered by Stivers to the plaintiffs, in consideration of a precedent debt, greatly exceeding the sum due by this promissory note.

The question is, whether the possession so obtained by the plaintiffs of this negotiable note, in consideration of a precedent debt, entitles them to protection as indorsees against the defense set up by the maker, on account of the transactions between them and the payee?

This question was fully argued and decided by this court in the case of Swift v. Tyson, 16 Peters, 2, 16, 20, 21, 22. It was thereupon resolved by the court, that a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. The question was examined upon principle, and upon the adjudged cases, English and American; and the conclusion is, "that a bona fide holder taking a negotiable note in payment of, or as security for, a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all equities between the antecedent parties." To sustain that doctrine many cases are cited by the court previously decided in the Supreme Court of the United States, and in England, and the opinion in that case says of them: "They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration." 16 Peters, 21.

This decision, and the authorities therein cited by the court, are full and conclusive. Nothing can be, or need be added on this point by the counsel for the plaintiffs.

The special verdict submits to the court the question whether, "in the absence of all [*479 positive proof upon the subject of the consideration between Johnson and Stivers for the note, it is to be presumed that Stivers gave value for it.

The presumption is so until repelled by proof to the contrary; as stated in Swift v. Tyson, 16 Peters, 16. But the question is immaterial whether or not Stivers paid value to Johnson, seeing that the plaintiffs are holders bona fide, for value, and without notice, and obtained the note regularly in the direct line of negotiation.

In Haley v. Lane, 2 Atk. 182, Lord Hardwicke determined, that, "where there is a negotiable note, and it comes into the hands of a third or a fourth indorsee, though some of the former indorsers might not pay a valuable consideration for it, yet it is a good note to him, unless there should be some fraud, or equity appearing against him in the case."

In the cases of Grant v. Vaughan, 3 Burr. 1516, Anonymous, 1 Salk, 126, plea 5, Miller v. Race, 1 Burr. 452, and Peacock v. Rhodes, 2 Douglas, 632, the negotiable papers passed through the hands of mere finders and thieves into the possession of bona fide holders for valuable consideration without notice, yet such valueless and vicious derivatives did not impair the rights and titles of such bona fide possessors.

The special verdict finds that this note was made and delivered in Philadelphia, and indorsed and delivered in Louisville by the payee to Stivers, and by Stivers delivered to the plaintiffs in Louisville. So this note was made and delivered in one State, negotiated in another, and sued upon in a third.

The note so made in Pennsylvania, having no reference by its terms to performance in any other State, must be adjudged by the laws of that State, and was there a good and valid contract. By the law of that State, it was a mercantile negotiable instrument. The act of the Legislature found by the jury and the decisions of the Supreme Court of that State, before cited (5 Binn. 469; 1 Serg. & Rawle, 180, and 9 Serg. & Rawle, 193), show that this note and all such like are, by the law of that State, negotiable according to the principles of the "general mercantile law;" that such notes are "in the situation of bills of exchange;" that the Act of 1797, relating to such promissory notes, was passed "for the purpose of making them subject to the rules of general mercantile law." The supreme judicial tribunal of that State has so expounded the statute, and settled its meaning and effect.

The points were thus stated by Mr. Badger, upon the same side:

"It will be also insisted for the plain- [*480 tiff, that—

1st. Every holder of a bill or note is presumed to be a bona fide holder for value, until something is shown to repel the presumption. Story on Prom. Notes, p. 220, sec. 196; Ib. on Bills of Exch. p. 492, sec. 415.

2d. Every person in possession of a bill or note, indorsed in blank, and appearing to be the lawful holder thereof, can by delivery convey a good title thereto to anyone believing him to be such owner, so as to convey a right of action against the maker or acceptor, notwithstanding the want of consideration, or any other matter

of defense as between the previous parties to the bill or note. Arbouin v. Anderson, 1 Adolph. & Ellis, N. S. 498; Story on Bills, sec. 415.

3d. To repel the presumption that the holder came by the bill or note honestly, fraud, felony, or some such matter, must be proved, and a holder for value is not affected by any infirmity in the bill or note, or in the previous negotiations thereof, unless mala fides is brought home to him. Knight v. Pugh, 4 Watts. & Serg. 445; Goodman v. Harvey, 4 Adolph. & Ellis, 870; Arbouin v. Anderson, above cited; Story on Bills, secs. 415, 416.

And as a consequence from these positions, it will be insisted that the plaintiff in error is entitled to recover.

And even upon the doctrine once held, that gross negligence or even ground of suspicion is sufficient to affect the holder (Story on Prom. Notes, sec. 197; Story on Bills, sec. 416; Goodman v. Harvey, above cited), the plaintiff in error is here entitled to recover, there being in this case neither such negligence nor ground of suspicion.

Mr. Ewing, for defendant in error:

1st. This suit was brought in Virginia, on a promissory note, by the assignee, against the maker. It is not averred in the declaration that the note was made in any other State or community, or that it is affected by any law or usage other than the laws and usages of Virginia. There being no such averment, there can be no such proof of fact found legally in the case, for it makes a different contract, governed by different legal principles. The case, therefore, stands as it is set out in the declaration. A suit upon a note made in Virginia, and controlled by the laws and usages of Virginia. By these, a promissory note is not a commercial instrument, and the fraud of the payee in obtaining the note may be set up against the indorser.

The special verdict finds that the note was obtained by fraud. This is enough to sustain 481*] the judgment of the court below. *But if the declaration be out of the question, and the case rests upon the special verdict, irrespective of the pleadings, then the note is commercial paper, and the special verdict finds that it was fraudulently obtained.

The plaintiffs are indorsees; but pending the case in the courts below, they had due notice that the note was obtained by fraud, and that they would be called upon on the trial to prove the consideration paid for the note.

Commercial paper which is obtained by fraud is subject to the same defense in the hands of the assignee as in those of the payee, unless he show that it was transferred to him for a valuable consideration, in the due course of trade. Holme v. Karpeer, 5 Binn. 469; Morton v. Rogers, 14 Wend. 580; 2 Barn. & Aldolph. 291; 4 Taunton, 114; Chitty on Bills, 69, and cases cited in notes.

The verdict does not find that the plaintiffs gave any consideration for the note, or received it in any fair transaction, except as the same may be deduced from evidence to which it refers. This evidence must be treated as a nullity, were it not for the agreement of counsel, that the court, in deciding the case, may make all just inferences and conclusions of fact and law from the evidence. Conclusions of fact, deduced by the court from the evidence, cannot be a subject of reversal. This court deals with errors in law.

The jury, therefore, not having found any consideration for the assignment of the note, the judgment cannot be reversed because the court below did not infer a consideration from evidence which, by agreement of counsel, it was to pass upon. The record does not show whether the court inferred any consideration for the transfer or not. This court cannot assume that they did infer any. The jury did not find any. So that the facts found leave a clear case of a note obtained by fraud, and transferred without consideration. The evidence referred to cannot change it here, as this court has nothing to do with evidence.

The counsel for the plaintiffs contend that this must be considered as an agreed case, not as a special verdict. This does not help the matter in the least. If it be an agreed case, it is agreed in it that, so far as the jury find facts, the court shall pronounce the law upon them. So far as they find evidence, the court shall infer from it the facts, and pronounce the law upon the facts so inferred. It is pro tanto a submission to the court upon the evidence.

But if this court look to and pass upon the evidence, which was by consent submitted to the court below, then the case *made out [*482 is that of a note obtained by fraud, transferred to the plaintiff as security for a pre-existing debt, no consideration being paid for the note, no debt extinguished by its transfer.

We admit and contend that the liability of the maker of this note is governed by the laws of Pennsylvania; and if by the statutes, as expounded by the courts of that State, he is allowed to set up the defense here set up, he is entitled to do so, notwithstanding it has been indorsed in another State. Story's Con. of Laws, secs. 317, 332, 333, 345; Story on Bills, secs. 158, 161, 163, 164, 167, 168, 169; Judiciary Act, 1789; Shelby v. Guy, 11 Wheat. 361; Green v. Neal, 6 Pet. 291; Elmendorf v. Taylor, 10 Wheat. 152; 12 Pet. 89.

According to the law of Pennsylvania, the defense of fraud in the consideration of this note may be set up against an indorsee who has received it merely as collateral security for a pre-existing debt. Petrie v. Clark, 11 Serg. & Rawle, 377; Walker v. Geisse, 4 Whart. 257, 258; Depeau v. Waddington, 6 Wharton, 232; Jackson v. Polack, 2 Miles, 362; and see 4 Wharton, 500, and Evans v. Smith, 4 Binney, 366; Cromwell v. Arrot, 1 Serg. & Rawle, 180.

In Virginia there has been no decision of the question, as one of general commercial law affecting negotiable paper; but see 2 Rand. 260; 2 Leigh, 503; and Prentice & Weissinger v. Zane, 2 Grat. 202.

In Kentucky notes are not negotiable unless negotiated by a bank. 1 Marsh. 540; 3 Ib. 162. No decision of the courts of that State has been found upon the question whether the indorsee of negotiable paper, in a case like this, holds it discharged of all equities between the original parties. At all events, it has been shown that the local law of that State would not affect the liability of this defendant.

In New York negotiable paper is on the same footing as in Pennsylvania, when received as collateral security for an existing debt. Bay

v. Coddington, 5 Johns. Ch. 56; and the same case, in error, 20 Johns. 643; 9 Wend. 170; 6 Hill, 93; 24 Wend. 230.

In New Hampshire, see 10 N. H. 266; 11 Ib. 66. In Alabama, 4 Ala. Rep. In Tennessee, 10 Serg. 428, 434.

In England the most of the cases have been those of bankers, who probably make advances to their customers upon an understanding, in all cases, that they shall be covered by bills; or advances are made on the credit of the bills. See 1 Stark. R. 1; 8 Ves. 531; 4 Bing. 396; 1 Bing. N. C. 469; 16 E. C. L. Rep. 256; 17 Ib. 356; Vallace v. Siddell, Chitty on Bills, 87, 88, 10th Am. ed. De la Chaumette v. Bank [*483 of England, 9 Barn. & Cress. 209, 17 E. C. L. R. 356, seems to sustain the doctrine for which we contend.

Numerous cases, in this court and elsewhere, which seem, perhaps, to affect the present question, really turn upon the circumstance, that the bill or note has been received in payment of the pre-existing debt, and not as collateral security; or that advances have been made, or some other consideration given, at the time of taking the note; as Swift v. Tyson, 16 Pet. 1; 2 Ib. 170; 2 Wheat. 66; Brush v. Scribner, 11 Conn. 388; 12 Pick. 399; 22 Ib. 24; 11 Ohio, 172; etc. Even in Pennsylvania (4 Whart. 258), and now in New York (21 Wend. 499; 23 Ib. 311; 24 Ib. 115; 1 Hill, 513; 2 Ib. 140), it is held, that, if the indorsee receive a bill in payment or discharge of a pre-existing debt, he holds it exempt from all equitable defenses; but not if he has taken it merely as collateral security for such a debt. See Munn v. M'Donald, 10 Watts, 270.

The opinion of Story, J., in Swift v. Tyson, on this point, is obiter, and is not sustained by the authorities in England or America. It is directly opposed to the Pennsylvania cases, which, as expositions of a statute of that State, or of the commercial law prevailing there, must be conclusive.

The protection given to indorsees of negotiable paper is analogous to, and perhaps derived from, the doctrine of courts of equity, in cases where a purchaser has obtained the legal title without notice of equitable right. In such cases, if the legal title has been transferred as a mere security for a pre-existing debt, it cannot be retained against a prior equitable owner. 6 Hill, N. Y. 96; 22 Pick. 243; 4 Paige, 221; 6 Ib. 648, 466; 4 Whart. 506.

It is just that the defense here should be sustained; because the defendant received nothing, the plaintiffs really paid nothing for the note, and therefore it is iniquitous to require the defendant to pay the plaintiff some nine or ten thousand dollars, merely because he signed, and they hold, the paper.

The general commercial law does not exclude the defense. The law of Virginia, where the suit was brought, or (so far as we know) of Kentucky, where the plaintiffs took the note, does not exclude it. In neither of those States is the note negotiable by their own law. 2 Leigh, 198; 6 Munf. 316; 1 Call. 226, 497; 2 Va. 219. Therefore the plaintiffs are driven to rely on the statute of Pennsylvania; and that, as expounded by the courts of that State, does not sustain them.

Mr. Justice Grier delivered the opinion of the court:

The plaintiffs in error were plaintiffs below. They declared *on a promissory note [*484 given by defendant to James H. Johnson, or order, for the sum of $5,437.59, payable five years after date. The note was indorsed by the payee and delivered to John Stivers, who delivered it to the plaintiffs. The defendant pleaded non assumpsit, and a jury being called, found a special verdict, setting forth the note, and finding that it was made by the defendant and delivered by him to the payee, but that "the consideration was fraudulent on the part of the payee"; that the note was indorsed by the payee to John Stivers before its maturity, "and that there has not been any evidence submitted to the jury that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated," etc. They also find that Stivers delivered the note to plaintiffs, but without saying whether for a valuable consideration or not; and they refer the court to the deposition of a witness and the record of a chancery suit appended to the verdict for the evidence on that point.

This special verdict is manifestly imperfect and uncertain, as it finds the evidence of facts, and not the facts themselves.

A verdict, says Coke (Co. Litt. 227, a), finding matter uncertainly and ambiguously, is insufficient, and no judgment will be given thereon.

A verdict which finds but part of the issue and says nothing as to the rest is insufficient, because the jury have not tried the whole issue. So, if several pleas are joined, and the jury find some of them well, and as to others find a special verdict which is imperfect, a venire facias de novo will be granted for the whole. 2 Roll. Abr. 722, Pl. 19; Auncelme v. Auncelme, Cro. Jac. 31; Woolmer v. Caston, Cro. Jac. 113; Treswell v. Middleton, Cro. Jac. 653; Rex v. Hayes, 2 Ld. Raym. 1518.

In all special verdicts, the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding; and therefore the judges will not adjudge upon an inquisition or aliquid tale found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true. Street v. Roberts, 2 Sid. 86.

In The Chesapeake Insurance Co. v. Stark, 6 Cranch, 268; and Barnes v. Williams, 11 Wheaton, 415, this court have decided that, where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire de novo. The court in this case would have been bound to pursue the same *course, if the judgment of [*485 the court below had been rendered on the imperfect special verdict which the record exhibits. But it appears that the court and counsel were aware of this imperfection in the verdict, and that it was not such as would warrant any judgment thereon by the court. Nevertheless, the parties, instead of asking for a

venire de novo, or amending the verdict, agree to waive the error, and to submit the cause to the court, both on the facts and the law. Their agreement is as follows:

"Memorandum. Upon the trial of this cause the parties, by their attorneys, filed a written agreement in the words following, to wit: 'And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the State of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict, on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom if the same were submitted to them upon the trial of this cause; and that this agreement is to be made part of the record in this suit.'"

The judgment of the court below was rendered upon this submission, and not on the special verdict alone.

In cases at law, this court can only review the errors of the court below in matters of law appearing on the record. If the facts upon which that court pronounced their judgment do not appear on the record, it is impossible for this court to say that their judgment is erroneous in law. What "inferences or conclusions of fact" the court may have drawn from the evidence submitted to them, we are not informed by the record. The fact submitted to the judge formed the turning point of the case. So far as the record exhibits the facts, no error appears. The note being found to have been obtained from the defendant by fraud, the plaintiff's right to recover on it necessarily depended on the fact that he gave some consideration for it, or received it in the usual course of trade. We must presume that the court found this fact against the plaintiff; and if so, their judgment was undoubtedly correct. Whether their "inferences or conclusions of fact" were correctly drawn from the evidence, is not for this court to decide.

486*] *That such has been the uniform course of decision in this court, may be seen by reference to a few of the many cases in which the same difficulty has occurred. In Hyde v. Booraem, 16 Pet. 169, this court say: "We cannot upon a writ of error revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived. The court can only re-examine the law so far as he has pronounced it on a state of facts, and not merely on the evidence of facts found in the record in the making of a special verdict or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the Supreme Court, by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with supposed conclusions in matters of fact." See, also, Minor v. Tillotson, 2 How. 394, and United States v. King, 7 How. 833.

The judgment of the court below is therefore affirmed.

Messrs. Justices McLean, Wayne, and Woodbury dissented.

Mr. Justice Wayne:

I do not concur with the court in the course which it has taken in this case, or in affirming the judgment. The record in my view is irregular. It is difficult to say whether it has been brought to this court upon a special verdict, or a case stated by agreement of the parties; and I think it difficult to determine whether the court below acted upon either. It may have given its judgment pro forma to get the case to this court. I think a different direction ought to have been given to it, by returning the case to the District Court for amendment, so that the case might have been decided substantially upon its merits. This would have been according to what has been done by this court in other cases similarly circumstanced as this case is.

Mr. Justice Woodbury:

I feel obliged to dissent from the judgment in this case. It is conceded that the special verdict is defective in form. Instead of stating some of the matter as a fact—only the evidence of it is given. The most obvious and proper course under such circumstances would seem to be, to send the case back, and give an opportunity to the plaintiff to have that defect corrected, and afterwards, if the case comes up again, *to render judgment on the mer- [*487 its upon all the facts, when thus formally set out. This could regularly be done by reversing the judgment below, instead of affirming it, as here. That judgment was rendered erroneously on this same defective verdict, instead of putting it first in proper shape, and then deciding on it as corrected.

After the reversal here, we should, in my opinion, remand the case to the Circuit Court, not to have judgment entered there either way on this imperfect verdict, but to have a venire de novo ordered so as to correct it. Such I understand to be the well settled practice of this court. As decisive proof, that the course now pursued, of refusing to send the case back for correction before final judgment, is not in accordance with what has been done by this court in like cases, Chief Justice Marshall, in Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, observed: "In this case the jury have found an abandonment, but have not found whether it was made in due time or otherwise. The fact is therefore found defectively, and for that reason a venire facias de novo must be awarded." "Judgment reversed, and the cause remanded, with directions to award a venire facias de novo." Such was deemed the proper course there, rather than at once to give absolute and final judgment, as here, against the plaintiff, because the special verdict was defective. Another objection there was precisely as here, "because the jury have found the evidences of the authority and time, but not the fact of authority nor the reasonableness of the time." p. 271.

So, again, in Livingston v. Mar. Ins. Co. 6 Cranch, 280, the court made a like order. And another of similar character in Barnes v. Williams, 11 Wheaton, 415. We should thus obtain a verdict in due form, with all the facts found positively, and not the mere evidence of some of them submitted. And the judgment below could then be rendered understandingly, as it could also here, if the case was again brought here by either party.

It does not seem promotive of justice to affirm a judgment below, on the ground that the imperfect verdict must at all events stand, and to decide technically on the hypothesis that a certain transaction is not in the case as a fact, and is not to be considered, nor allowed to be corrected and restated, though full evidence of it is submitted. And the more especially does it look wrong where, if it was corrected in conformity with what the evidence proves, the judgment ought, in my view, to be for the plaintiffs.

But it is objected, that the counsel agreed 488*] below to waive *this exception to the special verdict, and consequently the court there rendered judgment on that agreement and waiver, as well as on the verdict, and that this was a wrong course of proceeding.

Supposing it was wrong, there is no proof that the court acted on the agreement and waiver, but may have deemed it proper to disregard them and decide on the verdict alone. On the contrary, if that court decided on the whole, their decision for the defendant seems to me erroneous, both on the merits and on the course of proceeding, and ought in either court to be reversed instead of affirmed, as it has been on this occasion by the majority of this court. The original plaintiffs should, on the apparent merits, in my apprehension, recover, because no doubt exists, first, that in point of law the note in controversy must be construed by the laws of Pennsylvania, where it was made; and that by those laws it was negotiable. See Act of February 27th, 1797, 4 Dallas, Laws of Pennsylvania, 102.

It is as little in doubt, that no pretense exists but that the plaintiffs took this note from the second indorsees before it was due, and without any circumstances to excite suspicion or cast a shade over its goodness, and without any notice or knowledge of the badness of its original consideration.

Under such circumstances it is equally clear, that such a bona fide holder of a note is presumed to have given a valid consideration for it, and on producing it is entitled to a recovery of its amount, unless this presumption is repelled by counter evidence. Story on Prom. Notes, p. 220.

Furthermore, in such case it is no obstacle to a recovery, that a consideration is not shown between the first indorsee and his indorser. 1 Adolph. & Ell. 498.

But it is found here that, for some reason not specified in the record, there was fraud in the original consideration. Hence it is contended that the holder must, in such case, prove a consideration given by him; but he is not otherwise affected by the original fraud, when without notice of it. 4 Adolph. & Ell. 470; Chit. *on Bills*, 69.

Granting this for the argument, it appears that he proceeded to show a consideration, and proved that the second indorsee passed the note to him to secure and pay certain debts and liabilities assumed then in his behalf, as would seem to be inferable from the record. It would in that event be obtained in the course of business for a new and original consideration, and thus the transfer stood unimpeached. But if the debts were pre-existing ones, as is contended, they would still constitute a good *consideration. However the decisions [*489 in different States on this may differ, and may have changed at different periods, this court seems deliberately to have held this doctrine in Swift v. Tyson, 16 Peters, 15, 22.

It will not answer to overturn all these established principles, because some might fancy the equities of the maker, who was defrauded as to the consideration, greater than those of the present holder, who paid a full and valuable consideration for the note, relying, too, on the good faith of the maker, not to send negotiable paper into the market, and running for five years, so as to mislead innocent purchasers, and, for aught which appears, making no attempt to recall it when discovering he was defrauded, and giving no public and wide caution, as is usual, by advertisement or otherwise, against a purchase of it after such discovery.

Under such circumstances, if equities were to weigh, irrespective of the law, which cannot be correct, they seem rather to preponderate in favor of the holder, who has thus been misled and exposed to be wronged by the conduct of the maker. United States v. Bank of the Metropolis, 15 Peters, 398.

Finally, were we compelled to give a decision as to the merits on the special verdict, as it now stands somewhat defective in form, but with an agreement by counsel virtually to waive the defect of form, it would be most just to regard the jury as intending to find for a fact what they find as given in evidence and uncontradicted. This is clearly the substance of this verdict, and in such a view, as already shown, the same result would follow, that the plaintiffs appear in law entitled to recover.

Order.

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

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*ALEXANDRINE MAGER, Widow Col- [*490
lard, Opponent and Plaintiff in the matter of the succession of John Mager, Deceased, Plaintiff in Error,

v.

FELIX GRIMA, Testamentary Executor of the last Will and Testament of John Mager, Deceased, and the Treasurer of the State of Louisiana.

Louisiana law, imposing tax on legacies payable to aliens, constitutional.

Howard &

By a law of the State of Louisiana, every person not being domiciliated in that State, and not being a citizen of any State or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the State of ten per cent. of the value thereof.

This law is not repugnant to the Constitution of the United States.

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Louisiana.

The Widow Collard, who was the plaintiff in error, resided at Metz in the kingdom of France, and was the universal legatee of her brother, Jean Mager, who died in Louisiana. There was a statement of facts in the court below, which explains the whole case.

"Statement of Facts agreed.

"Succession of John Mager, on the opposition of Alexandrine Collard, to the tableau filed by the testamentary executor.

Case agreed.

"1st. The tableau filed by the executor is made part of this case, to show that the executor retains from the opponent, the universal legatee of John Mager, the sum of eight thousand dollars and upwards, being the amount of the tax imposed by the fourth section of the Act of the Legislature of the State of Louisiana, passed on the 26th of March, 1842, on property or estates inherited by foreigners within the State of Louisiana, and which is in the words and figures following:

"'Sec. 4th. Be it further enacted, etc., that each and every person not being domiciliated in this State, and not being a citizen of any State or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property, which he may actually receive from said succession, or so much thereof as is situated in this State, after deducting debts due by said successions. When the said inheritance, donation, or legacy consists of specific property, and the same has not been sold, the appraisement thereof in the inventory shall be 491*] considered *as the value thereof. Every executor, curator, tutor, or administrator, having the charge or administration of succession property belonging, in whole or in part, to a person residing out of this State, and not being a citizen of any other State or territory, shall be bound to retain in his hands the amount of the tax imposed by this act, and to pay over the same to the State treasurer, if the succession be opened in the parish of Orleans or Jefferson, or to the sheriff, if the succession be opened in any other parish; in default whereof every such executor, curator, tutor, or administrator, and his securities, shall be liable for the amount thereof. It shall be the special duty of the judges of the courts of probate to see that the tax imposed by virtue of this section be collected and paid over; and each of said judges shall be bound to furnish to the treasurer, once a year, a statement or list of the successions opened in his parish, whereof persons who are neither residents of this State, nor citizens of any other State or territory in the Union, are heirs, legatees, or donees, in whole or in part, and of the amount accruing to such persons; and any judge failing to furnish such statement shall be subject to a fine not exceeding five hundred dollars for each and every such omission; and that he be responsible to the State for the amount due; and that the sheriffs of the different parishes throughout the State, except those of the parishes of Orleans and Jefferson, shall pay over the taxes thus received from successions in the same manner, and be subject to the same penalties, as in the payment of other taxes; and that the taxes thus received be taken in view in the execution of the sheriff's bond.'

"2d. It is agreed that, by the laws of France, a tax or duty of six and a half per cent. would be levied by the French government on an inheritance falling to an American citizen, in the same degree of relationship to a deceased French subject as the opponent and universal legatee in this case bore to the deceased John Mager, the testator.

"3d. The testator, John Mager, was a natural-born Frenchman, who had emigrated to the United States after the cession of Louisiana to France, and died in the city of New Orleans.

"4th. The opponent, Agathe Alexandrine Mager, Widow Collard, is the sister of the testator, and his universal legatee, according to his last will and testament, duly recorded in this court, and admitted to probate, and is a French subject residing in France.

"5th. The last will of the testator, John Mager, and all the mortuary proceedings in this court, make part of this case, and may be referred to, and used in whole or in part, by either party.

"'If upon this case the law of the [*492 State of Louisiana aforesaid, imposing the tax aforesaid, be valid, and not repugnant to the Constitution of the United States, then the opposition of the opponent to be dismissed, and the tableau homologated and approved. If, on the contrary, the said law imposing said tax is repugnant to the Constitution of the United States, then the opposition shall be maintained, and the item of eight thousand dollars and upwards, as aforesaid, retained as the amount of said tax, shall be expunged, and the same merged in the succession of the said John Mager, to be paid over to his universal legatee.

(Signed) "Isaac T. Preston,
"Attorney-General.
"H. R. Denis,
"Attorney for Opponent."

The Court of Probate dismissed the opposition of the Widow Collard, and ordered the account of the executor (retaining the tax) to be homologated. An appeal was carried to the Supreme Court of Louisiana, which affirmed the judgment of the Court of Probates, and the case was then brought up to this court, under the twenty-fifth section of the Judiciary Act.

It was argued by Mr. Jones for the plaintiff in error, and Mr. Coxe for the defendants in error.

The points upon which Mr. Jones rested his argument were the following, which were opposed by Mr. Coxe:

I. The tax in question is laid on the person and the rights of an alien, residing in his own country; and so is repugnant to the exclusive power of Congress to regulate commerce with foreign nations.

II. Or it is a tax on the property and effects in the hands of the executor, and under the sole destination of being exported to the foreign legatee; and so is a tax on exports, and expressly prohibited by the Constitution.

I. It is repugnant to the power of Congress to regulate commerce with foreign nations.

Under this head, two questions arise:

First, whether it be in the nature of a regulation of commerce, such as the Constitution contemplated in the grant to Congress of the power to regulate commerce.

Second, whether that power be in its terms or in its nature exclusive, and incompatible with State regulations of commerce.

First. To lay a peculiar tax, out of the rule of taxation common to the citizens of the State, on foreigners residing in their own country and holding property, or having vested rights 493*] *and interests of any kind in the State, and to lay it for the reason that they are foreigners beyond the jurisdiction of the State, is to exercise a power comprehended in the terms of the general power to regulate commerce with foreign nations.

II. The tax in question is, essentially, a tax on exports.

The State of Maryland could lay no tax on imported goods, even after the importation was consummated, and the goods removed to the importer's warehouse for sale, but still unsold. Brown v. Maryland, 12 Wheat. 419. A fortiori, not on effects deposited in the hands of an executor, trustee, or agent, to be exported or remitted to the owner abroad.

Shifting the tax from the material of the export to the person of the exporter does not alter its essence. Brown v. Maryland, 12 Wheat. 449.

Mr. Chief Justice Taney delivered the opinion of the court:

This is a plain case, and when the facts are stated, the question of law may be disposed of in a few words.

The plaintiff in error was the residuary legatee—or, in the language of Louisiana law, the universal legatee—of a certain John Mager, who was a native of France, and migrated to the United States after the cession of Louisiana. He died at New Orleans possessed of property to a large amount. The Widow Collard is his sister. At the time of his death she was a French subject residing in France.

By the law of Louisiana a tax of ten per cent. is imposed on legacies, when the legatee is neither a citizen of the United States, nor domiciled in that State. And the executor of the deceased, or other person charged with the administration of the estate, is directed to pay the tax to the State Treasurer.

Felix Grima, the defendant in error, is the executor of John Mager, and retained the amount of the tax, in order to pay it over as the law directs. And this suit was brought by the legatee to recover it, upon the ground that the act of the Louisiana Legislature is repugnant to the Constitution of the United States.

Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, *and may, if it thinks proper, di- [*494 rect that property so descending or bequeathed shall belong to the State. In many of the States of this Union, at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the State.

In some of the States, laws have been passed at different times imposing a tax similar to the one now in question, upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively. It certainly has no concern with commerce, or with imports or exports. It has been suggested, indeed, in the argument, that, as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the law was therefore a tax on exports. But if that argument was sound, no property would be liable to be taxed in a State, when the owner intended to convert it into money and sent it abroad.

The judgment of the State court was clearly right, and must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

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*CHARLES A. WILLIAMSON and Cath- [*495
arine, his Wife, Plaintiffs,

v.

JOSEPH BERRY.

Construction of private act of Legislature of New York, passed to remove obstacles in way of executing certain trusts under will.

Mary Clarke devised to Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, "all that part of my said farm at Greenwich aforesaid, called Chelsea, etc., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, etc., during his natural life, and from and after the death of Thomas B. Clarke, in further trust, to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death." Under this devise, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born, and such vested remainder became a fee-simple absolute in the children living, on the death of their father.

The acts of the Legislature of New York passed for the relief of Thomas B. Clarke show that he was made the trustee of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor.

His obligation was to account annually for the proceeds of every sale or mortgage which might be made, and it was his right to use the interest of the principal for himself and for the education and maintenance of his children.

The acts of the Legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

The acts of the Legislature for the relief of Clarke are private acts. They provide that the Chancellor may act upon them summarily, upon the petition of Clarke, upon which orders are given, as contradistinguished from decrees in suits by bill filed. The last are judgments upon the matters in controversy between the parties before the court. The others are orders in conformity with a legislative act in a particular case. Whatever the Chancellor does in either case, he does as a court of chancery. It will stand when it has been done within the jurisdiction conferred by the private act, until it has been set aside upon motion, as his decrees in suits upon bill filed do, until they have been set aside by a bill of review.

In such a case the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. It cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

In these acts for the relief of Clarke, what the chancellor can do is precisely stated. No authority was given to him, in giving his assent to Clarke's making sales of any part of the devised premises, to order that Clarke might make sales of any portion of it, in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon, between him and his respective creditors. Or that Clarke might take the money arising from the sales of the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family. This was not an exercise of jurisdiction, but an order out of and beyond it.

These were private acts for the alienation of land, to be made with the assent of the Chancellor that there might be an assurance by matter of record, under his sanction, of a transfer of the property to such as might become purchasers from Clarke.

Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole in a collateral way.

But it is a well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in 496*] every other court, when *the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings.

The rule applies to the case in hand, though it may have been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors, in payment of his debts, for though this court will recognize as a rule for its judgments the decisions of the highest courts of the States relative to real property as a part of the local law, it does not recognize as in any way binding upon them, as a part of the local law, the decisions of the State courts upon private acts of any kind, or such of them as provide for the alienation of private estates, by particular persons, with the sanction of a court or of the Chancellor. Decisions upon private acts form no part of the local law of real property. They concern only those for whose benefit they are made, and can be no rule for any other case.

This court decides that, under the acts of New York, the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse, nor his alienee Berry, can derive from the order of the Chancellor, or from the conveyance by Clarke to De Grasse, any title to the premises in dispute.

Sale is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.

A sale ordered, decreed, or permitted by a chancellor, subject to the approval of a master, requires the master's approval, and confirmation by the court, before a purchaser can have a legal title to the estate that he means to buy or has bid for under the decree of the court.

In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order.

If he takes under an imperfect sale, he must abide the consequence.

The sale in this instance by Clarke to De Grasse, if it were otherwise good, which it is not, would be a nullity, for it wants the approval by the master to whom the execution of the order was confided by the Chancellor.

Nor was Clarke's sale to De Grasse a judicial sale. By judicial sale is meant one made under the process of a court, having competent authority to order it, by an officer legally appointed and commissioned to sell.

In order that the sale by Clarke to De Grasse should be a judicial sale, it was requisite that the Chancellor should have had the authority to direct a sale of the premises to his creditors for their demands, and that it should have been approved by the master in the way the order directed it to be done.

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

It was an action of ejectment for one third of eight lots of land in the city of New York. Mrs. Williamson was the daughter of Thomas B. Clarke, being one of three children who survived him, the other two being Mrs. Isabella M. Cochran and Bayard Clarke.

In the year 1802, Mary Clarke died, leaving a will, from which the following is an extract:

"Item, I give and devise unto the said Benjamin Moore and Charity, his wife, and to Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, all that certain lot of land number eight, in the said thirteenth allotment of the said patent, containing one hundred acres; also that part of *my said farm at Greenwich aforesaid, [*497 called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Ray, east-

erly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox; also all my house and lot, with the appurtenances, known by number seven, within the limits of the prison, and now occupied by Thomas Byron; to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to the said Thomas B. Clarke, natural son of my late son Clement, during his natural life, and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death in fee; and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence to convey the said hereby devised premises to my said grandson Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death prior to the death of the said Thomas B. Clarke."

On the 2d of March, 1814, Thomas B. Clarke presented a petition to the Legislature of New York, stating the will; that the trustees had signed a paper agreeing to all such acts as the Legislature might pass, and requesting to be discharged from the trust; that Clement C. Moore, the devisee in remainder, had also consented to such acts; and that the estate could not be so improved and made productive as to answer the benevolent purposes of the testatrix. The prayer was for general relief.

On the 1st of April, 1814, the Legislature passed an act, entitled, "An Act for the relief of Thomas B. Clarke." It recited the facts above mentioned, and then provided, in the first section, "that it shall and may be lawful for the Court of Chancery, on the application of the said Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified and set forth in the said in part recited will and testament, and in this act, in the place and stead of the said Benjamin Moore and Charity, his wife, and the said Elizabeth Maunsell, who are hereby discharged from the trusts in the said will mentioned. Provided, 498*] that it *shall be lawful for the said court at any time thereafter, as occasion may require, to substitute and appoint other trustee or trustees in the room of any of those appointed in this act, in like manner as is practiced in the said court in cases of trustees appointed therein; and such trustee or trustees, so appointed, are hereby vested with the like powers as if he or they had been named and appointed in and by this act."

The second, third, fourth and fifth sections prescribed minutely what should be done by the trustees, and authorized them to sell and dispose of a moiety of the estate, and invest the proceeds in some productive stock, the interest, excepting a certain portion, to be paid to Mr. Clarke, and the principal to be reserved for the trusts of the will.

The sixth section was as follows:

"VI. And be it further enacted, that in every case, not otherwise provided for by this act, the trustees appointed, or to be appointed, in virtue thereof, shall be deemed and adjudged trustees under the said will, so far as relates to the premises mentioned and described in the recital to this act, in like manner as if such trustees had been originally named and appointed in the said will; and they shall, in all respects, be liable to the power and authority of the Court of Chancery for or concerning the trusts created by this act."

It did not appear that any proceedings took place under this act.

On the 1st of March, 1815, Clarke presented another petition to the Legislature, stating that Clement C. Moore, the contingent devisee, had released all his interest in the property to Clarke and his family, whereby the petitioner and his infant children had become the only persons interested in the estate. He stated, also, that he had been unable to prevail upon any suitable person to undertake the performance of the trust.

On the 24th of March, 1815, the Legislature passed an act supplemental to the "Act for the relief of Thomas B. Clarke." This act being a very important part of the case, it is proper to recite it.

"An Act supplemental to the 'Act for the relief of Thomas B. Clarke,' passed April 1, 1814.

"Whereas, since the passing of the act entitled 'An Act for the relief of Thomas B. Clarke,' Clement C. Moore, in the said act named, by an indenture duly executed by him, and recorded in the office of the Secretary of this State, and bearing date the 21st day of February, in the year 1815, hath, for the consideration therein expressed, and in due form of law, released and *conveyed unto [*499 the said Thomas B. Clarke, his heirs and assigns, forever, all the estate, right, title, interest, property, claim, and demand whatsoever, of the said Clement C. Moore, of, in, and to the real estate mentioned in the said act, whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children. And whereas the said Thomas B. Clarke hath prayed the Legislature to alter and amend the said act, particularly in relation to the interest of the said Clement C. Moore, and the execution of certain trusts in the said act mentioned, therefore—

"I. Be it enacted by the people of the State of New York, represented in Senate and Assembly, that all the beneficial interests and estate of the said Clement C. Moore, or those under him, arising or to arise by virtue of the act to which this is a supplement, or by the will mentioned in the said act, shall be, and the same is hereby vested in the said Thomas B. Clarke, his heirs and assigns; and so much of the act to which this is a supplement as is repugnant hereto, and so much thereof as requires the trustees to set apart and reserve a certain annual stipend out of the interest or income of the property thereby directed to be sold, for the purpose of creating and accumulating a fund at compound interest, during the life of the said Thomas B. Clarke; and so much of the said act as requires the several duties therein enumerated to be performed by

trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby repealed.

"II. And be it further enacted, that the said Thomas B. Clarke be, and is hereby authorized and empowered to execute and perform every act, matter and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children.

"III. And be it further enacted, that no sale of any part of the said estate shall be made by the said Thomas B. Clarke, until he shall have procured the assent of the Chancellor of this State to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee; and, further, that it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such 500*] sale only, the interest *being to be applied by the said Thomas B. Clarke, in such manner as he may think proper, for his use and benefit, and for the maintenance and education of his children; and if, on such return, or at any other time, and in any other manner, the Chancellor shall be of opinion that the said Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove the said Thomas B. Clarke from his said trust, and appoint another in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in the said Thomas B. Clarke as trustee.

On the 28th of June, 1815, Clarke presented a petition to the Chancellor. It recited the will and the two acts of the Legislature; stated that he had a large and expensive family and no means of maintaining them except from the rents and income of the devised property, which were then and always had been insufficient for the purpose; that he had been compelled to resort to loans and incur debts; that he had borrowed, in order to meet the exigencies of his family, the sum of $4,400 in the year 1805, and $4,500 since; that a sale of a moiety of the devised property had become necessary, so much of the proceeds of which as might be required should be applied to the payment of the above debts, and the residue vested in him as trustee under the acts; and praying the Chancellor to authorize, order, and direct a sale for the above mentioned purposes.

On the same day, the Chancellor referred this petition to one of the masters, to examine into the allegations and matters contained in it, and report thereon.

On the 30th of June, 1815, the master reported, and stated the condition of the property and the income which it produced; the debts of the petitioner; the opinion of the master, that they had been contracted for the support of his family, and that the rents and profits were insufficient for the reasonable and proper support of the petitioner and his family according to their situation in life.

On the 3d of July, 1815, the Chancellor issued an order, reciting all the circumstances of the case, and concluding thus:

"Therefore, on motion of Mr. S. Jones, Junior, of counsel for the petitioner, it is ordered that the assent of the Chancellor be, and hereby is given to the sale, by the petitioner, of the said house and lot in the fifth ward of the city of New York, and of the eastern moiety or half part of the said premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line in the manner for that purpose mentioned in the said petition; and the petitioner is authorized and directed *to sell and dispose of the [*501 same, under and according to the aforesaid acts of the Legislature in that behalf, the said sales to be made under the direction of one of the masters of this court, and the petitioner to proceed in making the sales and conveyances of the said premises, so to be sold, in the manner for that purpose in and by the said acts prescribed and directed. And it is further ordered, that the purchase moneys for the said premises so to be sold be paid by the purchasers to the said master, to be disposed of by him as hereinafter directed. And it is further ordered and directed, and his Honor the Chancellor hereby doth authorize, order, and direct, that so much of the net proceeds, to arise from such sales, as may be necessary for the purpose, be applied, under the direction of one of the masters of this court, in and for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family, to be proved before the said master; and the costs, charges, and expenses of the petitioner, on his petition in this matter, and the proceedings had, and to be hereafter had, under or in consequence thereof; but so, however, and it is further ordered and directed, that the net proceeds of the said eastern moiety of the said premises at Greenwich aforesaid, or so much thereof as shall be necessary for that purpose, be applied in the first place, and before and in preference to any other appropriation or application thereof, to pay and satisfy to the President and Directors of the Manhattan Company aforesaid the aforesaid debt or sum of four thousand four hundred dollars, with the interest thereof up to the time of such payment, or such part and balance of the said debt, and interest, as shall not have been otherwise paid or satisfied. And it is further ordered and directed, and his Honor the Chancellor hereby doth further order and direct, that the residue of the said net moneys, and proceeds arising from such said sales, after the said debts, costs, charges, and expenses shall be discharged and paid by and out of the same, be placed out at interest, on real security, in the city of New York, in the name of the petitioner as trustee, under the direction of one of the masters of this court, upon the following trust, to be expressed upon the face and in the body of the said securities respectively, whereon the same shall be so placed, that is to say, upon trust that the interest and income thereof, or so much of the same as may be required for that purpose, be applied, from time to time, in and for the suitable and proper maintenance

and support of the petitioner, and his wife and children, already born and to be hereafter born, according to their situation in life, and for the 502*] suitable education* of the said children; and upon further trust, that the principal sum or sums, with the securities whereon the same may be vested or placed, and may stand, shall be held, and he, the petitioner, as trustee, stand and be possessed thereof in trust, for the benefit of the lawful issue of the petitioner who shall be living at the death of him, the petitioner, according to the trusts upon which the unsold moiety of the said premises at Greenwich aforesaid, in the aforesaid acts of the Legislature mentioned, are or shall be held; and so, and in such manner, that the said interest and income of the said trust moneys, funds and securities, or so much thereof as may be requisite thereto, shall be appropriated, applied, and secured in the first instance, and exclusively, to the suitable maintenance of the family of the petitioner, according to their situation in life, and the suitable education of his children, and shall not be subject or liable to or for the engagements, debts, or control of the petitioner, or for any other purpose whatsoever than the said purposes hereby designated and authorized; provided that any surplus of the said interest and income, that may be left and remain after the said objects and purposes, hereby designated as aforesaid, are first fully and liberally fulfilled and accomplished, according to the true meaning hereof, shall be for the use and at the disposal of him, the petitioner. And it is further ordered, that the master, under whose direction the said sales should be made, and the debts paid, and surplus proceeds placed out as aforesaid, report to this court the proceedings that may be had in the premises, and the securities that may be taken therein, pursuant to this order, with all convenient speed; and that all and every person or persons who are, or is, or may become interested therein, have liberty to apply to this court, at any time or times hereafter, for any further or other orders or directions in or touching the premises."

On the 12th of March, 1816, Clarke again applied to the Legislature. The petition is short, and may be inserted.

"To the Honorable the Legislature of the State of New York. The memorial and petition of Thomas B. Clarke, of the city of New York, respectfully showeth:

"That his Honor, the Chancellor, under the Act 'for the relief of Thomas B. Clarke,' passed April 1, 1814, and the Act 'supplemental, to the Act for the relief of Thomas B. Clarke,' passed March 24, 1815, did order and direct that the said Thomas B. Clarke should sell the eastern moiety or half part of the premises in the said act and order mentioned.

"And your petitioner further shows, that, 503*] owing to the scarcity *of money, and the present low price of property, no sale can be made without a great sacrifice.

"Your petitioner therefore prays, that he may be allowed to mortgage such part of the property, in the said act mentioned, as the Chancellor may appoint, and for the purposes mentioned in the said acts and order; and that your petitioner be allowed to bring in a bill for that purpose. And he will ever pray, etc."

On the 29th of March, 1816, the Legislature passed the following act:

"An Act further supplemental to an Act entitled 'An Act for the Relief of Thomas B. Clarke.'

"Be it enacted by the people of the State of New York, represented in Senate and Assembly, that the said Thomas B. Clarke be, and he is hereby authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to mortgage or to sell the premises which the Chancellor has permitted, or hereafter may permit, him to sell, as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed for the relief of the said Thomas B. Clarke."

On the 27th of May, 1816, Clarke presented another petition to the Chancellor, again reciting all the facts in the case, and praying his assent to a mortgage.

On the 30th of May, 1816, the Chancellor passed the following order:

"It is ordered, that the said petitioner, under the Act entitled 'An Act further supplemental to the Act entitled "An Act for the relief of Thomas B. Clarke,"' passed March 29th, 1816, be, and he is hereby authorized, so far as the assent of this court is requisite, to mortgage, instead of selling, the lands he was authorized to sell, in and by an order of this court of the third day of July last; and that the moneys to be procured, and the debts to be extinguished by such mortgage or mortgages, be appropriated and adjusted in the same manner and under the same checks, and not otherwise than is prayed for in and by said order, and the said order is to apply to and govern the application of the moneys to be raised by mortgage, equally as if the same had been raised by a sale of all or any of the lands authorized to be sold in and by the said order. J. Kent.

"May 30th, 1816."

On the 8th of March, 1817, Clarke presented another petition *to the Chancellor, [*504 representing the propriety and expediency of dividing the estate by an eastern and western, instead of a northern and southern line, and of granting to the petitioner the power to sell or mortgage the southern, instead of the eastern moiety. This being referred to James A. Hamilton, a master in chancery, he reported that it would be expedient to divide the estate by a line running from east to west, passing through Twenty-sixth Street.

On the 15th of March, 1817, the Chancellor passed the following order:

"On reading and filing the report of James A. Hamilton, Esquire, one of the masters of this court, bearing date the 11th day of March, 1817, by which it appears that no part of the northern moiety of the estate at Greenwich, mentioned in the petition of the above named petitioner, the same being divided into two equal parts by a line running from east to west, through a street called Twenty-sixth Street, has been either sold or mortgaged by the said Thomas B. Clarke, and it appearing to this court reasonable and proper that the prayer of the said petitioner should be granted, it is thereupon ordered, on motion of Mr. S. Jones, solicitor for the petitioner, that the said peti-

tioner be, and he is hereby authorized to sell and dispose of the southern moiety of the said estate, the same being divided by a line running east and west through the center of Twenty-sixth Street aforesaid, together with the lot in Broadway, instead of the eastern moiety of the said estate, as permitted and directed by the orders heretofore made in the premises. And it is further ordered, that the said Thomas B. Clarke be, and he hereby is authorized to mortgage all or any tract or parts of the said southern moiety of the said estate, if in his judgment it will be more beneficial to mortgage than to sell the same. And the said Thomas B. Clarke is further authorized to convey any part or parts of the said southern moiety of the said estate, in payment and satisfaction of any debt or debts due and owing from the said Thomas B. Clarke, upon a valuation to be agreed on between him and his respective creditors, provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And it is further ordered, that the said Thomas B. Clarke shall be, and he is hereby authorized to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, 505*] and invest the surplus *in such manner as he may deem proper to yield an income for the maintenance and support of his family."

On the 9th of April, 1816, Clarke mortgaged the premises in question, with other property, being in the southern moiety of the estate, to Henry Simmons, which mortgage was discharged in 1822.

Having given this historical account of the facts of the case, let us now see what occurred upon the trial in the court below.

It has already been mentioned, that it was an ejectment brought by Williamson and wife gainst a party in possession of a portion of the property included in the devise of Mary Clarke. The following case was stated for the opinion of the court:

Circuit Court U. S., Southern District New York.

Charles A. Williamson & Catharine H., his Wife,
v.
Joseph Berry.

This is an action of ejectment for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York.

The pleadings may be referred to as part of this case.

The plaintiffs claimed under the will of Mary Clarke.

The plaintiffs gave in evidence an exemplified copy of the will of Mary Clarke, proved in the Supreme Court, of which a copy is hereto annexed.

It was then admitted by the defendant's counsel, that Mary Clarke was seized of the premises described in the said will as "all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall; bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox." At the time of the making of the will, and thence until her death, which took place in July, 1802, that the said premises included the eight lots claimed herein; that the said trustees, Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, are all dead—Mrs. Moore having died since 1830, the other two previously; that Thomas B. Clarke was married in 1803; that his wife died in August, 1815, and himself on the 1st of May, 1826; that he left three children surviving him, Catharine, Isabella, and Bayard; that he had four other children, all of whom died before him, without having had any children, *and unmarried; that Catharine [*506 was born on the 5th of June, 1807, and was married to Charles A. Williamson, on the 10th of May, 1827; that Isabella was born on the 11th day of June, 1809, and was married to Rupert J. Cochran on the 4th day of June, 1835; that Bayard was born on the 17th day of March, 1815; all of whom are still living. It was also admitted that the defendant was the actual occupant of the premises at the commencement of this suit, on the 6th of March, 1845; and that one third of the premises claimed was of greater value than two thousand dollars.

The plaintiffs thereupon rested.

The defendant's counsel then proved the acts of the Legislature, the deed of Clement C. Moore, the petitions to the Chancellor, the master's reports, and the orders of the Chancellor (excepting only the order indorsed on petition), of which copies are hereto annexed.

The defendant's counsel then offered in evidence the deed from Thomas B. Clarke to George De Grasse, of which the following is a copy:

"This indenture, made this 2d day of August, in the year of our Lord 1821, between Thomas B. Clarke, of the city of New York, gentleman, of the first part, and George De Grasse of the second part. Whereas the said Thomas B. Clark, by virtue of sundry conveyances, acts of the Legislature, and orders of the Court of Chancery of the State of New York, hath been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person or persons, the southern moiety of the estate at Greenwich, devised by Mary Clarke, deceased, for the benefit of the said Thomas B. Clarke and his children, or any part thereof. Now, therefore, this indenture witnesseth, that the said Thomas B. Clarke, in consideration of the premises, and of two thousand dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, all those

lots of ground situate, lying, and being in the Ninth ward of the city of New York, known and distinguished on a certain map of the property of the said Thomas B. Clarke," etc.

(The deed then described twenty-nine lots, with a covenant of general warranty.)

James A. Hamilton joined in his deed, as a trustee for Clarke's life estate, of which he had become possessed.

507*] *This deed was objected to by the plaintiffs' counsel, for two reasons:

1. Because not approved by a master.

2. Because not shown to have been given upon a sale for cash.

The objections were overruled, and the plaintiffs' counsel excepted.

The deed was then read in evidence, as was also a deed from George De Grasse to Margaret Van Surlay. (It is not necessary to insert this deed.)

The defendant's counsel then rested.

The plaintiffs' counsel then offered to read the petitions to the Legislature, the extracts from the journals of the two houses and the order indorsed on petition, of which copies are hereto annexed. They were objected to by the defendant's counsel, the objection sustained, and the plaintiffs' counsel excepted.

The plaintiffs' counsel then proved the mortgage executed by Thomas B. Clarke to Henry Simmons, of which the following is a copy. (It is not necessary to insert this mortgage.)

The plaintiffs' counsel then offered evidence to show the consideration of the deed from Clarke to De Grasse. The defendant's counsel objected; the objection was overruled, and the defendant's counsel excepted.

The plaintiffs' counsel then called as a witness James A. Hamilton, who testified that he knew Thomas B. Clarke and George De Grasse; that in 1821, and for some years previous, he was a master in chancery in the city of New York; that the order of March 15, 1817, was put into his hands for execution, and that Clarke and De Grasse applied to him to approve the deed from Clarke to De Grasse above set forth; that on that occasion, which was at or about the time the deed was given, they explained to him the consideration of the deed, and that the consideration for which it was given was some wild lands in Pennsylvania or Virginia, and on account for articles previously furnished to Clarke by De Grasse, out of an oyster house which he kept, including some items of money lent. On thus ascertaining its consideration, he refused to approve the deed.

On his cross-examination, he said that he could not state the time at which the transaction occurred, except by reference to the deed; he had more than one interview with Clarke and De Grasse, he was sought by them more than once; he did not consider the execution of the life estate deed a matter of any interest; he executed it as trustee. He did not remember at all a person by the name of James Cunning-

508*] ham; and on being *shown the signature of James Cunningham, as subscribing witness to the deed for the life estate, witness said that his recollection of the person was not thereby revived. He received from De Grasse no fee. It was his impression, that the account for articles furnished at the oyster shop was exhibited. He held the life estate of Clarke in the premises as trustee for Clarke. His impression was that Clarke filled up his own deed to De Grasse, and to obtain his sanction called upon witness; he was not certain that De Grasse was present upon that occasion. He did not recollect that De Grasse was present when the deed for life estate was executed, but he recollected that both Clarke and De Grasse came together to witness's office more than once on the subject, and he was besought by them frequently to approve the deed. In answer to a question by defendant's counsel, what evidence he had of the insufficient value of the lands which formed part of the consideration, the witness stated that he had evidence enough then, though he did not recollect it now, that the lands were worthless tax lands. There might have been some money charged in De Grasse's account against Clarke; the whole account was for articles furnished previously. He did not recollect that there were any notes forming part of the consideration of the deed from Clarke.

The plaintiffs' counsel then proved that seven of the lots in suit, viz., numbers 5, 6, 7, 41, 42, 43, and 45, were reconveyed to De Grasse on the 31st of October, 1844.

The defendant's counsel then proved that lot number 44 had been conveyed to Samuel Judd.

They also proved the bond of Clarke to Simmons, referred to in the aforesaid mortgage to Simmons, and called Henry M. Western, who, being shown two indorsements on the said bond, as follows:

"Received, New York, October 18th, 1821, from Mr. George De Grasse, one hundred dollars on account of the within bond.

"$100. H. Simmons."

"Received of George De Grasse two hundred and fifty dollars, being in full for principal and interest, and all other claims and demands on account of the within bond and also of the mortgage therein mentioned, for which mortgage I have this day entered satisfaction of record. H. Simmons."

" New York, March 28th, 1822.

"Witness—

"H. M. Western."

*testified that he was a subscribing [*509 witness to the last, which he wrote; but that he recollected nothing of the transaction but from the paper.

The plaintiffs' counsel then offered to prove—

(1.) That the acts of the Legislature were not for the benefit of the infants, but for the benefit of Thomas B. Clarke merely.

(2.) That the orders of the Chancellor had the effect to take the proceeds of their future interest in the property, and to apply the same to the father's debts, without giving them any benefit by support or otherwise, out of the income of the life estate in other parts of the property.

(3.) That, under the acts and orders, he actually aliened the lot on Broadway and all of the southern moiety of the Greenwich property, excepting two lots, and that none of the children received any benefit from such alienation.

(4.) That the whole of this property was mortgaged or conveyed for old debts; that no pro-

ceeds were ever invested, or secured, or even received from the grantees or mortgagees.

(5.) That, so far from providing for the children, or protecting the estate, he suffered a large portion of the northern moiety to be sold for assessments, and was proceeding to dispose of the northern moiety for twenty-one years, when, on the 31st of March, 1826, a bill was filed against him on behalf of the children, and an injunction issued.

(6.) That the plaintiff, Mrs. Williamson, was from the death of her mother in August, 1815, supported entirely by one of her aunts; and that after about two years from the mother's death, the other children were supported by their friends, and were entirely neglected by their father; and that this was notorious in the city of New York, and would have been immediately known to anyone making inquiry.

The defendant's counsel objected; the objection was sustained, and the plaintiffs' counsel excepted.

A verdict was then taken for the plaintiffs for one undivided third part of the eight lots, subject to the opinion of the court upon the questions of law, with power to enter a verdict for defendant, if such should be the opinion of the court, and with liberty to either party to turn this case into a special verdict or bill of exceptions.

On the 18th of May, 1846, the judges of the Circuit Court pronounce their judgment upon the four following point, viz.:

1. Under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate as they were successively born.

510*] *2. This estate would have become a fee-simple absolute in the children living on the death of T. B. Clarke, the 1st day of May, 1826; and it is not important now to decide whether the trustees took a fee, under the will, in trust to convey to the children after his decease, or a fee for his life, as in the latter case the estate would vest in possession in the children at the death of T. B. Clarke, and in the former case the law would presume an execution of this trust by the surviving trustee on the death of T. B. Clarke, or the trust would be executed in 1830, by force of the Revised Statutes.

3. The several offers of the plaintiffs to give parol evidence to the jury touching the objects and operation of the acts of the Legislature, referred to in the case, or the effect of the orders of the Chancellor therein stated upon the interests of the children of T. B. Clarke, or the failure of T. B. Clarke to apply or secure the proceeds of the devised estate, when disposed of by him, to and for the benefit of his children, or the consideration on which the devised estate was disposed of by T. B. Clarke, or his neglect to protect the estate from sacrifice for assessments, etc., or to provide for or support his children, were properly overruled by the court, with the exception of such particulars included in those offers as may be embraced in the points hereafter stated, upon which the judges are divided in opinion.

4. The acts of the Legislature of the State of New York, of April 1, 1814, March 24, 1815, and March 29, 1816, referred to in the case, are constitutional and valid.

But the judges are divided in opinion upon the following points presented by the case:

1. Whether the acts of the Legislature, stated in the case, devested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of the estate by *the trustee, as is stated in the case, on [*511 any other consideration than for cash, paid on said conveyance.

5. Whether the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid.

6. Whether the said deed is valid, it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke having previously mortgaged the premises in fee to Henry Simmons had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises as set forth in the case, made by George De Grasse, rendered the title of such grantee or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs, by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified, under the seal of this court to the Supreme Court of the United States, to be finally decided.

Upon this certificate, the case came up to this court. It was argued in conjunction with the next two cases which will be reported in this volume, by Mr. Field and Mr. Webster for the plaintiffs, and Mr. Jay and Mr. Wood for the defendants. Mr. Flanagan also filed a brief for the defendants.

Each one of the counsel pursued his own train of argument, and filed a separate brief The statement of these points will make the report of this case unusually long, but the importance of the principles discussed makes it necessary to place before the reader the view which each counsel took in the case. They will be stated in the following order: Mr. Field for the plaintiffs, Mr. Jay and Mr. Wood for the defendant, and Mr. Webster for the plaintiffs, in reply and conclusion.

Mr. Field: The plaintiffs maintain—

1. That the acts of the Legislature stated in the case, whether they devested the estate of the trustees under the will of Mary Clarke or not, did not vest the whole estate in fee in Thomas B. Clarke.

2. That the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued.

3. That the orders set forth in the case were not authorized by, and in conformity to, the said acts of the Legislature, and are to be regarded, not as the acts of the Court of Chancery, empowered to proceed as such in that behalf, but as the doings of an officer acting under a special authority.

512*] *4. That the Chancellor had no competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on such conveyance.

5. That the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is not valid.

6. That it is invalid for this reason also, that it was not approved by the Chancellor, or by a master in chancery.

7. That Mr. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had exhausted his power over the subject, and had not competent authority to sell and convey the same to De Grasse.

8. That the subsequent conveyance of a part of the premises, as set forth in the case, made by George De Grasse, did not render the title to that part, of such grantee or his assigns, valid against the plaintiffs.

In support of these positions, the plaintiffs make the following points:

First Point. The acts of the Legislature changed the equitable life estate of Mr. Clarke into a legal estate, but they did not give him the legal estate in remainder. His power over the remainder of the children was a statutory power, and, like all such powers, to be strictly pursued, and when once executed was exhausted.

I. Whether even the trustees appointed by the will took a fee is not certain. In Clarke v. Van Surlay, 15 Wend. 442, it was conceded that "the legal interest in the property under the will was in the cestuis que trust."

It is a general rule in the construction of devises, that trustees take no greater estate than is necessary to support the trusts, whatever words of inheritance may have been used. Stanley v. Stanley, 16 Ves. 491; Doe v. Simpson, 5 East, 162; Doe v. Nichols, 1 Barn. & Cress. 336; Doe v. Needs, 2 Mees. & Welsb. 129; Warter v. Hutchinson, 3 Dowl. & Ryl. 58; Hill on Trustees, 240.

II. But if the testamentary trustees took a fee, their estate, when devested, did not pass to Mr. Clarke alone. It passed to him and his children; to him for life, and to his children in fee. The reasons are:

1. There is no language in any of the acts expressly giving the fee to him. On the contrary, the expressions seem carefully chosen to avoid that conclusion. He is "authorized and empowered to execute and perform every act, matter, and thing, in like manner, and with like effect, that trustees duly appointed under

513*] *the said act might have done." (Sec. 2 of second act.) This is language appropriate to a power, not to a conveyance. It clothes *him, not with* the estate, but with a power in trust. The word "trustee," used in reference to him, has not of itself force enough to give him the fee. He was, both in popular and in legal phrase, trustee of a power. He was to have the proceeds invested in his name as trustee. Sec. 3 of second act. The expression is not so strong as that in the preamble of the second act, "whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children."

The fee not being expressly given to Mr. Clarke, if he took it at all, he took it by implication. But a fee by implication is never allowed, except where it is necessary to the purposes of the trust; and here it was not necessary, for everything which he was to do could be done under the power as well, and far more safely to the rights of the children.

2. To give Mr. Clarke the fee for the execution of the trust, would involve this absurdity, that it would suppose a conveyance by him after his death. The testamentary trustees, if they took the legal estate, were to convey to the children at Mr. Clarke's death. That is a sufficient reason why he was not, and could not be, put in the place of those trustees.

3. If the fee was given to Mr. Clarke, at the passing of the second act, it must either have been then taken out of the children to be vested in him, or it must have been in abeyance since the passing of the first act. That discharged the trustees under the will. Sec. 1 of first act. If, then, the children were not vested with the fee, it remained in abeyance. But abeyances are not favored, nor are they allowed by construction or implication. Com. Dig. Abeyance, A. 3; Catlin v. Jackson, 8 Johns. 549.

If, however, as we contend, the fee was then in the children, there was no reason for taking it out, and vesting it in the father. To do so would, besides, have been open to grave constitutional objection. It would have exposed the estate of the children to a peril, for which there was no necessity, real or supposed.

III. If Mr. Clarke was not vested with the legal estate in remainder, he was clothed with a statutory power—a common law authority, as defined by Mr. Sugden. "A power given by a will, or by an act of Parliament, as in the instance of the land tax redemption acts, to sell an estate, is a common law authority." 1 Sugden on Powers, 1.

A power is to be strictly pursued. Doe v. Lady Caven, 5 *Term Rep. 567; Doe [*514 v. Calvert, 2 East, 376; Cholmeley v. Paxton, 3 Bing. 207; Cockerel v. Cholmeley, 10 Barn. & Cress. 564; 3 Russ. 565; 1 Russ. & Myl. 418; 1 Clark & Fin. 60; 2 Sug. Pow. 95, 197, 198, 330, 331, 413.

And a statutory power in particular. Rex v. Croke, Cowp. 26; Collett v. Hooper, 13 Ves. 255; Richter v. Hughes, 2 Barn. & Cress. 499; Proprietors of Stourbridge Canal v. Wheeley, 2 Barn. & Ad. 792; Lessee of Carlisle v. Longworth, 5 Ham. 370; Smith v. Hileman, 1 Scam. 324; Sharp v. Spier, 4 Hill. 76; Williams v. Peyton's Lessee, 4 Wheat. 77; Thatcher v. Powell, 6 Wheat. 119.

The leases under ecclesiastical statutes in England are instances. Bac. Abr. Leases, E. 2; Cro. Eliz. 207, 690.

Wherefore, not having pursued his authority, Mr. Clarke conveyed nothing by his deed.

Howard 8.

IV. A statutory power once fully executed is exhausted. "An authority once well executed cannot be executed de novo." 3 Vin. Abr. p. 429, sec. 42; Palk v. Lord Clinton, 12 Ves. 48; Barnet v. Wilson, 2 Younge & Coll. 407; 1 Sug. Pow. 359.

Therefore Mr. Clarke, having once fully executed his authority by a mortgage to Simmons, could not execute it again by a conveyance to De Grasse.

Second point. If, however, Mr. Clarke were to be deemed vested with the legal estate in remainder, he was disabled from alienation, without the consent of the Chancellor. Sec. 3 of second act.

If he took the fee, he took it qualified, and with a restricted power of disposition. The general rule of law, that he who has the legal estate can convey the legal estate, was modified in his case. It might have been so modified by deed at common law. M'Williams v. Nisly, 2 Serg. & Rawle, 513; Burton on Real Property, 11, note; Doe v. Pearson, 6 East, 173; Perrin v. Lyon, 9 East, 170. The private acts of the Legislature, whence he derived his right, were laws repealing to that extent the general law. M'Laren v. Pennington, 1 Paige, 102; Hibblewhite v. M'Morine, 6 Mees. & Welsb. 200; Myatt v. St. Helens Co. 1 G. & D. 663; Earl of Lincoln v. Arcedeckne, 1 Collyer, 98.

There is now a general law in New York, that a conveyance by a trustee, in contravention of the trust, is void. 1 Rev. Stat. 730, sec. 65. This is but an extension to all cases of the principle established for this case by these private acts.

Instances of restricted powers of alienation, imposed upon the fee, are not uncommon. The case of Indian lands is a familiar instance. See, also, Prince's case, 8 Coke's Rep. 1.

515*] *The consent of the Chancellor was interposed as a check upon Mr. Clarke. The first act did not prescribe it for the trustees to be appointed by the Chancellor; but when, by the second statute, the tenant for life was authorized to act, the consent of the Chancellor was required, for the protection of the infant children.

Third Point. Mr. Clarke was also disabled from alienation, except for a money consideration.

The acts give no authority to do more than to sell or to mortgage. The purpose was to raise funds for investment.

The first act provides, that the trustees shall invest the "proceeds in any public stock of the United States, or of this State, or bank stock, or shall put the same out at interest on real security." Sec. 3 of first act.

Section fourth of the same act provides, that the "principal sum of money arising from the said sales" shall be held, etc.

Section third of the second act provides, that the Chancellor shall "direct the manner in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee."

The third act is still more explicit. It authorizes Mr. Clarke, under the order before granted, or any subsequent one, "either to mortgage or to sell the premises, which the Chancellor has permitted, or hereafter may permit, him to sell, as trustee, under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required," etc.

If "to sell and dispose of" included every kind of alienation, it included a mortgage, and the third act was unnecessary.

On a similar expression in a will, the Supreme Court and Court of Errors of New York held, that a sale must be for cash, or something which could be invested. Waldron v. McComb, 1 Hill, 111, and Bloomer v. Waldron, 3 Hill, 361. And though the Court of Errors reversed the first judgment, they did not impugn the principle. 7 Hill, 335.

So, also, in the case of Darling v. Rogers, 22 Wend. 486, it was held by the Court of Errors, that the words "to sell" did not include the power to mortgage.

Answer. But it is not so in cases where for payment of debts; then may mortgage. 5 Johns. 43. No sale in fact, yet legal title passed.

Fourth Point. The Chancellor's order of March, 1817, did not authorize any conveyance, and least of all a conveyance for such a consideration as this, unless it were approved by a master.

The language is, "Provided, nevertheless, that every sale and *mortgage and con- [*516 veyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises."

The defendant claims, that this qualification applies only to the conveyance in satisfaction; the plaintiffs, that it applies to every deed or mortgage that might be made. That the latter is the true construction is claimed, because—

I. The statute declared, that no sale of any part of the estate should be made without the assent of the Chancellor to such sale, who was, at the time of giving the assent, to direct the mode in which the proceeds, or so much as he should think proper, should be vested in Mr. Clarke, as trustee. This implied that the Chancellor's consent was to be given to every sale.

The Chancellor delegated the power to a master of his court. Supposing such a delegation lawful, the power was to be exercised on every sale. To restrict it, therefore, to a conveyance in satisfaction, is not only to pervert the Chancellor's order, but to repeal the statute.

II. The language of the order itself is free from ambiguity; it being thus: "Provided, nevertheless, that every sale and mortgage and conveyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved," etc.

This is a repetition of the words previously used to express, (1) a sale for cash, (2) a mortgage for cash, and (3) a conveyance in satisfaction. So, in the last part of the sentence, the words are repeated with added emphasis. The approval is to be indorsed on "every deed or mortgage that may be made in the premises." It does not seem a fair interpretation to construe this to mean, not "every deed or mortgage that may be made in the premises," but a

particular kind of deed, namely, a conveyance in satisfaction of an antecedent debt.

III. The ruling of the State court on this point was made with great hesitation. Judge Bronson gave no reasons for his opinion. It does not appear to have been discussed at the argument in the Supreme Court. In the Court of Errors, the Chancellor said, "Upon this point, I concur, though with much hesitation;" in the conclusion, that the restriction was only intended to apply to sales and conveyances in satisfaction of debts. 20 Wend. 379. He overlooked altogether the word "mortgage," twice used in the same sentence. Mr. Verplanck, who delivered the only other opinion, 517*] was clear that the restriction *applied to sales and mortgages, as well as conveyances in satisfaction. 20 Wend. 386, 387. What were the opinions of the remaining members of the court does not appear.

But the opinions of the courts of New York do not bind the courts of the United States, in the construction of a writing like this. In the case of a will, this court rejected the construction given by the courts of Mississippi. Lane v. Vick, 3 How. 464.

In the present case, however, the conveyance was not for cash, but chiefly in payment and satisfaction of a debt, and therefore, within the decision of the Supreme Court and Court of Errors of New York, it should have been approved by a master.

Not having been so approved, it was void.

Fifth point. So far as the order sanctioned a conveyance for any other than a money consideration, it was unauthorized by the acts, and therefore beyond the Chancellor's jurisdiction. Consequently it gave no force to the title.

In acting under these private statutes, the Chancellor exercised a special and limited jurisdiction, and where he exceeded his jurisdiction his acts were void. The proceeding was not by suit between party and party, where an appeal could be had from an erroneous determination.

Cases of this kind are numerous in the books. In New York, the cases upon assessments are familiar instances. Striker v. Kelley, 7 Hill, 9; Matter of Beekman Street, 20 Johns. 271; Matter of Third Street, 6 Cow. 571.

So in cases of partition. Deming v. Corwin, 11 Wend. 647.

So in cases of bankruptcy, jurisdiction to grant the discharge must be specially shown. Sackett v. Andross, 5 Hill, 330; Stephens v. Ely, 6 Hill, 607.

Other cases in the State courts: Yates v. Lansing, 9 Johns. 431; Borden v. Fitch, 15 Johns. 141; Bloom v. Burdick, 1 Hill, 139; Rogers v. Dill, 6 Hill, 415; Wickes v. Caulk, 5 Harr. & Johns, 42; Pringle v. Carter, 1 Hill, S. C. 53. See, also, Fisher v. Harnden, 1 Paine, 55.

In the English courts: Shelford on Lunatics, 375; Matter of Janaway, 7 Price, 690.

"If a conveyance were made by an infant, even under the order of the court, it would not be valid, if he were not within the act of Parliament. These things, I am sorry to observe, pass too often sub silentio." By the Lord Chief Baron, in The King v. Inhabitants of *Washbrook*, 4 Barn. & Cress. 732.

There are many cases in this court which go to the same point. Griffith v. Frazier, 8 Cranch, 9; Thatcher v. Powell, 6 Wheaton, 119; *Elliot v. Peirsol, 1 Pet. 340; Bank of [*518 Hamilton v. Dudley's Lessee, 2 Pet. 523; Wilcox v. Jackson, 13 Pet. 498; Shriver's Lessee v. Lynn, 2 How. 43; Lessee of Hickey v. Stewart, 3 How. 750.

In this case the "subject matter" over which the Chancellor had jurisdiction by these private statutes was not the real estate, for then he might have authorized its alienation by another person than Mr. Clarke; nor was it every alienation by him, for then a mortgage or an exchange might have been authorized under the first act; but it was to determine whether or not the circumstances were such as to justify his assent to a sale or mortgage for cash, and upon a sale or mortgage to superintend the application of the proceeds. When he went beyond this, his act was coram non judice, and void.

There are two fatal errors in the Chancellor's order of the 17th of March:

1. He could not delegate his power to a master at all. The authority was personal, and to be exercised by himself. It was not the discretion of a master, but the discretion of the Chancellor, that was trusted.

2. He could not authorize a conveyance in satisfaction of Mr. Clarke's debts. The statutes gave him no such authority; and if they had, they would have been void, for the Legislature had not power to appropriate one person's property to the debts of another.

And even if it were held that the Chancellor could delegate the power of consenting, and the order were construed to allow a sale with the consent of a master, there would be a further and insurmountable objection to it; that the consent of the Chancellor, either directly or through a master, could not be dispensed with, according to the letter or spirit of the statutes.

The Chancellor conferred upon Mr. Clarke no portion of his authority; that came directly from the statutes. The Chancellor could neither give it nor enlarge it. The lands, if they passed at all, passed by force of the statutes. The Chancellor had no power, except to dissent from the sale; to interpose his veto. He could not even compel Mr. Clarke to act; he could only say when he should not act, and if he acted, what should be done with the proceeds of the estate.

Sixth Point. The subsequent conveyance of a part of the property to a purchaser, for value, and without notice of the defect in the title, did not make the title valid, as against the plaintiffs.

This is so upon general principles. If the conveyance by Mr. Clarke do not devest the plaintiffs' title, the subsequent *transfer [*519 did not. There is no principle of law which would make De Grasse give a better title than he had.

In most of the cases, upon defective execution of authority, the property was in the hands of innocent holders. Wilson v. Sewall, 1 Bl. 617; Bloom v. Burrdick, 1 Hill, 130; Rogers v. Dill, 6 Hill, 415.

There is no room here for an estoppel. The children were neither parties nor privies to

the conveyance to De Grasse. They take as devisees under the will. See Roe v. York, 6 East, 86; Roxburghe Feu case, 2 Dow. 189.

Mr. John Jay, for defendant:

Defendant's Points on the Eighth Questions stated in the Certificate.

I. The acts of the Legislature stated in the case devested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke, as trustee in their place and stead.

1. To determine the meaning and scope of these acts, we must discover what were then understood to be the interests and rights of the parties to be affected by them; and for this purpose we must refer to the judicial decisions which governed the courts and the Legislature at the time of their enactment, even though these decisions have been departed from by later judges; for it would be contrary to the first principles of law and justice to give to long subsequent adjudications a retroactive operation in the interpretation of ancient statutes; and such a course would lead to the worst evils of ex post facto legislation in regard to vested and sacred rights. 2 Inst. 292; 1 Kent's Com. 461; Doe v. Allen, 8 Term R. 504, per Ld. Kenyon.

2. The trustees under the will took the legal estate in fee in the premises in question. This is clear from the language of the devise, and from the powers given to them to lease the premises during Clarke's life, and to convey to the parties who should become entitled to the same on his decease.

3. The children, as they came in esse, were then supposed to take, under the will of Mary Clarke (according to the uniform ruling of all the courts, both in England and America, at that time, and for a long time previously), not a vested remainder in fee, liable to open and let in after-born children, and subject to be defeated by their death during Clarke's life, but simply a contingent remainder dependent upon their surviving their father, and that remainder 520*] (excepting so far as *their interest in the premises was enlarged by the acts of the Legislature passed with Clarke's assent) was then regarded as amounting, during their father's life, to a mere presumptive title, a naked possibility, uncoupled with any immediate beneficial interest. Denn, ex dem. Radcliffe v. Bagshaw, 6 Term R. 512, in the King's Bench, per Lord Kenyon, and all the judges, in the year 1796; Doe v. Scudamore, 2 Bos. & Pull. 289, per Lord Eldon, Ch. J., and Heath, Crooke, and Chambre, J. J., in 1800; Roe v. Briggs, 16 East, 406, per Ld. Ch. J. Ellenborough, in 1802—"That no case had been shown where an estate depending on such a contingency had ever been held vested;" Doe v. Provost, 4 Johns. 61, in 1809, per Justice Van Ness; Kent, Ch. J., and Thompson and Yates, J. J., concurring. See this case commented upon and sustained in Hawley v. James, 16 Wend. 242 et seq.; Dunwoodie v. Reed, 3 Serg. & Rawle, 435, in 1817, per Tilghman, Ch. J., and Gibson, J. See remarks of Savage, Ch. J., in Coster v. Lorrillard, 14 Wend. 311, on the question of remainders dependent on survivorship, showing the conflicting definitions of the statute and common law, and thus accounting for the discrepancy between the former and the later decisions. See note, 4 Kent's Com. 261, on the case of Jackson v. Waldron, 13 Wend. 178, affirming the judgment of the Supreme Court in Pelletrau v. Jackson, 11 Wend. 121, per Nelson, J. 2 Blackstone's Com. 170; Fearne on Contingent Remainders and Executory Devises; Preston on Abstracts, 21; Cruise, title 16, Remainder, ch. 1, secs. 10 to 27; Jickling's Analogy of Legal and Equitable Estates; Dixon et ux. v. Pickett, 10 Pick. 517; Blanchard v. Brooks, 12 Pick. 47, per Shaw, Ch. J., pp. 63 and 64; Davis v. Norton, P. Wms. 392; Duffield v. Duffield, 3 Bligh. N. S. 260, 329, 355, per Best, Ch. J., on character of a contingent estate; Jackson v. Waldron, 13 Wend. 214 et seq., per Tracey, Senator.

4. Thomas B. Clarke, under the will, took an equitable life estate, and after the transfer to him, by the act of the Legislature, of the contingent estate of Clement C. Moore, the whole estate in remainder was alternate between Clarke and his children, dependent upon the like contingency of survivorship.

5. In whatever light the estate of the children be regarded, the interest of Clarke in the premises in question was larger than theirs; for the life estate was absolutely his, and the remainder was limited on the same condition to each, to wit, survivorship; and as the case shows that one moiety of the devised premises was carefully reserved by the acts of the Legislature and the orders of the Court of Chancery, for the benefit of the children, it is clear that, in addition to the benefit they *derived [*521 from the other moiety, which was partly disposed of, they have received a larger share of the estate than they would have been entitled to, had an equitable division of their relative interests been made between them and their father when the acts and orders were passed and made.

6. The acts having been adjudged constitutional and valid, the only question here is as to their meaning; and since they were remedial statutes, they are to receive an equitable interpretation, by which the letter of the act is sometimes enlarged and sometimes restrained, so as more effectually to meet the beneficial end in view, and to prevent a failure of the remedy. The intention of the Legislature is to be deduced from a view of the whole, and the real intention is to prevail even over the literal sense of the words. Dwarris on Statutes; 1 Kent's Com. 461; Cochran v. Van Surlay, 20 Wend. 365, per Bronson, J.

7. The first act of the Legislature, April 1, 1814, discharging the trustees under the will and providing for the appointment of new trustees by the Court of Chancery in their place and stead, and directing that such new trustees may lease all or any part of the land for a term not exceeding twenty-one years, and may sell or dispose of a moiety in their discretion, and declaring that they shall be decreed and adjudged trustees under the will, in like manner as if they had been named therein, clearly devested the trustees under the will of their legal estate in the land.

The trustees had no beneficial interests. They were liable to be removed by the Court of Chancery. There was nothing in their appointment under the will, and their acceptance of the

trust, which can be construed as a contract, of which their removal was an unconstitutional violation; for the reason, among others, that the Constitution protects only such contracts and vested rights as are beneficial, and not such as are merely onerous; and in this case the objection could only be taken by the trustees themselves; and they not only assented to the act, but solicited its passage; and the change of trustees, being avowedly for the benefit of the children, was within the clearest parental authority of the Legislature. Cruise, title Private acts; Townley v. Gibson, 2 Term Rep. 701.

8. The first act not only devested the trustees of their estate, but provided for its transfer without diminution to new trustees, to be appointed by the Chancellor. The second act, of March 24, 1815, in the absence of such appointment, created Clarke the new trustee, clothed him with all the powers specified in the former act, and, with abundant care lest anything should be omitted, authorized him to [*522 execute and perform *every act, matter, and thing in relation to the real estate, in like manner and with the like effect that trustees under the former act might have done; and made him, in like manner, responsible to the Chancellor for his faithful "management of the estate thereby vested in Thomas B. Clarke." The "estate" here spoken of could only have been the land, as there were then no proceeds for investment. And the third act, passed March 29, 1816, again distinctly recognized him "as trustee under the will of Mary Clarke." He could not have been the trustee for himself; but that trust had merged in the legal estate; he was therefore trustee only of the remainder.

9. The acts cannot be fairly construed as conferring upon Clarke only a power in trust; for, apart from the express recognition of him by the second act, as vested with the estate, the intention to vest it in him may be collected from all the acts taken together. To suppose that the legal estate was intended to be left in the original trustees, after they were "discharged from the said trust," is not only unreasonable, but utterly irreconcilable with the exercise by Clarke of the rights and duties conferred and imposed upon him—such as the leasing all or any part of the land (sec. 5, Act of April 1, 1814), receiving the rents and profits, and doing other acts requiring and implying the possession of a legal estate. Goodright, on dem. Revell and others, v. Parker and others, 1 Maule & Selw. 692; Doe, on dem. Gillard, v. Gillard, 5 Barn. & Ald. 785; Doe, on dem. Breezley, v. Woodhouse and others, 4 Term Rep. 89.

The words "authorize and empower," in the act, cannot have the effect of turning this into a mere power. They simply declare the trusts for which Clarke was already appointed, and for the execution of which he was vested with the estate. Brown v. Higgs, 5 Ves. 506, per Ld. Kenyon.

10. It has been judicially held, in New York, that the acts did vest the legal estate in Clarke as trustee. Per Walworth, Ch., in Clarke v. Van Surlay, 20 Wend. 377.

And this court will, in accordance with their *general* practice, follow the ruling of the State *tribunals*. Swift v. Tyson, 16 Peters, 19.

II. The authority given by the said acts to the trustee to sell, was not a special power to be strictly pursued, but he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

1. By the Act of April 1, 1814, the broadest powers of sale were conferred on the trustees therein provided for. By sec. 2 of the Act of March 24, 1815, the same powers were conferred on Clarke in express terms. He was authorized and empowered *to execute and [*523 perform every act, matter, and thing in relation to the real estate, in like manner and with like effect that trustees under the former act might have done.

2. This language is only consistent with the supposition, that Clarke held the trust estate in fee under the will. It is irreconcilable with the supposition that he was acting under a special power, to be strictly pursued.

3. The doctrine of naked powers is odious, as often leading to grievous injustice; and the court will not so construe the act, if it will bear any other construction. 4 Term Reports; 1 Kent's Com. 461.

4. The further provision of the act directing the annual accounting before the Chancellor, that the Chancellor might see that Clarke had duly performed the trust reposed in him, was personal to Clarke, and did not abridge the powers conferred upon him as trustee.

III. and IV. The orders set forth in the case made by the Chancellor are to be regarded as the acts of the Court of Chancery of the State of New York, and not as the doings of an officer under a special authority.

The Chancellor, in a court of law, must be assumed to have had competent authority, under the acts, for every order which he made in the matter, whether such order allowed a sale for any other consideration than cash paid or not.

1. That the assent and direction of the Chancellor in this case, required and given under the acts, was a judicial proceeding, not to be assailed collaterally in a court of law, was held in the courts of New York by Mr. Justice Cowen, Clarke v. Van Surlay, 15 Wend. 447; Chancellor Walworth, in Cochran v. Van Surlay, 20 Wend. 378; Mr. Senator Verplanck, Ibid. 384.

2. The accountability of Clarke to the Chancellor was a continuance of the accountability which rested upon the trustees under the will, and which was expressly intended by the first act of the Legislature (sec. 6) to rest upon their successors, and which properly belonged to his position as trustee. 2 Story, Eq. Jur. secs. 960, 974, 978; 2 Fonb. 36, note; 3 Ves. Jun. 9.

3. The presumption of the acts of the Chancellor being judicial, even if no reference to the Court of Chancery had been made in the former act, would result from the appointment of a judicial officer having exclusive jurisdiction over matters of trust and the estates of infants; and the fact that the rights of Clarke, as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales and in the profits, required judicial adjustment, not according to the technical and unbending rules of the common law, but at the hands of the presiding *officer of the [*524

High Court of Equity, having authority to take a wider range, as the interest of the parties might require. Fisher v. Fields, 10 Johns. 505, per Kent, Ch.; 2 Story, Eq. Jur. sec. 331.

4. The contemporaneous action, under the acts, by the Chancellor, was judicial, and not ministerial, and that action is evidence of the true construction of the acts. The Act of 1816 refers to the proceedings already had by the Chancellor, and adopts them, and thus gives a legislative exposition of the prior act, showing them to have been judicial; and being judicial, they cannot be impeached collaterally.

5. That the Chancellor regarded his acts as the acts, not of an individual, but of the High Court of Chancery, and that he regarded that court as having exclusive jurisdiction in the future of all matters connected with the sales and mortgages, is clear from the repeated permission given in the successive orders to "all parties interested, or to become interested, in the premises, to apply to the court at any time or times thereafter, for further orders or directions."

6. Of that permission the plaintiffs should have availed themselves, if Clarke had in anything abused his powers, to enforce the trust and recover the purchase money, instead of seeking to review the orders of a court of chancery in ejectment suits at common law. Mitford's Pleadings, 133; 2 Story, Eq. Jur. sec. 1127; 2 Madd. Ch. 125; Potter v. Gardner, 12 Wheaton, 499, per Marshall, Ch. J.

V. and VI. The deed executed by Clarke to De Grasse, for the premises in question, is valid, even if it were given for a consideration other than cash paid on the purchase (of which there is no proper evidence), and without having a certificate indorsed thereon, that it was approved by a master in chancery, supposing Clarke to have taken only a power in trust.

1. Under the acts of the Legislature Clarke had authority to sell and dispose of the land, in such manner, and upon such terms, as he might deem best for the interest of the several parties. The Chancellor had full authority under the acts to assent to a sale in satisfaction, if Clarke thought such a disposition of the land expedient, the terms being altogether in Clarke's discretion, and that assent being judicially given is not to be questioned.

The rules fixed by the Chancellor for Clarke's guidance, in regard to the valuation, and approval, and certificate of a master, in certain cases, were merely directory to the trustee, and not conditions precedent to the validity of the sale, and no omission can invalidate the exer-
525*] cise of Clarke's power given by *the act, nor of the deed to De Grasse given under it. Mineuse v. Cox, 5 Johns. Ch. 447, per Kent, Chancellor, in a closely analogous case.

2. But the legal estate being necessarily vested in Clarke, as already shown, the deed to De Grasse conveyed a title absolute in a court of law, whether the conditions of the trust had been complied with or not. The plaintiffs are estopped at law, though not in equity, from impugning a deed duly executed by the trustee, and their remedy for any supposed fraud or breach of trust is in equity alone. Taylor v. King, 6 Munf. 366, per Roane, J.; per Cowen, J., in Clarke v. Van Surlay, 15 Wend. 447; per Walworth, Ch., in Cochran v. Van Surlay, 20 Wend. 378, 379.

VII. The fact that Clarke had previously mortgaged the premises in fee to Henry Simmons, did not at all effect his competent authority to sell and convey the same to De Grasse.

The power given to Clarke as trustee was not one which called only for a single execution. The words "either" and "or" are not alternative, but distributive, and the beneficial intent of the act not having been satisfied by the execution of the mortgage, the power to sell survived. Omerod v. Hardman, 5 Ves. 732.

VIII. If it be assumed (which is hardly possible), that Clarke had only a naked power, that the rules fixed by the Chancellor were conditions to its exercise, and that the loose and random recollections of the witness who testified touching the consideration of the deed to De Grasse were admissible, and sufficient evidence on that point, still the title of a bona fide purchaser, without notice, cannot be questioned in a court of law, for the want of the master's certificate required to conveyances in satisfaction, for the reason that the deed on its face was a deed for cash, executed in legal conformity to the power, and the remedy of the plaintiff is in equity, where the payment of the purchase money might be enforced. Sugden on Powers, ch. 11, secs. 1 and 2; Wood v. Jackson, 8 Wend. 32; Anderson v. Roberts, 10 Johns.; Jackson v. Terry, 13 Johns. 471, per Thompson, Ch. J.; Astor v. Wells, 4 Wheaton, 487; Bean v. Smith, 2 Mason, 273; Fletcher v. Peck, 6 Cranch, 141; Jackson v. Henry, 16 Johns. 195; Jackson v. Van Dolsen, 5 Johns. 43; Franklin v. Osgood, 14 Johns. 527.

Further Points in Favor of the Defendant.

I. By the Act of March 24, 1815, it was provided that Clarke should account annually to the Chancellor, or to such person as he might appoint, for the principal of the proceeds of each sale *made by him, and if on such [*526 return, or at any other time, and in any other manner, the Chancellor should be of opinion that Clarke had not duly performed the trust by that act reposed in him, he was authorized to remove Clarke from his said trust, and appoint another in his stead.

There is no proof in the case that the Chancellor ever removed Clarke, as he was bound to do, if he thought he had not duly performed his trust, or that the Chancellor ever disapproved of the sale to De Grasse, or of the consideration thereof. On the contrary, it appears from the offers of evidence made by the plaintiffs, that on the 31st of March, 1836, Clarke was still acting as trustee and making sales, and it is therefore a sound legal presumption, that the Chancellor approved of this conveyance, and of Clarke's conduct generally; for had he disapproved of them, Clarke would have been removed or enjoined, as the plaintiffs say he was, at the instigation of the children, at a later period.

The Chancellor had been by the act, "virtually made the trustee of the property" (per Jones, Ch., in Sinclair v. Jackson, 8 Cowen, 548, quoted and approved by Verplanck, Senator, in Cochran v. Van Surlay, 20 Wend.

387), and the care and exactness exhibited in the orders contained in the case forbid the imputation of carelessness or neglect in his fulfillment of the important duties especially imposed upon him by the Legislature. He must be presumed to have done his duty intelligently, diligently, and faithfully, and that presumption which forbids the supposition that the premises in dispute were disposed of fraudulently or improperly is to govern in this court until overthrown by positive proof to the contrary. Best on Presumption of law, 63, and cases cited; Co. Litt. 103 and 232, b; Dig. lib. 50, title 17; Sutton v. Johnstone, 1 Term Rep. 503; Cowen & Hill's notes to Phillips on Evid. 205, et seq.

II. The conveyance to De Grasse was made 29 March, 1822; this suit was commenced in 1845. Although the marriage of Mrs. Williamson, in 1827, before the completion of her infancy, has saved her from being barred by the statutes of limitation, the singular and unexplained want of diligence and vigilance on the part of the plaintiffs in seeking to enforce their claims, if any they had, to these premises, until after the lapse of so many years of acquiescence and delay, and when the true state of the transaction has been forgotten, or become incapable of explanation, do not entitle them to the favorable consideration of the court; for they have slept upon their rights, and have thereby created a difficulty and imposed a hardship, misleading innocent parties 527*] by their silence. 2 Ball *& Beat. 433; Hawley v. Cramer, 4 Cowen, 483, per Walworth, Ch.; Broadhurst v. Balguy, 1 Younge & Col. N. R. 16, 28 to 32; 2 Story's Equity, secs. 1284, 1520, and cases quoted in note c; Wendell v. Van Rensselaer, 1 Johns. Ch. 354, per Livingston, Ch.; Higginbotham v. Burnet et al. 3 Johns. Ch. 184, per Kent, Ch.; Roberts v. Tunstall, 4 Hare's Ch. R. 263, per Wigram, V. Ch.

III. The length of time which has elapsed since the conveyance to De Grasse, coupled with the fact that this very deed has been sustained by the court of last resort in the State of New York, after prolonged litigation, will incline this court to give to the acts of the Legislature and the order of the Chancellor, in questions of doubt, the most favorable interpretation for the maintenance of the title, and the protection of the rights of bona fide purchasers and incumbrancers. The best interests of society demand that causes of action should not be deferred an unreasonable time, and this remark is peculiarly applicable to suits in ejectment, since nothing so much retards the growth and prosperity of the country as the insecurity of titles. Per McLean, J., Lewis v. Marshall, 5 Peters, 470; Per Marshall, Ch. J., in Bell v. Morrison, 1 Peters, S. C. 360.

Mr. Wood, for defendant:

I. The three trustees under the will of Mary Clarke took the legal estate in fee, in the premises in question, in part. Thomas B. Clarke took an equitable estate in said premises during his life; and his children took an equitable estate in remainder in fee; and Clement C. Moore took an alternate equitable remainder in fee, in case of failure of the issue of said Thomas B. Clarke.

II. Assuming Clarke to take a life estate with a limitation in remainder to his issue, such limitations of remainders in the alternative are lawful and valid. Luddington v. Kime, 1 Ld. Raym. 203.

III. The legal estate of the trustees was not executed by the statute of uses, by transferring it to the parties entitled to the equitable estates and interest in fee.

An important act on the part of the trustees was required to be done, viz., the conveyance to the children in fee after the death of Thomas B. Clarke, or in the alternative to Clement C. Moore. The trust was therefore active, and not executed by the statute. Mott v. Buxton, 7 Ves. Jun. 201; Leonard v. Sussex, 2 Vern. 526.

IV. The legal estate in the hands of the trustees involved *the power to lease, such [*528 power being necessary for the production of rents and profits of city property. Attorney-General v. Owen, 10 Ves. 560.

V. By the Act of 1815, the legal estate in the three trustees named in the will was transferred to Thomas B. Clarke in trust.

1st. The language of the act shows an intention to transfer it, and not to confer upon him a mere power in trust.

2d. It is not necessary that words of grant should be found in the act. The intention to vest him with the legal estate may be collected from the context. Euchelah v. Welsh, 3 Hawks, etc., 155. It is unreasonable to suppose the legal estate was meant to be left in the original trustees under the will, after they were stripped of the trust, and when they had no beneficial interests.

3d. Under the second section of said act, all the rights and duties are conferred upon him which would have devolved upon the trustees under the Act of 1814, by the fifth section of which they were to lease from time to time, receive rents and profits, and do other acts requiring a legal estate.

4th. A legal estate in trust may be implied even in private instruments, when the acts to be done are such as to render it proper and essential that the trustees should have the legal estate, and not a mere trust power. Griffiths v. Smith, Moore, 753; Goodright v. Parker, 1 Maule & Selw. 692; Doe v. Cundall, 9 East, 400; Doe v. Gillard, 5 Barn. & Ald. 785; Anthony v. Rees, 2 Cromp. & Jerv. 75; Carter v. Barnardiston, 1 P. Wms. 505; Thong v. Bedford, 1 Bro. C. C. 313; Striker v. Mott, 2 Paige, 389; Brewster v. Paterson, Court of Appeals, S. P., on this same will, in M. 5; Doe, ex dem. Breezeley v. Woodhouse, 4 Term. Rep. 89; Oates v. Cooke, 3 Burr. 1685.

VI. The act devesting the trustees under the will of the legal estate in trust was not unconstitutional.

1st. They had no beneficial interests. Their functions were under the control of equity; they were liable at any time to be removed by the Chancellor. Livingston v. Moore, 7 Peters, 469; Wilkinson v. Leland, 2 Peters, 267, 660.

2d. The Constitution protects only such contracts and vested rights as are beneficial to the party, not such as are merely onerous.

3d. The objection could only be taken by the trustees themselves, and they assented to the acts displacing their estate and their functions. 2 Peters, 411, 413; Watson v. Mercer, 8 Ib. 88; Sinclair v. Jackson, 8 Cow. 543; Currie's Ad-

m'rs v. Mutual Ins. Co. 4 Hen. & Mun. 315; Cochran v. Van Surlay, 20 Wend. 387. This last 529*] mentioned case is conclusive *of the whole question, being the decision of the highest court of the State on a local law.

VII. The sale and conveyance by Thomas B. Clarke (he having the legal estate), though he may have departed from his trust, was valid to pass the legal title, and the remedy for any supposed breach of trust is in equity only, not in these suits at law. 1 Sugden on Powers, ch. 11, secs. 1, 2; Jackson v. Van Dalssen, 5 Johns. 43.

VIII. Assuming that Thomas B. Clarke takes only a power in trust, his conveyance is valid.

1st. The assent and direction of the Chancellor, required under the act, is a judicial proceeding.

2d. The presumption of its being judicial results from the fact of its being conferred upon a high judicial officer, and the rights of Clarke as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales, and in the profits, required judicial adjustment.

3d. The contemporaneous action under it, by the Chancellor, was judicial, and not ministerial.

4th. Such contemporaneous action is evidence of the true construction of the act.

5th. The Act of 1816 refers to these judicial proceedings, adopts them, and thus gives a legislative exposition of the prior act, showing these proceedings of the Chancellor to be judicial.

6th. Being judicial, the orders of the Chancellor are final and conclusive, and cannot be impeached collaterally, though the proceeding is of a summary character. Moody v. Thurston, Strange, 481; 1 Douglas, 407; 1 Harg. Law Tracts, 446; 4 Greenleaf, 531; Henshaw v. Pleasance, 2 Bl. R. 1174, note showing the decision overruled; Doe v. Brown, 3 East, 15; Grignon's Lessee, 2 Howard, 319.

If jurisdiction, by irregular proceeding, final but on appeal. If no jurisdiction, this also decided in Cook v. Van Lear; for it is not the ordinary jurisdiction of equity, but jurisdiction under special statute.

7th. If not judicial but ministerial, the terms imposed are not conditions, but merely directory, and any omission does not invalidate the exercise of the power and the grant under it. Mineuse v. Cox, 5 Johns. Ch. 447; 5 Johns. 43.

IX. The sales and conveyances are valid to pass the title to the premises in question, and complete a good defense in this suit.

Mr. Webster, for plaintiffs, in reply and conclusion:

I propose to maintain four propositions, which will embrace all the eight questions, and answer them:

530*] *I. The acts of the Legislature stated in the case, while they devested the estate of the trustees under the will of Mary Clarke, did not vest the whole estate in fee in Thomas B. Clarke.

II. The authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued.

III. That, even if it be holden that the acts vested a legal estate in fee in Thomas B. Clarke, yet that the same acts imposed conditions and restraints on his power of alienation; and that he could make no lawful or valid conveyance, without having first complied with these conditions and restraints.

IV. That the conveyance made by him, under which the defendant claims, was not made in conformity with these conditions and restraints.

Mr. Webster, after arguing in support of the above propositions, said that he would now ask the attention of the court to a critical examination of the New York decisions, which he contended to be as follows:

It has been decided in the courts of New York, that the acts of the Legislature stated in this case are constitutional.

It has not been decided that the Chancellor's orders in the case were legal, or within the jurisdiction conferred upon him by the acts; but it has been decided, that, if acting within his jurisdiction, the propriety or legality of his orders could not be examined into, collaterally, in a court of law.

It has been decided that the Chancellor's order made in this case did not require that a sale, made by T. B. Clarke, when made for money, must have been approved by a master; but all the judges who gave reasons for their judgment signified their opinions, that, when a conveyance was made in satisfaction of a debt, such approval, under the Chancellor's order, was indispensable. But no case, turning on this single point, has been adjudged in New York.

It has not been decided by the courts in New York, that, under and by force of the acts, T. B. Clarke took a fee-simple estate in the whole property. That question has not directly arisen. Chancellor Walworth, arguendo, expressed an opinion in favor of the affirmation of that question. Chief Justice Bronson took the negative of the question as a point conceded.

It has not been decided by the courts of New York that T. B. Clarke took, by force of the acts, any such estate as that he could make a sale or conveyance, which should be sufficient to pass any title, legal or equitable, without conforming to all the limitations and requisites prescribed in the acts themselves.

*On the contrary, all the courts, and [*531 every judge in New York, so far as appears, has proceeded on the ground that those limitations and requisites must be complied with, before any estate, legal or equitable, could be passed by any deed or conveyance which Thomas B. Clarke could make.

All the courts and all the judges in New York have affirmed that these restrictions in the acts do bind the estate, and restrain and limit, ab initio, the trustees' power of sale.

Therefore, Mr. Webster contended, the attempt now made by defendant's counsel was nothing less than an attempt to overthrow the whole substance of the New York decisions.

Mr. Justice Wayne delivered the opinion of the court:

This cause has been brought to this court, to get its decision upon questions of law, which were raised upon a case stated in the Circuit

Court, upon which the judges of that court differed in opinion.

The suit is an action of ejectment, for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York. The plaintiffs claimed under the will of Mary Clarke. It was admitted by the counsel for the defendant, that Mary Clarke had been seized of the premises in dispute, when she made her will, and when she died in 1802. It was also admitted, that the defendant was the actual occupant of the premises when the suit was commenced against him.

The premises are a portion of a tract of land, devised by Mary Clarke to "Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants and not as tenants in common," of "all that part of my said farm at Greenwich aforesaid, called Chelsea," etc., "to have and to hold the said hereby devised premises, to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same" "to Thomas B. Clarke," etc., "during his natural life; and from and after the death of the said Thomas B. Clarke, in further trust, to convey the same in fee, to the lawful issue of the said Thomas B. Clarke, living at his death. And if the said Thomas B. Clarke shall not leave any lawful issue, at the time of his death, then in the further trust and confidence, to convey the said hereby devised premises to my grandson, Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death, prior to the death of Thomas B. Clarke."

532*] *It was also admitted, that the trustees named in the will were dead; that Thomas B. Clarke married in 1803; that his wife died in 1815; and that he died in 1826, leaving three children—Catharine, the wife of Charles H. Williamson, plaintiffs in this suit; Isabella, now the wife of Rupert Cochran, and Bayard Clarke, all of whom were still living. Here the plaintiffs rested their case.

The defendant then put his case upon conveyances from Thomas B. Clarke, made, as he says, under legislative enactments of the State of New York and orders of the Chancellor of New York.

The acts and the orders of the Chancellor under them will be the subjects of our consideration only so far as may be necessary to give answers to the points certified to this court. In other words, we will not discuss the quantity of interest which the persons provided for in the devise took under it.

It is right, however, to say, that we concur with the learned judges of the Circuit Court, that, under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born; and that their vested remainder became a fee-simple absolute, in the children living, on the death of their father.

The points certified are as follows:

1. Whether the acts of the Legislature, stated in the case, devested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on said conveyance.

5. Whether the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid.

6. Whether the said deed is valid, [*533 it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, rendered the title of such grantee, or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified under the seal of this court to the Supreme Court of the United States, to be finally decided.

Our first observation upon the Act of April, 1814, is, that the first section of it gives to the Chancellor the power to appoint trustees, in the place of those named in the will. This is to be done upon the petition of Thomas B. Clarke, as contradistinguished from a suit by bill for such a purpose; and as occasion may require, the Chancellor may substitute and appoint other trustees, in the room of these appointed under the act, in like manner as is practiced in chancery, in cases of trustees appointed therein. By the last section of the act, the trustees are said to be liable in all respects to the power and authority of the Court of Chancery, concerning the trusts created by the act.

It will be conceded by all, that the Court of Chancery, without this act, had not the power, under its inherent or original jurisdiction, to change the trustees summarily upon petition, or except by means of a bill filed by and against all proper parties, for such causes as trustees may be removed in chancery.

The second, third, fourth, fifth, and sixth sections of the act, except the last clause in the sixth already cited, prescribe minutely what may be done by the trustees who might be appointed by the Chancellor, in relation to the

land devised, leaving nothing to be done by the court, except in its supervisory power over the acts of the trustees.

Under this act, it does not appear that any application was made for the substitution of trustees in place of those named in the will. The latter continued in their testamentary relation to the land devised, until after the Act of March, 1815, had been passed.

That act was passed upon the petition of Thomas B. Clarke. He recites a release to him by Clement C. Moore of his contingent interest 534*] *in the estate devised, whereby he says himself and his infant children have become the only persons interested in the estate. And he declares that he has not been able to prevail upon any suitable person to undertake the performance of the duties enjoined by the first act. He then prays for an amendment of it.

Leave was given in the Senate of New York, that such a bill might be reported, and it was passed into an act on the 24th of March, 1815.

In the preamble to this act, after reciting Clement C. Moore's release, "whereby the said real estate became exclusively vested in Thomas B. Clarke and his children," it is enacted, that all the beneficial interest and estate of Moore, or those under him, arising by virtue of the act, to which this is a supplement, is vested in Clarke, his heirs and assigns, etc. And that so much of the act as requires the several duties therein enumerated to be performed by trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby repealed.

The power given by the first act to the court, to appoint trustees, having been repealed, the second section of the second act is, that Clarke is authorized and empowered to execute and perform every matter and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner, and with like effect, that trustees duly appointed under the first act might have done. And Clarke is required to apply the whole interest and income of the property to the maintenance of his family and the education of his children. Then it is enacted, in the third section, that no sale of any part of the estate shall be made by Clarke, until he shall have procured the assent of the Chancellor to such sale; who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Clarke as trustee; and further, that it shall be the duty of Clarke to render an annual account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest being to be applied by said Clarke in such manner as he may think proper, for his own use and benefit, and for the maintenance and education of his children. And if on such return, or at any other time, and in any other manner, the Chancellor shall be of the opinion that Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove him and appoint another trustee in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in Thomas B. Clarke as trustee.

535*] *We have hitherto used the words of the acts. And shall do so, as occasion may require, that Clarke's character under the acts as a trustee, with power as it might be given to him by the Chancellor to sell, may not be misunderstood; and that the special power or jurisdiction given to the Chancellor in the whole matter may be more apparent, when we treat of that part of the case.

The orders given by the Chancellor under the first and supplemental act, upon the petition of Clarke, shall have our attention, after the third act which was passed for Clarke's relief has been noticed.

It was passed upon the memorial of Clarke. It recites, that the Chancellor, under the act for his relief, did order that he might sell the eastern moiety of the property in the act mentioned, but that, owing to the scarcity of money and low price, no sale could be made, without a great sacrifice. And therefore he prays to be permitted to mortgage the property, as the Chancellor may appoint, for the purposes mentioned in the preceding acts and order of the Chancellor.

The act passed upon this petition is, that he is authorized, under the order heretofore given, or under any order which the Chancellor might give, to mortgage and sell the premises, as trustee under the will of Mary Clarke, and to apply the money to be raised by mortgage or sale to the purposes required or to be required by the Chancellor, under the acts heretofore passed for Clarke's relief.

So much of Clarke's petition to the Legislature has been cited in connection with its acts, to show that the latter were coincident with, and not beyond, the relief for which he asked.

Both fix conclusively that Clarke is to be regarded as the trustee only of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor. His obligation is to account annually for the principal of the proceeds of every sale or mortgage which might be made, and it is his right to use the interest of the principal for himself and for the education and maintenance of his children. He is called trustee in the acts. In that character, and in no other, is he recognized in the orders of the Chancellor. And, in the last clause of the third section of the second act, it is said another may be appointed in his stead, "subject to such rules as the Chancellor may prescribe, in the management of the estate, hereby vested in the said Thomas B. Clarke as trustee."

His relation to the devised estate was changed by the discharge of the trustees named in the will, but his interest in it was the same as it had been, with the exception of Moore's assignment *of his contingent remainder, [*536 and the power given to the Chancellor to assent to the sale or mortgage of a part of it. The acts of the Legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

We will now precede our inquiry into the jurisdiction given to the Chancellor by the acts, with a few remarks, which will aid in determining the extent of that jurisdiction, and what would have been its rightful exercise.

Jurisdiction in chancery is inherent and original, comprehending now almost every

exigency of human disagreement, for which there is not an adequate remedy at law.

Or it is statutory, meaning a new power from legislation for the court to act upon particular subjects of a like kind, as occasions for doing so may occur. Examples of this statutory jurisdiction are the 43d of Elizabeth, called the Statute of Charities. The act known as Sir Samuel Romilly's, giving a summary remedy in cases of breach of trust for charitable uses. And another is the trustee act of Sir Edward Sugden, for amending the laws respecting conveyances and transfers of estate and funds vested in trustees and mortgagees, and for enabling the courts of equity to give effect to their decrees and orders in certain cases.

Or, the jurisdiction in equity is extraordinary, as when a statute permits persons to present petitions to the Chancellor for relief in private affairs, when the petitioner cannot get relief by the ordinary course of law, or from the inherent power of a court of chancery. Cruise, in his Title 33, c. 11, says, they are termed real estate acts, and that it is a conveyance or settlement of lands or hereditaments, made under the immediate sanction of Parliament, in cases where the parties are not capable of substantiating their agreements without the aid of the Legislature, and where the carrying such agreements into effect is evidently beneficial to the parties.

In these cases, it must also be recollected that the Chancellor acts summarily, ex-parte, upon the petition of the party seeking relief. Upon such petitions orders are given, as contradistinguished from decrees in suits by bill filed. The last are his judgments upon the matters in controversy between the parties before the court; the other being orders in conformity with whatever may be the legislative direction and intent in any particular case. Whatever, however, the Chancellor does in either case, he does as a court of chancery. It will stand as his judgment, when it has been done within the jurisdiction conferred, until it has been set 537*] aside upon motion; as his *decrees do, until they have been set aside by a bill of review.

The acts for the relief of Thomas B. Clarke are of the last kind. They are private acts, relating to a particular estate and persons having interests in it; one of whom, Clarke, is empowered, as a trustee, to sell a part of it, with the consent of the Chancellor. Several cases of private acts for such relief as was asked by Clarke will be found in the 33 c. of Cruise.

The acts in this case provide that the Chancellor may act upon them summarily, upon the application or petition of Clarke, and in each of them what the Chancellor can do is precisely stated. In such cases, the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. In other words, it cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act, giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular *case, which* is to be carried out by the same *mode of procedure.*

The Legislature of New York, in the exercise of its rightful power to loose a devised estate from fetters put upon it by unforeseen causes, which were defeating the objects of the testatrix, substitutes the Court of Chancery for itself, to give relief to Clarke, to the extent that it is enacted, according to the manner of proceedings in such cases in courts of chancery. The relief wanted by Clarke was permission to sell or mortgage a part of the estate. Permission to do either, or both, is given by the acts, provided it is done with the assent of the Chancellor.

For the jurisdiction or power of the Chancellor in the matter, we must look to the third section of the Act of the 24th March, 1815, and to the Act of March 29th, 1816. Both shall be cited in terms. The first is, that no sale of any part of the said estate shall be made by Thomas B. Clarke until he shall have procured the assent of the Chancellor of this State to such sale; at the time of giving such assent, the Chancellor shall also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Thomas B. Clarke as trustee. And further, it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest being to be applied by Clarke, in such manner as he may think proper for his use and benefit, and for the maintenance and education of his children. *The Act of 1816 is, that Clarke [*538 "is authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to sell or mortgage the premises, which the Chancellor has permitted, or hereafter may permit him to sell, as trustee, under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed, for the relief of the said Thomas B. Clarke."

Such is the jurisdiction of the Chancellor under these acts, in respect to sale, mortgage of the estate, and the proceeds which might be made from either. No authority is given to convey any part or parts of the southern moiety of the said estate in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon between him and his respective creditors. None, that he might receive and take the moneys, arising from the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family.

This was not an exercise of jurisdiction, but an order out of and beyond it. The jurisdiction given by these acts to the Chancellor is suggested by Blackstone, when he says. "A private act of Parliament for the alienation of an estate is an assurance by matter of record, not depending upon the act or consent of parties themselves. But the sanction of a court of record is called in, to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another." 2 Wend. Black. 344.

It is not unworthy of remark, that the acts

of New York now under consideration were initiated and passed in strict conformity with the mode of legislative proceedings in passing private acts. There were petitions, references to committees, and leave to bring in bills. Nothing was done without the consent of the parties in being capable of consent; and the acts provide for an equivalent in money to be settled upon the infants interested, who had not a capacity to act for themselves, but who were to be concluded by what was directed to be done under the acts. 2 Wend. Black. 345.

In all this may be seen too manifestly for any denial of it, the intention of the Legislature as to the office of the Chancellor, in the execution of its acts for the relief of Clarke. The Chancellor's office, in respect to the sale of the premises, was to substantiate and preserve a perpetual testimony of the transfer of the property, as a matter of record, to whoever might be the purchaser of any part of it, in conformity with the way in which a sale of it could be made.

539*] *The beginning and the end of this affair are not unworthy of remark, or of being remembered. The Legislature is first asked to empower the Court of Chancery to appoint trustees, in the place of those named in the will of Mary Clarke, to carry out her beneficent intentions for her grandson and his children. The father, being unable to support himself and his children, asks that a sale might be made of a part of the devised premises, the rents, issues, and profits of which he was entitled to during life. An act is passed, permitting the appointment of trustees, giving a power to sell, and securing to the children an amount from the sales, thought by the Legislature to be only an adequate compensation for the sale of land in which they then had a vested estate in remainder, which would become theirs in fee-simple absolute upon the death of their father. The next year, the Legislature is told that a trustee could not be got. A supplemental act is passed, permitting Clarke himself to do all that trustees could do. Then follows another memorial for another aiding act; to permit Clarke to mortgage the premises, on account of sales not having been made, and because they could not be made for a fair price. Permission is given. After other orders, more numerous than the acts under which they were made, an order is given, permitting Clarke upon an agreed valuation between himself and his creditors, subject to the approval of a master in chancery, to convey the premises to his creditors. Further, that he may apply the money arising from the sales in payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the support of his family. Thus importunity, beginning with an intention to obtain consummate control over a part of the devised premises, triumphs in the privilege given to the children to have any surplus invested for their use, which may remain out of the sales of their estate, after the payment of their father's debts.

The best commentary upon the whole is, that its first result was a conveyance from Clarke to De Grasse, for much of the property, without the master's approval, for worthless wild tax lands in Pennsylvania or Virginia, for some money lent, and for articles furnished Clarke from De Grasse's oyster house. And De Grasse held on to the conveyance, in defiance of the declaration of the master, that he would not approve the deed for such a consideration.

It is under that conveyance, and another from De Grasse to him, that the present defendant in ejectment claims title to the premises in dispute. They do not give to him any title, either legal or equitable, against the fee-simple absolute which the *children of Thom- [*540 as B. Clarke have had in the devised estate since the death of their father.

Whenever the order of the Chancellor, permitting Clarke to convey the estate to creditors or to apply the money arising from it in payment of his debts, has been considered in the courts of New York, it has been intimated that the act did not give the Chancellor the power to give such an order. Judge Bronson, in Clarke v. Van Surlay, 15 Wend. 445, says so. The same may be gathered from the opinion of Chancellor Walworth, in Cochran v. Van Surlay, 20 Wend. 384. Mr. Senator Verplanck, in the same case, sitting in the Court for the Correction of Errors, says: "I have already intimated my strong impression, at least as at present advised, that the orders of the Chancellor were not in conformity with the acts, and that the third act still confined the Chancellor to allow no other application of the proceeds of the sale than was valid under the acts heretofore passed." "The order made under the first two acts was in contravention of the statute so far as it allowed a part of the proceeds of the sale to be applied to the payment of Clarke's former debts. Nor do I think that the words in the Act of 1816 ratified the former orders, or extended the Chancellor's powers in future orders, as to the liberty of applying the principal of the funds, of which, according to the acts heretofore on this subject, the interest only was to be expended." In this point, then, this court, in the opinion it now expresses, will not differ from the courts of New York.

But we do differ with the learned judges and Senator upon another point, common to the case before us and those cases in which they expressed their opinions. Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted on those cases. Indeed, our point of difference is not concerning a principle or rule in chancery; but as to the application of the rule in Cochran v. Van Surlay. It was said in that case, and it was the foundation of the judgment in it, that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. We concur, that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, *or whether the point ruled has arisen [*541 under the laws of nations, the practice in chancery or the municipal laws of States.

This court applied it as early as the year 1794, in the case of Glass et al. v. Sloop Betsey, 3 Dall. 7. Again, in 1808, in the case of Rose v. Himely, 4 Cranch, 241. Afterwards, in 1828, in Elliot v. Peirsol, a case of ejectment, 1 Peters, 328, 340. This is the language of the court in that case—not stronger, though, than it was in the preceding cases: "It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford County, and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, if the County Court had jurisdiction, its decision would be conclusive. But we cannot yield assent to the proposition, that the jurisdiction of the County Court could not be questioned, when its proceedings were brought collaterally before the Circuit Court. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers."

This distinction runs through all the cases on the subject.

This court announce the same principle in Wilcox v. Jackson, 13 Peters, 499, and twice since in the second and third volumes of Howard's Supreme Court Reports. Shriver's Lessee v. Lynn et al. 2 How. 59; Lessee of Hickey v. Stewart et al. 3 How. 750.

In the case in 3 Howard, the defendant in ejectment wished to protect himself by a record in a prior chancery suit between himself and the plaintiff, in which a decree had been made in favor of the former, upon which the Chancery Court had issued a habere facias possessionem, to put him in possession of the land. The record in the Circuit Court was admitted as evidence, the plaintiff objecting; and the court gave judgment for the defendant in ejectment. The case was brought here upon a writ of error. And this court said, that, as the defendant claimed property on the premises in dispute under the record from the Court of Chancery, it would inquire collaterally into the jurisdiction of that court to try the question of title. And it ruled that the court had 542*] no jurisdiction for such a *purpose; that the Circuit Court erred in permitting the record to be read to the jury as evidence in behalf of the defendant, and reversed the judgment.

The point in Cochran v. Van Surlay and in this case is, whether the Chancellor did or did not, in a case for which he had jurisdiction for certain purposes, exceed the jurisdiction given to him for the special purposes of the case. Jurisdiction may be in the court over the cause, but there may be an excess of jurisdiction asserted in its judgment. That was Shriver's case, in 2 Howard.

Then the point of inquiry now is, exactly *that which the judges in the cases in 15 and 20*

Wendell, admitted to be a very doubtful exercise of power by the Chancellor. That is, whether the order permitting Clarke to convey the property to his creditors, at a valuation to be agreed upon between them, and to apply the proceeds of sales and mortgages to the payment of his debts, was an order within the power given to him by the acts. Judge Bronson will not admit it. Chancellor Walworth puts it hypothetically, if the Chancellor has not exceeded his jurisdiction, but has merely erred upon the question whether such a sale as he ordered would eventually be for the benefit of the infants, Justice Bronson was clearly right in supposing that the decision of the Court of Chancery could not be reviewed in this collateral way. Mr. Senator Verplanck says that the order under the first two acts was in contravention of the statutes, nor does he think that the Act of 1816 extended the Chancellor's power as to the proceeds.

Upon the point of looking into the jurisdiction of a court collaterally, when a right of property is claimed under its proceedings, we must add, that it prevails in New York just as it does in the courts of England and in the courts of the United States. In Latham v. Edgerton, 9 Cowen, 227, it is said: "The principle that a record cannot be impeached by pleading is not applicable when there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced, or when any benefit is claimed under it." See, also, to the same point, Fenton v. Garlick, 8 Johns. 194; Kilbourne v. Woodworth, 5 Johns. 37; 19 Johns. 39; 6 Wend. 446. And in the case of Rogers v. Diel, 6 Hill, 415—a case of ejectment—the Chief Justice ruled that the power of a court of chancery to order the real estate of an infant is derived entirely from the statute; thus sustaining an objection collaterally to proceedings and a decree in chancery which were regular in *form, but [*543 void in fact, on account of the Chancellor's not having jurisdiction or authority to make such a decree.

The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into. The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal. Attorney-General v. Lord Hotham, Turn. & Russ. 219.

And such is the rule in New York, as has been shown by the citation of cases from the reports of that State. But it has been argued, that the rule will not apply in the cases now in hand, because it has been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors in payment of his debts.

It is difficult for us to admit that the cases of Clarke v. Van Surlay, in 15 Wendell, and Cochran v. Van Surlay, in 20 Wendell, were meant to decide that point, when each judge whose opinion has been reported in those cases expresses an opinion amounting almost to a denial that the Chancellor had jurisdiction to order or permit a sale in payment of Clarke's debts. But admit that the New York cases are otherwise, we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the States upon State statutes relative to real property as a part of local law, comprehends private statutes or statutes giving special jurisdiction to a State court for the alienation of private estates. It has never been extended to private acts relating to particular persons, for the reason, that whatever a court in a State may do in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law of a like kind, but then the utmost extension of it would be, that there would be two judgments in two private cases, which only show more plainly that no local law had been made by both.

The case put before us, upon several of the points certified, is this: The State of New York passes certain acts for the relief of Thomas B. Clarke, in relation to a devise of 544*] land, and *directs that the acts shall be carried into execution by the Chancellor of the State. In the course of the proceedings for that purpose, he orders that the trustee, Clarke, may sell or mortgage particular portions of the land, and permits him to convey parts of it in payment of any debt or debts, upon a valuation to be agreed on between himself and his creditors; and that Clarke may apply the proceeds of sales to the payment of his debts.

The defendant in this action says he bought from De Grasse. It is proved that De Grasse was a creditor of Clarke, and that the consideration for Clarke's conveyance to him, except the wild lands, was the amount that Clarke owed to him. Then, in order to sustain Clarke's conveyance to De Grasse, he introduces the acts for the relief of Clarke, and the orders of the Chancellor upon them.

This evidence raises the question, whether or not the Chancellor had jurisdiction to give an order, permitting Clarke to convey any part of the property in payment of a debt. After the most careful perusal of the acts and orders, we have concluded that the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse nor his alienee, Berry, can derive from the order, or the conveyance by Clarke to De Grasse, any title to the premises in dispute. This conclusion substantially answers the first four points certified; but answers will be given in more precise form hereafter.

We now proceed to the other points certified.

Upon the first of them, relating to the premises having been parted with by Clarke to De Grasse, upon a consideration other than cash, we remark, that "sale" is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money—which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Max, ch. 42; Shep. Touch. 244. No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted.

In the acts for the relief of Clarke, "sale" is the word used and frequently repeated. No other term, in reference to the power given to sell a part of the devised premises, is used. The Chancellor's order is, that Clarke is permitted to sell. No words are used in the acts to qualify the term "sale." There is not anything to raise a presumption that Clarke was permitted to sell for anything else than cash. Even the debts of Clarke, *which the [*545 Chancellor thought he had the jurisdiction to order the payment of, are directed to be paid out of the proceeds of the sale.

We think, therefore, that the deed executed by Clarke to De Grasse, being upon a consideration other than for cash, is not valid to pass the premises in dispute to De Grasse, or to his alienees.

Another point certified is, whether Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse. If Clarke could not convey the premises for which he was the trustee to a creditor in payment of a debt due when the order of the Chancellor was given, his having united with the master in chancery in mortgaging the premises in fee to Simmons, as a security for a debt, could not, from any transfer of it by the mortgagee, alter its character as a security for a debt, so as to permit the assignee, who by taking an assignment of the mortgage became a creditor, or any other person who became his assignee, to receive from Clarke a conveyance of the premises in discharge of the mortgage. Simmons was a creditor of Clarke. The assignee of his claim could only be a creditor in his place, having no other right to be paid by a conveyance of the premises than the original creditor had. But in truth the mortgage was discharged, and being so, Clarke was replaced in his trustee relation to the premises precisely as he stood before the mortgage was made. He could not then, because the land had been mortgaged in fee to Simmons, have any authority to sell and convey the premises to De Grasse, for the consideration of the debt due by him to De Grasse. But if by the question it was meant that, because Clarke had mortgaged to Simmons, he could not mortgage or sell again after a release from the mortgagee, then we conclude that Clarke's having previously mortgaged the premises in fee to Simmons, did not prevent him, after a release from the mortgagee, from selling and mortgaging the premises again, provided the same was not done in payment of a debt, or as security for a debt.

The eighth point may be dismissed with two observations. If the conveyance from Clarke to De Grasse did not give to him a title, and we have said it did not, De Grasse could not convey a title in the premises to a third person, though value was received by him from the

latter. Besides, in this case, the paper under which De Grasse claims has recitals in it, which would exclude any person buying from him from saying that he had not notice enough to put him upon an inquiry into the title of De Grasse.

546*] *We are now brought to the consideration of the point, whether the deed to De Grasse is valid, it having no certificate indorsed upon it that it was approved by a master in chancery. It involves what has been the practice in courts of equity, which, from long standing, habitual use, and uniform judicial acquiescence, has become law—law in England, law in New York, law for the courts of equity of the United States, and law in every State of the Union, except as it may have been modified by the legislation of the States.

The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the master's approval of the sale, and is one step towards a purchaser's getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. That report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation nisi is ordered by the court—to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered.

We have been thus particular, for the purpose of showing the offices of the master in relation to a sale, and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate, which he may have bargained to buy. We do not mean to say that such cautionary proceedings upon sales under decrees and orders in chancery may not be dispensed with, by a special order of the Chancellor to pretermit them, but that such are the proceedings, when no special order has been given. Nor do we mean to have it implied that a special order for the master's approval of the sale was not given in this case.

The proviso in the order of the 15th March, 1817, is: "Provided, nevertheless, that every 547*] sale, and mortgage, and conveyance *in satisfaction, that may be made by the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage which shall be made in the premises."

Our interpretation of the order is, that the approval of the master, and the certificate of it, are not confined to a conveyance in satisfaction of debt, but that the Chancellor meant that the approval and certificate should be given and be indorsed upon every deed of sale and mortgage, as well as upon conveyances in satisfaction of debts.

It was also argued, that the sale to De Grasse was a judicial sale. Unless a legal term of definite and unmistakable certainty in all the past application of it shall be made to comprehend a transaction which it has never included before, the sale by Clarke to De Grasse was not a judicial sale. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.

The sale by Clarke to De Grasse was an attempt by both of them to evade the order of the Chancellor, that every sale, etc., made by Clarke, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And in no event could a sale by Clarke, in conformity with the order, have been a judicial sale, but simply a sale by a private individual authorized to make it under acts passed for his relief, and assented to by the Chancellor, for the purpose of ultimately substantiating and verifying by a court of record the transfer of the property. It was a sale made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them, and done by one of them, who had only in a particular way the assent of the Chancellor to sell.

Now if, in the instance of Clarke's conveyance to De Grasse, none of the usual cautions have been taken by the latter to make the conveyance complete—which, for the sake of the present point, we are only supposing might have been done, subject to our conclusion that Clarke could not have conveyed the premises to him as a creditor—whose fault is it that they were not taken? and how much more is De Grasse's fault aggravated from the testimony in the cause, which proves that he was told by the master, Mr. Hamilton, from the start of his buying or meaning to buy from Clarke, that he would not approve the sale, and make such a certificate of it, upon the paper *given[*548 to him by Clarke, upon such a consideration for the property.

We find the answer to our inquiries in the long experience and practice in chancery. In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order. Colclough v. Sterum, 3 Bligh. 181; Lutwiche v. Winford, 2 Bro. C. C. 251. If he takes a title under an imperfect sale, he must abide the consequence.

In this instance there was a perverse disreward by De Grasse of the order of the Chancellor and the caution of the master. His conduct puts it out of his power, or anyone claiming under him, to complain, if Clarke's conveyance shall be declared to be invalid, on account of the master's disapproval of the sale and

his refusal to put a certificate of approval of it upon the deed to De Grasse.

Mr. Hamilton's (the master) testimony in the case is, that Clarke and De Grasse came to him to approve the deed which it is his impression had been filled up by Clarke, and that, upon ascertaining from them the consideration, he refused to do so. The deed, too, recites a consideration of two thousand dollars, and it is proved that the consideration was, in fact, wild, worthless tax lands in Virginia or Pennsylvania, an account for articles furnished to Clarke by De Grasse, and some items of money lent. The witness says, both Clarke and De Grasse came together more than once to his office on the subject, and that he was besought by them frequently to approve the deed; that he would not do so. It is the case of an anxious creditor, holding on to what he could get from an insolvent and prodigal debtor, in spite of what he knew to be the only terms upon which the debtor could convey.

We think that the sale by Clarke was a nullity without such approval by the master, to whom the execution of the order was confided by the Chancellor. "Looking merely to the parties, it is a nullity, because it wants the assent of the Chancellor, through the officer whom he substitutes for himself to give it. Looking to the conveyance, it is void for the want of the performance of that condition precedent which was made essential, not merely to the commencement of the estate, but to the very creation of the power of sale."

It is under that conveyance, and another from De Grasse to him, that the defendant in ejectment claims title to the premises in dispute. They do not give to him any title, either legal or equitable.

549*] *We answer, then, to the points certified to this court for its decision:

To the first point, we rule that the act of the Legislature, stated in the case, devested the estate of the trustees under the devise in the will of Mary Clarke, but did not vest the whole estate in fee, or any part of it, in Thomas B. Clarke.

To the second point, we rule that the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, and that the trustee was not vested with an absolute power of alienation, but only with the power to sell with the assent of the Chancellor, subject, in all that the trustee might do, by way of sale or otherwise, concerning the premises, to re-examination and account in equity.

To the third point, we rule that so much of the order set forth in the case, as having been made by the Chancellor, which permitted Thomas B. Clarke to convey any part or parts of the southern moiety of the estate, or any other part of the estate, in payment and satisfaction of any debt or debts due and owing from Thomas B. Clarke, upon a valuation to be agreed between himself and his respective creditors, provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of the court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises, or which authorized Thomas B. Clarke to receive and take the moneys arising from the premises and apply the same to the payment of his debts, and to invest the surplus in such manner as he may deem proper to yield an income for the maintenance and support of his family—was not authorized or in conformity to the acts of the Legislature, as they are set forth in the record. That these orders, however, are to be regarded as the acts of a court of chancery, exercising a special jurisdiction under private acts, which did not give to the Chancellor jurisdiction to pass the orders as they have been stated in this answer to the third point.

To the fourth point, we rule that the Chancellor had authority under the acts to assent to sales and conveyances of the estate by the trustees, but not to any sale or conveyance, or any other consideration than for cash paid on said conveyance.

To the fifth point, we rule that the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, is not valid, it having been made for a consideration other than for cash paid on the purchase.

To the sixth point, we rule that, if the deed to De Grasse *had been otherwise valid, [*550 which we have said was not, it would not be valid without having a certificate indorsed thereon, that it was approved by Mr. Hamilton, the master in chancery, to whom the execution of the order was confided by the Chancellor.

To the seventh point, we rule that the mortgage in fee of the premises by Clarke to Simmons, did not so exhaust the power as trustee, that he might not, after a release from the mortgagee, sell or mortgage the property again; but it was not in the trustee's power to sell to De Grasse for a debt.

To the eighth point, we rule that the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, would not give to his grantee, or the grantee's assigns, a valid title against the plaintiffs in ejectment.

Mr. Chief Justice Taney dissented from the opinion of the court in this case, and also in the subsequent cases of Williamson and Wife v. The Irish Presbyterian Congregation of New York, and of Charles A. Williamson and Wife, Rupert J. Cochran and Wife, and Bayard Clarke v. George Ball; and concurred with Mr. Justice Nelson.

Mr. Justice Catron also dissented in the above enumerated cases, and concurred with the opinion of Mr. Justice Nelson.

Mr. Justice Nelson:

I am unable to concur in the judgment of a majority of the court in this case, and shall, therefore, proceed to state the grounds of that dissent, with as much brevity as the nature and importance of the questions involved will admit.

I shall confine the examination to those grounds which I regard as decisive in the determination of these questions, without stopping to discuss several other points made upon the argument, and which have a more remote bearing upon the case.

The will of Mary Clarke, made and published April 6th, 1802, lies at the foundation of this

controversy; and it is necessary, therefore, to recur for a moment to its provisions.

She devised to three trustees and their heirs, a part of her farm at Greenwich, called Chelsea, then situate in the vicinity of the city of New York, now a part of it, embracing some forty acres of land, together with a dwelling house in town, in trust, to receive the rents and profits, and pay the same to Thomas B. Clarke, a grandson, during his life; and after his decease, to convey the estate to his children living at his death; and if he should leave no children, then, in trust, to convey the same to Clement C. Moore, and his heirs.

551*] *Thomas B. Clarke, the tenant for life, was married in 1802, and in 1814 had a family of six children, the eldest eleven years of age; and on the 2d of March of that year, applied to the Legislature of New York for relief, on the ground that the property devised was, in its then condition, nearly unproductive, and incapable of being improved so as to yield an adequate income for the maintenance and support of himself and family.

The trustees and C. C. Moore joined in the application.

On the 1st of April, 1814, an act was passed for his relief, authorizing the Court of Chancery to appoint trustees in the place of those named in the will, and providing for a sale of a moiety of the estate by the trustees, under the direction of the Chancellor; the proceeds to be invested in stocks or real security, upon the trusts in the will, and the income to be applied to the maintenance and support of the family of Clarke, and the education of his children. Nothing was done under this act.

On the 21st of February, 1815, Clement C. Moore, the ultimate remainderman under the will, released and quitclaimed all his interest in the estate of Clarke; and on a second application to the Legislature for relief, a supplemental act was passed, on the 24th of March, 1815, reciting in the preamble the release, and substituting Clarke as the trustee of the estate in place of those provided for in the previous act; and authorizing a sale by the trustee of a moiety of the estate, with the assent of the Chancellor, and providing for the investment of so much of the proceeds in Clarke, as trustee, as the Chancellor should direct; the income of the investment to be applied to the maintenance and support of the family, as in the previous act.

On an application to the Chancellor, under this and the previous act, on the 28th of June, 1815, an order of reference to one of the masters in chancery was made, directing him to inquire into the debts of Clarke, distinguishing between those contracted for the maintenance of his family and the education of his children; and into the then condition of the estate devised under the will, and the means possessed by Clarke to maintain and support his family, other than from the rents and profits of the estate; which report was made accordingly. And on the coming in and filing of the same, the Chancellor, on the 3d of July, ordered a sale of a moiety of the estate, together with the house and lot in town; and that so much of the proceeds as might be necessary for the purpose be applied, under the direction of one of the masters of the court, to the payment and discharge of the debts *then owing* by Clarke, and to be contracted for the necessary purposes of the family, to be proved before the said masters; and the residue to be invested and the income applied as therein provided by the order.

*Nothing was done under this order [*552 except the sale of a few lots, the sales having been superseded by the master for want of bidders, at the request of the trustee, to prevent the sacrifice of the property. And on application to the Legislature, another act was passed, on the 29th of March, 1816, authorizing Clarke, as trustee, under the order already granted by the Chancellor, or any subsequent orders that might be granted, either to mortgage or sell the premises which the Chancellor had permitted, or might permit, him to sell; and to apply the proceeds to the purposes required, or that might be required, by the chancellor, under the previous acts of the Legislature.

On the 15th of March, 1816, on an application, the Chancellor ordered that Clarke be authorized to mortgage or sell the moiety of the estate, as provided for in the several acts, as might be deemed most beneficial to all parties concerned; and also to convey any part of it in payment and satisfaction of any debt owing by him, upon a valuation to be agreed on between him and his creditors, provided that every sale, and mortgage, and conveyance in satisfaction, that may be made by him, shall be approved by one of the masters of the court; and that the certificate of such approval be indorsed on such deed or mortgage that may be made in the premises. And further, that he apply the proceeds to the payment of his debts, and invest the surplus in such manner as he may deem proper to yield an income for the support and maintenance of his family.

On the 2d of August, 1821, Clarke, under this order of the court, sold and conveyed the lot in question, among others, to George De Grasse, for the consideration on the face of the deed of $2,000. No approval of the master appeared to have been indorsed on the deed.

The defendant holds through intermediate conveyances from De Grasse, and is admitted to be a bona fide purchaser.

I have thus stated the material facts out of which the important questions involved in this case arise; and I have done so for the reason that, in my judgment, the statement itself presents a history of legislative and judicial proceedings, which demonstrate that the legal title to the premises in controversy is in the defendant, upon well established principles of law—a title derived under a judicial sale, made in pursuance of an order or judgment of one of the highest courts in a State, in the exercise of its general jurisdiction.

This plain proposition is manifest on the face of the record. Every order made by Chancellor Kent was made in his court according to the established forms of proceeding, and rules of the court.

*The Chancellor had previously de- [*553 termined (In the Matter of Bostwick, 4 Johns. Ch. 100), that a proceeding of this character could be properly instituted by petition instead of by bill, as he found it to be in conformity with the established practice of the Court of Chancery in England.

The practice there had not been uniform, depending somewhat upon the amount of the es-

tate; and a distinction had been made, at one time, between real and personal estate; but the later authorities had generally concurred in allowing the institution of the proceeding by petition. 2 Story's Eq. sec. 1354, p. 582, and cases there referred to; Macpherson on Infants, ch. 22, sec. 1, and cases.

In every instance, the application took the usual course of a reference to one of the masters of the court, directing him to inquire into the truth of the allegations in the petition, and report thereon; and upon the coming in and filing of the report, the order was entered.

All the powers and machinery of the court were used in conducting the proceedings; and which, while they facilitate the orderly despatch of business, at the same time enable the parties to present their case in the fullest and most authentic form, for the judgment of the court.

Even if a bill had been filed in this case—and we have seen that it might have been, in which event, it would hardly have been pretended the order or decree of the court could have been questioned collaterally—the forms of the proceeding could not have been more strictly observed. Indeed, the petition in the particular case is nothing more than a substitute for the bill, as affording a more speedy and economical mode of instituting the proceedings.

Originally it was supposed that a bill was indispensable (Fonbl. Eq. Book 2, part 2, ch. 2, sec. 1, note d), as it still is in England, where the estate of the infant is large, or it is doubtful as to the fund. 15 Ves. 445; Macpherson on Infants, p. 214, and cases.

Any party interested in the order had a right to appeal from the decision of the Chancellor to the Court for the Correction of Errors, as appeals may be taken from interlocutory, as well as final decrees, according to the laws and practice in New York.

That an appeal might have been taken in the case is the established practice, and would be doubted by no lawyer there; and which, of itself, would seem to be decisive of the nature and character of the jurisdiction exercised by the Chancellor.

Being, therefore, a judicial sale under the judgment of one of the highest courts of the State, the principle is fundamental, that the 554*] *regularity of the proceedings cannot be inquired into in this collateral way.

The general impression of all the cases on this head, says Lord Redesdale, is, that the purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has on investigation properly decreed a sale. 1 Sch. & Lef. 397. And says Mr. Justice Thompson, in delivering the opinion of this court in Thompson v. Tolmie, 2 Peters, 168: "If the purchaser was responsible for the mistakes of the court in point of fact, after it had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser in not bound to look farther back than the order of the court. He is not to see whether the court was mistaken in the facts."

The defendant in that case held the title under a judicial sale, ordered by the court in a case of partition, where the commissioners had reported that partition could not be made without loss. The suit was brought by the heirs, who set up, as invalidating the title of the defendant, that neither of the children of the intestate was of age at the time of the sale. The statute expressly forbade it, until the eldest became of age. The other ground was, that the sale had been confirmed only conditionally. The court held the parties concluded by the order and sale.

I shall not pursue the examination of this branch of the case farther, as the principle upon which it rests has become incorporated into the very elements of the law. I have referred to these two cases, simply to illustrate the strength and force of the principle, in protecting the title of a bona fide purchaser, standing in the relation of the present defendant.

But it has been argued, that Chancellor Kent, while sitting in his court, administering the law under these acts of the Legislature of New York, has misconstrued or misapprehended the nature of his jurisdiction; and that, instead of sitting as a court, he was acting in the subordinate character of a commissioner, or as an individual outside of his court; that it was an extraordinary power, conferred upon him by a special statute, prescribing the course of proceeding; and that any departure therefrom, or error in the proceedings, rendered the order null and void, and of course all acts done under it.

It was even intimated, though not argued, that the statutes themselves were unconstitutional; that it was not competent for the Legislature to authorize the sale of the real estate of infants for their maintenance and support, or for their education or advancement in life.

*We suppose this power will be [*555 found to exist in every civilized government, that acknowledges a superintending and protecting power over those of its citizens or subjects who are disabled through infancy or infirmity from taking care of themselves; and that, where they possess the means of themselves, they will be applied, under the direction of the proper authority, to their support and nourishment.

No one doubts the power of the government to take the property of the citizen to support the paupers of the State; and, surely, it can hardly be regarded as a very great stretch of power to provide for the application of it to the maintenance and support of the owner or proprietor himself, or even to the support of members of the same family.

But I shall not go into this question; for whatever may be the objections to the exercise of the legislative powers, we are not aware of any on the ground of repugnancy to the Constitution of the United States, or, if made, that there is any foundation for it; and as to the State of New York, where the question alone must be determined, no doubt is entertained there in respect to it, by any department of the government.

But to recur to the jurisdiction of the Chancellor.

The Court of Chancery possesses an inherent jurisdiction, which extends to the care of the persons of infants so far as is necessary for their protection and education; and also to the care of their property, real and personal, for its due management, and preservation, and proper application for their maintenance.

The court is the general guardian, and, on the institution of proceedings therein involving rights of person or property concerning them, they are regarded as wards of the court, and as under its special cognizance and protection; and no act can be done affecting either person or property, or the condition of infants, except under the express or implied direction of the court itself; and every act done without such direction is treated as a violation of the authority of the court, and the offending party deemed guilty of a contempt, and treated accordingly. 2 Story's Eq. secs. 1341, 1352, 1353; 3 Johns. Ch. 49; 4 Ib. 378; 2 Ib. 542; 6 Paige, 391, 366; 10 Ves. 52; Macpherson on the Law of Infants, p. 103, App'x, 1; Hughes v. Science, 3 Atk. 601, S. C.

If the father is not able to maintain his children, the court will order maintenance out of their own estate; and the inability need not depend upon insolvency, but inability, from limited means, to give the child an education suitable to the fortune possessed or expected. 556*] Buckworth v. Buckworth, 1 Cox, *80; Jervoise v. Silk, Coop. 52. The allowance will be made, although the devise or settlement under which the property is held contains no direction for maintenance (Ibid.), but even directs the income to accumulate. 5 Ves. 194; 195, note, 197, note; 10 Ib. 44; 4 Sim. 132; Macpherson, ch. 21, sec. 2, p. 223.

It is also settled, that where there are legacies to a class of children, for whom it would be beneficial that maintenance should be allowed, though the will does not authorize it, but directs an accumulation of the income, and the principal, with the accumulation, to be paid over at twenty-one, with survivorship in case any should die under age, the court will direct maintenance (11 Ves. 606; 12 Ib. 204; 2 Swanst. 436); but if there is a gift over, it will not be allowed without the consent of the ultimate devisee. 14 Ves. 202; 5 Ib. 195, note; Ward on Legacies, 303; Macpherson, pp. 232, 233, 234.

So the court will break in upon the principal, where the income is insufficient for maintenance and education (1 Jac. & Walk. 253; 1 Russ & Mylne, 575, 499); and will break in upon it for past payments (2 Vern. 137; 2 P. Wms. 23); and where the father is unable to maintain his children, and has contracted debts for this purpose, or for their education, the court will direct a re-imbursement out of the children's estate (6 Ves. 424, 454; 1 Bro. C. C. 387; Macpherson, sec. 9, p. 246); and will, if the father or mother is in narrow circumstances, in fixing the allowance, have regard to them, increasing it for the benefit of the family. 1 Ves. 160; 2 Bro. C. C. 231; 1 Beav. 202; 1 Cox, 179.

The management and disposition of the estates of infants, which I have thus referred to, and briefly stated, with the authorities, are among the mass of powers upon this subject which belong to the original and inherent jurisdiction of the Court of Chancery. They relate to their personal, and the income of their real, estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the Legislature. It will be seen, therefore, that the *only additional* authority conferred upon the Chancellor, by the acts of the Legislature in question, was the power to direct the sale of the real estate—to convert it into personalty for the purposes mentioned. It was but an enlargement, in this respect, of the existing jurisdiction of the court; placing the real estate, for the purpose of maintenance and education, upon the same footing as the personalty. With this exception, every power conferred or exercised under the acts in question, in the management and application of the fund, as we have seen, belonged inherently to its general jurisdiction; and its exercise in the particular case was as essential for the proper management and *preservation, and applica- [*557 tion, as in any other that might come before the court.

We can hardly suppose that it was the intention of the Legislature to confer authority upon the Chancellor in one capacity to sell, and in another to manage and apply the proceeds for the benefit of the children. And yet such must be the conclusion, unless we suppose it was intended that the fund itself should be administered out of court, and under the direction of the Chancellor as a commissioner.

I must be permitted, therefore, to think, that Chancellor Kent, familiar to his mind as were the powers and duties belonging to his court over the estates of infants, as well as in respect to every other branch of equity jurisprudence, did not mistake or misapprehend the nature of the powers and duties enjoined upon him under the acts in question. And that he might well conclude, that the authority to sell the real estate of the children, for their maintenance and education, was but an enlargement of his general jurisdiction in the management and disposition of their property for the purposes mentioned. Indeed, the very objects of the sale pointed directly to this jurisdiction. How apply the fund for maintenance and education—as commissioner, or chancellor? Certainly, he could not doubt as to the intent or objects of the acts in this respect. It was a fund to be brought into the court, and the children were to become wards of the court, to be cherished, and protected by its powers.

In addition to the judgment of Chancellor Kent himself, we have also the judgments of the two highest courts in New York, in the case of Clarke v. Van Surlay, 15 Wend. 436, and Cochran v. The Same, 20 Wend. 365, S. C.

That was a suit involving the same title, brought by one of the heirs of Thomas B. Clarke, and depending upon the same evidence. It was first decided in the Supreme Court of that State in 1836, and in the Court for the Correction of Errors in 1838.

It was determined by both courts, that the title of the purchaser was valid, on the ground that he held under a judicial sale directed by the Chancellor in the exercise of his general jurisdiction; and that, having jurisdiction of the subject matters, if any error was committed, either in his construction of the acts of the Legislature or in the application of the funds, it was not inquirable into in a court of law. The order was conclusive, till set aside, upon all the parties.

No member of either court that expressed an opinion entertained a doubt about the nature of the jurisdiction. The judgment *had [*558

the concurrence of Chancellor Walworth, his learned successor, who has presided in that court with distinguished ability for the last twenty years, and is familiar with its organization and powers. If it is possible, therefore, for a judicial question involving the construction of State laws to be settled by learning or authority in its own courts, it would seem that the one before us has been.

But there is another view of this branch of the case, which, in my judgment, is equally decisive of the question; and much more important, on account of the principle involved. Where are we to look, for the purpose of ascertaining the jurisdiction of the Court of Chancery of the State of New York? To the judgment of this court, or to the laws and decisions of the courts of the State?

It should be recollected, that, in the trial of titles to real property held or claimed under the laws of the State, the federal courts sitting in the State are administering those laws, the same as the State courts, and can administer no other. They are obliged to adopt the local law, not only because the titles are founded upon it, but because these courts have no system of jurisprudence of their own to be administered, except where the title is affected by the Constitution of the United States, or by acts of Congress.

It has been held, accordingly, that we are to look to the local laws for the rule of decision, as ascertained by the decisions of the State courts, whether these decisions are grounded on the construction of statutes, or form a part of the unwritten law of the State. The court adopts the State decisions, because they settle the law applicable to the case. Such a course is deemed indispensable in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the States, and of the United States, would be productive of the greatest mischief and confusion—a perpetual conflict of decision and of jurisdiction.

In construing the statutes of a State on which and titles depend, say the court, infinite mischief would ensue should this court observe a different rule from that which has been established in the State; and whether these rules of land titles grow out of the statutes of a State, or principles of the common law, adopted and applied to such titles, can make no difference; as there is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. This court has repeatedly said, speaking of the construction of statutes, that it would be governed by the State construction where it is settled, and can be ascertained, es- [*559*
pecially *where the title to lands is in question. 12 Wheat. 167, 168; 6 Peters. 291. In the case of Nesmith et al. v. Sheldon et al. 7 Howard, 818, decided at the last term, involving a question upon the statutes of Michigan, the court say: "It is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own constitution and statutes, when that construction has been settled by the decision of its highest judicial tribunal."

Now, what can be more peculiarly a matter of local law, and to be ascertained and settled by the State tribunals, than the character and extent of the jurisdiction of their courts, and the effect to be given to their own orders and judgments.

I suppose it will not be denied but that each State has the right to prescribe the jurisdiction of her courts, either by the acts of her Legislature, or as expounded by the courts themselves; and that, if that jurisdiction is settled by a long course of decision, or, in respect to the particular case, by the authority which has a right to settle it, this court, professing to administer the laws of the State as they find them, and acting upon their own principle, as well as the principle of the thirty-fourth section of the Judiciary Act, cannot disregard the jurisdiction as thus settled.

It is no answer to this view to say, that the question here is the construction of a private statute of New York. That assumes the very point in controversy. The point is, Can this court reach the question involving the construction of the statute? That depends upon the prior one, whether Chancellor Kent acted in the exercise of the jurisdiction of his court in expounding the statute. If he did, the question upon its construction is concluded; and whether the construction be right or wrong is a matter not inquirable into in this collateral way.

The case, therefore, comes down to a question of jurisdiction—a question which Chancellor Kent himself settled in this very case in 1815, which settlement has since been confirmed by the highest tribunals in the State, and about which no one of them there could be brought to entertain a doubt.

I must be permitted to think, therefore, that, looking at the question as an original one, Chancellor Kent was right in the jurisdiction that he exercised in administering the acts in question; and that, whether so or not, it belonged to the courts of that State to expound and settle the limit of his jurisdiction; and that, when so settled, it becomes a rule of decision for the federal courts sitting in the State, and administering her laws; and that therefore the order of the Chancellor in question was conclusive upon the matter before him, and is not inquirable into collaterally in a court of law.

*But were we compelled to go be- [*560
hind the order, and to re-examine the case, as upon an appeal, we perceive no difficulty in sustaining it.

When Clarke applied to the Legislature, in 1815, for relief, he was the owner of the life estate, and of the ultimate remainder in the premises, the residue belonging to the children; and for this reason, doubtless, the act which was passed at that time left it discretionary with the Chancellor to determine the portion of the proceeds that should belong to Clarke, individually, and also as trustee for the children.

And under this provision of the law, before any order was made for the disposition of the proceeds, the court ordered a reference to the master to ascertain the amount of his debts, and what portion of them had been contracted for the maintenance of the family and education of the children.

The interest of Clarke in the proceeds was properly applicable to his own debts, as well as to the debts contracted for the support of the family; and after the coming in of the

report which exhibited the amount of the debts, and for what purposes contracted, the order for the application of the proceeds was made. This is the order referred to and confirmed by the Act of 1816.

It, in effect, applied what was regarded by the Chancellor as the interest of Clarke in them to the payment of his own debts, the amount of that interest, as we have seen, having been left to be ascertained by him in the exercise of his judgment in the matters. That Clarke had a considerable interest is apparent, having united in himself two portions of the estate. That the Chancellor erred, in the exercise of his judgment in dividing the proceeds of the estate between Clarke and his children, according to their respective interests, does not appear, nor can it be shown from anything to be found in the record; much less can a want of power to act, or an excess of power in acting, be predicated of the exercise of any such discretionary authority.

Then, as to the application of a portion of the fund belonging to the children for the maintenance of the family, as well as their own education.

From the cases already referred to on that subject, we have seen that this is within the acknowledged powers of the Court of Chancery and of which it is in the habitual exercise, in cases where the parents are in narrow circumstances, and unable to furnish the means of support. The application is made for the benefit of the children, that they may have the comforts and enjoyments of a home, with all the wholesome and endearing influences of the family association.

561*] *Even beyond this, small annuities have been settled upon the father and the mother, in destitute circumstances, out of the estates of the infant children.

It was a knowledge of these principles, which were familiar to the mind of Chancellor Kent, as was the whole system of the powers and duties of his court over the persons and estates of infants, that dictated the granting of the order in question; and, in my judgment, so far as the power and authority of the court was concerned, which is the question here, it requires but an application of these principles to the facts before him to enable us to see that it was well warranted.

Again, it is said that the children were not parties to the proceedings. The same may be said concerning the exercise of all the powers of the Court of Chancery over the estates of infants.

The answer is, the proceeding is not an adversary suit. The estate is regarded as a fund in court, and the infants as wards of the court; the Chancellor himself, as the general guardian, exerting his great power, either inherent or vested by positive law, over a class of persons specially committed to his care, for their own benefit, for the proper management of their estates, real and personal, for their maintenance and support, for their education and advancement in life.

It is a proceeding in rem, the property itself in custodia legis; and if a guardian had been appointed, it would have been but a desecration of the power of the court, which in the proceeding before us was exercised by the court itself, through the agency and instrumentality of its officers.

The rule in respect to adversary suits against infants, requiring the appointment of a guardian, pendente lite, has no sort of application to the proceedings in question.

It has also been argued, that the order of the Chancellor, authorizing Clarke to sell and convey the premises in question, required a certificate of the approval of one of the masters of the court to be indorsed on the deed; and that no such certificate has been given or indorsed thereon.

The deed to De Grasse was executed on the 2d of August, 1821; and on the next day it appears that the master was a witness to prove the execution before the commissioner who took the acknowledgment.

It further appears, that on the same day, the master, having had the life estate of Clarke in the premises previously conveyed to him in trust, in order to complete the title, indorsed on the back of the deed, and executed under his hand and seal, a release of this life interest to the purchaser, and duly acknowledged the same, that it might be recorded in the [*562 register's office along with the deed. This was done, as the master recites in the release, at the request of the trustee, and for the purpose of completing the title.

One can hardly conceive of a more effectual approval than is to be derived from these acts of the master; for without the release of the life estate, which he held in trust, the title could not have been perfected, and the sale must have fallen through. The release enabled the trustee to complete it, and invest De Grasse, the purchaser, with the fee.

But the courts of New York in the case already referred to have held, that, upon the true construction of the order, the approval of the master was not necessary, as the direction in that respect was limited to conveyances by the trustee in satisfaction of debts. Even if this construction should be regarded as doubtful, or that requiring the approval was thought to be the better one, inasmuch as this construction has been given by the highest court of a State upon this very title, in a case in which its judgment was final, the habitual deference and respect conceded by this court to the decisions of the State courts upon their own statutes and orders of their courts, would seem to render it conclusive.

This view was directly affirmed, and acted on, in the case of The Bank of Hamilton v. Dudley's Lessee, 2 Peters, 492. That, as is the case before us, was an action of ejectment by the heir to recover a tract of land situate in the city of Cincinnati. The defendant held under a deed made by administrators, upon a sale under an order of the Court of Common Pleas for the County of Hamilton, which possessed the powers of an orphans' court.

The title depended upon the effect to be given to the order under which the sale took place. It was made at the August term, and entered as of the May term preceding. It was alleged that, though granted at the May term, the clerk had omitted to enter it. The law conferring the powers of the Orphans' Court upon the Common Pleas had been repealed between the May and August terms; and the question was

whether the order was a nullity, or valid until set aside.

The sale had taken place at an early day, and the property had become of great value. The case was most elaborately argued. The action of this court, independently of the principle decided in the case, is worthy of remark.

Chief Justice Marshall, in delivering the opinion, observed, that the case had been argued at the last term, on the validity of the deed made by the administrators; but as the question 563*] was *one of great interest, on which many titles depended, and which was to be decided upon the statutes of Ohio, and as the court was informed that the case was depending before the highest tribunal of the State, the case was held under advisement.

The State court held, that the order of the Court of Common Pleas, entered at the August term as of the preceding May term, was coram non judice, and void; and that the deed under which the defendant derived title was, of course, invalid.

This court held, that the judgment of the Supreme Court of Ohio should govern the case. I will give its language.

"The power of the inferior courts of a State," said the Chief Justice, "to make an order at one term as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the revising tribunal of the State, that a majority consider that judgment as authority, and we are all disposed to conform to it."

I will simply add, that the Court for the Correction of Errors in New York possessed a revising power in all cases over the orders and decrees of the Chancellor, and that that court has held, upon this very title, not only that the order in question was an order entered by him acting as a court, but, in expounding it, that the deed of conveyance given to De Grasse under it did not require the approval of a master. Further comment to show the identity of the two cases would be superfluous.

But I forbear to pursue this branch of the case farther.

The validity of the execution of the deed to De Grasse by the trustee, as it respects the alleged want of approval, stands—

1. Upon the acts of the master in the execution of it, as a substantial approval within the meaning of the order; and,

2. Upon the decision of the highest judicial tribunal of the State, whose laws we are administering, that, upon a fair interpretation of the terms of the order, an approval was not essential.

It has also been argued, that, according to the true construction of the order, the sale should have been for cash, and that here it was otherwise.

But this is an action at law; and the deed on the face of it shows a cash consideration of $2,000. The nature of the consideration was not inquirable into, and should have been excluded at the trial. If the complainant had sought to invalidate the proceedings on that ground, he should have gone into a court of equity, where the question could have been appropriately ex-564*] amined, *and justice done to all the parties. That it was not examinable in a court of law is too plain for argument. The recital of the considerations can no more be varied by parol proof than any other part of the deed. 2 Phillips on Ev. 353, 354, 2 C. & H. note 289, and cases there cited; 1 Ib. note 228, p. 384; 7 Johns. 341; 8 Cow. 290; 2 Denio, 336; 4 N. H. 229; 1 J. J. Marsh. 388, 390.

I have thus gone over the several grounds relied on for the purpose of impeaching the title of the defendant to the premises in question; and, although in the minority in the judgment given, have done so, not so much on account of the magnitude of the interest depending, which is great of itself, as of the importance of the principle involved; and upon the application of which the judgment has been arrived at.

Notwithstanding several questions have been brought within the range of the discussion, there are but two, in reality, involved in the determination of the case. 1. The effect to be given to the order of Chancellor Kent made on the 15th of March, 1817; and 2. The execution of the conveyance by Clarke, the trustee, under this order.

If the order was made by the Chancellor in the exercise of his jurisdiction as a court, his judgment was conclusive in the matters before him; and there is an end of that question. It affords an authority to sell and convey, that cannot be controverted in a court of law. And the validity of the deed executed under it stands upon an equally solid foundation.

The title of the defendant, therefore, would seem to be beyond controversy, were it not for the principle against which we have been contending, and which imparts to the case its greatest importance, namely, the right claimed for this court to inquire into the nature and character of the jurisdiction exercised by the Chancellor in making the order coming before us collaterally; and as this court determines that jurisdiction to be general or special, to refuse or consent to go behind his judgment, and re-open and rejudge the merits of the case; and according to the opinion entertained upon that question, to affirm or disaffirm the validity of all acts and proceedings that have taken place under it. And this, too, in a case where the jurisdiction thus exercised by the Chancellor has been settled by himself in his own court, under the State laws, and affirmed by the judgment of the highest judicial tribunals of the State.

It is apparent, that if this principle becomes ingrafted upon the powers of this court, and is to be regarded as a rule to guide its action in passing upon the judgments of the State courts coming up collaterally, a revising power is thus indirectly *acquired over them, in cases [*565 where no such power exists directly, under the Constitution or laws of Congress. For, if the right exists to inquire into the kind and character of the jurisdiction, without regard to that established by the laws and decisions of the States; and to determine for itself whether the jurisdiction is general or special, and if the latter, to go behind the judgment to see whether the special authority has been strictly pursued, there is no limit to this revising power, except the discretion and judgment of the court.

The principle will be as applicable to every State judgment coming before us collaterally, as to the one in question. It denies, virtually,

to the States the power, in the organization of her courts, to prescribe and settle their jurisdiction, either by the acts of her Legislature, or the adjudication of her judicial tribunals.

I cannot consent to the introduction into this court of any such principle, and am, therefore, obliged to refuse a concurrence in the judgment given.

CHARLES A. WILLIAMSON and Catharine H. Williamson, his Wife, Plaintiffs,

v.

THE IRISH PRESBYTERIAN CONGREGATION OF THE CITY OF NEW YORK.

Construction of private act of New York Legislature.

The principles established in the preceding case of Williamson and Wife v. Berry applied to this case.

The circumstances, that the defendants paid to the grantees of George De Grasse a valuable consideration for the premises in dispute, does not give them a valid title against the plaintiffs.

THIS case was similar to the preceding one, in which the same facts and principles were involved. The only difference between them was, that the following point was certified in this case, which was not in the preceding, viz.:

8. Whether the defendants, who derive title bona fide, and for a valuable consideration, by purchase through the grantees of George De Grasse, as set forth in the case, have a valid title as against the plaintiffs.

It was argued in conjunction with the preceding case, as has been mentioned in the report of that case.

Mr. Justice Wayne delivered the opinion of the court:

In this case the points certified to this court are identical with those certified in the case of 566*] Williamson et ux. v. *Joseph Berry, except the eighth. We direct that our rulings in that case shall be sent to the Circuit Court, as our answers to the points certified in this case. And further rule to the eighth point certified in this case, that the defendants, having paid to the grantees of George De Grasse a valuable consideration for the premises in dispute, do not thereby acquire a valid title against the plaintiffs.

Mr. Chief Justice Taney, Messrs. Justices Catron and Nelson dissented. See the report of the preceding case.

1200

CHARLES A. WILLIAMSON and Catharine H. Williamson, his Wife, Rupert J. Cochran and Isabella M., his Wife, and Bayard Clarke, Plaintiffs,

v.

GEORGE BALL.

Construction of private act of New York Legislature.

The principles established in the case of Williamson and Wife v. Berry applied to this case also.

Under the acts of the Legislature of New York for the relief of Thomas B. Clarke, the Chancellor had no authority to order that the trustee might make a conveyance of any part of the premises devised for a precedent debt due by the trustee to his grantee.

The deed executed by Clarke to Chrystie in this case was not made in the due execution of the power and authority to sell and convey, though approved by the master in conformity with the Chancellor's order, it not having been within the Chancellor's jurisdiction to order that the trustee might make a conveyance of the premises to a creditor in payment of the debt.

Although the defendant in this case may have paid to such a grantee a valuable consideration, yet he cannot be said to have acquired any title against the plaintiffs; inasmuch as Clarke had no lawful authority to convey to his grantee, that grantee had no right to convey to another.

THIS case was similar to the two preceding ones in all the leading facts. It will be perceived, however, that all the children of Thomas B. Clarke now united as plaintiffs.

Upon the trial in the court below, the will of Mary Clarke, the acts of the Legislature of the State of New York, the orders of the Chancellor of that State, and other facts, were shown, as in the case of Charles A. Williamson et ux. v. Joseph Berry.

It further appeared in evidence, that on the 8th of December, 1818, Mr. Clarke conveyed the lot in question, with other lots, to Albert Chrystie, reciting that "the said Thomas B. Clarke is justly indebted to the said Albert Chrystie in the sum of $525, and is willing to convey in satisfaction of such debt the premises hereinafter mentioned and described;" and declaring, *"that the said Thomas B. [*567 Clarke, in consideration of the premises, and of $525 to him in hand paid," conveys, etc.

This deed was approved by James A. Hamilton, master in chancery. There was also a quitclaim executed by him, he having acquired a title to Mr. Clarke's life estate, under a sale upon execution.

A conveyance from Mr. Chrystie to James Covell, from Covell to John R. Driver, and the will of Driver, were also shown.

A verdict was taken for the plaintiffs, subject to the opinion of the court, upon a case. On the argument, the judges ruled as stated in Williamson v. Berry and were divided in opinion upon the following points:

1. Whether the authority given by the said acts of the Legislature to the trustee, to sell the estate, was a special power, to be strictly pursued, or whether he acquired the absolute power of alienation, subject only to review and account in equity.

2. Whether the orders set forth in the case, made by the Chancellor in this behalf, were

authorized by, and in conformity to, the said several acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such, or the doings of an officer, acting under a special authority.

3. Whether the Chancellor had competent authority, under the said acts, to order or allow a conveyance of the premises by the trustee, in payment or satisfaction of a precedent debt owing by the trustee to the grantee.

4. Whether the deed executed by Thomas B. Clarke to Albert Chrystie, stated in the case, was in due execution of the power and authority of said trustee.

5. Whether the defendant, deriving title by purchase bona fide, and for a valuable consideration, from such grantee, has a valid title against the plaintiffs.

It was argued in conjunction with the case of Williamson et ux. v. Berry, as was stated in the report of that case.

Mr. Justice Wayne delivered the opinion of the court:

In this case Thomas B. Clarke made a conveyance of the premises in dispute to Albert Chrystie for a debt, of $525; and the approval of the master in chancery is indorsed upon the deed. The plaintiff objected to it as any evidence of title, on account of its having been made without authority of law.

Chrystie conveyed the premises in dispute to James Covell, for the consideration of six hun-
568*] dred dollars. Covell and wife *conveyed the same to John R. Driver for eight hundred dollars. Driver died, having devised the premises to his executors, Nicholas Zelpen and George Deroche.

In the course of the trial of the cause in the Circuit Court, the judges thereof were divided in opinion upon five points of law, and have certified them to this court for decision.

The first and second points certified in this cause have been decided by this court, in its ruling of the second and third points in the case of Williamson et ux. v. Joseph Berry. We direct that those rulings of the second and third points in the case just mentioned shall be taken as the answers given by this court to the first and second points in this case.

To the third point in this case, we rule that the Chancellor had authority, under the acts passed for the relief of Thomas B. Clarke, to assent to a conveyance of the premises in dispute by his trustee, but that it was not within the jurisdiction given to the Chancellor by the acts of the State of New York mentioned in this case, to order that the trustee might make a conveyance of any part of the premises devised, as is mentioned in this case, for a precedent debt due by the trustee to his grantee.

To the fourth point, we rule that the deed executed by Clarke to Chrystie was not made in the due execution of the power and authority to sell and convey, though approved by the master in conformity with the Chancellor's order, it not having been within the Chancellor's jurisdiction to order that the trustee might make a conveyance of the premises to a creditor in payment of the debt.

To the fifth point, which is, whether the defendant, deriving title by purchase bona fide and for a valuable consideration from such grantee, has a valid title against the plaintiffs, we answer, that, though the defendant may have paid to such a grantee a valuable consideration, he cannot be said to have acquired any title against the plaintiffs, inasmuch as Clarke had no lawful authority to convey to his grantee, that grantee had no right to convey to another.

We direct the foregoing rulings to be certified to the Circuit Court, as the answers of this court to the points certified to it for decision.

Mr. Chief Justice Taney, Messrs. Justices Catron and Nelson dissented. See the report of the case of Williamson et ux. v. Berry.

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*ADAM L. MILLS, John H. Gay, [*569 Charles Mullikin, John O'Fallon, William C. Wiggins, Andrew Christy, Elizabeth Christy, Mary F. Christy, Melanie Christy, which Melanie is the Widow, and which said Elizabeth Christy and Mary F. Christy are the only Children and Heirs at Law of Samuel C. Christy, Deceased—said Children being Infants, and appearing by said Melanie, their next Friend—Emily Pratte, Widow of Bernard Pratte, Lewis Penguet and Therese, his Wife; Stephen F. Niedlet and Celeste, his Wife; Louis V. Bogy and Pelagie, his Wife; Joseph Blaine and Aimi, his Wife; which said Emily Pratte, Bernard Pratte, Therese Penguet, Celeste Niedlet, Pelagie Bogy, and Aimi Diane Blaine, are Children and only Heirs at Law of Bernard Pratte, Deceased, Plaintiffs in Error,

v.

THE COUNTY OF ST. CLAIR and James Harrison.

Grant of ferry right by State—two interpretations—this court no jurisdiction to try questions, whether oppressive use has been made of right of eminent domain by county under State law.

In the year 1819, the Legislature of Illinois authorized Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him," provided the ferry should be put into actual operation within eighteen months.

At this time he had no land, but within the eighteen months acquired an interest in a tract of one hundred acres.

In 1821, another act was passed, authorising him to remove the ferry "on any land that may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act.

The words of this act, "on any land that may belong to him," must be construed to apply to the land which then belonged to him, and not to such as he obtained after the passage of the act, viz., in 1822.

The following rules for construing statutes applied to the case, viz.:

First. That in a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government; and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fail.

Second. If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant, if in such case one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.

The jurisdiction of this court, under the twenty-fifth section of the Judiciary Act, extends to a review of the judgment of a State court, where the point involved was the alleged violation of a contract granting a ferry right by a State to an individual, but it does not extend to a case where the alleged violation of a contract is, that a State has taken more land than was necessary for the easement which it wanted, and thus violated the contract under which the owner held his land by a patent. It rests with State Legislatures and State courts exclusively to protect their citizens from injustice and oppression of this description.

THIS case was brought up from the Supreme Court of the State of Illinois, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Mills and others filed their bill in chancery in the State court of Illinois, seeking to obtain [*570] an injunction against the defendants *in error. The bill states the case of the complainants as follows:

The people of the western part of Illinois had, from the earliest settlement of that country, maintained a constant commercial intercourse with the town of St. Louis, and long felt the necessity for increased facilities in crossing the Mississippi River. For the purpose of securing these facilities, the State made a contract with Samuel Wiggins for the establishment of a ferry across that stream, with boats to be propelled by steam or horse power. An act of the General Assembly was passed, which was approved on the 2d of March, 1819, which was as follows:

"An Act to authorize Samuel Wiggins to establish a Ferry upon the Waters of the Mississippi. Approved March 2d, 1819.

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that Samuel Wiggins, his heirs and assigns, be, and they are hereby authorized to establish a ferry on the waters of the Mississippi, near the town of Illinois in this State, and to run the same from lands at the said place that may belong to him. Provided, that he shall not use any boat or water craft, except such as shall be propelled or urged to the water by steam, horses, oxen, or other four-footed animals. Provided, that the said Samuel Wiggins, his heirs and assigns, shall have the said ferry in actual operation within eighteen months from and after the passage of this act.

"Sec. 2. And be it further enacted, that no person or persons, except those who have ferries now established at this place, shall establish any ferry of the description aforesaid within one mile of the ferry established under this act. And if any person or persons shall, contrary to the provisions of this act, run any boat or boats of the description aforesaid, he, she, or they shall forfeit every such boat, with its furniture and apparel, to the said Samuel Wiggins, his heirs and assigns, which may be attached and recovered before any court in this State having competent jurisdiction.

"Sec. 3. And be it further enacted, that it shall and may be lawful for the said Samuel Wiggins, his heirs or assigns, to demand and receive the same rates of ferriage as are now of right demandable at the ferry established nearest to the ferry authorized to be established by this act. Provided, that no more shall be charged for a wagon, cart, or other carriage, if loaded, than could be charged if empty.

"Sec. 4. And be it further enacted, that the ferry hereby established shall be subject to the same taxes as are now, or hereafter may be, imposed on other ferries with- [*571 in this State, and under the same regulations and forfeitures. And that if the provisions of the second section of this act shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the said second section may be repealed."

At the date of this act, Wiggins did not own any land near the town of Illinois; but within the time allowed by the act for the establishment of the ferry, he purchased a tract of land of one hundred acres, and established the ferry, with boats propelled by horses, according to the terms of the act.

He increased the means of transportation as the public wants required, and changed the boats employed from boats propelled by horses to boats propelled by steam, so as to comply with the letter and spirit of his contract with the State of Illinois, and meet all the demands of the increasing population and commerce.

The bill claims, that under this act of the 2d of March, 1819, Samuel Wiggins, his heirs and assigns, were entitled to the perpetual franchise of maintaining a ferry across the Mississippi from any point near the town of Illinois, upon any land that might at any time belong to him or them.

The bill states that the bank of the Mississippi, opposite the town of St. Louis, is an alluvial formation, which is continually falling into the stream, and that the character of the stream is such that, by reason of the frequent changes in the channel, the sudden formation of sand bars, and the falling of the banks, it became necessary for Wiggins, in order to fulfill his contract with the State of Illinois, to acquire title to a large space of land on the bank of the river, in order to change the place of landing as the changes in the river and in its banks might require.

The Legislature of Illinois, appreciating this necessity, and recognizing the franchise as perpetual, passed an act on the 6th day of February, 1821, the essential parts of which were as follows:

"An Act to authorize Samuel Wiggins to make a Turnpike Road, and for other Purposes. Approved February 6, 1821.

"Sec. 1. Be it enacted, by the people of the State of Illinois, represented in the General Assembly, that Samuel Wiggins, his heirs or assigns, be, and hereby are authorized to make and construct a turnpike road, of one hundred feet wide, to commence on the Mississippi

572*] River, opposite to St. Louis, *on lands that may belong to him, to run thence across the American Bottom to the bluffs within two miles of George Swaggart's, and to construct and erect all necessary bridges on said road; and that he or they be, and are hereby authorized to build and make said turnpike road through the lands of any person or persons whomsoever, except yards, gardens, orchards, or dwelling houses; that, when the aforesaid road is about to be carried through any improved land, the maker of the said road shall first obtain the consent of the proprietor or proprietors of said grounds, and should the parties not agree on the amount of said damages, then a jury of six reputable freeholders should be summoned, and being duly sworn before any justice of the peace of the county faithfully and impartially to assess the damages, which damages shall be paid before the said road shall be permitted to pass through such grounds.

"And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi River, near the town of Illinois, in this State, and a sand bar having been formed since that time opposite said ferry, therefore:

"Sec. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby authorized to remove said ferry on any land that may belong to him or them on the said Mississippi River, under the same privileges as were prescribed by the Act entitled, 'An Act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi,' approved March 2d, 1819."

On the 13th of July, 1822, Wiggins acquired title to a tract of four hundred acres of land, adjoining the tract from which he first ran his ferry. The tract so acquired is situated on the bank of the river below his first tract, and was necessary to the owners of the ferry franchise in order to secure a convenient landing of the boats, as changes occurred in the channel or in the bank of the river.

The bill states sundry conveyances and descents, by which the complainants have become invested with the title to all the land held by said Wiggins, and with the franchise granted by the State of Illinois.

It is also averred that Wiggins, while the owner of the franchise, fulfilled all the duties and obligations which he had assumed under his contract with the State of Illinois, and that his assignees, owners of said franchise, have ever since his transfer of the franchise in like manner fully discharged those duties; that speedy, secure, and comfortable passage has 573*] been *at all times afforded for all persons and property offered to be crossed over the river, in such vessels only as are required by the act granting the franchise.

The bill then states an act of the Legislature of the State of Illinois, approved on the 2d of March, 1839, by which commissioners were appointed to locate a road and ferry landing between Cahokia Creek and the Mississippi River, opposite St. Louis; the road and ferry landing to be three hundred feet wide, upon the most eligible ground for the purpose. This act authorized the County Commissioners' Court of St. Clair County to cause the land on which the road and ferry landing should be located to be condemned, and pay the owners of the land the damages; and after such payment the said court should have power to enter upon the land so condemned, and establish a ferry across the Mississippi River, and might either carry on the ferry for the county itself, or lease it for any term not exceeding five years, to any lessees.

The commissioners thus appointed located the road and ferry landing, three hundred feet wide, upon the land which Wiggins acquired in July, 1822, and which was conveyed by him with the franchise.

The land was condemned, and its value estimated at six hundred dollars, being less than the annual ground rent which it would produce without any connection with any ferry privilege.

In estimating the damages to be paid, the jury were expressly directed to confine their estimate of the damages to the value of the land itself, and not to consider any interference with the ferry franchise of the complainants as a subject of compensation.

The bill states that the County of St. Clair, through its agents, entered upon and took in possession the said lands so condemned, and has leased the same, together with the ferry authorized by the said act of 1839, to James Harrison, at a yearly rent of $800; and that a ferry has been established from said land to the city of St. Louis. The rates of ferriage charged by said Harrison are fixed in his lease, exhibited with the bill, as exhibit S., No. 18.

The complainants aver that the land so taken from them is a part of their ferry landing, as authorized by the two acts of the Legislature under which they claim, and that the land so taken is indispensable to the exercise of the franchise with which they are invested. From time to time they have been compelled to change their place of landing, as the changes in the river, and its banks and sand bars, required, so that the whole *front on the river has [*574 been necessary to the enjoyment of their franchise and the performance of their duty, and that the said land so taken from them is not only the most convenient point on their land for their ferry landing, but is the only point where boats can securely be landed without running far up the stream, so as to make their trip about twelve hundred yards longer than if they still owned and could use the land so taken from them.

The complainants allege that the Act of the Legislature of Illinois of March 2, 1839, authorizing the taking of a part of their ferry landing, is a violation of the first clause of the tenth section of the first article of the Constitution of the United States, which prohibits the States from passing laws impairing the obligation of contracts.

The bill prays for an injunction to restrain the defendants from maintaining a ferry from the land so taken from the complainants.

To this bill there was a demurrer, which was sustained by the Circuit Court of St. Clair County, and the bill dismissed. An appeal was taken to the Supreme Court, and the decree of the Circuit Court affirmed.

From this decree of the Supreme Court of the State of Illinois, a writ of error brought the case up to this court.

It was argued by Mr. Gamble and Mr. Webster for the plaintiffs in error, and Mr. Breeze for the defendants.

Mr. Gamble made the following points, which he sustained orally. [Mr. Breeze and Mr. Webster both presented written arguments, of which the Reporter can only give extracts]:

1. The franchise which the complainants hold by purchase from Wiggins, extended to the land which has been taken from them under the Act of the Legislature of Illinois of 2d March, 1839.

2. The land so taken is necessary to the enjoyment of the franchise.

3. No compensation has been made to the complainants, nor is any authorized to be made, for the violation of the franchise.

4. The act of the Illinois Legislature complained of is a violation of the Constitution of the United States, under the earlier decisions of this court. Fletcher v. Peck, 6 Cranch, 87; Providence Bank v. Billings, 4 Peters, 514; New Jersey v. Wilson, 7 Cranch, 164; Dartmouth College case, 4 Wheat. 518.

5. The act complained of is not constitutional, within the scope of the later decisions in the Charles River Bridge case, 11 Peters, 549, and West River Bridge case, 6 Howard, 507.

575*] *Mr. Breeze first contended, that this case did not fall within the jurisdiction of the court, because the Supreme Court of Illinois rested its decision upon the construction of the act of the Legislature, and the extent of the ferry franchise acquired under it; limiting it to the land owned by Wiggins when the Act of 1821 was passed, with the exercise of which franchise the law complained of did not interfere.

2. That the grant to Wiggins was of no validity, because the Legislature had no power to make grants of privileges to be exercised beyond its territorial limits and over a navigable stream, declared by law to be a public highway.

3. That the laws in question were not contracts, within the meaning of the prohibition of the Constitution of the United States. That private contracts alone were contemplated in this provision of the Constitution.

4. That these laws in themselves had none of the features of contracts, for the want of mutuality, etc.

5. Admitting, however, for the sake of the argument only, that these laws are contracts, then the appellees insist that the Legislature of Illinois has in no degree impaired their obligation, by any other act in favor of other parties subsequently passed, and certainly not by the Act of March 2, 1839, about which this controversy has arisen. The appellants, to sustain their complaint, assume the ground, that, by the Act of 1819, the authority to Wiggins to establish a ferry was perpetual and exclusive, and that having become the proprietor of other lands at a great distance from the tract he pretended to own in 1819, the Legislature authorized him, by the Act of 6th February, 1821, to remove his ferry to them, and thereby, as his assigns, the appellants, contend, have necessarily excluded all other ferries between them, making theirs a movable one, covering a distance of a mile or more up and down the river, and authorizing them to shift it from point to point, as their views of expediency might suggest.

The appellees contend that the appellants have not, as the assigns of Wiggins, any exclusive right to a ferry franchise by the Act of 1819, and that their ferry is not of that ambulatory character they insist it has been made by the Act of 1821.

The court understands, that, when the Act of 1819 was passed, Wiggins owned no land on the river near the town of Illinois; that it was not until a year or more thereafter that he obtained title to an undivided two sevenths of a tract of one hundred acres, of the heirs of one Piggot, and known as claim 624. Upon this tract he located his ferry, at a certain known and fixed point. It will be further understood by the plat of survey *before the court, [*576 that the town of Illinois is not on the river, but on the east bank of Cahokia Creek, and some hundred yards from the river, and from it to the river there never was a public road until after the passage of the Act of 1839, under which appellees claim. The grantor of appellants, owning the land between the creek and the river, and the whole of the river bank, could, and did up to that time, prevent all competition with him and his assigns and keep off all rivals; and for a similar purpose he enlarged his possessions on the bank of the river by the purchase of land from Jarrot and others, in 1822, known as claim 579, on which the appellees established their ferry, at the termination of a public road, regularly laid out, three hundred feet wide, from the bridge over Cahokia Creek to the river, and through the land of the appellants, after the same was regularly condemned in pursuance of the laws of the State of Illinois, and compensation tendered. To this last named tract, appellants' ferry was removed under the authority supposed to be granted by the Act of 1821, although Wiggins did not, at the passage of that act, own it. To whatever point, then, on this tract, it was removed, the appellees insist, that point became the ferry landing, and there appellants' privileges were to be exercised, and not elsewhere. It could not therefore be removed to the first location without the consent of the Legislature, nor to any other point on the tract. A ferry must, from the nature of such establishments, be kept stationary at one point, until legislative sanction can be had to remove it to another; and so Wiggins thought when he applied to the Legislature to remove it from claim 624 to claim 579. And this from motives of public convenience. It would be a great injury to the public to permit the owner of such a franchise, at his discretion, and to suit his whim or caprice, to move it from point to point. When a point was selected, that became the "ferry," and there and there only, and from it, could the privilege be exercised. The right of way over the water could not, by any reasonable construction, extend over every particle of space covered by miles of distance. A reasonable space for landings and ferryways is all that could be claimed. The excuse put forth by appellants, for shifting their landing—the character of the current and the texture of the banks—is all idle, as everyone knows who has ever seen the bank of the Mississippi opposite St. Louis. A landing can be made at one point

as well as at another, if proper means are used for grading the banks, and proper platforms provided. The object and design for shifting the landing was undoubtedly to keep off rivals —to prevent competition, and thus enable, for all time to come, the appellants to divide their fifty thousand dollars a year.

577*] *The ferry being established, by the Act of 1819, on the Piggot tract (claim 624), within eighteen months after its passage, Wiggins had the right, so far as the Legislature could confer it, to all the advantages which might result from it, and to all the provisions of the act, and nothing more.

Did, then, the Legislature by that act, intend that his privilege should be exclusive forever, and is that intention manifest from the terms used in the act?

The first section contains the grant, if it be one, and is, in substance, as follows: That Samuel Wiggins, his heirs or assigns, are authorized to establish a ferry on the waters of the Mississippi, near the town of Illinois, in this State, and to run the same from lands at the said place that may belong to him, with a provision that he shall use steam or the power of four-footed animals, and provided, that the same shall be in operation within eighteen months, etc.

The second section provides, that no person or persons, except those who had ferries then established at that place, should establish any ferry of that description within one mile of it, and if it is done, a forfeiture to Wiggins of the boats, furniture, and apparel shall be the consequence.

The third section authorizes Wiggins to receive the accustomed rates of ferriage, and the fourth and last section subjects it to taxes, and then declares, "If the provisions of the second section shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the said section may be repealed."

The appellants contend that the grant would be perfect without the second section. So it would; but when arraigning an act of the Legislature of a sovereign State as repugnant to the Constitution of the United States, because it repealed a former act of that body, we must examine and see what the first act is—we must take the whole of it together, to ascertain the intention of the law maker; and we see in this act of 1819 a right reserved to the State to repeal that part of it which bestows the character of exclusiveness upon the appellants' privilege. The Legislature of 1819 acted upon circumstances as they then were, and foreseeing that, from the great advantages the State possessed, in soil, climate, and power of production, and its great capacity for settlement and cultivation, people from distant lands would seek it for a home, reserved the right to take away a privilege, which, when granted, might be of great public benefit, but likely to become in time oppressive.

With commendable forecast, the fourth section was inserted, and became an important part of the so-called contract, and the Act of 578*] *1821 was passed, with the same power to repeal included. The acts were accepted, with that power reserved. In 1833 (Rev. Laws, 310, 311), the Legislature determined that section was injurious to the public good, as well as the fifth section of the Act of 1821. Fourteen years' experience had satisfied them that what was intended for the public benefit had become an oppressive monopoly, and they performed a most popular act by repealing them, thus taking away all pretext of exclusiveness, and opening the whole subject to further legislation. This was "nominated in the bond," and the appellants cannot with any propriety or justice complain, if it is injurious to them.

The Legislature, then, having, by the Act of 1833 (Rev. Laws of 1833, p. 310), repealed the restrictive clause of the second section of the Act of 1819, and of the fifth section of the Act of 1821, proceeded, in 1839, in obedience to public clamor, excited to a high tone by the continued and oppressive exactions of this monopoly, and its repeated failures, and manifest inability or want of desire to satisfy the public demands for proper facilities for crossing the river, to put measures in train to satisfy the public want. The preamble to the Act of 2d March, 1839, assigns the reason for its passage—the facts upon which the Legislature acted—and they must be taken to be true. It is a legislative decision, that the exigency had arisen, which, on the repeal of the second section of the Act of 1819, required increased facilities of approach to a place then grown to be a great commercial city, and the great market of the State.

By examining the provisions of that act, it will be seen that in no part of it is an expression used of a design to take from the appellants their franchise; theirs still exists in all its vigor, precisely as it did before the passage of the act. No interference with their ferryways is contemplated or attempted; no part or portion of their right, as secured by the Act of 1819 or 1821, is taken from them or abridged. Although the receipt of tolls may be lessened by this rival ferry, yet the right itself is as perfect as ever. It is still lawful for them to receive all the tolls that may come to their ferry. Should the rival ferry so successfully compete with them, as finally to take from them all the travel, still their rights, conferred by the Act of 1819 and 1821, yet inure to them. Charles River Bridge v. Warren Bridge, 11 Peters, 420.

The appellees perceive no distinction between the rights of pontage and of ferriage, and if it was lawful, as it was, unquestionably, to establish the Warren Bridge, by which all the tolls were taken from the Charles River Bridge, previously established by an act of the Legislature of Massachusetts, it is not perceived *why the same results should not right- [*579 fully flow in this case, the more especially as the Legislature had reserved the right, in the very act which gave the authority, to destroy the character of exclusiveness for which the appellants contend. Legislation affects every day the value of property, and it must be so in the nature of things. Providence Bank v. Billings, 4 Peters, 514.

If the Act of 1839 designed to seize the ferryways of the appellants, there would be ground of complaint; but it does not. It designs only to establish a healthy and necessary competition, at a very important point, by which the public good is vastly promoted, and the land

taken for such a beneficial public purpose, for a road and landing, has been condemned in the usual mode, the damages assessed, and a tender of the amount made to appellants.

Whether the road is too wide or not is not for this court to determine; it is only to determine whether, in the adjudication of the rights of these parties by a State court, validity has been given to a law of the State impairing the obligation of any contract entered into between the State and the appellants, and doing, by such decision, injustice to them. The appellees can see no ground for such a pretense, and without taking up more time, they submit the case on their part to the court, confident that this most just and enlightened tribunal will not condemn a law of a sovereign State, unless that law is manifestly repugnant to the Constitution of the United States.

Mr. Webster replied to each one of these points, and particularly the last, citing and commenting upon many parts of the bill, which were all admitted by the demurrer, in order to show that the Act of 1839 had destroyed the value of the ferry privilege.

Mr. Justice Catron delivered the opinion of the court:

By an Act of March 2d, 1839, the Legislature of Illinois appointed five commissioners to locate a road and ferry landing, three hundred feet wide, on the east bank of the River Mississippi, opposite to the city of St. Louis; the road to extend back to Cahokia Creek. The road and landing were accordingly located; the distance from the river to the creek being about sixty poles. The ferry having gone into operation under the Act of 1839, this bill was filed, seeking to obtain a perpetual injunction against an exercise of a ferry privilege, on the ground, among others, that Samuel Wiggins and his assignees were entitled to the exclusive ferry right at that place, by contract with the State of Illinois; and that said contract was violated 580*] by *the Act of 1839, and the establishment of a road and ferry under and by force of its provisions. The Supreme Court of Illinois having decided that the State law, and the acts done pursuant thereto, did not violate the contract made with Wiggins, and that it was not opposed to the Constitution of the United States, that court proceeded, by a final decree, to dissolve an injunction granted nisi, and to dismiss the bill. To reverse this decree, on the grounds stated, a writ of error has been prosecuted to the Supreme Court of Illinois, from this court, under the twenty-fifth section of the Judiciary Act of 1789.

The contract relied on by the defendants was made with Wiggins, by two acts of the Legislature of Illinois. The first act, approved March 2d, 1819, authorizes Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him;" provided that said ferry should be put into actual operation within eighteen months from and after the passage of that act. And it was also provided by the second section, that no other person should thereafter establish any ferry within one mile of that established by Wiggins, with this *reservation:* "That if the provisions of the second section of this act shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the second section may be repealed." Wiggins had no land of his own on the river near the town of Illinois when the above act was passed; but within less than eighteen months, he acquired an interest in a tract of land of one hundred acres, part of which lay between Illinois town and the river, and extended to a considerable distance above it; and on this tract he established his ferry.

On the 6th of February, 1821, Samuel Wiggins had another act passed in his favor by the Legislature of Illinois, authorizing him to make a turnpike road, to commence on the Mississippi River opposite St. Louis, on lands that "may belong to him," and to run across the American bottom to the bluffs. The act further provides: "And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi River, near the town of Illinois, in this State, and a sand bar having been formed since that time opposite said ferry, therefore—

"Sec. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby authorized to remove said ferry on any land that may belong to him or them on the said Mississippi River, under the same privileges as were prescribed by the Act entitled, 'An Act to authorize Samuel *Wiggins [*581 to establish a ferry upon the waters of the Mississippi,' approved March 2d, 1819."

By an act approved January 19th, 1833, so much of the acts of 1819 and 1821 as prohibited another ferry from being established within one mile of Wiggins's ferry landing, was repealed. This restriction is therefore out of the case.

On the 13th of July, 1822, Wiggins obtained, by purchase from Julia Jarrot, a tract of one hundred acres, lying below the tract first acquired, adjoining thereto on the south, and fronting on the river; and it is upon this tract that the new ferry and road were located under the Act of 1839. The parties respectively assume, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law shall govern: only two general principles need be invoked in construing the acts of 1819 and 1821, which are, First, that in a grant, like this, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is, that, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government; and therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. Such is the established doctrine of this court, as was held in the case of The Charles River Bridge v. The Warren Bridge, 11 Peters, 544–547. Second. if the

grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.

Testing the contract by these rules, and what are the complainants entitled to, under the acts of 1819 and 1821? By the first act, Wiggins was to establish the ferry near the town of Illinois, "and to run the same from lands at said place which may belong to him." At the time the act was passed, Wiggins owned no land near the town of Illinois, and if the grant was in the present tense, and extended only to land 582*] *that was then the property of the grantee, the act of Assembly had no operation, and was worthless. But we suppose the words employed were not restricted to the time when the act was passed; the grantee was allowed eighteen months to put the ferry into operation, and he was to run his boat from his own lands, that is, from lands which might belong to him at the time the running commenced; and for this there was great reason, as the opposite shore lay within another State, and there, also, a ferry landing had to be secured. The matter was one of speculation; and lands could not, with propriety, be purchased at high prices before the privilege was secured on both banks. And this construction, as we apprehend, is the one that the Legislature of Illinois put on the Act of 1819 by that of 1821; by which it was admitted that a ferry had been established according to the first act, and the grantee was authorized to remove it to another point, because a sand bar had been formed in front of the landing. We therefore feel ourselves constrained to differ from the carefully prepared and able opinion of the Supreme Court of Illinois, found in the record, which holds the first grant to have been inoperative.

We come next to consider the Act of 1821. When it was passed, Wiggins had land fronting on the river for nearly a mile, extending both above and below Illinois town, and lying between it and the river. It was all the land he then could desire for the purposes of his ferry and at the end of his road. Indeed, it is doubtful whether, under the grant, Wiggins could have gone below his first purchased tract and been "near the town of Illinois," because his land extended considerably below the town. As the Act of 1821 recognized the fact that Wiggins had complied with his contract under the Act of 1819, and had established a ferry on land that belonged to him, and that it was established "near the town of Illinois," it is fair to presume that both parties to the contract, as modified and enlarged by the Act of 1821, understood what land it was that Wiggins owned at that time, and the boundaries thereof; and also the extent of his interest, being two sevenths of the tract.

The Act of 1821 was treated by the bill, and was relied on in argument, as conferring a perpetual privilege on Wiggins, and on his assigns, to remove the ferry to any land that might belong to him, or to them, at the time of the removal; and, furthermore, that the right of removal was unrestricted as respects time, and could have been made at any time heretofore, or could be made hereafter.

That the act is somewhat obscure, in regard to the place to which the ferry could be removed, must be admitted; and in *seek- [*583 ing its true construction, several considerations present themselves. In the first place, that the act operated in the present tense, and was a mere enlargement of the privileges conferred by the Act of 1819, and must be taken as a part of the first contract, cannot be denied; second, when we take into consideration the fact that Wiggins had a specific tract of land at that time, at the proper place—that is to say, lying in front of Illinois town, and extending above and below it—a reasonable conclusion is, that some place on such tract was referred to by the Act of 1821; and, third, as the Act of 1819 reserved authority in the Legislature to repeal so much of the law as secured to Wiggins an exclusive ferry right for two miles on the river front, such reservation could only mean that rival ferries might be established, at discretion, by the Legislature. Nor can it be assumed, with any claim to a plausible construction, that the power of removal had no limitation of time or place, as this would confer a right to remove to the same landing with a newly established ferry, set up as a rival, and drive it away; and thus the public convenience would again be reduced to a single ferry. Now, in view of these facts and consequences, and applying them to language of an ambiguous character, and seeking assistance from a settled rule of construction in case of doubt, and finding that rule of construction to be, that when two constructions are equally open to the court, the one shall be adopted most favorable to the government, the consequence must be, on this construction, that Wiggins was confined to the tract of land partly owned by him when the Act of 1821 was passed; and that when the ferry was removed to other land, lower down the river, it was an act not within the contract, nor protected by it. This disposes of the first and principal ground of relief sought by the bill.

Whether Wiggins, or those claiming under him, had the right after he had established his new ferry, under the Act of 1821, to remove it to another place on the tract of land he then owned, and whether the State of Illinois may not authorize another ferry on the same tract of land, not interfering with the operations of the one established by Wiggins, are questions which the record does not bring before us, and upon which, therefore, we express no opinion.

A second ground of relief is relied on by the bill, and was most earnestly and ably urged in argument here, and which it is incumbent on us to dispose of also.

The first special prayer would seem to conclude an inquiry into any ground of interference by this court, other than the *ques- [*584 tion arising on the acts of 1819 and 1821, standing as a contract, claimed to have been violated by the Act of 1839. But the bill has also a general prayer; and on this, as well as upon the special prayer, the Supreme Court of Illinois

ordered, "that it be certified in this case, that there was drawn in question the validity of the statute of the State of Illinois entitled, 'An Act to authorize St. Clair County to establish a ferry across the Mississippi River,' approved March 2, 1839, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the court was in favor of the validity of said statute;" from which certificate it is manifest that the Act of 1839 was upheld against each state of facts set forth by the bill; and if it was apparently repugnant to the Constitution on either ground assumed, this court has jurisdiction of the cause; and having jurisdiction, the plaintiffs in error were entitled to be heard, and are entitled to our judgment, on both grounds presented, and relied on to reverse.

The bill sets forth that gross abuses were imposed on complainants by the Act of 1839, and by the commissioners and their lessee, under the act; that the said three hundred feet include a wider space, and more land, than is necessary or convenient for a road, and but a small portion of it has been used and appropriated by the said County of St. Clair to that purpose, leaving a strip on either side to be used by the said County of St. Clair and its lessees, for private property, for building lots, and other private purposes; and that that portion of the said three hundred feet which is not included in said road, and which is now used for private purposes, or is left to be thus used, will yield an annual ground rent larger than the whole amount of the damages assessed as aforesaid for the whole of said three hundred feet; and furthermore, that only the condemned land was valued, and no compensation awarded or tendered for the ferry franchise and landing taken from complainants.

As the bill was demurred to, and the demurrer sustained in the State courts, and in this form the case comes before us, all charges of abuse and oppression on the part of the authorities of Illinois are admitted, to the extent alleged; and the question presented here on these facts is, whether this court has power to redress the injuries complained of, under the twenty-fifth section of the Judiciary Act of 1789.

The Constitution having declared that no State shall pass any law impairing the obligation of contracts, it becomes our duty to inquire whether the State law, and the acts done under it, violate a contract. If any contract 585*] was violated under the *Act of 1839, it must have been a grant to land vesting the fee-simple title; and such title complainants exhibit. To the width of needful roads and ferry landings, property can undoubtedly be taken, for the purposes of such easements; and necessarily, the State authorities must decide (as a general rule), how much land the public convenience requires. That the power may be abused, no one can deny; and that it is abused, when private property is taken, not for public use, but to be leased out to private occupants to the end of raising money, is too plain for reasoning to make it more so. Such an act is mere evasion, under pretense of an authorized exercise of the eminent domain; and if it be an *evasion*, it is void, and may be redressed by an action at law, like any other illegal trespass, done under assumed authority; as, for instance, a trespass by a younger grantee on land held by an elder patent depending for support on a State law of later date than the first grant. But it is not an evasion and illegal seizure of private property on pretense of exercising the right of eminent domain, and which act is an abuse claiming the sanction of a State law, that gives this court jurisdiction; such law and the acts done under it, are not "the violation of a contract," in the sense and meaning of the Constitution. It rests with State Legislatures and State courts to protect their citizens from injustice and oppression of this description. The framers of the Constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations necessary to the well-being and existence of the States. Were this court to assume jurisdiction, and re-examine and revise State court decisions, on a doubtful construction, that an interest in land held by patent was a contract, and the owner entitled to constitutional protection by our decision in case of abuse and trespass by an oppressive exercise of State authority, it would follow, that all State laws, special and general, under whose sanction roads, ferries, and bridges are established, would be subject to our supervision. A new source of jurisdiction would be opened, of endless variety and extent, as, on this assumption, all such cases could be brought here for final adjudication and settlement; of necessity, we would be called on to adjudge of fairness and abuse to ascertain whether jurisdiction existed, and thus to decide the law and facts; in short, to do that which State courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers, heretofore supposed to belong exclusively to State cognizance, would be taken from the States, and exercised by the general government, *through the in- [*586 strumentality of this court. That such a doctrine cannot be maintained here has in effect been decided in previous cases; and especially in that of Charles River Bridge v. Warren Bridge, 11 Peters, 539, 540, where other cases are cited and reviewed.

For the reasons above stated, it is ordered that the judgment of the Supreme Court of Illinois be affirmed.

Mr. Justice McLean dissented.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Illinois, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby affirmed, with costs.

JOSEPH J. KENNEDY, Trustee of Henry Shultz, an Insolvent debtor, and for the Creditors of the said Henry Shultz, and Henry Shultz, Appellants,

v.

THE BANK OF THE STATE OF GEORGIA, The City Council of Augusta, John McKinne, and Gazaway B. Lamar.

Bill to set aside final decree in insolvency—parties—barred by lapse of time—amendments allowed in this court—judgments and decrees of circuit courts binding until reversed—insolvency in South Carolina—suit pending in U. S. Circuit Court for Georgia—assignee barred by final decree.

Some of the distinctions stated between bills of review, of revivor, and supplemental and original bills in chancery.

This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the Circuit Court for that purpose.

When a cause is brought before this court on a division in opinion by the judges of the Circuit Court, the points certified only are before it. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.

If the jurisdiction of a Circuit Court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity.

But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the Circuit Court.

A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections.

Where a party interested consented to the sale of property, afterwards took the benefit of the insolvent law, and at a subsequent period counsel representing him filed a consent decree to complete the sale, the trustee having taken no steps for two years to connect himself with the proceedings in court, and then having suffered fifteen years more to elapse without moving in the business, it is too late for such trustee to object to the consent decree.

So, also, the holders of bridge bills, who have no specific lien upon a bridge, must be considered to have lost their right to impugn the sale as fraudulent, after so long a lapse of time.

587*] *THIS was an appeal from the Circuit Court of the United States for the District of Georgia sitting as a court of equity.

As the decision of the court turned upon some collateral points, it is not necessary to state all the facts in the case, which were extremely complicated. The Reporter therefore refers the reader to the opinion of the court, which was delivered by Mr. Justice McLean, and which contains a recital of all the facts necessary to an understanding of the points decided.

It was argued in conjunction with another case between the same parties, involving the same principles of law, and with nearly the same state of facts. The two cases were argued by Mr. Waddy Thompson, Mr. Butler, and Mr. Webster, for the appellants, and upon the part of the appellees by Mr. Davis, representing Lamar, Mr. McAllister and Mr. Johnson (Attorney-General) representing the Bank, and Mr. Sergeant representing the city of Augusta.

The arguments of the counsel continued for several days, and it is therefore impossible to give a full report of them, or to do more than merely state the points and authorities.

The points raised on behalf of the appellants were the following, as stated in the briefs of Mr. Webster and Mr. Thompson:

On the 9th day of May, 1821, one Christian Breithaupt and the said Henry Shultz filed their bill in the Circuit Court against the Bank of the State of Georgia, praying that the bridge across the Savannah River at Augusta, and other property therein named, might be decreed to be first liable to the redemption of the bills issued by the Bridge Company aforesaid, and for an injunction restraining the Bank of Georgia and other creditors of the said John and Barna McKinne, as well as the creditors of the said Bridge Company, from enforcing executions and selling the bridge and other property of the said Bridge Company.

Amongst various interlocutory orders in said cause, was one ordering the bridge aforesaid to be sold by two commissioners therein named; and it was sold accordingly, and the Bank of the State of Georgia became the purchaser. The said Henry Shultz consented to the sale in writing; but the said John McKinne refused to give such assent.

On the 6th day of May, 1830, a decree, drawn up by the consent of counsel, was signed by the Hon. W. Johnson and J. Cuyler, which will be found in the record.

It is alleged by the present complainant, the assignee of Henry Shultz, that the order of sale aforesaid is not binding, in *so far as [*588 those whom he represents are concerned. First, because John McKinne, the joint tenant of the said Henry Shultz, refused his consent. And second, that the creditors of the Bridge Company were not parties to said suit; and that the decree of the 6th of May, 1830, presents no bar to the claim of your orator, John W. Yarborough,[1] as it purports on its face to have been made by the consent of the counsel of the said Henry Shultz, two years after he had made an assignment of all his estate, and specifically of the bridge aforesaid, to Thomas Harrison, for the benefit of his creditors, and therefore he had no power or authority in the premises, and also because the court had no jurisdiction of the cause.

The bill prays that the bridge and other property of the Bridge Company may be decreed to be first liable for the redemption of the bills issued by the said Bridge Company, and afterwards to refund the creditors of Henry Shultz, the amount, with interest, which he paid for the redemption of said bills after his retirement from the Bridge Company.

To this bill of complaint John McKinne answers, admitting all the material allegations of the bill. The other defendants filed demurrers.

The complainant submits to this honorable court, that the sale of the bridge, by the interlocutory order of the court, is void as to him, and those whom he represents, the creditors of

Note.—Nature of bill of review; when may be brought; who may maintain; time within which; what it should contain. See note to 8 L. ed. U. S. 891.

Who may maintain bill of review. See note to 36 L.R.A. 336.

1.—Yarborough was the original trustee of Shultz, in whose place Kennedy was now acting.

Henry Shultz, who were not parties to the suit. 2d. That the said sale was made without the consent of the said John McKinne. 3d. That the court, at the time of the said order, had no jurisdiction of the case, as proper parties were not before the court.

2. That the consent decree of the 6th of May, 1830, has no binding efficacy on the complainant or those he represents, as they were not parties in said suit, and that the consent of the said Henry Shultz was without authority, as regards the claims of his creditors, as he had previously assigned all his interest in the premises, under the insolvent debtor law of South Carolina, to Thomas Harrison, Esq.; and because the court had not jurisdiction of the case.

3. That the mortgage by John and Barna McKinne to the Bank of Georgia was void, as violating a statute of Georgia, and second, as appropriating the assets of the partnership to the payment of the individual debts of the partners, in violation of the general law on that subject, as well as the special terms of this particular copartnership.

589*] *4. That if the said mortgage be valid, the defendants, never having foreclosed, are to be regarded as mortgagees in possession, and chargeable with rents, issues, and profits.

5. That if the court should be of opinion that, as regards the interest of the said Henry Shultz, the sale made under the interlocutory order aforesaid be valid, it is void as to the interests of the said John McKinne, the joint owner of said bridge.

6. That the mortgage, if a valid lien, has been more than paid off, and the residue is subject to division amongst the creditors of Henry Shultz.

7. That a release by the Bank of Georgia to John McKinne, one of the two joint owners of the bridge, and partners with the Bridge Company, is, in law, a release of the said Henry Shultz.

The following authorities will be relied on in the argument: 3 Ves. Jun. 255; 2 Kent's Com. 400; 2 Story's Equity, 304, secs. 446–449, 463, 1039, 1040; Jac. Law. Dict. tit. Estate; 3 Mod. 46; 2 Story's Eq. 527, sec. 1287, 240, sec. 976; 2 Treadway, S. C. Re. 674; 3 Taunt. 976; 2 Story's Eq. 491; sec. 1244; Mill on Eq. Mort. 123; Law Library, 47; 1 Story's Eq. 383, sec. 395; Mill on Eq. Mort. 76, 79, 80, 81; 1 Story's Eq. 625, sec. 675; 2 Story's Eq. 500, sec. 1253; 3 Kent's Com. 65; 1 Story's Eq. 588. sec. 633; 3 Laws United States, 482, sec. 6; 10 Wheaton, 1, 20; 2 Cranch, 33; 3 Wheaton, 591; 2 Marsh. 11; 1 Bland, 20; 6 Leigh, 400; Story's Eq. sec. 10; 13 Peters, 691, 729; 8 Cranch, 9, 22; 2 Peters, 157, 163; 10 Peters, 449, 475; 10 Wheaton, 199; Gov. Deg. 974–976; 9 Pick. 259; Story's Eq. secs. 329, 330, 349, 380, 403, 425, 354; Mit. Eq. Pl. by Jeremy, 97, 98; 7 Paige, 287, 290; Story's Eq. secs. 466, 499, 500, 503, 505, 507, 508, 513, 519, 521, 526; Barton's Suits in Equity, 131; 1 Peters, 329; 2 Term Rep. 282; 4 Ves. Jun. 396; 3 Atk. 809, 811; 5 Ves. Jun. 3; 2 Stat. at Large, 159 and note; Story's Eq. Pl. 443; 1 Ves. & Beames, 536; 19 Ves. 184; 2 Story's Eq. Jur. 1520 and note; 1 Peters, 329; 10 Ib. 480; 11 Wheaton, 1.

Mr. Davis contended, on behalf of Lamar, *hat the Bank of the State of Georgia was a purchaser at a judicial sale, under a decree of a court having jurisdiction of the cause, the parties, and the subject matter—the sale being unimpeached for either fraud or irregularity, and so entitled to the bridge, and to convey it to Lamar.

To this it is replied, in substance, that the decree was erroneous, considered as pronounced in adversum.

Lamar rejoins—

I. That the decree of the 21st of December, 1821, was by *consent of all parties in [*590 interest—Shultz and McKinne, joint owners and partners, the Bank as mortgagee, and Breithaupt and others, creditors of said Shultz; and,

1. That they and all claiming under them are estopped, by such consent, to insist on error in the decree. Webb v. Webb, 3 Swanst. 658; Bradish v. Gee, Ambler, 229; 2 Daniell's Ch. Pr. 617; Downing v. Cage, Eq. Cas. Abr. 165, sec. 4; Toder v. Sansam, 1 Bro. P. C. 469, 473, 476; Harrison v. Rumsay, 2 Ves. Sen. 488; Wall v. Bushby, 1 Bro. Ch. 484, 485, 489; Norcot v. Norcot, 7 Vin. Abr. 398; Bernal v. Donegal, 3 Dow. P. C. 133; Mole v. Smith, 1 Jac. & Walk. 665.

2. That there is no sufficient averment that McKinne did not consent to the decree of December, 1821, but only that he never consented to, or executed any power or authority to the commissioners to make said sale, or to execute any title to the purchaser; and that, after consent to the decree, his objection could not stop the sale, nor was a power of attorney requisite. Bradish v. Gee, Ambl. 229; Webb v. Webb, 3 Swanst. 658.

3. The language of the bill, on the contrary, imports an express averment that the decree was in fact made "by consent of the parties, complainants and defendants."

4. Were there a direct denial, still a party cannot controvert the consent recited in the decree—unless, perhaps, for fraud in its insertion. Downing v. Cage, Eq. Cas. Abr. 165, sec. 4; Norcot v. Norcot, 7 Vin. Abr. 398; Mole v. Smith, 1 Jac. & Walk. 665; Biddle v. Watkins, 1 Pet. 686.

5. A fortiori, not as against a purchaser under the decree, such party never having objected to the decree or sale, nor moved to have the "consent" stricken out, though before the court always, after twenty-four years from the decree of sale, and fifteen from its formal ratification and final decree. Voorhees v. Bank of United States, 10 Pet. 449, 473; McKnight v. Taylor, 1 How. 161; Lupton v. Janney, 13 Pet. 385.

6. McKinne not seeking as complainant the avoidance of the decree and sale on that ground, Shultz cannot avail himself of the error, as against McKinne, to enable him to avoid his own consent and acts. Thomas v. Harvie's Heirs, 10 Wheat. 146; 6 Cond. R. 44, 47; Whiting v. Bank of United States, 13 Pet. 6.

II. If the denial be adequate and allowable in itself, and available for Shultz, still,

1. No error, or omission, or false recital, or want of proof, or other error behind or on the face of the decree, the court having jurisdiction, can effect a purchaser under it. Simmes & Wise v. Slacum, 3 Cranch, 300; 1 Cond. R. 539, 541; Thompson *v. Tolmie, 2 Pet. [*591

157, 167, 168, 169; United States v. Arredondo, 6 Pet. 729; Bank of United States v. Bank of Washington, 6 Pet. 8, 16; Voorhees v. Bank of United States, 10 Pet. 449, 472, 478; Shriver's Lessee v. Lynn, 2 How. 43, 58; Grignon's Lessee v. Astor, 2 How. 319, 340–343; 10 Wheat. 192, 199; 6 Cranch, 267.

2. The denial of the consent is such—for consent is in lieu of evidence or law authorizing such a decree; and it is to deny a fact recited as the foundation of the decree; and if it be as recited—a sufficient foundation for it.

3. The inference that McKinne's refusal avoided the whole sale, impeaches the judgment of the court, ordering and confirming the sale in spite of such want of consent; i. e., the court erred in decreeing, upon consent of one, the sale of the whole, or of any part of the bridge.

4. The allegation of the invalidity of the mortgage to the bank is likewise controverting the opinion of the court, that it was valid, so far as to authorize a sale, or it is entirely irrelevant.

So none of them avail, to impeach the title of the bank or of Lamar. 2 How. 43, 58; 2 Pet. 168; 10 Pet. 472, 473; Bennett v. Hamill, 2 Sch. & Lef. 577, 578.

The denial of the consent recited does not show the decrees to be nullities; the consent is not the decree, but only waiver of objection to it; the decree is the act of the court—valid as a decree on the subject matter till reversed, in spite of the want of consent. So denial of consent removes that estoppel, only against showing errors in the decree.

III. The absence of McKinne's consent would not avoid the sale of the bridge.

1. (a) The parties had a chattel interest, an estate for years only, in the franchise.

(b.) It was partnership property; and therefore one partner could dispose of the whole interest, so as to bind his copartner. Harrison v. Sterry, 5 Cranch, 289; 2 Cond. R. 260–263; Anderson v. Tompkins, 1 Brock. 456; Robinson v. Crowder, 4 McCord, L. R. 519.

(c) McKinne being party to the suit with his copartner, and having never moved to avoid the sale, has, by his acquiescence and knowledge, ratified his partner's act. Storrs v. Barker, 6 Johns. Ch. 166, 169, 172; Wendell v. Van Rensselaer, 1 Ib. 354.

(d) McKinne is barred by lapse of time from avoiding the sale for want of his consent; and so are Shultz and his assignee, when relying on McKinne's refusal.

592*] *2. The supposed pledge of the bridge is a legal nullity; for—

(a) It was, if anything, a private understanding merely of the partners, that this fund should remain as security for the bills, which did not affect their power of disposal, as to third parties. Hawker v. Bourne, 8 Mees. & Wels. 710.

(b) If publicly notified, it gave no lien on the bridge passing with the notes into each holder's hands.

(c) There is no direct averment of any legal pledge creating a lien on the bridge for holders of bridge bills, before other social creditors; nor of any disposition of, or agreement with reference to, the bridge, restraining the power of both or of either to sell it—even were there one as to the application of its proceeds.

(d) If such pledge avoided Shultz's consent and sale of his interest, it must likewise avoid his assignment of his share under the South Carolina insolvent laws; and so the trustee has no interest in the suit.

IV. The sale, being regular, passed the whole interest of Shultz in the property; and,

1. Its confirmation binds McKinne also.

(a) It was virtually confirmed by payment and acceptance of the purchase money, and possession of the bridge; all which were acquiesced in.

(b) By express decree.

(c) Both Shultz and McKinne are estopped from alleging error by consent to the decree. (See cases cited above.)

(d) There is no suggestion that the counsel of "defendants" assenting thereto did not then represent McKinne.

(e) Even as to Shultz, it is not averred that his solicitor had ceased to be such; but only that he by his consent could not bind the fund nor the interests of the creditors.

2. This decree is not shown to be void by any sufficient averment; for,

(a) Being by consent, without dispute, no error can be alleged against it other than such as shall go to the jurisdiction of the court which gave it.

(b) This decree was rendered by the Circuit Court in which the suit was brought; and it is not averred that it had not jurisdiction.

(c) The denial of jurisdiction in the Supreme Court does not involve the denial of that of the Circuit Court, nor show that its decree is void; for on certificate of division, the points certified alone are before the Supreme Court; the cause remains below, and may be proceeded in there. 2 Stat. at Large, p. *159, sec. [*592 6; Ogle v. Lee, 2 Cranch, 33; Harris v. Elliot, 10 Pet. 25, 56; Davis v. Braden, 10 Pet. 286, 289; Adams & Co. v. Jones, 2 Pet. 207, 213, 214; White v. Turk, 12 Pet. 239, 240; United States v. Baily, 9 Pet. 267, 273, 274; Perkins v. Hart, 11 Wheat. 237; Wayman v. Southard, 10 Wheat. 1; United States v. Briggs, 5 How. 208.

Therefore, if the Supreme Court had jurisdiction, the cause was regularly remanded, and it was competent for the Circuit Court to render any decree it saw fit. If the Supreme Court had not jurisdiction, the cause remained before the Circuit Court, with like power of proceeding to decree.

(d) But the facts averred do not show that the Supreme Court had not jurisdiction at January Term, 1830; for though its opinion was ordered to be certified, it had not been done; and till it had been done, it was competent for counsel to ask for its re-instatement by consent.

It was also within their power to agree to, and of the court to allow, an amendment of the pleadings, not stating new points, but obviating obstacles to the decision of those certified. Bank of Kentucky v. Ashley, 2 Pet. 327, 328, 330; Woodward v. Brown et ux. 3 How. 1, 2; Union Bank of Georgetown v. Geary, 5 Pet. 99, 111, 113; Holker v. Parker, 7 Cranch, 436. 456; Osborn v. Bank of United States, 9 Wheat. 738; Jackson v. Stewart, 6 Johns. 34, 37, 296, 300; Henck v. Todhunter, 7 Harr. & Johns. 275, 278.

The order of January Term, 1828, was predicated on "the present state of the pleadings," and contemplated an amendment; and it could as well be allowed before the Supreme as the Circuit Court. Matheson's Adm. v. Grant's Adm. 2 How. 263, 281; Marine Ins. Co. v. Hodgson, 6 Cranch, 206.

(e) The Supreme Court having assumed jurisdiction, allowed the re-instatement, and certified the cause below for further proceedings, it is not competent for any party or court to impeach its jurisdiction. Voorhees v. Bank of United States, 10 Pet. 474; Martin v. Hunter's Lessee, 1 Wheat. 104; Ex-parte Sibbald v. United States, 12 Pet. 492; Washington Bridge Co. v. Stewart et al. 3 How. 413, 424, 426; Skillern's Exec. v. May's Exec. 6 Cranch, 267.

If, then, the decree of 1830 be not void, but valid as to all parties to it, then,

1. McKinne is expressly bound by it.

2. It ratifies the sale, and thus removes all difficulty arising from McKinne's previous supposed dissent; and,

3. Thus Shultz being bound by the sale, and 594*] McKinne by *the ratification, the whole interest in the bridge is concluded by consent decrees.

V. The confirmation by final decree was not vitiated by failure to bring Shultz's assignee before the court; for,

1. The decree for sale was final and conclusive on Shultz's whole interest. Ray v. Law, 3 Cranch, 179; Whiting v. Bank of United States, 13 Pet. 6, 15.

2. The sale was merely execution of the decree, and confirmation was the right of the purchaser, and, of course, in the absence of cause shown.

3. No cause is shown in this record, no irregularity or fraud, nor any grievance to the complainants' assignee.

And the confirmation pending the abatement or defectiveness of the suit by reason of the assignment and the absence of the assignee, is not error for which a bill of review will lie, unless the sale be impeached. Thomas v. Harvie's Heirs, 10 Wheat. 146; Whiting v. Bank of United States, 13 Peters, 15, 16.

4. There were always parties before the court competent to act; for by the assignment the suit was not abated but defective, and could be proceeded with if neither party required the assignee to be brought before the court and he did not come in. Story's Eq. Pl. sec. 328; Sedgwick v. Cleaveland, 7 Paige, 287, 289, 290, 291, 292; Massey v. Gillelan, 1 Paige, 644.

Shultz was still a necessary and proper party, and could for his own interest consent to the re-instatement and the amendment—especially if assignee declined or neglected to proceed with the suit. Sedgwick v. Cleaveland, 7 Paige, 290; Mitf. Eq. Pl. by Jer. 65, note t.

This assignment being out of the State where the suit was pending, if considered as made under a tribunal and law operating in invitum, cannot appear on the fund in the hands of the Circuit Court, extraterritorially. Harrison v. Sterry, 5 Cranch, 289; Blane v. Drummond, 1 Brock. 62.

If voluntary, the assignee is bound by all proceedings before he is made party. Story's Eq. Pl. sec. 351; Mitf. Eq. Pl. by Jer. 73, 74.

VI. This is a bill of review to vacate a decree, and to have the benefit of the proceedings.

It is therefore barred by lapse of more than five years from the final decree, whether the decree of December, 1821, or May, 1822, or May, 1830. Thomas v. Harvie's Heirs, 10 Wheat. 146; Whiting's v. Bank of United States, 13 Peters, 13, 15.

And treating the decree of December, 1821, and May, 1822, as final, by lapse of twenty years and laches and negligence.

*VII. But, in fact, it appears that [*595 Lamar is not the purchaser of anything that ever was the property of the complainants.

The right claimed was a franchise to have a toll bridge over a navigable river, held by acts of the Legislatures of South Carolina and Georgia, for a limited time, which had expired when Lamar purchased the bridge, which then was held under a new grant. Laws of Georgia for 1833, p. 40, 41, tit. Bridges; 9 Statutes of South Carolina, 589, sec. 24; 471, 472, sec. 53; Act of Georgia, Dec. 23, 1840.

The record of the original cause, being in the Supreme Court, under the certificate of division, and being referred to in the bill, may be inspected. Bank of United States v. White, 8 Pet. 262, 268.

The franchise in this case was an incorporeal hereditament granted for a term of years to the grantees and their heirs, and could only exist by virtue of the acts of Assembly, and ceased on the expiration of the time limited. 2 Bl. Com. 37, 38; 2 Inst. 220; Bank of Augusta v. Earle, 13 Pet. 595; People v. Thompson, 21 Wend. 235, 249, 250; 23 Wend. 537, 554, 564, 569.

That this franchise and the statute creating it are public in their nature. 9 Bac. Abr. 231, 232; 21 Wend. 235, 249, 250; 15 Johns. 387, 389; Gresley on Eq. Ev. 293, 294; 1 Starkie on Ev. 196.

The points made by Mr. McAllister and Mr. Johnson were the following:

1st. That the present bill of revivor and supplement has not been exhibited in accordance with the practice and usages of courts of equity, and on that ground the demurrer must be sustained. Story's Eq. Pl. sec. 643; 1 Daniell's Chancery Prac. 649; Wortley v. Birkhead, 3 Atk. 809, 811; Fletcher v. Tollett, 8 Ves. 3.

2d. That the present bill was filed without leave of the court and notice to the adverse party, on the erroneous supposition that the original suit, the revival of which is the object of the present bill, had abated, whereas, by complainants' own showing, it had only become defective, and, in such case, the court had no jurisdiction of the bill without previous leave given to file it, and due notice to the opposite party of the intention to file such bill, in compliance with the 57th Rule of Practice of the courts of equity of the United States. 1 Howard, xviii.; 17 Law Library, 112; Story's Eq. Pl. sec. 383, note 3; 1 Daniell's Ch. Prac. 75; Sharp v. Hullett, 2 Sim. & Stu. 496; Pendleton v. Fay, 3 Paige's Ch. R. 206; Whitney v. Bank *of United States, 13 Peters, 13; 3 Dan- [*596 iell's Ch. Prac. 1733, 1737; 2 Ves. Sen. 571, 577; Dexter v. Dexter, 4 Mason, 304; Story's Eq. Pl. secs. 466, 527, 528, 443; 1 Daniell's Ch. Prac. 449, 625, 655; 4 Paige's Ch. R. 632.

3d. That where two complainants exhibit their bill, both must have an interest in the subject matter of dispute, or else the demurrer will be sustained. Story's Eq. Pl. secs. 232, 509, 544; 1 Daniell's Ch. Prac. 347, 348, 361, 362, 617. The King of Spain v. Machado, 4 Russ. 225, 242; Abrahams v. Plestoro, 3 Wend. 546.

4th. That, by their own showing, neither of the complainants in this case had such an interest as would authorize the filing of the present bill.

1. As to Henry Shultz. His interest is concluded by the decree of 8th May, 1830, entered into by consent of his attorney, who was the attorney of record. Union Bank of Georgetown v. Geary, 5 Peters, 112, 113; Bradish v. Gee, Ambler, 229; 5 N. H. 393; 4 Munroe, 377; 2 N. H. 520; 1 H. Black. 21; 17 Johns. 461; 16 Mass. 396; 7 Cowen, 744.

2. That against this consent decree, no error can be alleged by him. Harrison v. Rumsey, 2 Ves. Sen. 488; Monell v. Lawrence, 12 Johns. 534; Webb v. Webb, 3 Swanst. 658; Brown's Parl. Cas. 244; 2 Daniell's Ch. Prac. 1179, 1180.

3. That he is concluded, by his acquiescence in this decree, from its date to 9th May, 1845, when the present bill was filed.

4. That he is concluded by his letters of attorney to Walker and Fitzsimmons, authorizing them to sell the Augusta Bridge, his consent to such sale, its sale under a power from him, and the subsequent confirmation of said sale by the consent decree.

5. That present bill does not allege that Schultz is not concluded by said decree, but simply affirms that all his interest in the subject matter had passed out of him, prior to the consent given to said decree by the solicitor of him, the said Henry Shultz, and that therefore said decree could not bind his (the said Shultz's) creditors and assignees.

Thus much for Shultz.

5th. As to the other complainant, John W. Yarborough, he has no interest.

1. He was not the assignee of Shultz, under the insolvent law of South Carolina. By the allegations of the bill, it appears he was merely a trustee, appointed by a court of equity in that State to distribute the funds in that court belonging to an insolvent party. Such court did not, and could not, assign to the trustee the right to sue for money at the time in the registry of a foreign tribunal, nor could such 597*] appointment (if it *be deemed that the bridge was unsold at the time) pass real estate situate in Georgia. James's Dig. Laws S. C. 121; 2 Hill, S. C. 468.

2. Admitting, ex gratia, that Yarborough was assignee, duly appointed by an insolvent court, the assignment constituting him such assignee was in invitum in the State of South Carolina, and it could not on that ground operate a transfer of funds in the registry of the court of Georgia. Such assignment was not only in invitum, but was the creature of a local law of South Carolina, and could have no extraterritorial operation to pass property in Georgia. The general right of a foreign assignee to sue may be admitted; but it will be contended, that right is based upon national comity, and is admitted only when neither the State in which he seeks to sue, nor her citizens, would suffer injury from the application of the foreign law; that the consent decree was in the nature of a settlement between debtor and a creditor without notice of change of interest, and the application of a foreign law, to the detriment of the latter, would be as unjust as it would were it permitted by its application to cut out a domestic creditor in favor of a foreign assignee. Story's Eq. Pl. sec. 379; Sugden on Vendors, 460, 537; Picquet v. Swan, 5 Mason, 40; 1 Story's Eq. Jur. sec. 406; Calvert's Equity, 102; Bishop of Winchester v. Payne, 11 Ves. 194, 197; 2 Ves. & Beames, 199, 205; Sugden on Vendors, 538; 3 Atk. 392; Bald. C. C. 45, 296; 1 Wendell's Black. 441, note; Fenwick v. Sears, 1 Cranch, 259; Dixon's Ex. v. Ramsay, 3 Cranch, 319; 1 Kirby, 313; 6 Binney, 353; 1 Harr. & McH. 236; 2 Hayw. 24; 20 Johns. 227; 3 Wend. 538; 2 Kent's Com. Lec. 37, pp. 40, 46, 407, 408, 2 ed.; 1 Mill's Cond. Rep. S. C. 283; 4 McCord. 519, 367; 2 Hill. S. C. 601; 5 Cranch, 302; 12 Wheaton, 213, 356; 5 Howard, 295; 1 Brock. 203, 211; 9 Johns. 64.

Thus much for the interest of Yarborough.

6th. It will be contended that John W. Yarborough must be a privy or a stranger to Henry Shultz. If the former, he is bound by the letter of attorney of Shultz to Walker and Fitzsimmons—his consent to the sale of the bridge and all his previous acts; in a word, if Yarborough was a privy, he comes in pendente lite, and must come in pro bono et malo. On the other hand, if Yarborough be a stranger, he is clearly not entitled to revive the proceedings of another for his own benefit.

Should it be urged again, as it was in the court below, that all that was done by Shultz was done coram non judice, and void, we shall answer:

1. If the proceedings were void (which is by no means admitted), *what was done [*598 by Shultz was good as matter of contract, having received his assent.

2. If the proceedings were void, how comes it complainants seek to revive a nullity?

3. We shall contend that the proceedings were not void, and that the decree cannot be impeached in the manner attempted by the present bill.

7th. We shall argue that the assignee (the only one appointed by the insolvent court), having disclaimed, Shultz, in whom the legal title was, became by implication the trustee of his creditors, and thus all parties were before the court at the time the decree was rendered. Tunno v. Edwards, 2 Cond. Rep. S. C. 674, Treadway's ed.

8th. If none of foregoing grounds be sustained by the appellate tribunal, the bill to which demurrer has been filed will be viewed in the attitude it professes on its face to hold—that of a bill of revivor and supplement—and it will be contended that, the object of the bill being to revive a portion of the proceedings and to set aside the decree, the demurrer must be sustained, such not being the office of a bill of revivor and supplement. Story's Eq. Pl. secs. 257, 333, 344, 354, 377, 383, 386, 617; Pendleton v. Fay, 3 Paige's Ch. R. 204, 206; 3 Daniell's Ch. Prac. 1739.

9th. It will be contended that the present

bill is in truth a bill of revivor and supplement, in nature of a bill of review; but as such it cannot be sustained, because such bill can only be filed within five years after decree rendered, for error of law apparent on the face of the decree, or with leave of the court upon affidavit of new facts recently discovered. Story's Eq. Pl. secs. 404, 405, 407, 409, 412, 417; Webb v. Pell, 3 Paige's Ch. R. 368; Whiting v. Bank of United States, 13 Peters, 6; Dexter v. Arnold, 5 Mason, 308; 10 Wheat. 146; Story's Eq. Pl. sec. 426; Mussell v. Morgan, 3 Bro. Ch. R. 79; Style v. Martin, 1 Ch. Cases, 151; Monell v. Lawrence, 12 Johns. 535; Kennedy v. Daly, 1 Sch. & Lef. 355, 374.

10th. It will be argued that the demurrer must be sustained by reason of the decree of May, 1830, the whole case being res adjudicata. That there was no error in said decree or the proceedings on which it was founded, which could have the effect to impeach its validity.

That admitting there was error, it was merely one of pleading, which did not vacate the decree, and giving to it the fullest effect, it could only render the decree voidable, to be set aside on appeal. Story's Pl. secs. 10, 638; 2 Smith's Leading Cases, 440; 1 Bibb, 262; 2 Howard, 599*] 497; Breese, 31; Coxe, 31, 70; *3 McCord, 280; Case of The Blaireau, 2 Cranch, 203; Jackson v. Ashton, 10 Peters, 480; Kempe's Lessee v. Kennedy, 5 Cranch, 173; Skillen's Ex'rs v. May's Ex'rs, 6 Cranch, 267; McCormick v. Sullivan, 10 Wheat. 199; Case of Tobias Watkins, 3 Peters, 203; Washington Bridge Co. v. Stewart et al. 3 Howard, 413; Voorhees v. Bank of United States, 10 Wheat. 473; 6 Howard, 39; Chancellor Harper's opinion in Yarborough, Trustee, and Shultz v. Bank of the State of Georgia and others, MS.; Ex-parte Bradshaw, 7 Peters, 647. That, so far from being a nullity, the decree placed the Bank of the State of Georgia, and those claiming under them, in the attitude of bona fide purchasers for a valuable consideration at a judicial sale, and that in favor of them the maxim of omnia presumuntur rite acta will apply. Bennett v. Hamill, 2 Sch. & Lef. 566; Lloyd v. Johnes, 9 Ves. 37; Denning v. Smith, 3 Johns. Ch. 344.

Lastly, it will be argued that, upon the ground of a general want of equity on the part of complainants—the demurrer must be sustained, and the decision of the court affirmed. Megham v. Mills, 9 Johns. 64; 4 Ves. 387; 16 Ib. 467; 18 Ib. 425; 1 Kelly, Geo. 193; Ex-parte Ruffin, 6 Ves. 119; Ex-parte Williams, 11 Ves. 3; 2 Story's Eq. Jur. 736; Elmendorf v. Taylor, 10 Wheat. 168; Foster v. Hodgson, 19 Ves. 185; Gregory v. Gregory, Coop. 201.

Mr. Sergeant, for the city of Augusta, made the following points:

I. That the decree of the Circuit Court of the United States, made in the year 1830, is final and conclusive, and cannot be appealed from, reviewed, or set aside, nor questioned; and this appears upon the complainants' bill. No court of equity, therefore, can maintain such a bill.

The principle thus stated is so familiar and settled, that no authority is necessary for it. One case, however, may be referred to, because the decision was between the same parties, on the very same points, upon full hearing, by a court entitled to the peculiar respect of these parties complainants, being the highest court of the State of South Carolina, of which State both of the complainants are citizens of whose laws it is the highest evidence. Yarborough and others v. The Bank of the State of Georgia and others, Chancellor Harper's opinion, p. 113, affirmed in the Equity court of Appeals, at Columbia, p. 120. The grounds of the affirmance sufficiently appear in the assignment of errors, pp. 118, 119.

II. It is argued in the bill, that Yarborough was not a party. *Referring only to [*600 the statement in the complainants' bill, which is open on the demurrer, the first remark to be made upon it is, that Yarborough and Shultz are joint complainants, making a joint statement, and uniting in one prayer for relief. If Yarborough really had any equity of his own, and Shultz only the contrary of equity, by whatever name called, it would not follow, it may be admitted, that he would not have a right to sue out an original bill, according to his equity. It may be admitted, further, that he might have a right to make Shultz a party defendant. But if they unite in one right, it must be obvious that the want of equity of the one must be available against both, and is demurrable. See Makepeace v. Haythorne, 4 Russ. 244; Redesd. 283, note 2.

There is another remark to be made. In the original bill, Shultz and one Breithaupt were complainants, and they proceeded together as joint complainants, throughout all the stages of the case, including the final decree. Breithaupt acquiesces in the decree, and, no doubt, had the benefit of it. He separates from Shultz, and is not a complainant here. Thus, then, in this bill, which professes to be in the nature of a bill of revivor, and supplemental bill, one of the original complainants is laid aside, or retires, and a new complainant is brought in and made a party. This is somewhat extraordinary.

But, further, in the bill there is a want of equity, in two essential particulars. The complainants nowhere deny that Yarborough knew of the pendency of the case in the Circuit Court of the United States for the State of Georgia. Shultz does not deny that Yarborough knew of it. In point of fact, it is very plain that he did know. In point of equity it was his duty to know, and in duty Shultz was bound to inform him. Nothing but a clear and positive denial could be admissible, and that would hardly be credible. Without such an averment, it becomes a fact in this case, that Yarborough did know. That Shultz did know, it is needless to say. If, with his knowledge, Yarborough stood by, and suffered Shultz to proceed with the suit, until a final decree was made, and years after, what pretense of equity can he have? They do aver, both of them, that the bridge property and rights became vested in Yarborough (which, by the by, is matter of law as to which the highest judicial authority in South Carolina has pronounced them to be wrong), and they also aver, that no act or consent of Yarborough or of Shultz could impair the right. But they nowhere aver that there was no such act or consent, as a fact, nor that Shultz did not act under the authority and with the knowledge, consent, and approbation of Yarborough. *They attempt, also, to [*601

bring in question the authority of the solicitor who acted for the complainants; which is a question not inquirable into here. If it were, it is only necessary to say that the decree went down to the Circuit Court, was entered there, nd the money raised from the sale of the mortgage property distributed under it, without objection then, or for fifteen years afterwards, when, for the first time, Mr. Yarborough comes in with Mr. Shultz. If Mr. Yarborough thus neglected his duty, the creditors (if there be any) have their remedy against him for his misconduct and neglect.

But is it true that Mr. Yarborough, under the insolvent law of South Carolina, acquired such a right as is here insisted upon? What the date of the assignment to him was is not stated in the bill; but it appears in the exhibits to have been on the 18th of December, 1830. The complainants allege that it related back to the 13th of October, 1828. Whether it did so or not is for the present purpose immaterial. The operation of the assignment upon real estate and franchises within the State of Georgia, and then, at the instance of the insolvent himself, in the custody of a court in the District of Georgia, and under the actual exercise of jurisdiction by such court—is it such in law that if the assignee be not made a party, the suit must abate or the jurisdiction be rendered inoperative? This is the question. To establish it would require that South Carolina had attempted such extraterritorial legislation, and the next, that Georgia submitted and agreed to it; but South Carolina did not, and does not so interpret her legislation, nor suffer her citizens so to interpret it. This has been distinctly decided by the highest court of South Carolina. Chancellor Harper's Opinion, 116. This is conclusive authority. It is unnecessary to cite others.

The fact of the bridge being partly in each State, as to its effect upon the jurisdiction, may be considered as decided by the same case.

But supposing the last objection out of the way, would an insolvent assignment operate in such a suit? It is not meant to inquire whether the assignee, upon his own application, made in due time, might be permitted in equity to become a party, or at all events to give notice of his right in some way upon the record. At law, he may have a suit marked to his use. But bankruptcy does not abate a suit, at law or in equity. 1 Cook's Bankrupt Law, 558, 560. The suit goes on. If the complainant become a bankrupt, his assignee may come in by supplemental bill. It depends upon himself whether he will or not. In either case, the suit goes on. He cannot file 602*] *a bill of revivor. Neither was it the business of the defendant to require or compel him to come in. It was the business and duty, therefore, of Mr. Yarborough himself to come in. If he neglected it, to the prejudice of his cestuis que trust, they must sue him. But he was not a necessary party. Nor is it necessary that he should state the bankruptcy (Redesd. 282, note n), even in a case then pending. It is not an abatement. Cooper's Equity Pleadings, 76, 77, and note.

III. There is another want of equity in the bill, believed to be decisive in itself, against both the complainants. In such a bill, the complainants must state their whole equity, negatively as well as affirmatively. They must deny all such things, within their own knowledge, as take away any seeming equity—not argumentatively, or by inference, but distinctly and positively, as matters of fact. The bridge property was sold, by order of the court, and with the consent of parties, and converted into personalty. The sale itself, and its effects, will presently be considered more particularly, under another head. The objection now offered is this: that neither of these complainants denies the receipt of part or parts of the consideration—and neither of them avers that it did not go to the benefit of the creditors. If it did, they can have no equity.

IV. So far, the answers in law upon the demurrer apply to the whole case. There are two remaining, peculiar to the city of Augusta, which are to be considered, and each in itself decisive.

First. It appears from the present bill, that the Bank of Georgia instituted a suit upon the mortgage in the State court of Georgia, which was so proceeded in, that there was a decree of foreclosure and sale, and a sale was about to be made under it. In this state of things, the suit in the State court being finally ended, including, of course, a decision upon the validity of the mortgage, Breithaupt and Shults filed their bill on the equity side of the Circuit Court of the United States for the District of Georgia, praying an injunction in the mortgage case, and certain other cases, and the assumption of jurisdiction in the whole matter. On the 13th day of June, 1821, an injunction was ordered "to stay the sale of said bridge, until the further order of the Circuit Court of the United States should be had thereon."

This injunction was granted to the complainants, who, taking the benefit, were bound by the terms. On the 21st of December, 1821, "with the consent of the parties, complainants and defendants," the Circuit Court appointed Freeman Walker and Christopher Fitzsimmons commissioners to make a sale of the bridge and appurtenances as mortgaged *to the [*603 bank, and required the parties to execute powers of attorney to the commissioners. The complainants executed powers of attorney. Colonel McKinne, who was a defendant, refused. This being reported, the court, on the 13th of May, 1822, "by consent of complainants," ordered a sale. On the 18th of November, 1822, a sale was made, returned, the money brought into court, and the sale confirmed by the court, without exception. At this sale, the Bank of Georgia became the purchaser. The Bank of Georgia, in 1838, sold to Gazaway B. Lamar, for a full and valuable consideration; and in 1840, Lamar, for a full and valuable consideration, sold to the city of Augusta. By the final decree, which was a consent decree, the whole of the proceeds were distributed according to the agreement of parties filed on record.

Thus, then, it appears that the title of the city of Augusta is derived directly from the sale of the 28th of November, 1822, and gives them all the right which was acquired by the Bank of Georgia, under that sale. Now, this was long before Yarborough acquired any right, even if his assignment could be shown to

relate back to the alleged assignment to Harrison, which the complainants state to have been on the 13th of October, 1828. Up to the sale, and six years after, the whole interest was in Shultz alone, and there was no such being in existence as Yarborough, assignee. The sale was therefore good.

It has been already shown that the Circuit Court had jurisdiction, the alleged defect in the bill being no defect at all. The sale, therefore, is a sale by the order of a court of competent jurisdiction, regularly conducted, confirmed by the court without objection, and the proceeds brought into court, and afterwards distributed by a decree of the court. Can it be necessary, or would it be respectful to the court, to argue that the purchaser at such a sale is protected by the law? There was no equity of redemption remaining; the whole was sold. There was nothing to come to Yarborough, or anybody else, by assignment from Shultz.

But suppose there was a want of jurisdiction. It is not necessary to remind the court that that is only error, and even a reversal for error would not affect the title of a purchaser. Neither is it necessary to say what a singular equity it would be which was founded on his own defect in his own pleadings, especially after so great a lapse of time. The law is well settled. It is a general rule, "that the purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause." Sugden, 5th ed. 46. All that the purchaser is bound to see is, that, as far as ap- [*604] pears upon the face of the *proceedings, there is no fraud in obtaining the decree. It is not pretended here that there was any fraud. The complainants do not allege that there was. There is no pretense of that kind set up.

Second. If the want of jurisdiction in the Circuit Court, for the reason alleged, were made out (as it is not), still Shultz, and those claiming under him, would be estopped in equity from disputing the title derived from the sale. Yarborough, as has been seen, derives from Shultz, by an assignment not claimed to be earlier than six years after the sale, and is affected by all that was previously done precisely as Shultz was. He took, subject to whatever equity or right there was then existing.

V. The complainants attempt in their bill to say something about notice. They do not say that the Bank of Georgia had any notice. So far, they must admit the title of the Bank of Georgia to be, on this ground, unassailable. The title of the Bank, they admit, was conveyed to Mr. Lamar, and by him to the city of Augusta. The Bank of Georgia does not dispute it. One is at a loss to conceive whence and how these complainants get any right to inquire into the consideration. If there were a defect in the title of the bank, the question of consideration and notice might arise—but not here. If the title of the bank was good, so was the title of Mr. Lamar, and so is the title of the city of Augusta. The saying about notice (for it cannot be called an averment) is altogether defective and insufficient, for want of explicitness and intelligible particularity.

VI. There is still a further want of equity, *or, more precisely speaking, a negative of equity, showing that, at the time of this suit instituted, the complainants had no right at all. The right they had was derived from legislative acts of the State of Georgia, both limited in time. The time expired, and the respective Legislatures in the year 1840 granted the property and privileges to the city of Augusta. The construction of this in equity has been determined in South Carolina, in the case before referred to. Chancellor Harper's Opinion, p. 114. This appears in the complainant's bill.

VII. As to the suggestion loosely thrown out in the bill, that the two ends of the bridge were in different States, it is not easy to perceive how any equity can grow out of it. All that it would amount to would be a question of jurisdiction. But that was waived and lost. It might have been pleaded to the jurisdiction of the State Court of Georgia. No such plea was put in, and the court made a decree, which has never been appealed *from, nor set [*605 aside, nor reversed. In the Circuit Court it was not objected to. All that was asked was to enjoin the sale by the State Court, and take the sale and distribution of the proceeds into the hands of the Circuit Court, and this was asked, consented to, and carried through, by the present complainant, Shultz. And further, the sale and conveyance were made under his power of attorney, so that the present owners hold under his own deed.

There are two points which have been touched incidentally in the preceding statement, which might be insisted upon more at large; namely, the title of the city of Augusta, as a bona fide purchaser, and the length of time. The bill states that the purchase was made on the 21st day of January, 1840. This was upwards of seventeen years after the sale. It was upwards of eleven years after the final decree, which placed it beyond the reach of an appeal; beyond the reach equally of a bill of review, which has the same limit at least as an appeal; and, in truth, unassailable in any way, in the same jurisdiction; while by its own nature it was protected from being questioned collaterally. What can be meant by the alleged notice therefore, it is impossible to conceive. Several more years elapsed, as has been seen, before the complainants themselves awakened to the conciousness that there was anything to take notice of. They slumbered on until 1845, before they commenced this suit, giving no sign but of profound acquiescence in what had been done. What notice had the city of Augusta to the contrary? This is the grossest laches, or worse. Either destroys all pretense of equity.

There might be added some points upon the form of proceeding here adopted. If they should be deemed necessary, they will be presented in a separate paper.

Mr. Justice McLean delivered the opinion of the court:

Henry Shultz and Lewis Cooper, in the year 1813, obtained from the State of South Carolina a charter for a bridge over the Savannah River, opposite the town of Augusta, in Georgia, for the term of twenty-one years; and in 1814 the State of Georgia granted to them a charter for the term of twenty years. In 1816 Henry Shultz and John McKinne, being the joint owners of the bridge, formed a partner-

ship in the business of banking, under the name of the "Bridge Company of Augusta;" the bridge was valued at seventy-five thousand dollars, and it, with other property named, constituted the partnership stock. In 1818, Shultz sold and transferred his interest in the partnership to Barna McKinne. The consideration of 606*] this *purchase was the sum of sixty-three thousand dollars, which Shults, owed to the firm, and which was credited to him on their books.

In a short time, the firm became greatly embarrassed. Among other debts, they owed to the Bank of the State of Georgia the sum of forty thousand dollars; and they obtained from it a further loan of fifty thousand dollars, with the view, as was stated, to relieve the Bridge Company. To secure the payment of the sum of ninety thousand dollars to the bank, the McKinnes mortgaged the bridge, eighty negroes, and some real estate, the 10th of June, 1819. Previous to this the "Bridge Bank" stopped payment. On being informed of this fact, Shultz resumed his place in the firm, by procuring a transfer of Barna McKinne's interest. He advanced fifteen thousand dollars of his own funds to pay deposits in the bank, and took other steps, with his partner, to sustain the credit of the bridge bills in circulation.

In 1831, a petition was filed by the Bank of Georgia, in the Superior Court for Richmond County, praying a foreclosure of the above mortgage; and at the May Term of that court, a rule was entered to foreclose the mortgage, unless the principal and interest due on it should be paid; and at the May Term, 1822, the rule was made absolute. The sum of $69,493 was found to be due to the bank on the mortgage and the property was directed to be sold. The sale was enjoined by Shultz, Christian Breithaupt, and others, by filing a bill against the bank in the Circuit Court of the United States for the District of Georgia, which, among other things, prayed that the property might be sold, and the proceeds applied to the payment of the creditors of the Bridge Company, and particularly to those who had obtained judgments. An order was made for the sale of the bridge, and commissioners were appointed to make the sale. The sale was made on the 28th of November, 1822, to the bank, for the sum of seventy thousand dollars. For this amount the bank issued scrip, which, by the order of the court, was deposited with its clerk.

In the further progress of the suit, the judges of the Circuit Court were opposed in opinion on the following points: 1. Whether the complainants were entitled to relief. 2. What relief should be decreed to them. These points being certified to the Supreme Court, at the January Term, 1828, the cause was dismissed for want of jurisdiction. The record did not show that a part of the defendants were citizens of the State of Georgia.

At the January Term of the Supreme Court 607*] in 1830, Messrs. *Wilde and McDuffie, being counsel for the parties, agreed in writing that the cause should be re-instated, and that the pleadings should be amended by alleging "that the stockholders of the bank were citizens of Georgia," and that the cause be argued. The court dismissed the case, on the ground that the whole cause was certified, and not questions arising in its progress. And the case was remanded to the Circuit Court, with "directions to proceed according to law."

This mandate was received by the Circuit Court at their May Term, 1830, and the case was re-instated on the docket. And at the same term "the cause came on to be heard on the amended bill, answers, exhibits, and evidence, and the court having considered the same, it was ordered and decreed, that the sale of the Augusta bridge, made by virtue of certain powers of attorney and the consent of the parties, and held and conducted under the direction of commissioners heretofore appointed under this court, be, and the same is hereby ratified and confirmed, and the said Bank of the State of Georgia vested with a full, absolute, and perfect title to the said bridge and its appurtenances, under the said sale, freed, acquitted, released, and discharged from all manner of liens, claims, or incumbrances, at law or in equity, on the part of the said Henry Shultz, John McKinne, Barna McKinne," etc.

"And it is further ordered and decreed by the court, by and with the consent of the parties, complainants and defendants, that the scrip issued by the Bank of the State of Georgia for the sum of seventy-one thousand six hundred and eighty-six dollars and thirty-six cents," etc., "be cancelled and delivered up to the bank by the clerk," etc., "and that the bill of complaint as to the several other matters therein contained, be dismissed with costs." Under which decree is the following agreement: "We consent and agree that the foregoing decree be entered at the next or any succeeding term of the said Circuit Court of the United States, District of Georgia;" signed, "George McDuffie, Sol. for complainants, and R. H. Wilde, Sol. for defendants." Dated Washington, 10 April, 1830. And the court say: "The within decree having been drawn up, agreed to, and subscribed by the solicitors, on behalf of the parties, complainants and defendants, on motion of Mr. Wilde, ordered that the same be filed and entered as the decree of this court," signed by both of the judges.

Fifteen years after the above decree was entered, the bill now before us was filed by Yarborough, as trustee of Henry Shultz, an insolvent debtor, and for the creditors of Henry Shultz, and Henry Shultz in his own right, which they say is "in the nature *of a [*608 bill of revivor and supplement," against the Bank of the State of Georgia, the City Council of Augusta, John McKinne, and Gazaway B. Lamar. In this bill the proceedings in the original suit are referred to, and many of them stated at length, and they are made a part of the present procedure. And the complainants pray that the said original bill, with all its amendments, the answers, decrees, decretal orders, and evidence, may be reinstated and revived for the causes set forth, to the extent of the several interests of the parties to this bill.

By way of supplement, the complainant Shultz states, that under the insolvent debtors' act of South Carolina, he executed an assignment of all his estate, in trust for his creditors, to Thomas Harrison, on the 13th of October, 1828. That his interest in the bridge was transferred by this assignment. Afterwards,

the complainant, John W. Yarborough, was appointed trustee of Shultz for the benefit of his creditors. That the bridge and its appurtenances having been originally pledged, as copartnership property, by John McKinne and Shultz for the redemption of the bills issued by them, the lien, never having been released, still remains. And if the mortgage executed to the bank be valid, the bank and all claiming under it occupy the ground of mortgagees in possession, and are bound to account for the rents and profits of the bridge, the same never having been sold under the foreclosure of the mortgage. That the bridge and its income are first liable to the redemption of bridge bills. After these are paid, one half of the surplus in the hands of the complainant, Yarborough, as trustee, to satisfy the creditors of Shultz, etc.

On the 4th of May, 1838, the bank conveyed its interest in the bridge to G. B. Lamar, for the sum of seventy thousand dollars, by a quitclaim deed. That Lamar purchased with a full knowledge of the title, and held the same, receiving the profits, up to 21st January, 1840, when he conveyed his interest in the bridge to the City Council of Augusta, for the sum of one hundred thousand dollars. That the city corporation had full knowledge of the claims on the bridge. The Legislatures of Georgia and South Carolina extended their charter of the bridge to the bank, on the 23d of December, 1840, reserving all liens upon it. That Yarborough, as trustee, out of the sale of the property of Shultz, paid bridge bills and judgments on such bills to the amount of about seventy thousand dollars, and that the unsatisfied creditors have the equity of now requiring a like amount of the copartnership property of the bridge company to be applied in payment of their individual claims. And in addition to the above payment, Shultz avers that he has *609*] paid *out of his private means, for the redemption of bridge bills, a sum of about one hundred and fifty-three thousand two hundred and ninety-six dollars. That the total amount paid by him out of his private funds, on account of bridge bills, was four hundred thousand eight hundred and twenty-six dollars, which he insists in equity he is entitled to receive, next after the redemption of the outstanding bridge bills. There is outstanding in bridge bills about the sum of ninety-two thousand dollars.

And the complainants allege that the decree, as entered on the original bill, is void as to all the parties except as regards the claim of Breithaupt, as the solicitor for the complainants in said bill did not represent the creditors of Shultz, and that no act of the solicitor could impair their rights. That all the right of Shultz passed out of him by virtue of his assignment for the benefit of his creditors. That the decree was a fraud upon them. That the sale of the bridge by the commissioners was void, as John McKinne, an equal partner of Shultz, never assented to it. That the Bank of Georgia, and all those who have held and are now holding under it, are in equity bound to account. But if the sale of the bridge shall be held valid, the complainants allege that the bank is bound to account for the amount of the purchase money and interest, and for the net sum of *tolls received*. And the complainants pray that the original bill, with all the proceedings thereon, may be received, and stand as before the decree was entered in 1830; that the said decree may be opened, reviewed, and reversed; that the mortgage to the bank may be declared null and void; and that the sale may be set aside, etc.

The defendants demurred to the bill, on the ground "that the complainants have not, by their bill, made such a case as entitles them in a court of equity to any discovery from the defendants respectively, or any or either of them, or any relief against them or either of them, as to the matters contained in the bill," etc. And afterwards John McKinne filed his answer, admitting the general allegations in the bill.

This bill has been considered by some of the defendants' counsel as a bill of review. But it has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for "error in law appearing in the body of the decree or record," without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree. But if this were a bill of review, it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from the *rendition of the judgment. Whiting [*610 et al. v. Bank of the United States, 13 Peters, 15.

Nor is this properly denominated a bill of revivor. When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave, and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. But this does not appear to be strictly of that character. The complainants denominate it a bill "in the nature of a bill of revivor and supplement." It must be treated as an original bill, having for its objects the prayers specifically set forth.

The proceedings on the original bill, under which the property now claimed was sold, are not before this court in their appellate character. We cannot correct the errors which may have intervened in that procedure, nor set it aside by a reversal of the decree. That case is collateral to the issue now before us.

The complainants insist, that the proceedings in the original suit, embracing the interlocutory decree under which the property was sold, and the consent decree of the 6th of May, 1830, were void for want of jurisdiction in the Circuit Court. It is not necessary now to inquire whether the Circuit Court had power to enjoin proceedings under the judgment in the State Court. The injunction was issued at the instance of Shultz, and for his benefit, and no question of jurisdiction was raised. But as there was no allegation in the original bill of citizenship of the stockholders of the Bank of Georgia, it is supposed the proceedings were coram non judice.

When the points on which the opinions of the judges of the Circuit Court were opposed were brought before the Supreme Court, at their January Term, 1828, the cause was dismissed for want of jurisdiction. But afterwards, at the January Term, 1830, of the Su-

preme Court, by the agreement of counsel, the record was amended by inserting the allegation, "that the stockholders of the bank were citizens of Georgia," and the cause was re-instated on the docket, and dismissed because the whole case was certified, and not the points on which the judges differed, as required by the act of Congress. The cause was sent down to the Circuit Court by a mandate, which directed that court to proceed therein according to law.

This court, it is contended, have no power to amend a record brought before them, and consequently the above entry was void.

There is nothing in the nature of an appellate jurisdiction, proceeding according to the com-611*] mon law, which forbids the *granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. 1 Gallis. C. C. 22. But it has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose. The only exception to this rule has been, where the counsel on both sides have agreed to the amendment. This has been often done, and it has not been supposed that there was any want of power in the court to permit it. The objection is, that consent cannot give jurisdiction. This is admitted; but the objection has no application to the case. Over the subject matter of the suit and of the parties, the court had jurisdiction, and the amendment corrected an inadvertence, by stating the fact of citizenship truly.

When a cause is brought before this court on a division of opinion by the judges of the Circuit Court, the points certified only are before us. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.

But if no amendment had been made, would the orders and decrees in the case by the Circuit Court have been nullities? That they have been erroneous, and liable to be reversed, is admitted. In Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267, a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to the Circuit Court, it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether in that court it could be dismissed for want of jurisdiction, after the Supreme Court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the Supreme Court for their decision. And this court held, "that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the circuit courts of the United States. In Kempe's Lessee v. Kennedy, 5 Cranch, 185, this court say: "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

And again in the case of McCormick v. Sullivant, 10 Wheat. 199, in answer to the argument that the proceedings were void, *where [*612 the jurisdiction of the court was not shown, the court say, the argument "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.

From these authorities, it is clear that the proceedings in the original case are not void for want of an allegation of citizenship of the stockholders of the bank. They were erroneous, and, had no amendment been made, might have been reversed, within five years from the final decree, by an appeal or a bill of review. But the mandate of this court which contained the amendment, as to the citizenship of the stockholders of the bank, agreed to by the counsel, was filed on the 6th of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this, the decree could not have been reversed for the want of jurisdiction. In the case of Bradstreet v. Thomas, 12 Peters, 64, the court held that an averment of citizenship in a joinder in demurrer, not being objected to at the time, was sufficient to give jurisdiction.

The sale of the bridge is alleged to be void, as it was made without the consent of John McKinne, who was an equal partner with Shultz.

The court ordered the bridge to be sold by Walker and Fitzsimmons, commissioners, and that the parties should execute powers of attorney to the commissioners authorizing the sale. All the parties concerned executed the powers except McKinne, and his refusal or neglect to do so prevented the sale. But afterwards the court, with the assent of the complainants, ordered the bridge to be sold for a sum not less than fifty thousand dollars, by the same commissioners, who were authorized to take possession of the bridge and receive the tolls until the sale was made.

McKinne does not complain of this sale, and Shultz consented to it. It was manifest from the embarrassment of the Bridge Company that the bridge must be sold, and the nature of the property seemed to require a speedy sale. All objection to that sale, by the parties on the record, must be considered as having been waived by the consent decree in May, 1830. *That decree "ratified and [*613 confirmed" the previous sale of the bridge. That the counsel who consented to that decree represented the parties named on the record is not controverted. A decree thus assented to and sanctioned by the court must stand, free from all technical objections.

But it is urged, that the consent of Shultz to the final decree did not bind his creditors, to whom he had assigned the bridge and his other

property under the insolvent act of South Carolina.

That assignment was made on the 13th of October, 1828. The bridge was sold by the commissioners, under the interlocutory decree of the court, in 1822; and the proceeds were held by the bank, subject to the order of the court. There was no abatement of the suit by the assignment of Shultz. The insolvent laws of South Carolina had no extraterritorial operation. They can only act upon the persons and the property within the State. The assignment did not affect property in Georgia, which was in the custody of the law—property which had been sold, with the express consent of Shultz, under the authority of a court of chancery; and the proceeds of which were kept subject to the distribution of the court.

The trustee of Shultz took no step to connect himself with the proceedings in the Circuit Court, although two years elapsed after the assignment, before the final decree was entered. For about seventeen years, he seems to have been passive in this matter, and until the present bill was filed. After so great a lapse of time, without excuse, he cannot be heard to object to a decree which was entered by consent. The power of attorney given by Shultz to the commissioners, which authorized them to sell the bridge, for the purposes specified, was conclusive upon him, and all claiming under him. And the decree which was agreed to by his counsel followed as a necessary consequence of the sale.

It does not appear that the holders of bridge bills had a specific lien upon the bridge. They were creditors of the Bridge Company, and could claim the rights of creditors against a fraudulent conveyance of the bridge and of its proceeds. But such a claim must be duly asserted and diligently prosecuted. A failure in this respect for fifteen years might well be construed into an acquiescence fatal to the claim. We cannot now, under the circumstances stated, look into the decree to ascertain whether, in the distribution of the proceeds of the sale of the bridge and of the other property, the court may not have mistaken the rights of some of the creditors of Shultz.

The objection, that the mortgage to the 614*] bank under a statute *of Georgia was void, is not open for examination. If anything was settled by the decree, it was the validity of that instrument. And this remark applies to several of the other objections made by the complainants. McKinne was a party on the record, and through his counsel assented to the final decree; but the counsel of Shultz now object to its validity, because McKinne did not assent to the sale of the bridge. And this objection is, for the first time, made in the bill before us. And it is not made by McKinne.

Within five years after the decree was entered, he might have reversed it, if erroneous, by an appeal or a bill of review. And that time having long since elapsed, the decree must stand as concluding the rights of parties and privies, unless it shall be held to be void. It cannot be so held, as we have shown, on the reasons assigned in the bill. Fraud in the obtainment of the final decree is not alleged in the bill. If this were stated and proved, it would authorize the court to set aside the decree. But even this would not affect the sale of the property, unless the purchasers should be, in some degree, connected with the fraud.

The final decree in the case, which covered and adjusted the whole subject of controversy before the court, was not only assented to by the counsel, but it was drawn up and agreed to by them. The court adopted it as their own decree, and entered it upon their record. It confirmed the sale of the bridge, and made a distribution of the proceeds. The bill was dismissed as to certain matters where relief was not given. The proceedings were not void for want of jurisdiction in the court. Nothing was left for its future action. The whole controversy was terminated. And here the matter rested for fifteen years, until the bill before us was filed. It asks the court to set aside the decree, and re-investigate the whole matter of the former suit. No fraud is alleged against the decree. The want of jurisdiction in the court, as urged, is not sustained. Errors in the procedure cannot now be examined.

The decree of the Circuit Court is therefore affirmed.

Order.

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

1230 Howard &

APPENDIX.

Pliny Cutler, Appellant, v. William A. Rae.

(7 Howard, 729-738.)

My attention was called early in this term of the court, by a letter from F. C. Loring, Esquire, Counselor at Law in Boston, to the declaration in the first sentence of my opinion in the above case, "that this court has decided an important constitutional question of admiralty jurisdiction without either oral or printed argument."

Mr. Loring's letter was the first intimation I had that an argument upon the jurisdiction had been filed by him, upon the part of the libelant and appellee in the cause.

Subsequently, my attention was called to Mr. Loring's argument by my brother Nelson, and afterwards it was made the subject of remark in one of the court's conferences, by the Chief Justice.

It is due to myself, to Mr. Loring as counsel in the cause, to the court, and particularly to the Chief Justice, who delivered the court's opinion, that I should say that an argument upon the constitutional jurisdiction was filed by Mr. Loring. The history of the cause in the Supreme Court was as I shall here state.

The case was filed and docketed, January 6th, 1847. On the 16th of February, Mr. Loring and Mr. Fletcher filed their arguments upon the merits, and an order was made to submit the cause upon them. So the case stood until the last term of the court. In 1848, January 24th, the case was again submitted upon printed arguments by the same counsel. In neither was the constitutional question of jurisdiction touched. On the 17th of February, the court passed the following order, I believe upon the suggestion of the Chief Justice: "In the printed arguments filed in this case, the question of jurisdiction raised by the fourth point stated in the record has not been noticed. The 616*] *court desire that point to be argued by counsel, either by printed argument or orally at the bar, as counsel may prefer." Under this order, Mr. Loring filed his argument upon the jurisdiction. Afterwards, on the 22d of December, 1848, the following letter from B. R. Curtis, Esquire, to David H. Hall, Esquire, of Washington city, was read to the court by the latter, and was filed with the other papers in the cause:

"Boston, December 20th, 1848.

"Dear Sir,—In the case of Rae and Cutler in the Supreme Court, respecting which Mr. Fletcher has heretofore corresponded with you, I have to request that you would make known to the court, that the appellant has instructed his counsel not to insist upon the objection to the jurisdiction which appears on the record; and that for this cause the counsel present no argument in support of the exception. The parties in interest are the underwriters, and they feel desirous that the courts of the United States sitting in admiralty should retain jurisdiction in cases of general average.

"If the court should proceed to the merits will you allow me to ask you to refer them to a case not cited in the argument, of which notice has been given to Mr. Loring, the counsel for the appellee—March v. Robertson, 4 Wheat. 360. You will of course make the proper charge for these services, and I will see you are paid. Your obedient servant,

"B. R. Curtis.

"David H. Hall, Esquire, Washington."

On the 26th of the month, the cause was submitted on further argument by Mr. Loring, without argument upon the jurisdiction from the opposing counsel, and on the 2d of March, the judgment below was reversed for want of jurisdiction. See 7 Howard, 729. Without any fault upon the part of our Clerk, William Thomas Carroll, Esquire, whose care it is to distribute briefs and arguments to the judges, I did not receive Mr. Loring's argument upon the jurisdiction. I aided in the court's consultations upon the case, without knowing that such an argument had been filed I gave an oral dissent from the judgment of this court dismissing the cause for want of jurisdiction, under that impression. The dissent was afterwards extended, as it appears in the report of the case, in the full belief that the counsel in the cause had disregarded the order of the court, and that the court in deciding the case had yielded the point required by its order. I was misled by the letter from *Mr. Curtis. I am pleased [*617 that it was otherwise. My duty growing out of it is the statement I have made. I also think it due to Mr. Loring, and to the court, to request the Hon. Benjamin C. Howard, the Reporter of the court, to print with this communication the argument made by Mr. Loring upon the jurisdiction of the court.

In respect to causes involving constitutional questions being submitted to the court upon printed arguments, my impression has been that such cases were not within the rule. It has not with the judges been mine alone. It has, however, been done twice. The cases have been brought to my notice by the Chief Justice. Once in the case of Bronson v. Kinzie et al. 1 Howard, 311, upon a written submission with the consent of the court, and again at this term without opposition by any member of it, in the case of Nathan v. The State of Louisiana.

I shall hereafter consider it to be the understanding of the majority of the court, that the rule permitting cases to be submitted on printed arguments comprehends the submission of such as involve constitutional questions.

James M. Wayne,
Associate Justice Supreme Court U. S.

December Term, 1849.

Argument for the Libelant upon the Question of Jurisdiction.

The case presented is a claim by the owners of a ship against an owner of the cargo, to recover contribution for an injury voluntarily done to the ship on the high seas, for the common benefit, by which the property, from the owner of which contribution is sought, was preserved from destruction by an impending peril.

Whether the facts in evidence make such a case as entitles the owner of the ship to a contribution has been previously discussed, in order to present the question of jurisdiction that must be assumed.

The question now to be considered is, whether such a claim is within the jurisdiction of the district courts of the United States, sitting in admiralty, or, in other words, is a proper matter for admiralty and maritime jurisdiction. The late decisions of this tribunal upon the subject of jurisdiction limit the range of discussion, forasmuch as it must now be considered as settled that the admiralty jurisdiction of the courts of the United States, both as to contracts and torts, is more extensive than 618*] *that exercised by the High Court of Admiralty of England at the time of the formation of the Constitution, and that, in cases of contracts, it embraces those "concerning the navigation and trade of the country upon the high seas and tide waters, with foreign countries, and among the several States." New Jersey Steam Nav. Co. v. Merchants' Bank, 6 Howard, 392; Waring v. Clark, 5 Howard, 431; Peyroux v. Howard, 7 Peters, 324.

The present inquiry is, therefore, limited to the question, whether general average, or the right to claim contribution for sacrifices, losses, and expenses voluntarily incurred or suffered in the course of a voyage, for the common benefit, is, or depends upon, a contract concerning the navigation and trade of the country.

This definition seems to assume the question. But it is impossible to define general average as a matter or incident pertaining to anything but a marine voyage. The principle on which it is founded is, at least by the common law, exclusively limited to maritime cases, and no case can be found in which it has ever been applied to facts happening on land unconnected with a ship, its cargo, or freight.

Parallel cases may occur on land; as, for instance, where a building has been blown up or pulled down to prevent the spread of a conflagration; but there is no case to be found in which it has been held that the owner of the building had a claim for contribution for his loss upon the owners of the adjacent buildings whose property was preserved by the sacrifice of his, and there is no authority to be found on which such a claim should be rested.

The case of Welles v. Boston Ins. Co. 6 Pick. 182, does not make an exception, because there the action was upon a policy of insurance, brought to recover the value of an article purchased, by the advice of the defendants, for the purpose of preserving the property; and because the defendants were willing to pay a proportion, and actually paid it into *court*. The question of contribution was not, *therefore*, raised, discussed, or decided; and, in fact, the court intimated a doubt whether the defendants were liable at all in law, saying, "for a proportion of the sacrifice the defendants are equitably, if not legally, entitled to recover," a sum exceeding which proportion the defendants had paid into court as above stated.

The books in which the subject is discussed have been searched in vain to find a definition of general average or contribution, in which it is not exclusively confined to maritime cases. In those which treat of shipping and insurance, where *this subject is necessarily [*619 discussed, this, it may be said, must be expected, and therefore they furnish no weight of authority; but the same definition is to be found in the books which profess to treat of the law at large, and in decisions of common law courts.

3 Kent's Commentaries, p. 232: "The doctrine of general average grows out of the incidents of a mercantile voyage, and the duties which it creates apply equally to the owner of the ship and of the cargo. General, gross, or extraordinary average, means a contribution, made by all the parties concerned, towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight."

Simonds v. White, 2 Barn. & Cress. 808: "The obligation to contribute depends not so much upon the terms of any particular instrument as upon a general rule of maritime law."

Scai v. Tobin, 3 Barn. & Adolph. 523: "The question of liability here (general average) depends entirely on the maritime law."

Citations to the same effect might be multiplied ad infinitum.

The doctrine of general average, growing out of the incidents of a mercantile voyage, and relating exclusively to ship, cargo, and freight, and depending upon the maritime law, necessarily from its very definition pertains to the trade and navigation of the country upon the high seas and tide waters, and therefore falls within the admiralty jurisdiction, as established by this court in its most recent, as well as in many previous decisions.

General average is sometimes considered as arising out of the contract of affreightment; that is, that there is a contract implied by law between the owners of the ship and the owners of the cargo, by which it is agreed, that, in case it should be necessary for the common benefit that any sacrifice be made of the vessel or cargo, the owners of what is preserved thereby shall contribute to make good that loss. Pothier, Maritime Contracts, Part 1, sec. 3, art. 96; "Finally, the freighter contracts the obligation of contributing to the common average." And Part 2, sec. 1: "The merchant who lades goods by the contract of charter-party (or affreightment), promises the master by the contract to contribute to the common average which may take place during the voyage; and, vice versa, the master virtually promises the merchant shipper, in case his property suffer any average losses for the good of all, to cause *him to receive an indemnity by con- [*620 tribution of the owners of the ship and other merchants. The subject of this contribution is, therefore, dependent on the contract of charter-

party and ought to be considered next to this contract. Average in marine language signifies the loss and damage suffered in the course of navigation. Common average is that suffered for the common safety, and alone admits of contribution."

If the doctrine of general average is to be considered as growing out of the contract of affreightment, it is a part of the contract, and therefore, by the decision in 6 Howard falls within the jurisdiction of the District Court, it being expressly decided in that case that the contract of affreightment is within the jurisdiction.

And while referring to that case, in which it was conceded by counsel, that the Admiralty Court of England would not exercise jurisdiction over a contract of charter-party or affreightment, and upon which assumed fact the division of opinion in the court seemed to arise, it may be remarked that the concession was unnecessary, and not correct in point of fact. There is a case in the first volume of Haggard's Reports, p. 226 (The Elizabeth), in which the jurisdiction was exercised, and sustained by Lord Stowell, in a suit on a charter-party for the charter money. The suit was originally brought in a vice-admiralty court. A protest was made to the jurisdiction, which was overruled, and an appeal taken to the High Court of Admiralty. The appeal not being prosecuted, the defendants moved to have it pronounced deserted and for costs, which was granted.

The question of jurisdiction, it is true, was not argued in the higher court, but the judgment of the lower court was not reversed, as it must have been if the court had no jurisdiction over the subject matter. See, also, the case of The Fly, 2 Browne's Civil and Adm. Law. 539, which was a suit brought in the admiralty on a charter-party for damages, which was entertained, and relief granted.

These cases fully sustain the proposition of Dr. Browne, that the Court of Admiralty could not refuse to entertain jurisdiction over a charter-party unless prohibited, and demolish the argument against the jurisdiction of the District Court over contracts of affreightment, which depends entirely on the assumed fact that they were not subjects of admiralty jurisdiction in England.

If, however, the claim for general average is to be considered as a quasi contract, created by implication of law at the time when the voluntary loss or sacrifice is incurred, then, whenever that happens upon the high seas, the local-
621*] ity is maritime, the *service is maritime, and all the elements exist necessary to bring the case within admiralty jurisdiction.

Indeed, it would be difficult to conceive of a service more purely and exclusively maritime than a jettison for the common safety upon the high seas, and the rights and duties growing out of it necessarily follow the principle.

Salvage is a subject of admiralty jurisdiction in England as well as in this country, and the jurisdiction has never been questioned; but it is extremely difficult to see any respect in which salvage differs from general average, so that one should be without and the other within the jurisdiction.

The service in both cases is maritime, and the object in both is to save property. If to tow a deserted vessel into port, or to take cargo out of her, or to render assistance to a vessel on shore in distress, are maritime services, it is difficult to see why the claim for contribution of an owner whose cargo is jettisoned for the common safety, or of a vessel the masts of which are cut away, or which is vountarily run on shore for the purpose of saving life, vessel, and cargo, does not equally depend upon a maritime service, and should not be a subject of the same jurisdiction.

Indeed, there is no distinction made between them in the books; they are usually considered together, in the same chapter, as "Salvage and General Average," and are often spoken of together as the "quasi contracts of salvage and general average."

The jurisdiction of the admiralty over this subject may be put upon the ground of the lien which exists on the part of the owner of the thing sacrificed upon the things preserved.

The existence of this lien in rem is universally admitted.

1 Emerigon des Ass. p. 651, ch. 12, sec. 43: "L'action en contribution est reele de sa nature."

Casaregis, Disc. 45, n. 34: "Actio ad petendam contributionem est in rem scripta."

Ordonnances de la Marine, liv. 3, tit. 8, sec. 21: "Si aucuns des contribuables refusent de payer leurs parts, le maître pourra, pour sureté de la contribution retenir, même faire vendre par autorité de justice, des marchandises, jusqu'à concurrence de leur portion."

Laws of Oleron, art. 9: "When the vessel arrives, the merchants should pay their proportions (of the contribution), or the master may sell or pawn the goods, and use the money so raised to pay the same before the cargo is unladen."

Its existence is also recognized in the courts of common law here, and in England. Simmonds v. White, 8 Barn. & Cress. *805; [*622 Strong v. New York Fire Insurance Co. 11 Johns. 323; United States v. Wilder, 3 Sumner, 308; Scai v. Tobin, 3 Barn. & Adolph. 523; Chamberlain v. Reed, 13 Maine, 387; American Ins. Co. v. Coster, 3 Paige, 323; Cole v. Bartlett, 4 Miller, 139.

The existence of a maritime lien in rem has been held to be a sufficient ground for asserting admiralty jurisdiction, because no other court can enforce it.

Menetone v. Gibbens, 3 Term. Rep. 269, Per Lord Kenyon: "It would be highly inconvenient if the admiralty had not jurisdiction, because that court proceeds in rem, whereas the courts of common law can only proceed against the parties."

Per Ashurst. "One strong reason for supporting the admiralty jurisdiction is, that in these cases that court proceeds in rem; whereas we can give no such relief."

The reasons on which this doctrine is founded are stated in the case of The Spartan, Ware's Reports, 154: "There is another ingredient in this case which I hold to be conclusive in favor of the jurisdiction. If there is here an implied hypothecation raised by the

law, it can be enforced by no other than an admiralty court.

"It is a right adhering to the thing, a jus in re which is to be made available against the thing in specie. The course of the common law allows of no process upon the hypothecation by which the subject itself is directly reached, and a satisfaction for this right extracted from it. If a court of admiralty cannot entertain jurisdiction of the case, then the law has given the right, it has provided the security, but has refused the only means by which it can be rendered with certainty available. It holds out the right, and holds back the remedy. Where the law raises a lien for maritime service, I hold that this court has the power to carry it into effect."

Also by Judge Story, in United States v. Wilder, 3 Sumner, 311: "It is a case of general average, where, as in case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances, the general maritime law enforces a contribution independent of any notion of a contract, upon the ground of justice and equity, according to the maxim, qui sentit commodum, sentire debet et onus. And it gives a lien in rem for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that in a great variety of [*623] cases, without such a lien, the *ship-owner would be without any adequate redress, and would encounter most perilous responsibility."

Another ground on which the jurisdiction may be sustained is, that the subject matter is within the jurisdiction of the High Court of Admiralty in England.

That court, it is well known, formerly exercised jurisdiction over all contracts and torts of a maritime nature; and its present limited jurisdiction is the consequence of the encroachments of the common law courts.

Some subjects, however, have been left for its jurisdiction; the courts of common law having contented themselves with a concurrent jurisdiction, and among these may be classed the one now under consideration.

That this was originally within the jurisdiction of the maritime courts in England, and on the Continent, cannot be questioned.

It is treated of in the Consulat del Mare, and in all the codes of maritime laws established for the government and direction of the maritime tribunals, some of which contain express directions to the master to appear before the Court of Admiralty in such cases (Ord. de la Mar. liv. 3, tit. 8, art. 5); and is in its nature so purely of the sea, and so exclusive of the land, that it is not properly within the jurisdiction of any other tribunal; and it is not until within very recent times that courts of equity and common law have entertained jurisdiction over it, the first case at common law being in 1801.

It is highly improbable that there have not been previous disputes and lawsuits growing out of claims for contribution; these suits have not been at law or in equity, because the decisions of these courts are reported, and there are none relating to this subject; if there have been any such suits, and it seems impossible that there should not have been, they must, therefore, have been brought in the Admiralty Court, the decisions of which, previous to 1798, are not in print.

There is no case to be found in which a prohibition has been granted, or even asked, to prevent the Court of Admiralty from entertaining a case of this kind.

The negative testimony in favor of the jurisdiction in England is therefore very strong; as it appears that the subject is properly a matter of admiralty jurisdiction, and there is no case, and no authority, in or by which it has been questioned.

But there is other proof to sustain the jurisdiction other than that derived from the absence of all denial or question respecting it.

In a book published in London, in 1705, entitled. "A Treatise *on the Dominion [*624 and Laws of the Seas," it is asserted, without qualification, that the jurisdiction of the Admiralty Court extends to "all cases of gross adventure, all causes of jactus, and contributions with average."

2 Browne's Civil and Adm. Law, 122: "If a party institute a suit in that court on a charter-party for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain it."

There is no case in which a prohibition has been granted where contribution was claimed. Weskett on Ins., 135. Master may detain goods (in case of average), and juridically sell.

The Copenhagen, 1 Rob. Adm. 289: In this case the question whether there ought to be a contribution was considered by Sir W. Scott, without an intimation of a doubt in respect to the jurisdiction, nor was it incidental to the question of prize; it was a separate suit after the vessel had been restored. The court say expressly: "This is not merely or originally a matter of prize; she came in first from distress," etc. "In this case the transshipping, or rather the unloading, of the goods seems to have been for the common benefit of both, and therefore the expense of it seems to have the character of a general average."

It is therefore, so far as the jurisdiction is concerned, a case in point. The subject of general average was entertained, and no prohibition granted, if any was applied for.

The Eleonora Catharina, 4 Rob. 156: The question was entertained incidentally, whether a jettison was made for the common benefit.

The Gratitudine, 3 Rob. 240: In this case the power of the master to bind the ship, cargo, and freight by an express hypothecation, and the remedy in admiralty, are fully sustained. The same principles and reasons apply to the implied hypothecation created by law in cases of general average, and it is so considered and held by the court and the case referred to in illustration.

By the Articles of 16 February, 1633, it was declared, "that if suit shall be in the Court of Admiralty for building, amending, saving, or necessary victualling the ship, against the ship, and not against any party by name, no prohibition shall be granted, though this be done within the realm."

It would be no great straining of the word "saving" to apply it to those cases where the ship was preserved by a sacrifice of the cargo or a part of it, and thereby to bring cases of general average within the express terms of the articles.

625*] *See decisions in relation to these articles: The Hope, 3 Rob. 216, and The Trelaconey, 3 Rob. 216, note.

3 Salkeld, 23, "adjudged, that where a master pawns the ship at sea, the admiralty hath a jurisdiction; and that he may pawn to relieve the ship in extremity, for he being constituted master of the ship hath impliedly a power to preserve it in cases of danger." This would seem, from the language used, to apply to cases of extreme danger at sea, and if so, must be limited to the hypothecation created by law in cases of general average. But if it refers to the general power of the master to pawn the ship in foreign parts, it clearly recognizes the principle on which this suit is founded; and the same reasons exist for extending the admiralty jurisdiction over the hypothecations arising by the maritime law from the acts of the master, and those arising from his express contracts.

The jurisdiction founded on an implied hypothecation is familiarly exercised in cases where repairs, etc., are made on foreign vessels, or those of another State. The maritime law gives the lien, and courts of admiralty, in England, as well as in this country, enforce it, on the ground of an implied hypothecation; the service is not the less maritime certainly if rendered while on the sea, and to preserve the ship or cargo, and the existence of the lien in cases of general average has never been questioned.

A case is cited in 1 Molloy, 149, in which a master borrowed money to ransom the ship, and sued the owner for it in the admiralty, in relation to which a prohibition was applied for and refused. It seems difficult to distinguish that case from the present in point of principle. See, also, cases of prohibition refused in Anonymous, Cro. Eliz. 685; Radley v. Eggleafield, 2 Saunders, 260.

The American authorities in favor of the jurisdiction are numerous and direct. The question has not been previously before this tribunal, but the principles upon which it depends are maintained in the cases of The Gen. Smith, 4 Wheaton, 438; The St. Jago de Cuba, 9 Wheaton, 409; Peyroux v. Howard, 7 Peters, 329; Andrews v. Wall, 3 Howard, 568; New Jersey Steam Nav. Co. v. Merchant's Bank, 6 Howard, 344.

In the circuit courts there has been no express decision on the subject, but no case has been found where the jurisdiction has been questioned.

In De Lovio v. Boit, 2 Gallison, 475, it was held that the jurisdiction extended to all maritime contracts, and as to what were such, "all civilians and jurists agree that in this appellation are included, among other things, charter-626*] parties, affreightments, *marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts and quasi contracts respecting averages, contributions, and jettisons, and policies of insurance."

Cases for the adjustment or recovery of contributions are of familiar occurrence in the District Court of Massachusetts, and probably elsewhere. Shelton v. Brig Mary, 5 Boston Law Reporter, 75; S. C. 6 Ib. 73; Sparks v. Kittredge, 9 Ib. 319, in the Massachusetts District; The Mutual Safety Ins. Co. v. Cargo of Ship George, 8 Law Reporter, 361, in the Southern District of New York; S. C., N. Y. Legal Observer for June, 1848, p. 260. Other cases have been considered in the Massachusetts District Court, to the knowledge of counsel, which are not in print.

American Ins. Co. v. Coster, 3 Paige, 323: Process in the instance side of the Admiralty Court is mentioned as the ordinary mode of enforcing a maritime lien.

Dunlap's Adm. Practice, p. 57: "Cases of general average are legitimate subjects of admiralty jurisdiction, being cases of implied contracts, arising out of the marine contract of shipment. The master has a lien upon the goods saved, to enforce the payment of the lawful contribution. This is the maritime law of Europe and of the United States. The admiralty courts are the proper tribunals to enforce this lien, and adjust speedily the contribution."

If there are any cases or any books in which the jurisdiction of the Court of Admiralty over cases of general average has been denied, they have escaped my research.

As it must be admitted that the subject is in its nature maritime, and a proper subject for the cognizance of a court of general admiralty and maritime jurisdiction, the only mode by which it could be excepted from the admiralty jurisdiction of the District Court would be to show that the English Admiralty Court would not entertain jurisdiction of it.

That this, if proved, would not be a sufficient argument has been repeatedly held by this court; but at least we might ask from those who deny the jurisdiction over general average, one solitary decision, or at least a dictum of some judge, or elementary writer, or compiler, in support of such denial; but where is it to be found?

Another ground on which the jurisdiction might be placed, is that of necessity, expediency, and convenience.

The law gives (it is universally admitted) to the party entitled to contribution a lien, or jus in rem, against the property saved or benefited by the sacrifice.

*It is equally certain that this lien [*627 cannot be enforced by a court of common law. If it be the owner of the ship who is entitled to a contribution, he may, having possession, retain the goods till his claim is settled, and in this way compel a payment; but if it be the owner of the cargo who is entitled, though he has an admitted lien upon the ship, cargo, and freight, he cannot enforce it in any way; he has no remedy at common law but a personal suit against the other owners; his lien is perfectly valueless, because the common law provides no way of enforcing it.

In fact there is no decision to the point that an action for contribution could be maintained at common law until the year 1801. Birkley v. Presgrave, 1 East, 220.

And if the question were not to be considered as settled by mere precedents, it might well be doubted whether a court of common

law had jurisdiction over the subject of general average any more than it has over salvage. See Abbott on Shipping, p. 557, note; Brevoor v. The Fair American, 1 Peters's Adm. Dec. 94.

But admitting a concurrent jurisdiction, it is obvious that, apart from the defects of justice which must often be felt from the inability of a court of common law to enforce the lien, there are other serious inconveniences arising out of the necessity of bringing separate suits against each of the parties interested, and the impossibility of settling the general average case by one suit, and from the want of power in a court of common law to compel a discovery and the production of books, papers, etc. Twizell v. Allen, 5 Mees. & Welsb. 337. And that inconvenience is the more forcibly felt in this country, where different parties might elect different tribunals, one the common law courts, another the Court of Chancery; one might prefer to sue in the federal, and another in the State courts, there being no court having and exercising a complete jurisdiction over the whole subject matter.

If relief is sought in equity, all the parties may be joined and served, if within the jurisdiction; but if not, the absent parties and their property cannot be bound—and the lien is as unavailable in equity as at law. It was expressly decided in Hallett v. Bousfield, 18 Ves. Jun. 187, that the court would not, at the instance of a freighter, whose goods had been sacrificed, enjoin the master from delivering the residue of the cargo till the claim was settled and paid.

The inconveniences of the common law jurisdiction over this matter are forcibly stated in Story's Equity Jurisprudence, Vol. I. p. 542, sec. 491, and as arising principally from the 628*] inability *to bring all the parties interested before the court in any suit affecting a complete settlement; but the same objections apply to the jurisdiction of the Court of Equity, if all the parties interested are not within the jurisdiction: the want of power to enforce the lien is as seriously felt there as in a court of common law, and the slow, tedious, expensive proceedings of a court of equity constitute very formidable objections to the practical exercise of its jurisdiction in cases of this nature; and it is in fact very seldom resorted to. In the reports of the United States and State courts I cannot find a case in which a suit for general average has been brought in equity, and in the English reports only two, one above referred to in 18 Vesey, and another in Shower's Parl. Cases, p. 18.

On the other hand, the Court of Admiralty has all the advantages of a court of equity in such cases, without any of its disadvantages.

If its process in personam be resorted to, it is in fact the same thing, except that its proceedings are much less formal, technical, and dilatory; if recourse is had to process in rem, the libelant gets the benefit of the lien and preference to which he is entitled at law and in equity; all persons interested are brought directly before the court; the property, if perishable, may be sold, or it may be delivered to the claimants on stipulation; the process, pleadings, and practice are direct, simple, and summary, the practice being, as it has been, to proceed "velis alatis," or under full sail. The decree covers the whole subject matter, and being in rem is conclusive upon all the parties interested, and the whole world.

It might not be easy to imagine a case more fit and proper for so much of its powers, pleadings, and proceedings as are peculiar to a court of admiralty, than one of general average, especially where there are many parties interested.

Another reason in favor of the jurisdiction on this score is that of uniformity of decisions. The different rules, practices, and customs which prevail in relation to general average, the circumstances which give rise to it, and the mode of adjustment, have been a cause of much confusion and embarrassment, and have been greatly lamented by writers on commercial and maritime law.

If the admiralty cannot entertain jurisdiction over this subject, it must be left principally for the jurisdiction of the State courts, and different rules and systems of law in relation to it must arise. The jurisdiction of the federal courts at law and in equity, being dependent on the citizenship of parties, cannot always or generally be invoked, and the decisions of these *courts, however highly respected, are [*629 not conclusive and binding upon the State courts.

If, on the other hand, the admiralty has a rightful jurisdiction, the great advantages of its process will cause it to be exclusively resorted to for the determination of such cases, and the district courts being bound by the decisions of this tribunal, a uniformity of principle and decision may be established through all the States, the advantages of which in a commercial nation, and where the case is of daily occurrence, can hardly be overstated.

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